

**MAKING CAPITAL MARKETS WORK FOR AFRICA: INTERROGATING
PROGRESS, CHALLENGES AND THE PURSUIT OF INTEGRATION**

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Declaration

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Summary

This thesis examines the foundation, state, and practice of stock market integration in Africa and its ability to resolve the impediments to development of stock markets on the African continent. Specifically, the central research question that this thesis answers is whether the integration of stock markets in Africa can be accomplished and its potential to resolve the challenges facing the markets.

To answer the central research question, the thesis identifies the challenges which hinder the growth and development of stock markets in Africa. Principally these include illiquidity, low levels of market activity including limited initial public offers, low trading volumes, and transactions, limited cross-border activity, inadequate securities regulatory frameworks, unfavourable macro-economic and fiscal policy, and inadequate and inefficient market infrastructure. The thesis demonstrates the magnitude of these challenges by looking at the statistics for the levels of market development in Africa.

The state of African stock markets has inspired the pursuit of integration of the stock markets as a solution to making these markets work for Africa. Integration in Africa, as a general concept, is rooted in historical concepts of colonialism, post-colonial calls for unity and the quest for regionalism. The thesis examines the concept of regionalism and notes that stock market integration projects are generally spurred on by regional economic communities (RECs) and driven by the African Union's ambitions for an African Economic Community (AEC). The RECs are the building blocks of the AEC and also the conduits of stock market integration and the thesis shows how stock market integration has been carried out in Africa. Majorly, this has been through infrastructure linkages aimed at increasing cross border activity.

However, the research shows that due to the challenges faced by the RECs, there has been limited success in stock market integration in Africa. These challenges include the ability of member states to join multiple RECs which leads to wasted resources, conflicting loyalties, and conflicting projects. In addition, the lack of clarity on the place of regional law has led to conflict between regional law and national law and concerns of loss of state

sovereignty. Coupled with a lack of financing to regional projects and poor monitoring and judicial systems, stock market integration has largely been unsuccessful or extremely delayed.

To resolve these challenges, the thesis considers how conflicts of law scenarios are dealt with in other integrated jurisdictions. It undertakes a comparative approach by examining the European Union's (EU) approach to sovereignty concerns and how it deals with conflicts between EU law and member state's legal systems. The concept of supremacy and primacy of EU law are discussed and the thesis concludes that RECs should adopt the principles of primacy and supremacy of regional law. It also reviews the concept of an economic community such as the AEC, with lessons from both the EU and the Association of South East Asian Nations (ASEAN) to show the importance of ceding certain powers by member states in order to achieve integration and the AEC. To resolve financing challenges, the thesis draws attention to the existing efforts to finance integration in Africa.

With multiple memberships to the RECs posing a challenge, the thesis proposes rationalisation of the RECs along geographical locations, following the delineation of the five regions of Africa. It also points to the importance of judicial and non-judicial institutional mechanisms in monitoring integration and enforcing treaty commitments.

Due to the limited successes of the infrastructural stock market integration methodology, this thesis recommends that focus be shifted to regulatory harmonisation. This recommendation considers the rationale for stock market integration and the spirit of the Abuja Treaty. It draws attention to the successes of harmonisation of commercial law amongst member states of the OHADA Treaty in Africa as well as perceived successes of regulatory harmonisation in the EU and the United States-Canada Multijurisdictional Disclosure system. It suggests specific areas for harmonisation which include rules and regulations relating to trading, clearing and settlements, accounting standards, market abuse regulation, listing particulars and disclosures. These areas are viewed as more likely to attract concession and hence pave way for tackling more complex areas of securities regulation such as the centralisation of the supervision of the markets.

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Table of Abbreviations

ACP	African, Caribbean and Pacific States
ACHPR	African Court of Human and People's Rights
ACJHR	African Court of Justice and Human Rights
ACJHPR	African Court of Justice and Human and Peoples Rights
AEC	African Economic Community
AELP	African Exchanges Linkage Project
AECCJ	African Court of Justice of the African Economic Community
AfDB	African Development Bank
AfCFTA	African Continental Free Trade Area
AfDB	African Development Bank
AGOA	Africa Growth and Opportunity Act
AIM	Alternative Investment Market
AMU	Arab Maghreb Union
AON	All or None
ATF	Alternative Trading Facility
AU	African Union
AUC	African Union Commission
ASEA	African Securities Exchange Association
AUCJ	Court of Justice of the African Union
BCEAO	Central Bank of West African States
BRVM	Bourse Régionale des Valeurs Mobilières SA
BVMAC	<i>Bourse des valeurs mobilières de l'Afrique centrale</i> Central African Securities Exchange
CASE	Cairo and Alexandria Exchange
CDSI	Central Depository System Interface

CESR	Committee of European Securities Regulators (replaced by ESMA)
CJEU	Court of Justice of the European Union
CEMAC	Economic and Monetary Community of Central Africa
CENSAD	Community of Sahel-Saharan States
CESR	Committee of European Securities Regulators
CMA	Common Monetary Area
CMA	Capital Markets Authority
CMDC	Capital Markets Development Committee
CMI	Capital Markets Infrastructure Project
CMIPC	Capital Markets Insurance and Pensions Committee
CMU	Capital Markets Union
COMAI	Conference of African Ministers in Charge of Integration
COMESA	Common Market for Eastern and Southern Africa
COSSE	Committee of SADC Stock Exchanges
COSUMAF	Central African Financial Market Monitoring Commission
CSE	Casablanca Stock Exchange
CREPMF	Conseil Regional de L'epargne Publique et des Marches Financiers (Regional Council for Public Savings and Financial Markets)
DMA	Direct Market Access
DSX	Douala Stock Exchange
EAC	East African Community
EACJ	East African Court of Justice
EALR	East African Law Reports
EASEA	East African Securities Exchange Association
EASRA	East African Securities Regulatory Authority
EBA	European Banking Authority

EBRD	European Bank for Reconstruction and Development
EC	European Communities
ECB	European Central Bank
ECCAS	European Community of Central African States
ECDPM	European Centre for Development Policy Management
ECJ	European Court of Justice
ECM	Equity Capital Markets
ECOSOC	Economic and Social Council of the United Nations
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECR	European Court Reports
ECJ	European Court of Justice
EEC	European Economic Communities
EFTS	Electronic Funds Transfer System
EGX	Egyptian Stock Exchange
EPA	Economic Partnership Agreement
ESA	European Supervisory Authorities
ESC	European Securities Committee
ESMA	European Securities and Markets Authority
ETF	Exchange Traded Fund
ETN	Exchange Traded Note
EU	European Union
FCC	German Federal Constitutional Court
FDI	Foreign Direct Investment
FOK	Fill or Kill
FSA	Financial Services Authority
FSAP	Financial Services Action Plan

FSRDP	Financial Sector Development and Regionalisation Project
FTA	Free Trade Area
GAAP	Generally Accepted Accounting Principles
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GTC	Good Till Cancelled
GTD	Good Till Day
IASB	International Accounting Standards Board
IRBD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
IGAD	Intergovernmental Authority on Development
IMF	International Monetary Fund
IOC	Immediate or Cancel
IOSCO	International Organization of Securities Commissions
IPO	Initial Public Offering
JSE	Johannesburg Stock Exchange
KLR	Kenya Law Reports
LDC	Least Developed Countries
LPA	Lagos Plan of Action
LSE	London Stock Exchange
MAD	Market Abuse Directive
MiFID II	EU Markets in Financial Instruments Directive
MiFIR	Markets in Financial Instruments Regulation
MTF	Multilateral Trading Facility
MoU	Memorandum of Understanding
NEPAD	New Partnership for Africa's Development
NGX	Nigeria Exchange Limited

NPS	National Payment System
NSE	Nairobi Stock Exchange
NSX	Namibia Stock Exchange
OAU	Organisation of African Unity
OJ	Official Journal of the European Union
OHADA	<i>Organisation pour l'harmonisation en Afrique du droit des affaires</i> Organization for the Harmonization of Business Law in Africa
OMFIF	Official Monetary and Financial Institutions Forum
OTC	Over the Counter
PASE	Pan African Stock Exchange
PSSP	Public Sector Purchase Programme
REC	Regional Economic Community
REPSS	Regional Payments Settlement System
RFI	Regional Financial Integration
RG	Regional Grouping
RMA	Rand Monetary Union
RISDP	Regional Indicative Strategic Development Plan
RTGS	Real Time Gross Settlement Systems
SACU	South African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SARB	Southern Africa Reserve Bank
SEA	Single European Act
SEC	Securities and Exchange Commission
SIP	Share Issue Privatisation
SME	Small and Medium Sized Enterprises

SRO	Self Regulatory Organisation
SSA	Sub Saharan Africa
STT	Securities Transfer Tax
SZSE	Shenzhen Stock Exchange
TARGET2	Trans-European Automated Real Time Gross Settlement Express Transfer System
TEEAC	Treaty for the Establishment of the East African Community
TFEU	Treaty on the Functioning of the European Union
UDEAC	<i>Union Douanière et Economique de l'Afrique Centrale</i> Customs and Economic Union of Central Africa
UN	United Nations
UNECA	United Nations Economic Commission for Africa
USD	United States Dollars
VAP	Vientianne Action Programme
VP	Voucher Privatisation
WACB	West Africa Central Bank
WACH	West African Clearing House
WACMAC	West Africa Capital Market Conference
WAEMU	West African Economic and Monetary Union
WAEU	West African Economic Union
WAFSA	West African Financial Supervisory Authority
WAMI	West African Monetary Union
WAMZ	West African Monetary Zone
WASRA	West African Securities Regulators Association
WTO	World Trade Organisation

CHAPTER ONE

INTRODUCTION

This thesis is concerned with the concept of integration as a solution to the challenges facing stock markets in Africa. African stock markets are renowned for being underdeveloped, small, illiquid, inefficient, and unable to make substantial contribution to the economic growth of the individual countries and the continent. Interventions have mainly been at the national level with individual countries making regulatory and policy changes to tackle these challenges. However, the focus has now shifted to the potential that integration of stock markets may have for resolving these challenges.

Stock market integration projects are now relatively widespread in Africa under the auspices of regional economic communities¹ and driven by the African Union's ambitions for an African Economic Community.² In addition, they are fuelled by Africa's long and complex history of regionalism and regional cooperation. Africa is home to two regional exchanges including the Bourse Régionale des Valeurs Mobilières (BRVM), home to eight states in the West African Economic and Monetary Union (WAEMU) and the Central Africa based Bourse des Valeurs Mobilières de l'Afrique Centrale (BVMAC). In addition, the Abuja Treaty casually mentions the concept of regional stock exchanges and the African Union adopted the Pan African Stock Exchange as one of its five financial institutions. It is hence not surprising that the concept of integration of stock markets has gained momentum. In addition, Aspiration 2 of the African Union Agenda 2063 points to a more integrated continent with integrated infrastructure and seamless borders whereas Aspiration 7 of the New Partnership for Africa's Development (NEPAD) calls for the promotion of policies to link national capital markets to regional, continental, and global ones.

Despite the frequency and long history attached to integration endeavours, stock market integration in Africa has not been able to achieve the aims for

¹ An exception is the African Exchanges Linkage Project, a joint initiative of seven of Africa's stock exchanges to link their trading systems through an order routing system.

² Examples discussed in detail in Chapter 4 include the East African Community Capital Markets Infrastructure Project, the Economic Community of West African States' Charter for the Integration of Capital Markets in West Africa, and the South African Development Community's Regional Indicative Strategic Development Plan.

which it was pursued and the stock markets remain underdeveloped. Whereas Africa has not been successful in its stock market integration projects, other unions such as the European Union have registered tremendous successes. This begs the question: What impediments are there in Africa and what lessons can be drawn from other successful stock market integration concepts elsewhere? This thesis explores the origins, progress, and challenges of integrating African stock market, critiquing methodology and offering solutions to identified challenges as well as advocating for a move from structural integration to regulatory harmonisation.

This chapter provides an overall framework of the thesis and is structured as follows. Part 1.1 sets the stage by providing an understanding of some of the concepts and theories used in the thesis. It establishes the research territory, limits, and boundaries within which this research has been conducted. Next, the discussion provides a brief understanding of the content of the thesis. This includes the background to and overview of the state of African financial markets as well as the integration drive in Africa and the existing literature. In Part 1.3, the central research question and themes of the thesis are provided. The methodology applied to aid the discussion is considered in Part 1.4. In Part 1.5, a discussion is provided on how the thesis advances the state of the art and makes an original and significant contribution to existing knowledge. Before concluding this chapter, an outline of the structure of the thesis is provided and this incorporates the contribution of each chapter to the overall thesis and the central research question.

1.1 Setting the Stage

In the sea of literature on globalisation and developments in the growth of capital markets worldwide, African capital markets have attracted limited attention³ which is mainly general comments on the state of the stock

³ Most of the literature is fragmented and covers specific countries. See for example, Jacqueline Irving, 'Africa's Struggling Stock Exchanges: Boost to Economic Development or Costly Irrelevance?' (2000) 14(3) *African Recovery* 1-5; Lemma Senbet, 'African Stock Markets' (African Finance for the 21st Century High-Level Seminar, Tunisia, 4-5 March 2008; Lemma W Senbet and Isaac Otchere, 'African Stock Markets: Opportunities and Issues' in Marc Quintyn and Genevieve Verdier (eds), *African Finance in the 21st Century* (Palgrave MacMillan 2010); Issouf Soumaré, Désiré Kanga, Judith Tyson and Sherillyn Raga, 'Capital Market Development in Sub-Saharan Africa: Progress, Challenges and Innovations' (2021) ODI Working Paper 2 of 2021 <https://odi.org/en/publications/capital-market-development-in-sub-saharan-africa-progress-challenges-and-innovations/> accessed 6 June 2021.

markets. The most extensive commentary and research has been from the World Bank, International Monetary Fund, and the United Nations Economic Commission for Africa (UNECA).⁴ Recent developments on the continent including new products, new stock markets, the advent of financial technologies, focus on financial inclusion, increased competition and innovation have all had an impact on the state of financial markets. The increase in foreign direct investment and influx of international investors has necessitated a focus on the financial markets in Africa.⁵

In doing so, local, and international policymakers have increased advocacy for the overall integration of Africa's economy as the key to unlocking growth.⁶ Successes have been registered in trade with the establishment of

⁴ The most common sources are policy reports and working papers of these bodies. See for example United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa I* (UNECA 2004), United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* (UNECA 2006); United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa* (UNECA 2008) All available at <https://archive.uneca.org/publications/serie/assessing-regional-integration-in-africa> accessed on 4 November 2021; Edward A. Arowolo, 'The Development of Capital Markets in Africa, with Particular Reference to Kenya and Nigeria' (1971) 18(2) Palgrave Macmillan Journals on behalf of International Monetary Fund 420; Jacqueline T Irving, 'Regional Integration of Stock Exchanges in Eastern and Southern Africa: Progress and Prospects' (2005) International Monetary Fund Working Paper WP/05/122 <https://www.imf.org/external/pubs/ft/wp/2005/wp05122.pdf> Accessed on 8th February 2019; Olatundun Janet Adelegan, 'The Impact of the Regional Cross-Listing of Stocks on Firm Value in Sub-Saharan Africa' (2009) IMF Working Paper WP/09/99 (International Monetary Fund 2009) 8.

⁵ See Anupam Basu and Krishna Srinivasan, 'Foreign Direct Investment in Africa – Some Case Studies' (2002) IMF Working Paper WP/02/61, <https://www.imf.org/external/pubs/ft/wp/2002/wp0261.pdf> accessed 23 November 2021; Eliokplimi Komla Agbloyor, Joshua Abor, Charles Komla Delali Adjasi and Alfred Yawson, 'Exploring the Causality Links Between Financial Markets and Foreign Direct Investment in Africa' (2013) 28(1) *Research in International Business and Finance* 118-34; Folasade Bosede Adegboye, Romanus Osabohien, Felicia O Olokoyo, Oluwatoyin Matthew and Oluwasogo Adediran, 'Institutional Quality, Foreign Direct Investment and Economic Development in Sub-Saharan Africa' (2020) 38 *Humanities and Social Sciences Communications* 7.

⁶ See Daryl Collins and Mark Abrahamson, 'African Equity Markets and the Process of Financial Integration' (2004) 72(4) *South African Journal of Economics* 658; Iwa Salami, *Financial Regulation in Africa: An Assessment of Financial Integration Arrangements in African Emerging and Frontier Markets* (Ashgate Publishing Ltd, 2012); Sally Farid, 'Financial Integration in African Emerging Markets (African Economic Conference, Johannesburg, 23-30 October 2013); Akpan Ekpo and Chuku Chuku, 'Regional Financial Integration and Economic Activity in Africa' (2017) African Development Bank Working Paper 29, https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/WPS_No_291_Regional_Financial_Integration_and_Economic_Activity_in_Africa_A.pdf accessed 23 November 2021; Palesa Shipalana and Mopeli Moshoeshe, 'Bridging the Divide: Integrating SADC's Capital Markets' (2019) South African Institute of International Affairs Occasional Paper 295, https://media.africaportal.org/documents/Occasional_Paper_295_Bridging_the_Divide_Integrating_SADCs_capital_markets_1.pdf accessed 23 November 2021; TRALAC, 'Integration for Africa's Economic Prosperity' (2019) <https://www.tralac.org/documents/news/2597-aeo2019->

the world's largest trade bloc, the African Continental Free Trade Area (AfCFTA).⁷ Capital markets in Africa have not remained unaffected by the pursuit of integration and this thesis focuses on this specific area.

Throughout this thesis, there is substantial usage of the terms 'capital markets', 'stock markets,' 'integration,' and 'regional economic communities.' Capital markets, as a term, refer broadly to regulated markets or exchanges on which a spectrum of financial assets can be traded. The term has been defined as 'the system of financial organisations from which companies and governments raise money selling stocks, bonds, etc. to investors.'⁸ This connotes that the term could refer to bond markets, equity markets, commodity markets, currency markets, and foreign exchange markets. Capital markets are both public and private. This thesis restricts its discussion to equity markets and specifically the selling and buying of shares on stock markets in Africa. Unless specifically indicated, it does not cover bonds, derivatives, and commodities, and all statistics are limited to stocks.

Capital markets comprise both primary and secondary markets. Securities are listed on the primary markets by issuers through an initial public offer and are then traded on the secondary market by market intermediaries who include brokers and market makers. Capital markets are also sometimes referred to as financial markets.⁹ Stock markets are examples of capital markets. The stock market is a public market for the issuance, purchase, and sale of stocks. In this thesis, stock market and capital market may be used

chapter-3-integration-for-africas-economic-prosperity-afdb/file.html accessed 23 November 2021.

⁷ See United Nations Economic Commission for Africa, *Assessing Regional Trade in Africa IV: Enhancing Intra-African Trade* (UNECA 2010); United Nations Economic Commission for Africa, *Assessing Regional Trade in Africa V: Towards an African Continental Free Trade Area* (UNECA 2012); United Nations Economic Commission for Africa, *Assessing Regional Trade in Africa VIII: Bringing the Continental Free Trade Area About* (UNECA 2017) All available at <https://archive.uneca.org/publications/assessing-regional-integration-africa-iv> accessed 23 November 2021. Also see Mthuli Ncube, Issa Faye, Audrey Verdier-Chouchane (eds), *Regional Integration and Trade in Africa* (Palgrave Macmillan 2015).

⁸ Cambridge Business English Dictionary (Cambridge University Press 2021).

⁹ 'Understanding Capital Markets' (Federal Reserve Bank of St Louis) <https://www.stlouisfed.org/education/tools-for-enhancing-the-stock-market-game-invest-it-forward/episode-1-understanding-capital-markets> accessed 4 December 2021; 'Financial Markets' (Corporate Finance Institute) <https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/financial-markets/> accessed 4 December 2021.

interchangeably but in doing so, the usage should be understood to refer to the public market for listing and trading of shares.

This thesis uses two further important terms i.e., 'integration' and 'regional economic communities.' Integration of financial markets refers to the process of 'unifying markets and enabling convergence of risk adjusted returns on the assets of similar maturity across the markets.'¹⁰ Although there is a variety of literature on financial integration, measuring the integration of financial markets is difficult.¹¹ For purposes of this thesis, stock market integration presupposes the ability of issuers, intermediaries, and investors to freely access markets across the different African regions.¹²

The pursuit of an internal market in the European Union has popularised the concept of integration and paved the way for similar initiatives in other jurisdictions and regional groupings including the Association of Southeast Asian Nations (ASEAN) and Africa. Integration of markets has advantages and disadvantages that are discussed in detail in this thesis but generally, it encompasses a complex interplay of electronic linkages, access by market intermediaries, regulatory changes, and political socio-economic reforms. In Africa, all of these are brought together in a melting pot within the regional economic communities (RECs).

The term REC is defined as 'a regional grouping of African states organised into a legal entity by treaty, with economic and social integration as main objective.'¹³ The 1980 Lagos Plan of Action, the Abuja Treaty and the Relations Protocol all viewed the role of RECs as facilitating integration among members in a specific region.¹⁴ The concept of a regional economic community is not unique to Africa as there are other economic communities globally including the European Economic Community (EEC), the Eurasian

¹⁰ Reserve Bank of India, *Financial Market Integration*, 29 January 2011. <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/77579.pdf> accessed 19 July 2021.

¹¹ See Geert Bekaert, Campbell R Harvey, Robin L Lumsdaine, 'Dating the Integration of World Equity Markets' (2002) 65(2) *Journal of Financial Economics* 203.

¹² Unless specifically specified, integration refers to stock market integration as opposed to other forms of integration such as trade.

¹³ See Article 1 of the Protocol on Relations between the African Union and the Regional Economic Communities (RECs), 27 January 2008, Addis Ababa, Ethiopia.

¹⁴ See Lagos Plan of Action for the Economic Development of Africa 1980-2000; The Treaty Establishing the African Economic Community, 3 June 1991; Protocol on Relations between the African Union and the Regional Economic Communities, 27 January 2008.

Economic Community, the North American Free Trade Agreement (NAFTA), and the Central America Free Trade Agreement (CAFTA). However, the African RECs are unique in both structure, background, and composition. RECs in Africa are the building blocks of the African Union (AU) and the African Economic Community (AEC). The African Union recognises eight RECs which are the Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC), Economic Community of Central African States (ECCAS), Community of Sahel-Saharan States (CEN-SAD), Southern African Development Community (SADC), Economic Community for West African States (ECOWAS) and the Intergovernmental Authority on Development (IGAD). Their history and activities in the area of stock market integration are discussed in Chapter 4.

It is these RECs that are responsible for the integration of stock markets in Africa, and it is through the progressive integration of their activities that a continental economic integration and the AEC are to be achieved. As a result, the challenges faced by RECs translate into the challenges of stock market integration. These challenges primarily include the ability for member states to belong to multiple RECs, lack of a dedicated funding mechanism, lack of political will, the clash between the powers exercised at the regional level and at the national level as well as conflict between regional and national law. These challenges are discussed in Chapter 4, 5 and 6 of the thesis.

Reference is also made to 'regional groupings (RGs)' which are alliances between states in a region to pursue mutual economic development or growth. The difference between RGs and RECs is that whereas RECs are recognised by the AU and expressly provided for in the Abuja Treaty and the REC Protocol,¹⁵ RGs are not recognised by the AU despite their substantial progress in economic integration. Such RGs include the Economic and Monetary Community of Central Africa (CEMAC), West African Economic and Monetary Union (UEMOA), West African Monetary Zone (WAMZ), Economic Community of the Great Lakes Countries (CEPGL), Mano River Union (MRU) and the African Free Trade Zone (AFTZ). This complex structure of the co-

¹⁵ Decision on the Protocol on Relations between the African Union and the Regional Economic Communities (RECs), Assembly/AU/Dec.166 (IX)

existence of RGs and RECs in the same regions while pursuing similar objectives and composed of the same member states is discussed in detail in this thesis, as one of the challenges to achieving the aims of stock market integration.

Lastly, a disclaimer is useful at this initial stage. This thesis is not a study of integration projects in Africa. Such a study would be extensive due to the sheer number of integration projects on the continent and the depth required for such study at the doctoral level would not be achieved in one thesis. Rather, the thesis concentrates on the concept of integration of stock markets in Africa and the different projects as well as individual country and regional realities are used to reflect upon the concept, challenges, successes, and progress.

1.2 Central Research Questions and Themes

This thesis is concerned with the concept of stock market integration in Africa and its ability to resolve the challenges faced by stock markets in Africa. As expounded in 1.3 below, there is a long and complex history of integration in Africa fuelled by the regionalism agenda and supported by multinational agencies who view globalisation of capital markets as a necessity for Africa's stock markets and economic growth.

The central research question that this thesis seeks to answer is whether integration of stock markets in Africa can be achieved and resolve the challenges facing securities markets in Africa. It asks whether the current structural integration is able to achieve the aims of making capital markets work for Africa, or is a less ambitious solution such as harmonisation more feasible?

This central research question is further split into other themes that are explored in this thesis. First, what is the state of African capital markets? One cannot formulate a solution to an unknown problem. Therefore, to design effective solutions for stock markets in Africa, a discussion must be provided on the state of the markets to interrogate and understand the depth and nature of challenges. As will be seen in the discussion, this requires contextual analysis of the current state of the market including the structure and history of the development of the markets, market development including liquidity and market capitalisation as well as market activity that incorporates

domestic, cross-border, outbound and inbound activity and a brief discussion of the macroeconomic factors that affect the markets. This discussion will therefore explore the impediments to the growth of the securities market in Africa.

Secondly, why has integration been pursued as the response to the challenges facing the securities markets? Understanding the rationale is important for designing interventions. Africa has a long history of regionalism and calls for unity are an outcome of post-colonial ambitions to preserve the hard-fought independence. Under this theme, the discussion will explore the concept of regionalism and how that has motivated regulators to pursue closer relations both globally and in the region.

A third theme that arises from the central research question is the successes and failures of integration. What has worked and what has failed in the pursuit of integration? In addition, why has integration failed to make capital markets work for Africa? This discussion will examine the impediments to integration which include structural, foundational, and operational challenges, centred around the use of RECs and the interaction between regional law and national law.

The last theme focuses on an alternative proposal for integration. Specifically, is regulatory harmonisation a more suitable integration approach for stock market integration projects in Africa? The thesis will interrogate the concept of regulatory harmonisation and investigate whether it could fulfil the objectives of integration while preserving the spirit of the Abuja Treaty and the pursuit of an African Economic Community. In doing so, it will interrogate how regulatory harmonisation could be implemented in an African context, using lessons from the European Union. The discussion will scrutinise possible areas for harmonisation, methodology of harmonisation, and structures for tracking and monitoring harmonisation.

1.3 Originality and contribution to existing knowledge

Although there is no shortage of comment on the state of African capital markets,¹⁶ comprehensive and recent research into African capital markets is

¹⁶ See Footnote 1. Other key literature include Charles J Kenny and Todd J Moss, 'Stock Markets in Africa: Emerging Lions or White Elephants?' (1998) 26(5) *World Development* 829-43; Keith

still scarce. Much of the current research has been tailored to individual markets at a certain phase in their development¹⁷ or to concepts of investor protection.¹⁸ There is also literature on stock markets in Africa that tests economic theories and their application in these markets.¹⁹ There is a lack of comprehensive research on the viability, rationale, challenges, and solutions to the impediments facing the multimillion-dollar stock market integration projects in Africa.²⁰

This thesis will scrutinise the concept of integration of stock markets in Africa to identify the challenges facing stock markets in Africa which integration

Jefferis and Graham Smith, 'The Changing Efficiency of African Stock Markets' (2005) 73(1) *South African Journal of Economics* 54; Charles Amo Yartey and Charles Komla Adjasi, 'Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges' (2007) IMF Working Paper 209 of 2007 <https://www.elibrary.imf.org/view/journals/001/2007/209/001.2007.issue-209-en.xml> accessed 2 December 2021.

¹⁷ For example, see Edward Arowolo, 'The Development of Capital Markets in Africa with Particular Reference to Kenya and Nigeria' (1971) 18(2) *IMF Staff Papers* 420-72; Shakill Hassan, 'South African Capital Markets: An Overview' (2013) Economic Research Southern Africa Working Paper 391 of November 2013, http://www.econrsa.org/system/files/publications/working_papers/working_paper_391.pdf accessed 28 November 2021; C Firer and M Staunton, '102 Years of South African Financial Market History' (2002) 31(56) *Investment Analysts Journal* 57; Kenneth Kaoma Mwenda and Gerry Nkombo Muuka, 'Prospects and Constraints to Capital Markets Integration in Eastern and Southern Africa' (2001) 2(1) *Journal of African Business* 47; Masafumi Yabara and Peter Allum, 'Capital Market Integration: Progress Ahead of the East African Community Monetary Union' (2012) IMF Working Paper WP/12/18, <https://www.elibrary.imf.org/view/journals/001/2012/018/article-A001-en.xml?language=en&redirect=true> accessed 29 November 2021; Wilson Kazarwa, 'The Challenges of Emerging Stock Markets in Africa: A Case of Rwanda Stock Exchange' (2015) 5(1) *East African Journal of Science and Technology* 257.

¹⁸ See for example, Mohamed Warsame, 'An Empirical Analysis of the Impact of Adopting International Financial Reporting Standards: Evidence From Emerging African Capital Markets' (PhD Thesis, Morgan State University 2011)

¹⁹ For example, Magnus Arni Magnisson and Bruce Wydick, 'How Efficient are Africa's Emerging Stock Markets?' (2002) 38(4) *Journal of Development Studies* 141-56; Chipso Mlambo and Nicholas Biekpe, 'The Efficient Market Hypothesis: Evidence from Ten African Stock Markets' (2007) 36(66) *Investment Analysts Journal* 5-17; Paul Alagidede, 'Day of the Week Seasonality in African Stock Markets' (2008) 4(2) *Applied Financial Economics Letters* 115-20; Graham Smith, 'Liquidity and the Information Efficiency of African Stock Markets' (2008) 76(2) *South African Journal of Economics* 161; Charles KD Adjasi and Nicholas Biekpe, 'Do Stock Markets Matter in Investment Growth in Africa?' (2009) 43(1) *The Journal of Developing Areas* 109-20; Kimiko Sugimoto, Takashi Matsuki and Yushi Yoshida, 'The Global Financial Crisis: An Analysis of the Spillover Effects on African Stock Markets' (2014) 21 *Emerging Markets Review* 201-33; Jones Odei Mensah and Paul Alagidede, 'How are Africa's Emerging Stock Markets Related to Advanced Markets? Evidence from Copulas' (2017) 60 *Economic Modelling* 1-10; Ikechukwu Kelikume, Evans Olaniyi and Faith A Iyohab, 'Efficient Market Hypothesis in the Presence of Market Imperfections: Evidence from Selected Stock Markets in Africa' (2020) 9(1) *International Journal of Management, Economics and Social Sciences* 37-54.

²⁰ Some of the exceptions include Collins G Ntim, 'Why African Stock Markets Should Formally Harmonise and Integrate Their Operations' (2012) 4(1) *African Review of Economics and Finance* 53. The Economic Commission for Africa is an exception as it releases reports on assessing regional integration in Africa. See Footnote 2.

seeks to resolve. It aims to provide a deeper understanding of the state of African stock markets through historical occurrences as well as the regulatory framework in treaties, charters, protocols, and regulations.

It interrogates the current push towards integration of the stock markets in Africa as a response to the challenges. It aims to further the debate on the basis and the ability of the current integration pursuit to resolve the challenges facing stock markets in Africa as well as the ability of the integration projects to fulfil the mandate of attainment of the AEC. It hence opens the debate on the ability of current integration projects to fulfil the mandate of making capital markets work and to contribute to the final attainment of the AEC. In addition, this thesis will investigate the reasons why structural integration has achieved limited success in Africa from both an operational and legal standpoint.

Although the concept of regulatory harmonisation is not new, this thesis will discuss how this can be applied in an African stock market integration context including the rationale for the choice of harmonisation as well as the areas that require regulatory harmonisation.

The objective of this research is to inspire and inform academic discourse and assist policymakers and regulators of integration projects in Africa in the design, implementation, and pursuit of integration in Africa and globally.

1.4 Background, Scope and General Overview

Africa's population is projected to increase to 1.688 billion people by the year 2030.²¹ In contrast, poverty rates in Africa are still high and the continent will not achieve Sustainable Development Goal 1 of eradicating poverty by 2030.²² With increased dependence on donor funds and a lack of adequate

²¹ See United Nations, *Project 2030: Demographic Challenges and Opportunities for Sustainable Development Planning* (United Nations 2015) 3.

²² See Kristofer Hamel, Baldwin Tong and Martin Hofer, 'Poverty in Africa is Now Falling – But Not Fast Enough' (*Brookings Institute*, 28 March 2019), <https://www.brookings.edu/blog/future-development/2019/03/28/poverty-in-africa-is-now-falling-but-not-fast-enough/> accessed 23 November 2021; African Development Bank, 'Can Africa's Extreme Poverty be Eliminated by 2030?' (*AFDB Blogs*, 13 April 2014) <https://blogs.afdb.org/fr/afdb-championing-inclusive-growth-across-africa/post/can-africas-extreme-poverty-be-eliminated-by-2030-13424> accessed 23 November 2021; Zachary Donnenfeld, 'What is the Future of Poverty in Africa?' (*Institute for Security Studies*, 2 March 2020) <https://issafrica.org/iss-today/what-is-the-future-of-poverty-in-africa> accessed 23 November 2021;

domestic resources, Africa's financing needs have grown exponentially.²³ The Program Infrastructure Development for Africa (PIDA) is a joint initiative between the AU, African Development Bank (AfDB), and the New Partnership for Africa's Development Planning and Coordination Agency (NPCA) which provides a framework for infrastructure development and financing on the continent. PIDA identifies the urgent infrastructure needs of the continent and has decried the lack of adequate infrastructure on the continent and the amount of funding needed to develop the critical infrastructure to ensure Africa's global competitiveness.²⁴ An increase in the population and poverty levels coupled with increased demands for services and infrastructure only point to the need for Africa to widen its financing sources and consider domestic markets to meet the demand.

The anecdote of the drunkard's search and the streetlight effect spells out the tendency in humanities research for focus to be placed on where it is easiest to look.²⁵ In an African integration context, academic research and public commentary largely focus on trade integration and the commencement of the African Continental Free Trade Area. Literature on the state of African stock markets has been growing, albeit rather slowly.²⁶ On the other hand, there has been a limited academic focus on the multimillion-dollar stock market integration projects that are happening on the continent. For example, the World Bank formulated the Regional Integration and Cooperation Assistance

²³ See Sylvain Bellefontaine (ed), 'Hard Times for Developing Countries: Africa's Financing Needs in Question' (2021) Agence française de développement Working Paper No 36, <https://www.afd.fr/sites/afd/files/2021-09-01-19-17/africa-financing-needs.pdf> accessed 23 November 2021; Kristalina Georgieva, 'Remarks' (Summit on the Financing of African Economies, 18 May 2021) <https://www.imf.org/en/News/Articles/2021/05/18/sp051821-remarks-at-financing-african-economies-conference> accessed 23 November 2021.

²⁴ For example, see Program Infrastructure Development for Africa, 'Closing the Infrastructure Gap Vital for Africa's Transformation' (African Development Bank) <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/PIDA%20brief%20closing%20gap.pdf>; Program Infrastructure Development for Africa, 'Financing PIDA Projects' (African Development Bank) <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/PIDA%20brief%20financing.pdf> accessed 23 November 2021. Also see <https://au.int/en/ie/pida>

²⁵ The origin of the crafter of this comical allegory is difficult but is first traced to a 1924 newspaper story. See Editorial, 'Did You Lose the Keys Here?' 'No, But the Light Is Much Better Here' (Quote Investigator, 4 November 2013) <https://quoteinvestigator.com/2013/04/11/better-light/> accessed 4 October 2021.

²⁶ Today, the most notable academic research in this area has stemmed from Iwa Salami, Kenneth Mwenda, Edward Arowolo and Boniface Chimpango, all of whose works are referred to in various places in the thesis. It is supported by the various working papers and reports of the IMF, World Bank and United Nations Economic Commission for Africa at Footnote 2 and 4.

Strategy (RICAS) in 2018, which dedicated around US \$ 10 billion to the integration agenda in Africa.²⁷ The World Bank is also the major financier of the EAC's integration through the Financial Sector Development and Regionalization Project (FSDRP) with a commitment of US \$16 million.²⁸ Component 4 of FSDRP I is on the integration of financial market infrastructure in the EAC including linking the trading and settlement systems in the region through an order routing system.²⁹ The Korea Africa Economic Cooperation (KOAPEC) boosted the African Exchanges Linkage Project (AELP) with a US \$980,000 grant.³⁰ The AELP is supported by the African Development Bank (AfDB) as an initiative of seven of Africa's largest securities markets that account for over 90% of the market capitalisation of the continent.

This thesis puts African stock market integration in the spotlight by interrogating the rationale, objectives, and methodologies, expounding on the challenges and successes, and suggesting solutions to some of the substantive impediments. It will expound on the need for a shift from structural integration to regulatory harmonisation and demonstrates the rationale for this shift, as well as the methodology to make harmonisation successful.

1.4.1 The state of African financial markets

In comparison to global stock markets, the concept of stock markets is relatively new to the African continent. The 15th century marked the start of colonialism in Africa³¹ which was only cemented with the 1884-1885 Berlin

²⁷ See World Bank Group, 'Supporting Africa's Transformation: Regional Integration and Cooperation Assistance Strategy' (World Bank, 7 May 2018) <https://documents1.worldbank.org/curated/en/700111528428661825/pdf/REGIONAL-INTEGRATION-CAS-AFRICA-05112018.pdf> accessed 21 July 2021.

²⁸ See World Bank, 'Financial Sector Development and Regionalization Project' <https://projects.worldbank.org/en/projects-operations/project-detail/P121611> accessed 21 October 2021.

²⁹ See Editorial, 'EAC Financial Sector Development and Regionalization Project' (East African Community) <https://www.eac.int/financial/financial-sector-development> accessed 21 October 2021.

³⁰ Editorial, Korea-Africa Economic Cooperation Lifts African Exchanges Linkage Project With \$980,000 Grant (World Stage News, 2018) <https://worldstagenews.com/korea-africa-economic-cooperation-lifts-african-exchanges-linkage-project-with-980000-grant/amp/> accessed 21 October 2021.

³¹ South Africa was colonised as early as 1652. See Erna Oliver and Willem H Oliver, 'The Colonisation of South Africa: A Unique Case' (2017) 73(3) HTS Teologiese Studies 1.

Conference.³² Africa remained a colonial empire until the mid-1950s³³ and hence remained shielded from stock market developments globally.³⁴ Since the formation of the Antwerp Stock Exchange in 1531 and the Amsterdam Stock Exchange in 1607, more stock exchanges had sprouted up including Austria in 1771, London in 1773, and NYSE in 1791.³⁵ Colonial Africa did not follow suit in establishing capital markets and even when a handful were established,³⁶ their focus was on sustaining the booming trade in the natural resources of the continent such as gold in South Africa.³⁷

This position did not change even after independence due to the small size of African states' economies coupled with a low demand for capital which was easily met by the banking sector and foreign private capital.³⁸ As a result, there were only eight stock exchanges in Africa in 1989.³⁹ Post-1989, stock exchanges started to sprout in African countries, and this can be attributed to certain factors. First, the general trend towards globalisation including the flow of capital and financial regulation was instrumental.⁴⁰ The theory of 'development economics' which emerged to support the implementation of the transition from 'rural, agricultural economies to something more industrialized, modernized and urban' required the formation of financial

³² The Berlin Conference is also known as the Congo Conference or West Africa Conference.

³³ Eritrea only gained independence from Ethiopia on 24 May 1993 although Namibia was the last African state to gain independence from a Western power. Britain granted Namibia independence on 21 March 1990.

³⁴ See generally William Goetzmann and Geert Rouwenhorst, *The Origins of Value: The Financial Innovations that Created Modern Capital Markets* (Oxford University Press, 2005).

³⁵ See Stephen Valdez and Philip Molyneux, *An Introduction to Global Financial Markets* (7th edn, Palgrave Macmillan, 2013); Petram Lodewijk, *The World's First Stock Exchange: How the Amsterdam Market for Dutch East India Company Shares Became a Modern Securities Market 1602-1700* (Eigen Beheer, 2011); Ranald Michie, *The London Stock Exchange: A History* (Oxford University Press, 1999).

³⁶ See discussion in Chapter 2.

³⁷ See Marius Lukasiewicz, 'From Diamonds to Gold: The Making of the Johannesburg Stock Exchange 1880-1890' (2002) 12(7) *Applied Financial Economics* 476; Pierre Morgenrood, 'Cape Town's Forgotten Stock Exchange' (2000) 54(4) *Quarterly Bulletin of the National Library of South Africa* 144.

³⁸ Edward A. Arowolo, 'The Development of Capital Markets in Africa, with Particular Reference to Kenya and Nigeria' (1971) 18(2) *Palgrave Macmillan Journals* on behalf of International Monetary Fund 420.

³⁹ These included the stock exchanges established in Egypt in 1883, South Africa in 1887, Morocco in 1929, Zimbabwe in 1948, Nairobi in 1954, Nigeria in 1960, Tunis in 1969 and Mauritius in 1988.

⁴⁰ Katharine Jackson, 'Pension-Funding the Future: Encouraging the Sustainable and Socially Responsible Development of Securities Markets in Sub-Saharan Africa' (2010) 44(2) *The International Lawyer* 792. A study also found that foreign direct investment is positively correlated to the development of stock markets. See Stijn Claessens, Daniela Klingebiel, and Sergio L. Schmukler, *FDI and Stock Market Development: Complements or Substitutes?* (World Bank 2001).

sectors including capital markets.⁴¹ Thirdly, the deliberate imposition of structural adjustment policies by the Bretton Wood Institutions encouraged African leaders to embrace the formation of stock exchanges to support privatisation of formerly owned state entities.⁴² These factors, amongst others, spurred on the establishment of stock exchanges leading to 29 exchanges as at the end of 2020.⁴³

Despite the passage of time since formation, the exchanges have not experienced exponential growth or yielded the expected results. Although commentary can be found on the state of financial markets in Africa,⁴⁴ it is fragmented and disjointed and largely composed of brief comments and general statements on the state of the markets. This thesis expounds on the commentary and provides a critical analysis of the extent of the problems facing stock markets in Africa. They are unable to substantially contribute to economic growth as GDP grows faster in economies with liquid markets.⁴⁵ In addition, the illiquidity of these markets deters foreign investment, discourages local investors and issuers, and increases transaction costs. There is limited market activity which is dominated by a handful of large issuers and institutional investors and few inbound initial public offers.

There is a general lack of proper institutions for capital market development in Africa as well as complex and cumbersome inadequate regulatory frameworks.⁴⁶ There are also socio-political impediments such as the lack of government support, corruption, inflation⁴⁷ and an unstable political

⁴¹ Ibid 793.

⁴² See Kwame Akonor, *Africa and IMF Conditionality: The Unevenness of Compliance 1983-2000* (Routledge 2006); Maria K. Boutchkova and William L. Megginson, 'Privatisation and the Rise of Global Capital Market' (2000) 29(4) *Financial Management* 31. For a narrative on the growth of 14 of the stock markets in Africa, including the role of privatisation, see Robert A Clark, *Africa's Emerging Securities Markets: Developments in Financial Infrastructure* (Quorum Books 1998).

⁴³ 25 exchanges representing 37 countries are members of the Association of African Securities Exchanges Association (ASEA).

⁴⁴ See Chapter 3 and Footnote 1.

⁴⁵ Ross Levine, *Stock Markets: A Spur to Economic Growth* (International Monetary Fund, 1996) <https://www.imf.org/external/pubs/ft/fandd/1996/03/pdf/levine.pdf> accessed 21 October 2021.

⁴⁶ Certain studies have explored the importance of proper institutions in developing capital markets. See for example, Andreas Billmeier and Isabella Massa, 'What Drives Stock Market Development in Emerging Markets- Institutions, Remittances or Natural Resources?' (2009) 10(1) *Emerging Markets Review* 23.

⁴⁷ Studies have established a negative relationship between inflation and financial development including activity on the equity markets. See John H Boyd, Ross Levine and Bruce D Smith,

environment. The state of African financial markets has hence gained attention globally, due to the challenges above but also due to the nexus between financial sector development and economic growth.⁴⁸ In addition, stock markets are an important source of finance to fund both private companies and governments and bridge the funding gaps left by the banking industry. Hence, the challenges faced by stock markets affect the general economy and require the attention of both academics and policymakers.

1.4.2 The Push Towards Integration

Due to the desire to tackle the challenges facing the stock markets in Africa, regulators and policymakers have turned to various initiatives, the key to which is integration. This scheme involves interconnecting the different stock markets in Africa in order to increase efficiency, effectiveness, size, and volume of activity and to make the markets more attractive to potential issuers and investors.

Financial integration is defined as 'the process through which different regions or countries become more financially interconnected, ultimately producing an increase in cross-regional asset holding and convergence of prices and returns for financial assets and services in the same risk category.'⁴⁹ The possible benefits of integration include lower transaction costs for intermediaries and issuers, more efficient and competitive markets on the global arena, diversification of risk, higher returns for investors, and increased cross-border capital flows.⁵⁰ Other benefits include the ability to attract large issuances which would not have been adequately absorbed at the national level as well as prevention of large capital outflows from the continent.⁵¹ If individual stock exchanges merge, it is contemplated that they would be able to resolve liquidity issues. These are the benefits that policy makers hope to gain from integrating Africa's stock markets.

'The Impact of Inflation on Financial Sector Performance' (2001) 47 *Journal of Monetary Economic* 221.

⁴⁸ See Joseph Schumpeter, *The Theory of Economic Development* (Harvard University Press, 1911).

⁴⁹ Danny Busch, Emiliós Avgouleas and Guido Ferrarini, *Capital Markets Union in Europe* (Oxford University Press, 2018) 13.

⁵⁰ Jacqueline T Irving, 'Regional Integration of Stock Exchanges in Eastern and Southern Africa: Progress and Prospects' International Monetary Fund Working Paper WP/05/122 <https://www.imf.org/external/pubs/ft/wp/2005/wp05122.pdf> Accessed on 8th February 2019.

⁵¹ Ibid.

The push towards integration in Africa is also credited to global occurrences which are explored in the thesis. Specifically, the European Union has provided immense inspiration for proponents of stock market integration in Africa.⁵² Although the EU has served as inspiration for African stock market integration projects, the methodology has differed i.e., although the EU pursues regulatory harmonisation as its integration agenda, different regional communities in Africa pursue both regulatory and structural integration.⁵³ There seems to be a consensus that integration would be good for Africa⁵⁴ and the signs have been evident in the pursuit of trade integration that culminated into the AfCFTA and two monetary zones: UEMONA/WAEMU and CEMAC. In addition, the rhetoric has been strong in calling for integration on the AU front and in regional meetings.

1.4.3 Making sense of the concept of regionalism and regional economic communities

Africa's general integration agenda has a long history that dates to as early as 1963 with the formation of the Organisation of African Unity (OAU) and the emergence of the concept of regionalism.⁵⁵ Social scientists have failed to agree on the definition of regionalism⁵⁶ but in the context of this thesis, regionalism and regionalisation are used to refer to reorganisations by different states in a particular regional space.

⁵² Ludger Kuhnhardt, 'African Regional Integration and the Role of the European Union' (2008) ZEI Discussion Paper C184 http://aei.pitt.edu/9046/1/dp_c184_Kuehnhardt.pdf accessed 23 November 2021.

⁵³ For example, the EAC's Capital Markets Infrastructure Project (CMI) seeks to create an infrastructure linkage between the member states by way of an order routing system to facilitate cross-border trading and settlement. The ECOWAS'S West African Capital Markets Integration Council (WACMIC) three-phase project will culminate into a fully integrated West African capital market where all member states are linked with a common trading platform.

⁵⁴ See African Development Bank, 'Importance of Regional and Continental Integration for Africa's Development' (African Development Bank, 3 Dec 2018) <https://www.afdb.org/en/news-and-events/importance-of-regional-and-continental-integration-for-africas-development-18773> accessed 23 November 2021; Ernest Harsch, 'Making African Integration a Reality' (United Nations Africa Renewal Magazine, September 2002) <https://www.un.org/africarenewal/magazine/september-2002/making-african-integration-reality> accessed 23 November 2021; Kingsley Ighobor, 'Africa's Regional Integration will Benefit All' (United Nations Africa Renewal Magazine, 24 December 2019) <https://www.un.org/africarenewal/magazine/december-2019-march-2020/africa%E2%80%99s-regional-integration-will-benefit-all> accessed 23 November 2021.

⁵⁵ See Chapter 4.

⁵⁶ See Bjorn Hettne, 'Beyond the 'New' Regionalism' (2005) 10(4) *New Political Economy* 544.

Africa has a complex history with regionalism endeavours which was only exacerbated by post-colonial pursuits of unity.⁵⁷ As the central theme of Pan Africanism,⁵⁸ unity became the rallying call for an independent Africa and provide the base for the formation of alliances, regional groups, and regional economic communities (RECs). It is these RECs that were recognised by the Abuja Treaty⁵⁹ as the building blocks of the AEC.⁶⁰ The RECs committed to working together to achieve the AEC⁶¹ and are hence recognised as crucial to all forms of integration on the continent.

They are the heart and soul of stock market integration projects and other than the African Exchanges Linkage Project, all other stock market integration projects in Africa are under the auspices of a REC.⁶² The RECs are also at different stages in their pursuit of integration and pursue different agendas laid down by the individual regional treaties and protocols.

1.4.4 The challenges of Africa's pursuit of stock market integration

The premise on which integration of stock markets stands has remained the same since the beginning but the processes, approaches, and attempts have constantly changed. Although the concept of integration was adopted by the founding treaties,⁶³ there was a lack of guidance on the exact type of integration that would be pursued or how it could be pursued.⁶⁴ This is made arduous by the different available integration models that regions can pursue.

⁵⁷ See Percy Mistry, 'Africa's Record of Regional Co-operation and Integration' (2000) 99 *African Affairs* 553.

⁵⁸ Pan Africanism refers to the belief that Africans have a common history and therefore should be unified. See John Henrik Clarke, 'Pan Africanism: A Brief History of an Idea in the African World' (1988) 155(1) *Presence Africaine* 26.

⁵⁹ The Abuja Treaty is the Treaty Establishing the African Economic Community, adopted on 3 June 1991 and entering into force on 12 May 1994.

⁶⁰ Iwa Salami, *Financial Regulation in Africa: An Assessment of Financial Integration Arrangements in African Emerging and Frontier Markets* (Ashgate Publishing Ltd, 2012) 8.

⁶¹ Protocol on Relations Between the African Economic Community and the Regional Economic Communities, Addis Ababa Ethiopia, 27 January 2008

⁶² There is a caveat, however. Although there are eight recognised RECs, there are other regional groupings that are advancing stock market integration. In addition, there are recognised RECs that do not have ongoing integration projects including the AMU (due to the Algeria-Morocco conflict), CEN-SAD (due to political conflicts and humanitarian crisis), and COMESA (due to its focus on trade).

⁶³ See Treaty Establishing the African Economic Community, 3 June 1991; Article 3(c) of the Constitutive Act of the African Union, 7 November 2020.

⁶⁴ For example, the Abuja Treaty mentions regional stock exchanges without elaborating on whether their creation would be through mergers or how their creation would affect the existence of national stock exchanges.

Performance on achieving integration has been mixed. The EAC and SADC have made substantial progress whereas AMU, CEN-SAD, and ECCAS have nothing to show in this area. Even where there has been reported progress, the political rhetoric has been strong, but the action is weak. In 2006, the AU Assembly added to the convoluted arena of stock market integration projects by introducing a concept of a Pan African Stock Exchange (PASE) which is not backed by Treaty and has no Protocol.⁶⁵

The concept of state sovereignty that emerged post-independence remains the biggest stumbling block to the achievement of integrated stock markets.⁶⁶ There are various other impediments and stumbling blocks discussed in Chapter 5 and 6 which include political impediments, financial impediments,⁶⁷ structural challenges and enforcement challenges. The use of RECs as conduits of integration also raises unique challenges. Since there are no prohibitions on memberships, every country belongs to more than one REC.⁶⁸ The discussion in Chapter 6 shows why this is problematic and how it can be resolved.

1.4.5 From Infrastructure to Regulation: Changing the Conversation

Having identified the impediments to integration, the discussion turns to alternatives. What alternative can regulators and policy makers pursue to make capital markets work for Africa since structural integration has largely failed to achieve the objectives of the Abuja Treaty? Emerging markets that are eager to integrate their markets with the international financial system cannot ignore the importance of regulation.⁶⁹ Regulation has always been at the forefront of securities markets.⁷⁰ Where different regulatory frameworks

⁶⁵ See Decision on the Establishment of a Pan-African Stock Exchange and on the Establishment of a Fund Within the African Union to Mitigate the Effects of the Increase in Oil Prices on the African Countries (Doc.Assembly/AU.8 (V1)) Add.5 and 6) Assembly/AU/Dec.92 (VI)

⁶⁶ This concept is discussed in Chapter 5 and 6 of the thesis.

⁶⁷ See African Union, Progress Report of the High-Level Panel on Alternative Sources of Financing the African Union (Assembly of the African Union, 15-16 July 2012, Addis Ababa, Ethiopia).

⁶⁸ This scenario is discussed in detail in Chapter 5 of the thesis. Also see United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa III: Rationalising Regional Economic Communities* (UNECA 2006).

⁶⁹ Robert A. Feldman and Manmohan S. Kumar, 'Emerging Equity Markets: Growth, Benefits, and Policy Concerns' (1995) 10(2) *The World Bank Research Observer* 181, 197.

⁷⁰ See International Organization of Securities Commissions, *Objectives and Principles of Securities Regulations*, June 2010.

exist, integration will only merge all the individual impediments into one larger and more complex problem. In addition, the structural integration itself cannot stand without regulatory amendments.

Where limited success has been achieved in the adopted methods of integration, the thesis asks whether African policy makers should consider regulatory harmonisation as an alternative. In doing so, they might consider the gains made by the EU and other jurisdictions in embracing regulatory harmonisation as well as the successes of the *Organisation Pour l'harmonisation en Afrique du droit des Affaires* (Organisation for the Harmonisation of Corporate Law in Africa).⁷¹

Is regulatory harmonisation cognisant of the requirements of the Treaties in the creation of an economic community and the use of RECs as the conduits of integration? This thesis considers whether there is any Treaty based justification for the recommendation to focus on regulatory harmonisation. In addition, this thesis provides justification for regulatory harmonisation. A widescale harmonisation drive would require substantial financial resources and time commitment which are not available and may overwhelm regulators hence slowing down progress. So, what areas require harmonisation and how could harmonisation be implemented? These questions are discussed in Chapter 7 of the thesis.

1.5 Methodology

This section discusses the approaches to the research and the methods employed to support the assertions made in this dissertation.

1.5.1 Use of Comparative Research

Fombad has argued that any legal research is either explicitly or implicitly comparative.⁷² He posits that even when the topic is not a study of different legal regimes, it is not possible to form the basis of a serious study without referring to similar comparable events in other jurisdictions.⁷³ Comparative

⁷¹ See Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309; Renaud Beauchard and Mahutodji Jimmy Vital Kodo, 'Can OHADA Increase Legal Certainty in Africa?' (2011) Justice and Development Working Paper Series 17/2011, 15, <https://openknowledge.worldbank.org/handle/10986/18322> accessed 23 November 2021.

⁷² Charles Manga Fombad, 'Comparative Research in Contemporary African Legal Studies' (2018) 67(4) *Journal of Legal Education* 984, 986-87.

⁷³ *Ibid*, 987.

research involves the comparison of different legal systems⁷⁴ to identify similarities and differences and how these can inform analysis. There are six different methods for comparative research including the analytical method, historical method, common-core method, in-context method, structural method, and functional method but these are not mutually exclusive and can be combined in the same research.⁷⁵

In this research, there is a mixed comparative research methodology. First, the thesis research uses the functional approach. Functional methodology has been the subject of intense debate.⁷⁶ Functionalism has several meanings but generally, it helps to study relations and how the different components interact with one another.⁷⁷ Huusa states that 'functional comparative law argues that the legal systems of different countries should be understood basically as providing answers to similar problems.'⁷⁸

Due to the global nature of the concept in review i.e., integration, it is impossible to conduct the research herein in isolation. Integration in Africa has been influenced and shaped by developments elsewhere, including the EU, and hence a level of comparative legal research is inevitable. In addition, by comparing with processes elsewhere, the research is able to identify impediments to the growth of stock markets in Africa, offer solutions to the challenges facing capital markets in Africa make recommendations for a shift to regulatory harmonisation and to solutions to impediments to the growth of capital markets and challenges to integration.

Throughout this thesis and especially in Chapters Five, Six and Seven, reference is made to the integration of capital markets in the European Union

⁷⁴ Ibid, 986.

⁷⁵ Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline* (Bloomsbury Publishing 2011) 11.

⁷⁶ See for example, Konrad Zweigert, 'Methodological Problems in Comparative Law' (1972) 7(4) *Israel Law Review* 465; John Reitz, 'How to do Comparative Law' (1998) 46(4) *American Journal of Comparative Law* 617; Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (trans Tony Weir, 3rd edn, Oxford University Press 1998); Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50(4) *American Journal of Comparative Law* 671, 679. A summary of these is discussed in Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann, *Oxford Handbook of Comparative Law* (1st edn, Oxford University Press 2016) 340.

⁷⁷ Jaakko Husa, 'Functional Method in Comparative Law- Much Ado About Nothing?' (2013) 2(1) *European Property Law Journal* 4,6.

⁷⁸ Ibid, 10.

(EU). There are substantial references to approaches as well as lessons learned from the pursuit of integration in the EU. The African Union has also modelled itself on the European Union.⁷⁹ Africa and the EU have a long history of partnerships rooted in post-colonial relations and the EU remains a player in Africa's pursuit of integration. For example, the EU's economic partnership agreements (APA) with Africa remain a key part of trade conversations.⁸⁰ The choice of the EU, therefore, is intentional and necessary. Zweigert and Kotz have stated that 'in law the only things which are comparable are those which fulfil the same function.'⁸¹ The functional method requires that comparison is between those that share the same function. Therefore, in choosing jurisdictions to compare, regard was had to similarities. The EU has established itself not only as a model for regional integration but also as the most successful capital markets harmonisation in the world. It is undoubtedly the most developed model of regional integration.⁸² It, therefore, made sense that the EU harmonisation drive would be instructive to the stock market integration projects in Africa.

Comparative analysis not only looks at similarities but also considers variance.⁸³ The discussions in this thesis show that the EU's integration methodology and process is different from that adopted in Africa. For example, the EU harmonisation is a regional initiative (of the members of the European Union) while in Africa, integration is pursued at a regional level under the RECs. However, since the intention of the RECs is to form the AEC as an end goal, the EU remains a good comparator.

⁷⁹ See George B.N Ayittey, 'Disband the African Union' (*Foreign Policy News*, 10 July 2016), <https://foreignpolicy.com/2016/07/10/disband-the-african-union/> accessed 14 July 2021; Olufemu Babarinde, 'The EU as a Model for the African Union: the Limits of Imitation' (2007) 7(2) *Jean Monnet/Robert Schuman Paper Series* 3.

⁸⁰ These originated from the 1975 Lome Convention i.e. ACP-EEC Convention Signed at Lome, 28 February 1975. Today, the EU and Africa engage under the auspices of the Cotonou Agreement i.e., Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, 2000/483/EC.

⁸¹ Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 34.

⁸² Fraser Cameron, 'The European Union as a Model for Regional Integration' (Council on Foreign Relations, 24 September 2010) <https://www.cfr.org/report/european-union-model-regional-integration> accessed 24 August 2021.

⁸³ Melinda Mills, Gerhard G van de Bunt and Jeanna de Bruijn, 'Comparative Research: Persistent Problems and Promising Solutions' (2006) 21(5) *International Sociology* 619, 621.

References to the EU are designed to achieve three aims. First, to offer a broad understanding of global integration initiatives and more advanced approaches that are being taken. As the most advanced integrated region, the EU offers scholars an opportunity to understand, analyse and critique. In return, scholars of African law can identify similarities and differences and how these impact Africa's integration initiatives. Secondly, the occurrences in the EU contribute to an understanding of the challenges that integration can pose as well as opportunities. Third, the principles that have taken root in the EU are studied to devise principles of law that can be applied to achieve harmonisation in an African context. For example, principles such as the supremacy of EU law and how that resolves the conflict between national law and EU law may help resolve conflict of law scenarios between national law and regional law (the law of the RECs). This is the problem-solving approach of comparative legal research.

References to the EU are in no way a stamp of recognition that the EU and Africa's integration initiatives are similar and hence Africa should adopt the EU model. There are limits to the pursuit of such imitation and such enthusiasm would be, at the very least, misguided. The thesis cautions against such an approach due to the fundamental historical, socio, and economic differences between the two continents and the differences in the structure and size of projects.⁸⁴ Building regions and pursuing integration is an exercise in trust and belief in shared ambitions. The EU has not been immune to suspicion, conflict of law, defiance to the spirit of integration, and this has slowed progress and even culminated into the exit of the United Kingdom from the EU. Yet even the challenges of the EU are instructive on what proponents of African integration should expect and how to circumvent some of the challenges.

There have been attempts to achieve some form of regional integration outside the EU which includes stock market integration projects. This thesis takes cognisance of such attempts and where necessary, some minor references are made to the Association of Southeast Asian Nations (ASEAN).

⁸⁴ For example, whereas the EU commenced its integration pursuit with six member states, the AU has 54 member states and every country in Africa belongs to at least one REC. This is discussed in Chapter 6 of the thesis.

The limited references to the ASEAN are due to the fundamental differences in the type of integration anticipated by ASEAN as opposed to the AU and RECs. Specifically, ASEAN integration does not involve any threats to legislative sovereignty and the ASEAN Capital Market Integration allows states to opt into projects depending on their level of development, national priorities, and market readiness. The use of multiple comparators has the disadvantage of diluting research focus and the depth of research and hence other than the EU, other comparators that have been used are not explored in detail. It must also be noted that the thesis is heavy on 'African-level' examples due to multiple integration projects being undertaken on the continent. The impact of this is that an intentional choice to focus on Africa requires that the thesis dedicate substantial discussion to the specific African realities such as specific REC projects.

The functional approach may have a limitation of focusing on results and ignoring the historical context of how results were achieved.⁸⁵ To guard against this, the historical approach as well as the law-in-context approach are also adopted. The thesis analyses the historical origins of the concept of regionalism and how it has impacted the pursuit of integration in Africa. Some of the challenges to stock market integration such as the lack of political will and the clash between national and regional law, discussed in Chapter 5 and 6 of the thesis, are attributed to the impact of colonialism and the post-colonial ringfencing of the idea of statehood. The context enables the reader to understand why stock market integration projects in Africa have achieved very limited success.

Lastly, determining the scale of analysis in comparative research can be difficult. It is important to mention that this research does not involve or intend to substantively analyse the EU's integration mechanism or study how the EU has achieved integration. Rather the references to the EU are specific with the intention to fill in gaps, suggest resolutions to challenges of integration and structure harmonisation. The comparative research herein is

⁸⁵ See Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press 2008) 384-419.

hence at the macro-comparison level as opposed to micro comparison. These are the limits of the comparative research herein.

1.5.2 Critical Analysis and Doctrinal Research

This thesis will primarily involve an analysis of the concept of integration of stock markets in Africa. This includes a critical analysis of specified treaties under the auspices of the African Union as well as the RECs to trace the origins of regionalism and subsequently integration efforts. It analyses, describes, interprets, and explains integration efforts in Africa and the challenges as well as opportunities for integration and the promise of regulatory harmonisation.

In conducting research for this thesis, both primary and secondary sources have been used. At the AU level, the primary resources include treaties such as the Constitutive Act of the African Union, the African Charter on Human and People's Rights and the Treaty Establishing the African Economic Community. In addition, protocols of the AU have been reviewed including Protocol on the Amendments to the Constitutive Act of the African Union, Protocol on the Statute of the African Court of Justice and Human Rights, Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Protocol of the Court of Justice of the African Union. At the regional level, reference has been made to the treaties establishing the different RECs and Protocols relevant to integration at the regional level. In Chapter 6 and 7, the thesis also refers to treaties of the European Union such as the Treaty on European Union. The reference to these is used to analyse how the European Union carries out integration and how regulatory harmonisation is implemented. Other primary sources used include legislation in member states of the African Union and case law emanating from courts in both Africa, the USA, and the EU. There are also directives, regulations, and protocols of both the EU and the RECs that are referred to in this thesis and which are secondary law. These relate to EU regulations and directives governing securities markets such as the Market Abuse Directive ⁸⁶ and the EU

⁸⁶ Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)

Accounting Directive.⁸⁷ The AU does not have directives but rather has conventions, protocols, and charters such as on establishment of the court,⁸⁸ the bank⁸⁹ and the fund.⁹⁰ Directives and regulations are passed by RECs such as those in the EAC⁹¹ in order to govern the financial markets integration agenda in the respective REC.

Concepts such as the supremacy of EU law are a creature of case law.⁹² Cases not only lay down principles but they also clarify and interpret treaties, directives, and regulation. Certain judgements of courts that relate to capital markets in both Africa and the EU were reviewed to form the basis for assertions such as the primacy of regional law or the importance of regulation for the protection of investors. Therefore, parts of the thesis are doctrinal as they focus on the letter of legislation and analyse what the different legislation, directives, and protocol require in the pursuit of integration. The thesis is concerned with due to its proposal of a regulatory approach i.e., harmonisation of regulation as opposed to structural integration

Secondary sources were also used to discuss and analyse primary sources. The research made use of published works in various African and international journals relating to capital markets in Africa and the European Union as well as stock market integration. This work benefitted immensely from working papers, conference papers and research papers, primarily of the World Bank, IMF, Economic Commission for Africa, and African Development Bank. For example, the reports of the Economic Commission for Africa proved invaluable in assessing economic integration in Africa and understanding the complex interplay of the activities of the RECs.⁹³ Other secondary sources

⁸⁷ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance

⁸⁸ Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998; Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008; Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.

⁸⁹ Protocol on the African Investment Bank, 30 June 2009.

⁹⁰ Protocol on the Establishment of the African Monetary Fund, 27 June 2014.

⁹¹ For example, Directive 2014/10/EU of the Council of Ministers on Securities Exchanges.

⁹² Case 6/64 *Costa V ENEL Nazionale per L'Energia Elettrica (ENEL)* [1964] ECR 585.

⁹³ UNECA (n4).

referred to included press releases, blogs, other theses, and newspaper articles.

1.6 Limitations of the study

Seeking to obtain reliable information on capital markets in Africa is difficult. Statistics on market activity and individual exchanges are not readily available and access requests are not always honoured even where there are freedom of information regimes. The lack of transparency leads to multiple contradictory statistics with different figures being provided by data firms such as Bloomberg, analysts such as PWC, and even the Association of African Securities Exchanges (ASEA).

The data provided on market activity in Chapter 3 is a culmination of hours scouring through different sources and private access to databases of ASEA which are not largely open to the public. To access this information, subscription fees had to be paid. However even then, the information is not well organised or easily comparable as it may be presented in multiple currencies. Certain information on the East African Community Capital Markets Infrastructure Project is not available to the public and was only obtained through careful scrutiny of donor reports such as those of the World Bank.⁹⁴ Therefore, the lack of public and easily accessible information is a hindrance to researchers seeking to engage with this area.

The use of multiple currencies is also challenge to the collection of statistics. Most African countries use a different currency, and, in many cases, market statistics are reported in the local currency. Conversions to US \$ for purposes of uniformity are difficult and can be misleading due to the changing dollar rate and its impact on the individual currencies and ultimately on the figures presented in dollars.

1.7 Chapter Outline

The thesis is split into six substantive chapters as well as two further chapters containing the introduction and the conclusion.

⁹⁴ For example, see World Bank, 'Financial Sector Development and Regionalization Project I (FSDRP 1)' <https://projects.worldbank.org/en/projects-operations/project-detail/P121611> accessed 20 November 2021.

Chapter 2 sets the scene of the thesis by examining the emergence of stock markets in Africa. Unlike global capital markets, the concept of capital markets generally and stock markets specifically is still relevantly new. By 1989, there were only five stock exchanges on the entire continent. This history is relevant to explaining the challenges of integration such as the sovereignty concerns that hinder commitment to regionalism and integration. States that gained independence only in the 1960s are more interested in protecting sovereignty than surrendering aspects of it to the supranational in a regional setting. In addition, the post-independence period inspired calls for unity which is the base of regionalism, and the calls for integration and the formation of the African Economic Community. Chapter 2 also justifies the thesis' focus on capital markets and the potential they present for the economic growth of Africa. Lastly, this chapter examines the history and of some of Africa's largest exchanges. It documents the efforts to establish and develop certain stock markets in Africa. The choice of exchanges is determined by their size, historical significance as well as the two unique regional exchanges.

In Chapter 3, the state of African markets is provided. Unlike current literature which provides short commentaries on African markets, this thesis sources and provides selected statistics to justify the statements made on the state of African markets. The discussion examines the factors that contributed to the emergence and development of the markets as well as the challenges that African stock markets face. The challenges covered include stock market development i.e., liquidity and capitalisation as well as stock market activity covering all facets such as outbound, inbound, and cross-border activity. To complete the picture, a limited discussion on macro-economic and fiscal policy is provided. It is the challenges identified in this chapter that inspire proponents of integration.

Chapter 4 addresses the concept of regionalism in Africa and the regionalisation of stock market integration projects. Integration projects in Africa are under the auspices of regional treaties which are inspired by the Abuja Treaty and the AU Act. This chapter explores the concept of RECs which are the building blocks of integration and their complex relationship and history. The activities, successes, and failures of the RECs in their projects

are examined as well as the different forms of integration that they have chosen to pursue.

The discussion in Chapter 4 lays the base for Chapters 5 and 6 which jointly point out the challenges that the current integration projects face. Chapter 5 examines the foundational challenges of integration. These include the uncertainty on the place of national exchanges in the calls for the establishment of regional exchanges and a newly recognised Pan African Stock Exchange. Is there room for co-existence or does this mark the demise of the national exchange? There is no guidance on this crucial matter which impacts sovereignty with the latter standing in the way of integration projects. Can the EU offer any guidance on resolving such sovereignty concerns? The Pan African Stock Exchange which was only recognised as a financial institution of the AU also brings peculiar challenges. There is no Protocol on its establishment hence making it a project shrouded in mystery. The attainment of the AEC is the end goal of integration. But what exactly is an economic community and how does that impact capital markets? What lessons can we pick from the ASEAN and the EU in pursuit of the AEC? Lastly, talk of integration is unachievable without robust and clear funding strategies and the chapter discusses the funding hurdle.

Chapter 6 is a continuation of the challenges of integration and looks at operational and relational matters. Most of these arise from the very use of RECs and the concept of regionalism. States belong to multiple RECs hence causing conflicts of mandates, loyalties, and wastage of resources. The challenge of multiple memberships is discussed, and the thesis will propose the rationalisation of RECs along geographical lines as a possible solution. The discussion delves into the conflict between regional and national law and studies the EU's legal regime for the concept of the primacy of EU law and how the supremacy of regional law can resolve this conflict. Lastly, this chapter will discuss the absence of robust monitoring and enforcement mechanisms of integration and the need for both institutional and judicial mechanisms to support the implementation of integration.

Having explored the challenges and possible solutions, Chapter 7 proposes an alternative solution which is regulatory harmonisation. Regulatory harmonisation is cognisant of the objectives of harmonisation while avoiding

some of the challenges that structural/institutional integration faces. This discussion will show why regulatory harmonisation is a good alternative, how it can be implemented in the current structures as well as the areas that require harmonisation as a matter of priority. In this Chapter, there are substantial references and comparisons with the European Union's regulatory harmonisation and some references to the United States-Canadian Multijurisdictional Disclosure System.

Chapter 8 concludes the discussions in the thesis. It reflects the findings in the research and also sets out some final remarks and issues that require further academic research while showing how the thesis has significantly contributed to the existing body of knowledge.

CHAPTER TWO

THE LONG WALK TO FREEDOM: THE EMERGENCE OF AFRICAN STOCK MARKETS

2.1 Introduction

There is a wide array of literature on the development of capital markets globally, especially on the largest and famed exchanges such as the London Stock Exchange and the New York Exchange. African exchanges have largely been left out of this historical interrogation, with analyses on capital markets in Africa focused on the current state of affairs. Theodore Roosevelt once said that ‘the more you know about the past, the better prepared you are for the future.’ The history of capital markets in Africa is important for explaining some of the most recent developments in the integration agenda. The legacies of colonial rule affected the post-colonial stock exchange development and today, the stock exchange is viewed as a key player in the economic development of countries. The discussion herein has three sections.

In Part 2.2 of the Chapter, a discussion on the nexus between economic growth and financial sector development is provided. This section presents the different arguments on the presence of such nexus and also explains why conversations on the development of capital markets are important for developing countries. Part 2.3 of the Chapter fills in a knowledge gap on the historical development of stock markets in Africa, an area that has largely been ignored. This section shows looks at the few African stock exchanges that existed during colonialism and why exchanges were generally non-existent in most of Africa until the 1990s. The discussion considers the impact of colonialism on economic development and shows how colonial rule affected the institutional settings and development of capital markets in Africa and sowed the spirit of unity which is the basis for many economic and political treaties as well as capital market integration agenda. This for example explains the creation of regional stock exchanges in two areas that shared a colonial master and the importance of a shared heritage, language, and colonial history to the development of such regional exchanges.

Part 2.4 of the Chapter examines the post-colonial status quo and the emergence of stock exchanges in Africa post colonialism. Specifically, there is a discussion on the origin of selected prominent stock exchanges in Africa

and the factors that contributed to their growth as well as their present state. These include the Johannesburg Stock Exchange, the Nairobi Stock Exchange, the Nigerian Exchange, the Egyptian and Morocco Exchanges and the two regional exchanges: The Bourse Régionale des Valeurs Mobilières (BRVM) and Bourse des Valeurs Mobilières d'Afrique Centrale (BVMAC). A conclusion is then provided.

2.2 Justifying the focus on capital markets development in Africa

2.2.1 The link between economic growth and financial sector development

Economists have often related the growth of the general economy with the sophistication of the financial sector.¹ As early as 1911, Schumpeter had argued that the services offered by financial intermediaries were essential to both economic development and technological innovation.² The role of the financial system on economic growth and the creation of a nexus between the two has been the subject of various studies, both empirical and theoretical, by policymakers and economic scholars including Robinson, Goldsmith, McKinnon, among others.³

From these studies, two schools of thought emerged. On one hand, some scholars agree with Schumpeter's assertion that establishes a nexus between economic growth and financial development. Hicks, using the industrialization era in England as an example, noted that the financial system in place at the time of industrialization played a critical role in facilitating the mobilization of the much-needed capital.⁴ He noted that the financial markets that were in place meant that there was availability of funds and circulating capital which was being invested with the hope of liquefying the investments whenever emergencies arose that required an injection of capital.⁵

¹ John Schellase, Moutusi Sau and Apanard Prabha, *Capital Markets in Developing Countries: The State of Play* (Center for Financial Markets, Milken Institute 2014) 4.

² Joseph Schumpeter, *The Theory of Economic Development* (Harvard University Press, 1911).

³ Joan Robinson, 'The Generalization of the General Theory' in Joan Robinson, *The Rate of Interest and Other Essays* (Macmillan 1952); Raymond Goldsmith, *Financial Structure and Development* (Yale University Press 1969); Ronald I McKinnon, *Money and Capital in Economic Development* (Brookings Institution 1973).

⁴ John A Hicks, *A Theory of Economic History* (Clarendon Press 1969) 144.

⁵ Ibid 144-5.

King and Levine, using data from 80 countries and covering the period 1960-1989, presented compelling evidence that was consistent with Schumpeter's view that a developed financial system can promote economic growth.⁶ McKinnon, whose focus was on less developed countries, noted that the impact of financial and monetary policies on capital markets was greater than scholars had portrayed and concluded that for there to be economic growth, the financial markets had to be liberalized and restraints on foreign trade had to be removed.⁷ Other scholars who have come to the same conclusion using data from different countries in Africa include Puatwoe and Piabuo (in Cameroon),⁸ Kagochi and Kabede (in seven African countries),⁹ and Allen and Ndikumana (in SADC).¹⁰

On the other hand, some scholars believe that financial development is a relatively unimportant factor when it comes to economic development.¹¹ The most notable of these scholars is Robinson.¹² He argues that 'where enterprise leads, finance follows' which means that economic development merely creates a demand for certain financial arrangements which the financial system then responds to and notes that when an economy is stagnant, it is not easy to figure out whether the cause is the lack of finance or the lack of enterprise.¹³ In doing so, he casts doubt on the generally accepted view that financial development and economic growth go hand in hand. Other scholars like Lucas believe that the presence or absence of a

⁶ Robert G King and Ross Levine, 'Finance and Growth: Schumpeter Might Be Right' (1993) 108(3) *Quarterly Journal of Economics* 717, 735.

⁷ McKinnon advanced his views in further publications which include Ronald I McKinnon, 'The Order of Economic Liberalization: Lessons from Chile and Argentina' (1982) 17 *Carnegie-Rochester Series on Public Policy* 159; Ronald I McKinnon, *The Order of Economic Liberalization: Financial Control in the Transition to a Market Economy* (2nd edn, John Hopkins University Press, 1993).

⁸ Janice Tieguhong Puatwoe and Serge Mandiefe Piabuo, 'Financial Sector Development and Economic Growth: Evidence from Cameroon' (2017) 3(1) *Financial Innovation* 1.

⁹ John M Kagochi, Omar M Al Nasser and Ellene Kebede, 'Does Financial Development Hold the Key to Economic Growth: the Case of Sub-Saharan Africa' (2013) 47(2) *Journal of Developing Areas* 61.

¹⁰ Donald S. Allen and Leonce Ndikumana, 'Financial Intermediation and Economic Growth in Southern Africa' (2000) 9(2) *Journal of African Economies* 132.

¹¹ Levine (n 6) 717.

¹² Robinson (n 3).

¹³ Ross Levine, 'Financial Development and Economic Growth: Views and Agenda' (1997) 35(2) *Journal of Economic Literature* 1.

nexus between the two is immaterial and that the role of financial factors in economic growth is 'badly overstressed.'¹⁴

Even in instances where it is agreed that financial development and economic growth are interlinked, there is still no consensus on how to measure financial development. On one hand, Levine argued that financial development is deemed to have occurred if financial instruments, financial markets, and financial intermediaries reduce without necessarily removing the transaction costs and costs involved in obtaining information and executing contracts.¹⁵ On the other hand, the available studies have sought to link financial development with many aspects, the more common being monetary aggregates.¹⁶ While measuring financial development in 38 countries in Sub Saharan Africa, Gelbard and Leite looked at the traditional measures of financial development such as the level of real interest rates and the ratio of broad money to GDP, and then introduced an index to measure financial development and a set of six indices that represented the key characteristics in the financial systems of the 38 sub-Saharan countries under review.¹⁷ These indices include market structure, financial products, financial liberalization, institutional environment, financial openness, and monetary policy instruments. Pill and Pradhan have advocated for inclusion of other important factors such as the extent of public borrowing, competitiveness of the banking sector, development of the non-bank financial intermediation, and measures to increase capital flows.¹⁸

In conclusion, there seems to be a generally accepted nexus between financial market development and economic growth. However, there is a

¹⁴ Robert E Lucas Jr, 'On the Mechanics of Economic Development' (1998) 22(1) *Journal of Monetary Economics* 3.

¹⁵ Ross Levine, 'Finance and Growth: Theory, Evidence and Mechanisms' (2004) 88(3) *Handbook of Economic Review* 537.

¹⁶ Traditional measures of financial development have come under attack from scholars. Pill and Pradhan have, for example, explained that 'conventional measures of financial deepening, such as the level of real interest rates and the ration of broad money to GDP, may give misleading signals about the success of [financial] reform and its implications for real activity.' Huw Pill and Mahmood Pradhan, 'Financial Indicators and Financial Change in Africa and Asia' (1995) IMF Working Paper 95/123, 28, <https://www.elibrary.imf.org/view/journals/001/1995/123/article-A001-en.xml> accessed 12 October 2021.

¹⁷ Enrique A. Gelbard and Sergio Pereira Leite, 'Measuring Financial Development in Sub-Saharan Africa' (1999) IMF Working Paper 99/105 <https://www.imf.org/external/pubs/ft/wp/1999/wp99105.pdf> accessed 12 October 2021.

¹⁸ Pill and Pradhan (n 16).

possibility that such nexus may work differently in emerging markets. Countries at similar stages of economic development may have financial systems that look different. It has been argued that most securities markets in emerging markets do not significantly contribute to the economic growth at the macro level because of various impediments that exist in their development.¹⁹ This argument may explain why a more 'developed emerging market' may have a less developed capital market. Nevertheless, the failure of the market to contribute to the economy would not have an impact on the assertion that there is a nexus between the two.

2.2.2 Why capital markets are important for Africa

The financial sector generally refers to banks and other institutions that provide financial services to the general population.²⁰ Owing to the divergence of issues and fundamental differences between equity and debt markets, the discussion herein focuses on equity markets. Applying the theory that there is a nexus between economic growth and financial development to the African continent may explain the rate of financial sector development. Africa is home to some of the world's fastest-growing economies although these economies may not necessarily have what are considered to be developed stock markets or even have stock markets at all.

For scholars who do not see a nexus between economic growth and financial sector development, this can be seen as an indictment of Schumpeter's theory. However, it is key to point out that the term 'fastest-growing economies' should not be confused with 'most developed economies' or 'large economies' and that an economy can be growing at a higher rate yet still be underdeveloped. Indeed, Africa's growth rate as a continent remains low in comparison to other continents. Angola, Nigeria, and South Africa have established themselves as Sub-Saharan Africa's largest economies.²¹ For Sub Saharan Africa, the growth rate was estimated at 2.3% for 2018, 2.8% for

¹⁹ Ali A Ibrahim, 'Developing Governance and Regulation for Emerging Capital and Securities Markets' (2007) 39(1) *Rutgers Law Journal* 114.

²⁰ Javed Ahmed J and Malik Fahim Bashir, 'An Empirical Investigation of Banking Sector Development and Economic Growth in a Panel of Selected SAARC Countries' (2016) 23(2) *Theoretical and Applied Economics* 66.

²¹ World Bank, *Global Economic Prospects*, June 2021, <https://openknowledge.worldbank.org/bitstream/handle/10986/35647/9781464816659.pdf> accessed 10 September 2021.

2019 and 2021, and 3.3.% for 2022 which are very low percentages.²² This relatively flat growth is a result of the increased debt obligations, inflation, and political developments in the region.²³ However, one can deduct from Schumpeter's widely accepted view that the slow economic growth could also be a result of the state of the financial markets in Africa and that the development of capital markets in Africa would significantly contribute to the overall economic development of the continent and the individual member countries.²⁴

Economic and academic literature has established the crucial role that capital markets play in economic development. They are an important source of finance which is necessary to fund the growth and expansion plans of companies and support governments.²⁵ Traditionally, banks were the main source of funding due to their earlier existence. Today, stock markets have become a source of long-term patient capital, which banks may not be able to provide. Capital markets play an important role in facilitating the formation of capital.²⁶ The markets 'aggregate small savings of numerous investors for use by agents with entrepreneurial talents who need funds for large scale capital investments.'²⁷ Therefore, investors use savings to finance companies and receive dividends in return.

In Africa, this role is particularly important as has been evidenced by the different studies conducted on the continent. For example, Glen and Singh conducted a study to explain differences between accounting ratios in corporations in emerging markets and those in the developed markets and noted that for South Africa, external equity-financed 18% of total growth between 1996 and 2000.²⁸ In Ghana, Yartey and Ajasi found that the stock

²² Ibid 116.

²³ World Bank, 'The World Bank in Africa,' <https://www.worldbank.org/en/region/afr/overview#1> accessed on 29th June 2019.

²⁴ Boniface Chimpango, *The Development of African Financial Markets: A Legal and Institutional Approach* (Routledge 2017) 10.

²⁵ Charles Amo Yartey and Charles Komla Adjasi, 'Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges' (2007) IMF Working Paper 07/209 <https://www.imf.org/external/pubs/ft/wp/2007/wp07209.pdf> accessed 22 October 2019.

²⁶ Allan R Roth, 'Capital Market Development in Israel and Brazil: Two Examples of the Role of Law in Development' (1967) 19(6) *Stanford Law Review* 1277.

²⁷ Solomon Tadesse, 'The Allocation and Monitoring Role of Capital Markets: Theory and International Evidence' (2004) 39(4) *Journal of Financial and Quantitative Analysis* 701, 705.

²⁸ Jack Glen and Ajit Singh, 'Capital Structures, Rates of Return and Financing Corporate Growth: Comparing Developed and Emerging Markets, 1994-2000,' in Robert Litan, Michael

market funded about 12% of the listed companies' total asset growth in the period 1995-2002.²⁹ Mutenheri and Green noted that in Zimbabwe, equity finance provided 7.8% of funding for listed companies.³⁰ In Mauritius, the percentage stood at 9% of total asset growth with retained earnings between in the period 1992-1999.³¹ These statistics demonstrate the potential of the stock markets to finance the expansion and growth of companies.

For entrepreneurs, the financial markets provide an opportunity to diversify portfolios and also obtain liquidity.³² Diversification of portfolios is particularly important for international investors who need to reduce risk exposure and maximise returns by investing in other jurisdictions.³³ Stock markets also enable firms to disseminate important information about their prospects and their valuation.³⁴ Investors require such information when firms seek finance. This information may also increase the visibility and reputation of potential issuers which in turn may attract a broad base of investors that the company would not have had access to. Investors use this information to monitor developments in the company and this also removes the cloud of mystery that lies over the finances and prospects of many businesses. Creditors can make informed decisions as to whether the company seeking funding is creditworthy and have an assurance that the firm would be able to pay back, even if it meant resorting to its shareholders to fulfil its loan obligations.

In conclusion, the need for capital markets in developing economies like Africa mainly arises in two instances; the government's requirement to

Pomerleano and Vasudevan Sundararajan (eds), *The Future of Domestic Capital Markets in Developing Countries* (Brookings Institution 2003).

²⁹ Yartey (n 25) 11.

³⁰ Enard Mutenheri and Christopher J Green 'Financial Reform and Financing Decisions of Listed Firms in Zimbabwe' (2003) 4(2) *Journal of African Business* 155. However, in similar research carried out in Zimbabwe in the period 1980-1989, Singh and Hamid's data suggested that internal finance was a more important source of finance than the external finance but Mutenheri and Green attributed this on the difference in the periods covered rather than the methodologies used. See Ajit Singh, Javed Hamid, 'Corporate Financial Structures in Developing Countries' (1992) IFC Technical Paper 1/1992 (World Bank 1992).

³¹ Jawaharlal Lallchand, 'Capital Markets Development in Sub-Saharan Africa: A Case Study of Mauritius,' (PhD Thesis, University of Cambridge 2001).

³² Asli Demirguc-Kunt and Vojislav Maksimovic, 'Stock Market Development and Financing Choices of Firms' (1996) 10(2) *The World Bank Economic Review* 341.

³³ Thomas Flavin and Ekaterini Panopoulou, 'International Portfolio Diversification and Market Linkages in the Presence of Regime-Switching Volatility' (2016) IIIS Discussion Paper No. 167/2016, <https://www.tcd.ie/triss/assets/PDFs/iiis/iiisdp167.pdf> accessed on 18th June 2019.

³⁴ Sanford Grossman, 'On the Efficiency of Competitive Stock Markets Where Traders Have Diverse Information' (1976) 31(2) *Journal of Finance* 573.

borrow locally and the rising demand by the private sector to finance the expansion.³⁵ In the former, the government usually makes use of the debt market by issuing treasury bills or bonds periodically whether for fiscal or monetary reasons. In the latter, firms make use of the savings of the investor and the equity market then acts as a link between the investor and the firm. In so doing, the market places intermediaries between the investor and the firm who are skilled in advising investors to make financial decisions and who ultimately execute these decisions in sponsored access scenarios.

2.3 The Place of Stock Exchanges in Colonial Africa

The development of stock markets globally is well documented. From the ancient Babylonian loan tablets,³⁶ the equity market in Ancient Rome³⁷ to the establishment of the first stock exchange in Antwerp,³⁸ there is no shortage of literature on the history of global stock markets. This literature extends to the birth of the London Stock Exchange,³⁹ which bears significance to the

³⁵ Edward A Arowolo, 'The Development of Capital Markets in Africa, with Particular Reference to Kenya and Nigeria' (1971) 18(2) *Palgrave Macmillan Journals* 421.

³⁶ See Campbell Thompson, *Late Babylonian Letters* (London 1906) Nos 11, 12 and 153; Morris Jastrow, *Aspects of Religious Belief and Practice in Babylonia and Assyria* (G.P. Putnam's Sons 1911); Edward Chiera, 'Old Babylonian Contracts' (1922) 3(2) *University of Pennsylvania Museum Publications of the Babylonian Section* 120; Benjamin Bromberg, 'The Origin of Banking: Religious Finance in Babylonia' (1942) 2(1) *The Journal of Economic History* 77; William Goetzmann and Geert Rouwenhorst, *The Origins of Value; The Financial Innovations that Created Modern Capital Markets* (Oxford University Press 2005).

³⁷ See William Goetzmann and Geert Rouwenhorst, *The Origins of Value; The Financial Innovations that Created Modern Capital Markets* (Oxford University Press 2005) 9; Ulrike Malmendier, 'Roman Shares' in William Goetzmann and Geert Rouwenhorst, *The Origins of Value; The Financial Innovations that Created Modern Capital Markets* (Oxford University Press 2005) 38; Geoffrey Poitras and Manuela Geranio, 'Trading of Shares in the Societates Publicanorum,' (2016) 61 *Explorations in Economic History* 95.

³⁸ See Violet Barbour, *Capitalism in Amsterdam in the Seventeenth Century* (University of Michigan Press 1966) 79; Wim Klooster, *Illicit Riches: Dutch Trade in the Caribbean 1648-1795* (Brill Publishers 1998); Edward Stringham, 'The Extralegal Development of Securities Trading in Seventeenth Century Amsterdam,' (2002) 24(1) *The Quarterly Review of Economics and Finance* 6; Oscar Gelderblom and Joost Jonker, 'Completing a Financial Revolution: The Finance of the Dutch East India Trade and the Rise of the Amsterdam Capital Market, 1595-1612,' (2004) 64(3) *The Journal of Economic History* 644; Cle Lesger, *The Rise of the Amsterdam Market and Information Exchange: Merchants, Commercial Expansion and Change in the Spatial Economy of the Low Countries, c. 1550-1630* (Hants Aldershot 2006) 20; Petram Lodewijk, *The World's First Stock Exchange: How the Amsterdam Market for Dutch East India Company Shares Became a Modern Securities Market 1602-1700* (Eigen Beheer 2011); Stephen Valdez and Philip Molyneux, *An Introduction to Global Financial Markets*, (7th edn, Palgrave Macmillan 2013) 201.

³⁹ See CF Smith, 'The Early History of the London Stock Exchange' (1929) 19(2) *The American Economic Review* 206; Ranald Michie, *The London Stock Exchange; A History* (Oxford University Press 1999). See also Adam Anderson, *A Historical and Chronological Deduction of the Origin of Commerce from the Earliest Accounts to the Present Time* (Sabin Americana 1802); Mark Smith, *A History of the Global Stock Market: From Ancient Rome to Silicone Valley* (University of Chicago Press 2003); Larry Neal and Lance Davis, *The Evolution of the*

stock markets in Africa due to it being a destination of choice for most African foreign listings as well as its alliances with African exchanges and to the origins of the New York Stock Exchange.⁴⁰ Yet as these global developments happened, there was very little activity on the African front mainly due to the initial 'lack of civilisation' and later, the advent of colonialism. There is therefore very little to no literature on the historical development of stock markets in Africa. This is particularly interesting considering the admission by writers such as Moss who noted that 'Africa was not entirely unaffected by the founding of the first stock exchanges.'⁴¹ The following discussion bridges some of that knowledge gap with a discussion of the presence and/or absence of stock markets in pre-colonial and colonial Africa.

As early as 1503, Portugal had colonised Zanzibar and in the 1800s, more African states fell to colonialism. The impact of this is that while stock markets were being set up in Europe and the Americas, Africa was grappling with a different type of problem; colonialism. Except in a handful of cases, African states did not form stock exchanges until they gained independence.

Structure and Performance of the London Stock Exchange in the First Global Financial Market 1812-1914 (Cambridge University Press 2006).

⁴⁰ See Stuart Banner, 'The Origin of the New York Stock Exchange 1791-1860' (1998) 27(1) *The Journal of Legal Studies* 113; Robert Sobel, *The Big Board: A History of the New York Stock Market* (New York Free Press 2000). Also see Joseph Stancliffe Davis, *Essays on the Earlier History of American Corporations* (Harvard University Press 1917); George Garvy, 'Rivals and Interlopers in the History of the New York Security Market' (1944) 52(2) *Journal of Political Economy* 128; Dale Arthur Oesterle, Donald Arthur Winslow and Seth C. Anderson, 'The New York Stock Exchange and Its out Moded Specialist System: Can the Exchange Innovate to Survive?' (1992) 17(2) *The Journal of Corporation Law* 239.

⁴¹ Todd Moss, *Adventure Capitalism: Globalization and the Political Economy of Stock Markets in Africa* (Palgrave Macmillan 2003) 9.

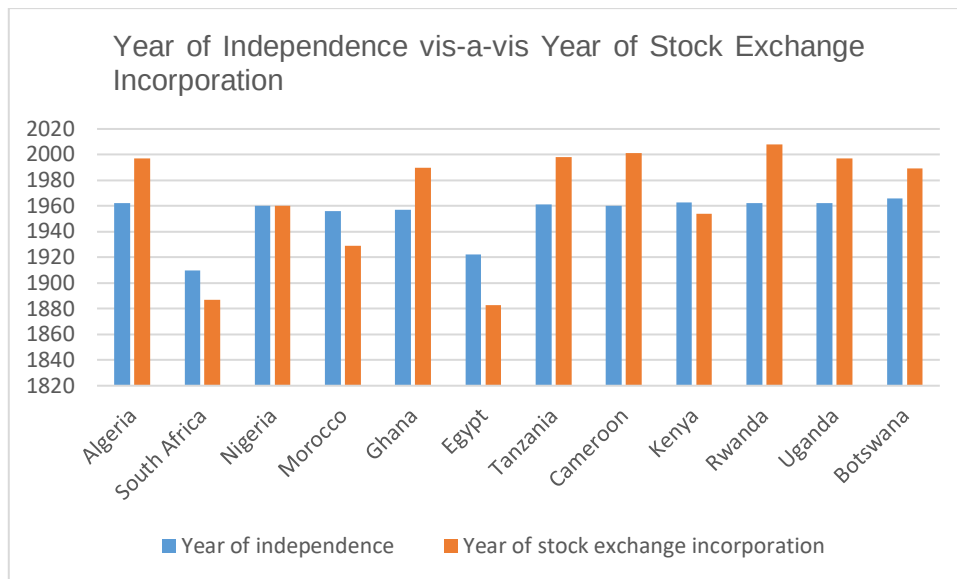


Figure 1: Year of independence Vs Year of Stock Exchange Formation in Selected African Countries

From the figure above, it can be deduced that very few countries had stock exchanges before attaining independence. Even in such cases, the formation of exchanges was mainly a colonial venture to advance colonial interests. The following discussion explores this phenomenon further.

2.3.1 A brief history of the Johannesburg Stock Exchange (JSE)

The origins of the JSE which remains Africa's largest stock exchange by both size and market capitalisation, are interchangeably woven with the flourishing gold industry in Witwatersrand at the time.⁴² The South African colonial story starts with settlers. As Dutch traders passed the Cape on their way to the East, there was a need to establish a resting point and with that, the first settlers arrived in South Africa in 1652.⁴³ The Dutch are considered the first colonial masters of South Africa⁴⁴ although over the next number of years, the natives lost and regained their independence on various occasions.

⁴² Marius Lukasiewicz, 'From Diamonds to Gold: The Making of the Johannesburg Stock Exchange 1880-1890' (2017) 43 (4) *Journal of Southern African Studies* 715.

⁴³ See Augustine SJ Park, 'Settler Colonialism and the South African TRC: Ambivalent Denial and Democratisation Without Decolonisation' (2021) 10(2) *Social and Legal Studies* 7.

⁴⁴ For a detailed reading of Dutch activities and settlement in South Africa, see Raven Rowland Hart, *Before Van Riebeeck: Callers at South Africa from 1488 to 1652* (Struik 1967) 10; Raven Rowland Hart, *Cape Good Hope, 1652-1702: The First Fifty Years of Dutch Colonisation as Seen by Callers* (Balkema 1971).

In the late 1860s, diamond was discovered in South Africa making it a critical part of the global economy.⁴⁵ Diamonds were discovered in Kimberly in 1867 and gold in Witwatersrand in 1886. The Mineral Revolution meant that more mining companies rushed to South Africa and as the mining activities intensified, there was a need to recapitalise the mining companies. Many of these mining companies were listed on the London Stock Exchange.⁴⁶ In 1881, the Kimberley Royal Stock Exchange was established as South Africa's first stock exchange to facilitate the trading of shares and enable the diamond mining companies to raise capital. The De Beers Consolidated Mines Limited became one of the major companies to be listed on it.⁴⁷

Two further stock exchanges were then established in Barberton with about 30 brokers after gold was discovered there.⁴⁸ This is supported by other writers including Lukasiewicz who writes about the rise of the Barberton Stock Exchange and the dubious dealings on the Exchange which, together with the loss of interest by investors, greatly contributed to its demise.⁴⁹

Following the discovery of gold in Witwatersrand in 1886, the Witwatersrand Club and Exchange Company Limited was established and in November 1887, the JSE succeeded it.⁵⁰ Other stock exchanges were later to be established in other parts of South Africa. This includes a stock exchange established in May 1901 in Cape Town to circumvent the Anglo Boer war and the disruptions it caused to trading activities.⁵¹ All these exchanges did not last long, however, and the JSE remained the dominant stock exchange. The JSE rapidly grew, partly due to the less stringent nature of its regulations which enabled companies to easily be quoted on the Exchange in comparison to London, which had been the default listing forum for many companies of the time. By

⁴⁵ Lukasiewicz (n 42) 715; Charles Feinstein, *An Economic History of South Africa: Conquest, Discrimination and Development* (Cambridge University Press 2005) 5.

⁴⁶ Lukasiewicz (n 42) 719.

⁴⁷ Pierre Morgenrood, 'Cape Town's Forgotten Stock Exchange' (2000) 54(4) *Quarterly Bulletin of the National Library of South Africa* 144.

⁴⁸ Ibid 145.

⁴⁹ Lukasiewicz (n 42) 722.

⁵⁰ Ibid.

⁵¹ See Heidi Raubenheimer, 'African Capital Markets: Challenges and Opportunities' (CFA Institute Research Foundation, 2019) 3 <https://www.cfainstitute.org/-/media/documents/article/rf-brief/rf-african-capital-markets.ashx> accessed 10 June 2021.

the end of November 1887, the JSE, a self-regulatory organisation, had 68 listed companies and 300 by the end of January 1890.⁵²

On 12th April 1877, the British annexed the Transvaal Republic as part of a deliberate wider scheme to try and unify the area that was South of Africa under British rule.⁵³ This was not the first time the British had colonised South Africa. In 1795, the British had taken control of the Cape and in 1845, they were able to take control of Natal.⁵⁴ The British remained in control until 1852 when they finally acknowledged the independence of all the Boer communities that were beyond River Vaal.⁵⁵ Whether or not it can be rightly stated that the British gave the Transvaal independence however is debatable but also beyond the scope of this discussion.⁵⁶

In conclusion, the establishment of capital markets in South Africa is tied to colonial pursuits and the need to fund the colonialist's interests in South Africa's vast mineral resources. If no such minerals existed, it is doubtful that any efforts would have been invested in establishing stock exchanges in Africa. Early establishment of the JSE may also have given it a head start on other African exchanges and contributed to its ability to cement itself as an exchange of choice. However, such an assertion would require further study but is a factor to be considered.

2.3.2 The Establishment of the Egyptian and Morocco Stock Exchanges

Egypt and Morocco have an intimate shared history that spans decades as both are located in the Maghreb region, are members of the Arab League, and have established a free trade zone amongst themselves. Two things

⁵² Lukasiewicz (n 42) 725.

⁵³ Michał Leśniewski, 'The Annexation of the Transvaal in 1877: The First Boer Reactions' (2017) 12(1) *Werkwinkel* 35.

⁵⁴ Jane Carruthers, 'Friedrich Jeppe: Mapping the Transvaal c. 1850–1899' (2003) 29(4) *Journal of Southern African Studies* 957.

⁵⁵ Leśniewski (n 53) 38.

⁵⁶ Leśniewski argues that the British did not give the Republic independence. He notes that there was no republic known as the South African Republic that would have been given independence. What existed were different territories made up of a collection of the Boer communities. Instead, what it did grant was 'the right to manage their own affairs and to govern themselves according to their own laws, without any interference on the part of the British Government.' Leśniewski (n 53) 42. For a detailed understanding of the territories that made up South Africa then, see Sir Harry Johnston, *Britain Across the Seas: A Description of the British Empire in Africa* (Cornell University Library 2009).

dominated these two countries; trade and colonialism. The Maghreb was a 'primary territory for colonisation movements' since its inception.⁵⁷ The British, French, and Spanish all occupied Morocco during its colonial years at different intervals. For example, the Spanish colonised Morocco mainly to protect their commercial interests at stake following increased foreign intervention in Morocco.⁵⁸ The story of Egypt is not any different.⁵⁹ The Arabs had been the first to conquer Egypt as early as 640 AD during the caliphate of Umar the Great.⁶⁰ After the Arabs, it was conquered by the Fatimids in 1171 AD, by the Ayyubids till 1250AD, and then Napoleon Bonaparte led the French expedition to Egypt in 1798.⁶¹ In 1882, the British defeated Napoleon and became the colonial masters until 1956 when they left following the terms of the 1954 Anglo-Egyptian Agreement.⁶²

Trade also flourished in this region. Whether it was oil, export crops, wine, handicrafts, or minerals, these two countries were able to supply.⁶³ Egypt even had a railway system as early as 1851 and Morocco followed suit in 1911.⁶⁴ These two states were not spared from the influx of export-import firms whose role was to finance the trade and by the 1850s, organised banking had started to take shape in the region and the states had started to borrow to finance their activities.⁶⁵ Unlike many other African states, the region had a currency in the early modern period with the Egyptian para and the Moroccan dirham.⁶⁶

⁵⁷ David Lubell, 'Paleoenvironments and Epi-Paleolithic Economies in the Maghreb (20,000-5,000BC)' in Desmond Clark, *From Hunters to Farmers: The Causes and Consequences of Food Production in Africa* (University of California Press 1984) 41.

⁵⁸ Joan Nogue and Jose Luis Villanova, 'Spanish Colonialism in Morocco and the Sociedad Geográfica de Madrid, 1876-1956' (2002) 28(1) *Journal of Historical Geography* 6.

⁵⁹ For an understanding of colonialism in Egypt, see David Prochaska, 'Art of Colonialism, Colonialism of Art: The Description de l'Égypte (1809-1828)' (1994) 34(2) *L'Esprit Créateur* 69-91.

⁶⁰ See generally Devin J Stewart, 'Popular Shiism in Mediaval Egypt: Vestiges of Islamic Sectarian Polemics in Egyptian Arabic' (1996) 84 *Studia Islamica* 35.

⁶¹ Yunus Gilani, 'An Islamic Response to Colonialism in Egypt: The French Occupation [1798-1801] and the Role of Ulamā' 20(3) *Hamdard Islamicus* 55.

⁶² Although the British occupied Egypt in 1882, they did not annex it. Instead, Egypt continued to have its own independent government. For a further understanding of British rule in Egypt, see Robert Tignor, *Modernization and British Colonial Rule in Egypt, 1882-1914* (Princeton University Press 1966).

⁶³ For an economic history of this region, see Charles Issawi, *An Economic History of the Middle East and North Africa* (Columbia University Press 1982).

⁶⁴ *Ibid* 6.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 185.

These developments, similar to South Africa, may have laid ground for the establishment of the Alexandria Stock Exchange in 1888 and the Cairo Stock Exchange in 1903. The flourishing trade in the region required finance and the stock exchanges would deliver it. The Casablanca Stock Exchange, formed in 1929 as the 'Office de Compensation des Valeurs Mobilières' (Office for Clearing of Transferable Securities) is the third oldest stock exchange in Africa and the first in the Maghreb region.⁶⁷ At its formation, it catered exclusively to foreigners and is viewed largely as a colonial legacy.⁶⁸ There is also a recognition that there was an exchange in Namibia as early as 1904⁶⁹ which like the rest, was credited to the diamond rush, and the exchange was soon closed in 1910 and only reopened after gaining independence in the 1990s.

2.4 Arguments on the role of colonialism in economic development in Africa

Other than the aforementioned stock exchanges, no other African country had an exchange before or during colonialism. Indeed, colonialism made it almost impossible for African countries to pursue economic development, let alone establish functioning stock markets.⁷⁰ Even in areas where indirect rule was applied, the existing administrative structures were only allowed to remain if they agreed to enforce colonial ordinances, collect, and remit taxes, and provide the cheap labour that was necessary to ensure the survival of commercial colonialism.⁷¹

Two schools of thought have emerged in the study of the impact of colonialism on the economic development in Africa. On one side, historians and economists argue that colonialism negatively affected economic growth. Myrdal asserted, for example, that colonial powers were to blame for the lack of growth. He noted that colonialism deprived the colony of its governance

⁶⁷ Joerg Wild and Hind Lebdaoui, 'Stock Market Performance and Economic Growth in Morocco' (2014) 3(5) *Global Advanced Research Journal of Management and Business Studies* 207.

⁶⁸ See Andrea Calamanti, 'The Stock Exchange and the Securities Market in Morocco' (1980) 4(4) *Savings and Development* 266, 267.

⁶⁹ It was then known as the Lüderitz Stock Exchange.

⁷⁰ Lea refers to it as commercial colonialism. See Lea YP, 'What's Wrong with Colonialism?' (2013) 41(2) *Philosophy & Public Affairs* 161.

⁷¹ Ambe Njoh, 'The Impact of Colonial Heritage on Development in Sub-Saharan Africa' (2000) 52(2) *Social Indicators Research* 163.

structure and without a government, there was no one to take the necessary steps to promote the growth of the economy and that the 'lack of political independence meant the absence of a unifying and integrating purpose for the collectivity.'⁷²

Those who subscribe to this school of thought view the colonial regimes as failing to pursue 'active economic development policies, especially in undertaking comprehensive central planning in the sense of state control of the composition and direction of economic activity outside subsistence agriculture.'⁷³ Further, that colonialism is also responsible for post-independence economic decline in Africa 'because the types of mechanisms that led to this decline were creations of colonial society and institutions which persisted.'⁷⁴ Under the economic theory of colonialism, which originated from Friedrich List, an influential German economist, the colonies were viewed as 'appendages of the industrial and commercial segments of the German economy.'⁷⁵

Many Pan-Africanists hold the same view. Dr Kwame Nkrumah, a celebrated African revolutionary, believes that colonialism greatly contributed to the decline in economic growth in Africa. He wrote:

'Thus all the imperialists, without exception, evolved the means, their colonial policies, to satisfy the ends, the exploitation of the subject territories, for the aggrandizement of the metropolitan countries. They were all rapacious; they all subserved the needs of the subject lands to their own demands; they all circumscribed human rights and liberties; they all repressed and despoiled, degraded and oppressed.'

⁷² Gunnar Myrdal, *Development and Underdevelopment* (Bank of Egypt 1956) 54.

⁷³ PT Bauer, 'The Economics of Resentment: Colonialism and Underdevelopment' (1969) 4(1) *Journal of Contemporary History* 59.

⁷⁴ Leander Heldring and James A. Robinson, 'Colonialism and Economic Development in Africa' (2012) 18566 *National Bureau of Economic Research Working Papers* 6/2012, <https://www.nber.org/papers/w18566> accessed 9 June 2019.

⁷⁵ Woodruff D. Smith, 'The Ideology of German Colonialism 1840-1906' (1974) 46(4) *The Journal of Modern History* 641.

*They took our lands, our lives, our resources, and our dignity.
Without exception, they left us nothing but our resentment.*⁷⁶

On the other hand, Bauer leads the school of thought that argues that colonialism did not affect the economy of the colonies. He asserts that although colonialism humiliated and/or irritated the states, it does not follow that the status of colonialism obstructed any material economic advancement and that any statement to the contrary would be invalid and only meant to conjure up feelings of guilt in the western world and facilitate increased foreign aid to Africa.⁷⁷ He notes that there is no reason to believe that sovereignty would have been any more favourable to economic development than being under colonialism, after all, independent Africa is not economically strong.⁷⁸

However, a major problem with Bauer's assertions is that it ignores the fact that there can never be any economic advancement without a right to use the economic resources for the advancement of that state. The United Nations General Assembly Resolution 1803 (XVII) of 14th December 1962 on the Permanent Sovereignty over Natural Resources emphasizes this aspect by noting in its preamble the need to strengthen the sovereignty of states over their natural resources and wealth as a way to reinforce their economic independence. Further, in arguing that independent Africa has not developed just as it was in colonial Africa, Bauer ignores the concept of neo-colonialism and assumes that the end of colonialism also marked the end of exploitation of African resources and interference in African matters by the colonial West.⁷⁹ This assumption could not be further from the truth and reality. Firstly, many writers have described neo-colonialism as the worst form of imperialism since unlike in colonial times where the colonial master had to justify its colonial policies on the international stage, there is no such

⁷⁶ Kwame Nkrumah, *Africa Must Unite* (Frederick A Praeger 1963) xiii.

⁷⁷ Bauer (n 73).

⁷⁸ Ibid.

⁷⁹ Some scholars however have cast doubt on the presence of neo-colonialism. For further reading, see David Kenneth Fieldhouse, *The West and the Third World: Trade, Colonialism, Dependence and Development* (Wiley Blackwell 1999).

requirement in neo-colonial tendencies.⁸⁰ Secondly, political independence does not ensure economic self-reliance.⁸¹

Fieldhouse agrees with Bauer and asserts that 'the post-colonial commitment to commodity-exporting in tropical Africa was not necessarily fatal to economic development.'⁸² However, his insistence on shifting the conversations of underdevelopment to political policies post-independence is at most a diversion from the real wrongs of colonialism. One wrong (the bad policies of African rulers post-independence) does not correct the other wrong (the impact of colonialism on Africa's economic development.)

The lack of capital markets during colonialism can also be explained by looking at the financial system in place before and during colonialism. The growth of capital markets requires a sound financial and monetary policy. Pre-colonialism, the majority of African states did not use 'money.' In North Africa, particularly Tunisia and Morocco, which were part of the Mediterranean commercial area, money was used long before colonialism which may explain why they were able to have stock markets.⁸³ Money is viewed as the 'spearhead of modern civilisation'⁸⁴ and to have economic growth, there must be a functioning monetary system.⁸⁵

For a long time, African societies carried out barter trade. In the conduct of trade, the traders would provide luxurious goods such as china and porcelain, seashells, and fabric and in return, the indigenous people would provide them with raw materials such as copper, ivory, and gold.⁸⁶ Over time, the cowrie shell was introduced although it was never recognised as a currency by the

⁸⁰ Kwame Nkrumah, *Neo-Colonialism, the Last Stage of Imperialism* (Thomas Nelson & Sons Ltd 1965) 5.

⁸¹ Ichiro Maekawa, 'Neo-Colonialism Reconsidered: A Case Study of East Africa in the 1960s and 1970s' (2015) 43(2) *The Journal of Imperial and Commonwealth History* 317.

⁸² David Kenneth Fieldhouse, *The West and the Third World: Trade, Colonialism, Dependence and Development* (Wiley Blackwell 1999) 291.

⁸³ Erin E Jucker-Fleetwood E, *Money and Finance in Africa* (George Allen and Unwin Ltd 1964) 190.

⁸⁴ Ibid.

⁸⁵ Ibid 19.

⁸⁶ For further reading on the early African trade, see Richard Burton and John Hanning Speke, 'A Coasting Voyage from Mombasa to the Pangani River' (1858) 28 *Journal of the Royal Geographical Society* 188-226; William Walter Augustine Fitzgerald, *Travels in the Coastlands of British East Africa and the Islands of Zanzibar and Pemba* (Chapman and Hall London 1898); Brian M Fagan, 'Early Trade in South Central Africa' (1969) 22(1) *Archaeology* 44-50; Thomas Håkansson, 'The Human Ecology of World Systems in East Africa: The Impact of the Ivory Trade' (2004) 32(5) *Human Ecology* 561-69.

West.⁸⁷ The cowries shells were more common in Nigeria and in the Gold Coast but not in Sierra Leone.⁸⁸ Even in places where cowrie shells were in circulation, barter trade still persisted.⁸⁹ Further, in areas where money existed, there were different types of currencies.⁹⁰ Such a confusing system could not meet the requirements of a proper monetary system.⁹¹ Fleetwood rightfully notes that 'the shift from a barter and money substitute system to a money and credit system is an essential precondition for modern economic development.'⁹²

In conclusion, with the continent being colonised as early as the 1500s and remaining under colonialism until the 1900s, it is understandable that most of Africa did not follow the global trend of establishing stock markets. This was worsened by the lack of a sound and functioning monetary system and the level of economic growth that existed at the time. Despite the end of colonialism, the effects of colonialism on stock exchange development linger. Fundamentally, questions of preserving sovereignty (which arise in debates of integration of stock markets) are based on the need to prevent interference of external agents into state economies, a stark reminder of the invasion of colonialism. On the other hand, the end to colonialism ushered in calls for unity among African states to consolidate the much-needed gains of independence. Unity became the rallying call in post-independence Africa and the need for unity became the foundation for the pursuit of economic integration and by extension, stock market integration. Therefore, a discussion on the integration of stock markets in Africa would not be complete without this discussion on colonialism and stock exchange development pre and during this period.

2.5 The appetite for capital markets post-independence

⁸⁷ See Marion Johnson, 'The Cowrie Currencies of West Africa' (1970) 11(1) *The Journal of African History* 17.

⁸⁸ Jucker-Fleetwood (n 83) 195.

⁸⁹ Albert Adomakoh, 'The Evolution of Currency and Banking in West African Countries' (1962) 174(6) *Basle Center Publication Series A* 506.

⁹⁰ An example is Tunisia where the Phoenecians, Greeks, Romans and Arabs all introduced different currencies to the same country.

⁹¹ Ibid.

⁹² Jucker-Fleetwood (n 83) 199.

With the end of colonialism, one would expect African countries to quickly join the trend and establish stock markets. However, and unsurprisingly, this was not the case.⁹³ African leaders had to prioritise the most pressing needs of their states. Ndulu and O'Connell note that post-independence, the political regimes evolved in three stages which included 'consolidation of authoritarian rule by the mid-1970s, crisis management under authoritarian rule to the late 1980s, and an outburst of democratization starting in 1990.'⁹⁴ In addition, up until 1990, African states received large amounts of foreign aid from the West which was, to some extent, adequate to finance the needs of the former colonies.

This started to change in the 1990s with the advent of adjustment packages and the call for reform of public sector institutions and the economic policies of Africa's rulers. The International Monetary Fund (IMF) which is one of the largest lenders to African states, required countries to commit to implementing certain remedial policies in return for balance of payment support.⁹⁵ One of these conditions was the commitment to end government monopolies which meant that governments would have to privatise state-owned enterprises. Governments can privatise agencies through three ways; asset sales, share issue privatisations (SIPs), or voucher privatisations (VPs).⁹⁶ Governments in Africa adopted a mix of SIPs and asset sales. Under SIPs, the governments sold their shares in parastatals on the public market, and this required the existence of a stock market. This led to the formation of many stock markets in Africa including Ghana (1990), Tanzania (1997), and Uganda (1996).

Stock markets became part of the states' strategies to overhaul and reform the financial sector since the stock markets are viewed as a way to mobilise capital, distribute the scarce financial resources, and attract foreign

⁹³ Prior to 1989, there were only eight stock markets in the entire continent of which three were in North Africa and five in the sub-Saharan Africa. This situation persisted even though as of 1989, all African countries, other than Eritrea and Namibia, had gained independence.

⁹⁴ Benno Ndulu and Stephen A O'Connell, 'Governance and Growth in Sub-Saharan Africa' (1999) 13(3) *Journal of Economic Perspectives* 41, 45.

⁹⁵ Kwame Akonor, *Africa and IMF Conditionality: The Unevenness of Compliance 1983-2000* (Routledge 2006) 1.

⁹⁶ For a detailed reading on the types of privatisations adopted by governments, see 'William L. Megginson, Robert C. Nash, Jeffry M. Netter and Annette B. Poulsen, 'The Choice of Private Versus Public Capital Markets: Evidence from Privatisations' (2004) 59(6) *The Journal of Finance* 2837.

investment. A stock market also evolved to become a symbol of sovereignty, and this can be best illustrated by the scenario of the co-existence of the Doula Stock Exchange and the BVMAC. Cameroon was part and parcel of the plans to establish the Securities Exchange of Central Africa (BVMAC), a regional stock exchange in Libreville, Gabon composed of six states: Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon. After conflicts emerged as to the location of BVMAC, Cameroon chose to abandon this project and establish its own exchange, a scenario that only ended in 2020 after negotiations that included moving the headquarters of BVMAC to Cameroon. After a World Bank and Swedish International Development and Cooperation Agency (SIDA) funded study concluded that Mozambique did not need a stock exchange at the time and should instead focus on creating an efficient market for securities and a demand for them (market development), the government did not heed and instead went ahead and established the Maputo Stock Exchange (Bolsa De Valores De Mocambique).⁹⁷

Africa is made up of 54 states that are recognized by the United Nations. These 54 states are further divided into two regions: North Africa and Sub Saharan Africa with the Sahara Desert being the boundary between the two. As of November 2021, there existed 29 stock exchanges in Africa with two of these being regional stock exchanges hence servicing more than one country.

Country	Name of stock exchange	Location	Year of formation
Algeria	Algiers Stock Exchange	Algiers	1997
Botswana	Botswana Stock Exchange	Gaborone	1995
Cameroon⁹⁸	Douala Stock Exchange	Douala	2001
Cabo Verde	Bolsa de Valores de Cabo Verde	Praia	2005

⁹⁷ Sam Mensah, 'Mozambique Capital Markets Project' (1998) Report for the Canadian International Development Agency, 20 July 1998.

⁹⁸ This exchange has recently merged with BVMAC.

CEMAC⁹⁹	Bourse Régionale des Valeurs Mobilières d'Afrique Centrale (BVMAC)	Libreville	1994
Egypt	The Egyptian Exchange	Cairo/Alexandria	1883
Ghana	Ghana Stock Exchange	Accra	1990
Kenya	Nairobi Securities Exchange	Nairobi	1954
Lesotho	Maseru Securities Exchange	Maseru	2016
Libya¹⁰⁰	Libyan Stock Market	Tripoli	2007
Malawi	Malawi Stock Exchange	Blantyre	1996
Mauritius	Stock Exchange of Mauritius	Port Louis	1988
Morocco	Casablanca Stock Exchange	Casablanca	1929
Mozambique	Bolsa de Valores de Moçambique	Maputo	1999
Namibia¹⁰¹	Namibia Stock Exchange	Windhoek	1992
Nigeria	Nigerian Exchange	Lagos	1960
Rwanda	Rwanda Stock Exchange	Kigali	2005

⁹⁹ CEMAC is not a country but rather a regional grouping of countries in Central Africa that share one stock exchange.

¹⁰⁰ The stock market has been closed since the Arab Spring.

¹⁰¹ The first stock exchange was established in Namibia as early as 1904 during the gold rush but collapsed as soon as the gold rush ended in 1910. After Namibia gained independence, the idea of a stock exchange was re-floated, and a new stock exchange was relaunched in 1992 with funding from 36 Namibian businesses. See Namibia Stock Exchange website, http://nsx.com.na/?page_id=276 Accessed on 11th November 2019.

UEMOA¹⁰²	Bourse Régionale des Valeurs Mobilières (BRVM)	Abidjan	1998
Seychelles	MERJ Exchange	Eden Island	2012
Sierra Leone	Sierra Leone Stock Exchange	Freetown	2009
Somalia	Somali Stock Exchange	Garowe	2015
South Africa	Johannesburg Stock Exchange	Johannesburg	1887
Sudan	Khartoum Stock Exchange	Khartoum	1994
Swaziland¹⁰³	Swaziland Stock Exchange	Mbabane	1990
Tanzania	Dar es Salaam Stock Exchange	Dar es Salaam	1998
Tunisia	Bourse de Tunis	Tunis	1969
Uganda	Uganda Securities Exchange	Kampala	1997
Zambia	Lusaka Securities Exchange	Lusaka	1994
Zimbabwe	Zimbabwe Stock Exchange	Harare	1946

Table 1: Existing African Stock Exchanges as of December 2020

Traditionally, African stock markets can be divided broadly into 4 categories:¹⁰⁴

¹⁰² UEMOA is not a country but rather a regional grouping of countries that share a common stock exchange, the BRVM.

¹⁰³ On 19 April 2018, King Mswati renamed Swaziland as the Kingdom of eswatini on his 50th birthday.

¹⁰⁴ Graham Smith, Keith Jefferis and Hyun-Jung Ryoo, 'African stock markets: Multiple Variance Ratio Tests of Random Walks' (2002) 12(7) *Applied Financial Economics* 476.

- a. South Africa which is the largest stock market on the continent.
- b. The medium-sized markets which, in many cases, were among the earlier established markets. These include Mauritius, Morocco, Egypt, Nigeria, and Kenya.
- c. The smaller new markets which are showing rapid growth such as Uganda, Tanzania, Botswana.
- d. The newly established markets such as Somalia, Rwanda, Khartoum, Burundi, etc.

Although this classification by Smith *et al* holds true, the examples of the markets he gave for each category merit an adjustment as with growth since 2002, some markets have moved up and down the classification. As at the end of 2019, South Africa remained the anchor exchange for the continent as demonstrated in the table below.¹⁰⁵

Exchange	Number of listed companies	Equity Market Capitalisation US\$ Bn	Equity Market Share Volume Traded	Total Equity Market Cap/GDP (%)
JSE	372	881.61	91,716,796,484	260
Nigeria	169	32.13	76,825,300	9.2
NSX	44	138.37	193,100,874	953
Botswana	35	41.3	582,518,113	217.4
Zimbabwe	62	19.42	2,517,356,999	62.66
Mauritius	63	20.64	6,335,817,398	23.48

¹⁰⁵ The information in this table has been extracted from Heidi Raubenheimer, African Capital Markets: Challenges and Opportunities' (CFA Institute Research Foundation , 2019) <https://www.cfainstitute.org/-/media/documents/article/rf-brief/rf-african-capital-markets.ashx> accessed 10 June 2021.

Kenya	63	20.64	6,335,817,398	23.48
Tanzania	28	8.61	790,309,259	16.37
Uganda	17	6.4	589,600,000	23.29
Rwanda	8	3.35	83,854,000	360.13
Ghana	39	12.68	200,577,882	19.35
Egypt	248	41.85	60,705,996,362	14.27
Morocco	76	60.86	282,730,309	51.4

Table 2: Status of Selected Exchanges as at the end of 2019¹⁰⁶

The following discussion focuses on selected exchanges as well as the two regional stock exchanges as the concept of regional stock exchanges is unique.

2.5.1 The South African Stock Markets

The history of the JSE has been discussed in detail in this chapter and requires no repetition. It is the giant of not only the South but of the entire continent. It is Africa's largest stock market by both capitalisation and turnover and as of the end of 2020, it was the 19th largest stock market worldwide.¹⁰⁷ At the end of 2020, the Exchange had an equity market capitalisation of R9.8bn (down from R10.4 Bn in 2019), 300 listed companies on the Main Board (2019: 312) including 69 foreign domiciled companies (2019:71).¹⁰⁸ The table below provides a five-year comparative of activity on the JSE.¹⁰⁹

¹⁰⁶ The 2019 statistics have been used as opposed to 2020 and 2021 due to the uniqueness of a global pandemic in 2020 and 2021 and the unique challenges that it presented for exchanges worldwide.

¹⁰⁷ See Ty Haggi, '20 Largest Stock Exchanges in the World' (Yahoo Finance, 19 September 2020), <https://finance.yahoo.com/news/20-largest-stock-exchanges-world-175549152.html> accessed 18 October 2021.

¹⁰⁸ See JSE Integrated Annual Report 2020. https://www.jse.co.za/sites/default/files/media/documents/2021-04/JSE%20Integrated%20Annual%20Report%202020_0.pdf accessed 10 June 2021.

¹⁰⁹ The information in the Figure has been extracted from the JSE Limited Integrated Annual Reports of 2016,2017,2018, 2019 and 2020.

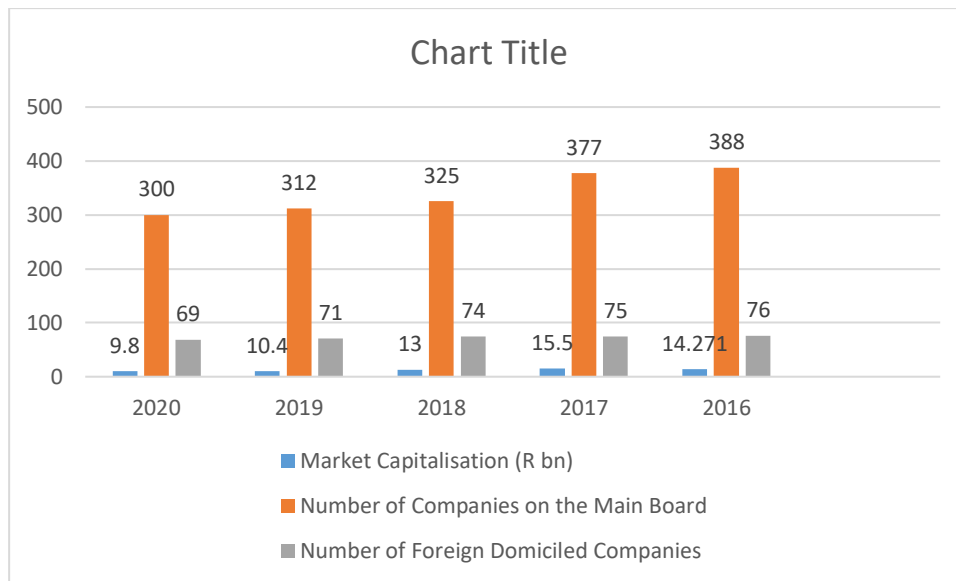


Figure 2: State of the JSE 2016-2020

It is a self-regulatory organisation and is supervised by both the Financial Sector Conduct Authority (FSCA) and the Prudential Authority (PA) since it operates an exchange and clearinghouse.

The JSE is best known for its mining stocks¹¹⁰ which is connected with the thriving mining trade in South Africa. Due to this, the JSE had an All-Gold Index which was composed of all the securities of the gold mining companies that are listed. Today, the FTSE/JSE Africa All Share Index which is a market capitalisation-weighted index, calculated in the South African rand, is comprised of the top 99% of the pre-free-float market capitalisation of all listed companies on the JSE. The JSE has the most advanced trading and settlement system on the continent and has invested heavily in ICT and product development which is evidenced in the number of products that are available for investment such as interest rate market which includes interest rate derivatives, floating-rate notes, cash bonds, and a green bond segment. It also has a vibrant commodity derivatives market and an equity derivatives market, depository receipt market, REITS market among others.

¹¹⁰ Michael J Page and Ivan Reyneke, 'The Timing and Subsequent Performance of Initial Public Offerings (IPOs) on the Johannesburg Stock Exchange' (1997) 24(9) *Journal of Business Finance and Accounting* 1403. For further information about South Africa's gold stocks, see John C van Eck, 'South African Gold Stocks' (1964) 20(5) *Financial Analysts Journal* 159-63; William F Boericke, 'South African Gold' (1959) 15(5) *The Analysts Journal* 55.

The Exchange accounts for a large percentage of all activity on the continent including IPOs, volume, and turnover.¹¹¹ It has the largest number of listed companies and is the destination of choice for companies seeking to raise capital in Africa. Part of the success of the JSE can be attributed to the institutional, political, and regulatory reforms that have taken place since the end of apartheid.¹¹² The end of apartheid led to the lifting of sanctions imposed on the country. In addition, there are no exchange control regulations for foreigners, negotiated brokerage fees are allowed, the Exchange is demutualised, and the securities are dematerialised. The JSE continues to rank first in all indices relating to capital markets in Africa, including the African Financial Markets Index AFMI.¹¹³

The JSE anchors all the other stock exchanges in this region and is credited for supporting the establishment of the Namibia Stock Exchange ('NSX'). The JSE provides the trading system that the NSX uses as well as the front-end technology known as TALX. It also maintains a very strong relationship with the JSE which is evidenced by the fact majority of the companies listed on the NSX are also listed on the JSE. In addition, the JSE/FTSE Africa index includes data from the NSX which has brought increased publicity for the NSX.¹¹⁴ At the end of 2019, the NSX had 44 listed companies (including dual listings). Many stock exchanges in Africa model their listing requirements on those of the JSE and the JSE remains the continental leader in initiatives e.g., it was the founding partner of the Sustainable Stock Exchanges Initiative and was the first African stock exchange to become a signatory to the United Nations-backed Principles for Responsible Investment.

2.5.2 The stock markets of the North; Casablanca and Egyptian Exchanges

There are six (6) stock markets in the Northern part of Africa, and these are found in Morocco, Libya, Egypt, Tunisia, Algeria, and Mauritania. Egypt is the

¹¹¹ Raubenheimer (n 51) 3-9.

¹¹² Keith Jefferis and Graham Smith, 'The Changing Efficiency of African Stock Markets' (2005) 73(1) *South African Journal of Economics* 66.

¹¹³ The 2021 Absa Financial Markets Index ranked the JSE in first position (the same position it had in 2017, 2018, 2019 and 2020).

¹¹⁴ The Index can be viewed at <https://www.jse.co.za/services/market-data/indices/ftse-jse-africa-index-series> accessed 10 October 2019.

largest of the economies in this region closely followed by Algeria, Morocco, Libya, and Tunisia follow in that order. The Egyptian and Moroccan stock markets dominate this region and merit a separate discussion. The Egyptian Exchange (EGX) which is the second-largest in Africa by both capitalisation and turnover and also the oldest on the continent, is divided into two exchanges; Cairo and Alexandria.¹¹⁵ The Alexandria Stock Exchange was established in 1888 and the Cairo Stock Exchange in 1903. However, these two are not considered as independent exchanges but merely locations of one stock exchange; the Egyptian Exchange.¹¹⁶ Although these were very vibrant in the 1940s, they declined and were largely dormant between 1961 and 1992. This can be attributed to the heavy reliance on the state to determine economic priorities, sweeping nationalization of both foreign and private assets as well as import substitution industrialization policies.¹¹⁷ The latter was unfavorable to the country's general economic development¹¹⁸ and in the end, these reforms led to a considerable reduction in the activity on the stock markets until 1992.¹¹⁹ Due to the nationalization policy, for example, the government converted stocks of 93 of the most active companies on the exchange to government bonds with 4% interest pa for 15 years.¹²⁰ In addition, the number of listed companies reduced from 275 in 1958 to a mere 55 in 1974.¹²¹ In the same period, the economy suffered as oil prices dropped leading to financial difficulties for the government.¹²² Although the government subsequently launched a reform program agreement with the

¹¹⁵ Jorge Braga de Macedo and Omar Kabbaj, *Regional Integration in Africa* (OECD Development Centre 2002) 118.

¹¹⁶ Law No 123 of 2008. However, until the Presidential Decree No 51/1997, they operated as separate entities with their own Boards and different administration. On 6th March 1997, Presidential Decree No 51/1997 was issued and this addressed matters of management of the two exchanges as well as their financial affairs, putting both exchanges under the same Board and Chairman as well as the same regulatory framework.

¹¹⁷ Alan Richards and John Waterbury, *A Political Economy of the Middle East* (3rd edn, Westview Press 1996).

¹¹⁸ John Waterbury, *The Egypt of Nasser and Sadat: The Political Economy of Two Regimes* (Princeton University Press 1983).

¹¹⁹ Maged Sawky Sourial and Mauro Mecagni, 'The Egyptian Stock Market: Efficiency Tests and Volatility Effects' (1999) IMF Working Paper 99/48 (International Monetary Fund 1999) 3 <https://www.elibrary.imf.org/view/journals/001/1999/048/001.1999.issue-048-en.xml> accessed 22 October 2020.

¹²⁰ Mohammed Omran, 'Structural Break in the Egyptian Stock Market: A Logistic Regression Analysis' (2006) 11(4) *International Journal of Business* 405.

¹²¹ Ibid 406.

¹²² Ibid 404.

IMF in 1987, it failed to adhere to it and the economic situation continued to deteriorate until the end of the Gulf War.¹²³

In 1991, the government launched further reforms with the help of the IMF which saw the economy stabilising, the stock market restructured, and the financial sector reorganized. The government continued to make further changes including abolishing the 2% capital gains tax on investment in securities and accelerating the privatisation program.¹²⁴ All these helped the EGX get back on its feet and the table below shows the trading volumes and total value traded through the EGX between 2010-2018. In 2019, the EGX's equity market capitalisation stood at US \$41.8 Bn with 248 listed companies and 60,705,996,362 shares traded.¹²⁵

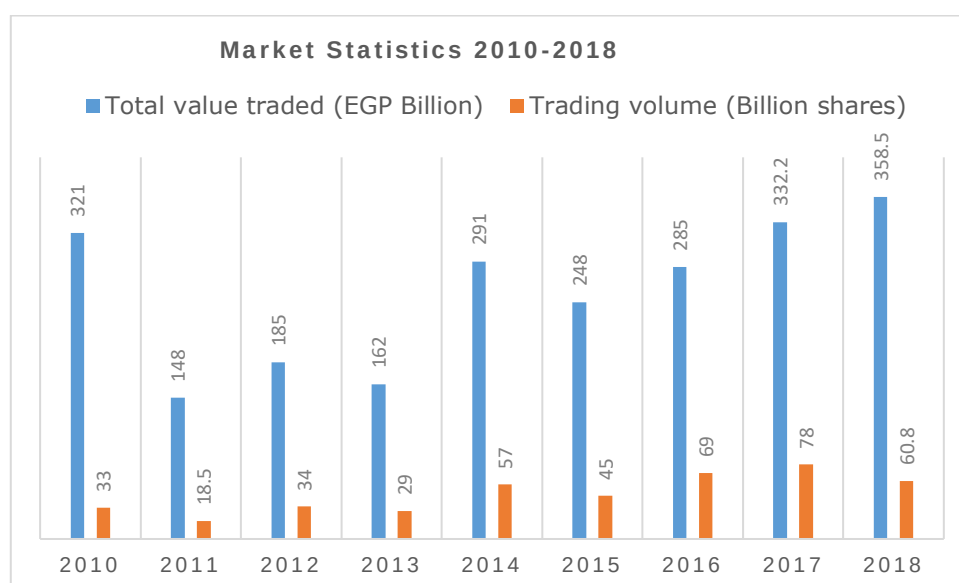


Figure 3: Analysis of market trends for the EGX between 2010-2018¹²⁶

The Casablanca Stock Exchange established in 1929 is the third-oldest stock exchange in Africa. Despite this, it remained largely inactive¹²⁷. It was a state institution, dominated by the banking sector with very few individual

¹²³ Ibid 405.

¹²⁴ Ibid.

¹²⁵ See Raubenheimer (n 51).

¹²⁶ The statistics have been compiled through a review of the disclosures made in the annual reports of the EGX for the years 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 and 2018 as well as disclosures made to the African Securities Exchange Association.

¹²⁷ Eric Ghysels and Mouna Cherkaoui, 'Emerging Markets and Trading Costs: Lessons from Casablanca' (2003) 10(1-2) *Journal of Empirical Finance* 173.

investors.¹²⁸ In 1989, Morocco embarked on the process of undertaking ambitious economic policy reforms which included privatisation and liberalization to make the economy more competitive.¹²⁹ These 1993 reforms transformed the management and organization of the stock market by privatizing it, establishing a securities commission and regulations for shareholder protection, market surveillance, and disclosure obligations. The growth of the stock market in Morocco can also be credited to the economic growth with a GDP growth rate of 4.1% in 2017.¹³⁰ Today, it is the second-largest stock exchange in Africa with a market capitalisation of approximately US\$ 67,049 Million and 74 listed companies.¹³¹ Like other markets, it is dominated by institutional investors and fund managers and companies moderately solicit it for capital raising.¹³²

2.5.3 The Stock Exchange of Mauritius (SEM)

Although Mauritius gained independence in 1968, it did not establish a stock exchange until 1989. However, this Exchange is one of the best performing exchanges in Africa. Mauritius is viewed as an economic success story due to its focus on international trade and tourism, good economic performance, prudent and proactive fiscal and monetary policy, and a well-developed financial sector.¹³³ The uniqueness of the SEM is the acceptance of multicurrency trading and settlement since 2015 and hence trading in a foreign currency is prevalent for foreign domiciled companies listed on the SEM. This makes it the only exchange in Africa and one of the few in the world to allow multi-currency trading.

¹²⁸ Hazem Marashdeh 2006, 'Financial Integration of the MENA Emerging Stock Markets' (University of Wollongong Thesis Collections 2006)108.

¹²⁹ Ghysels (n 126)10.

¹³⁰ See Karim Hajji, 'The Casablanca Stock Exchange 2017 in Review' 2017 Annual Report of the African Securities Exchange Association 32.

¹³¹ See SSE, Bourse de Casablanca https://sseinitiative.org/stock-exchange/casablanca_bourse/ accessed 31 August 2021

¹³² Adil Hlimi and Badr Benyoussef, Morocco (CFA Institute Research Foundation, 2020) 94. <https://www.cfainstitute.org/-/media/documents/article/rf-brief/morocco.ashx> accessed 31 August 2021.

¹³³ See Ali Zafar, 'Mauritius: An Economic Success Story' (World Bank, 2016) <https://www.un.org/esa/socdev/egms/docs/2016/AliZafar.pdf> accessed 14 July 2021; Sanjeev Sobhee, 'The Economic Success of Mauritius: Lessons and Policy Options for Africa' (2009) 12(1) *Journal of Economic Policy Reform* 29; Jeffrey Frankel, 'Mauritius: African Success Story' (2010) Harvard Kennedy School Faculty Research Working Paper RWP10-036 of 2010, https://dash.harvard.edu/bitstream/handle/1/4450110/Frankel_MauritiusAfrican.pdf accessed 10 August 2021.

SEM has greatly benefitted from its relationship with France as its former colonial master. France was instrumental in the setup of SEM, providing the technical expertise and drafting the initial legislation that governed the SEM.¹³⁴ The Exchange opened its doors in July 1989 with only five listed companies and ten stock brocking companies but has grown to 63 companies. SEM has engaged in annual regulatory amendments and increased its product offerings from equities into debt products, ETFs, ETNs, DR, and other structured products.

2.5.4 The Nigerian Exchange Limited

Nigeria is the largest economy in Africa and also has the largest population in Africa, placing its exchange in a unique position. The Nigerian Exchange was established in 1960 as the Lagos Stock Exchange by the Lagos Stock Exchange Act of 1960, although the capital market existed as early as 1946 when the British colonial government floated N600000 in stocks.¹³⁵ This loan stock with a maturity of 10-15 years was oversubscribed although local participation was poor which led the government to put in place various measures over the years, hoping to encourage the locals.¹³⁶

However, until the 1990s, the exchange was primarily a forum for the trading of government bonds.¹³⁷ After independence in 1960, the Nigerian government had established many state corporations and parastatals. This was worsened by the Nigerian Enterprises Promotion Decrees of 1972 and 1977 ('the Indigenization Decrees') where the government sought to create a Nigerian-dominated economy in what was viewed as economic decolonization, by nationalizing many foreign-owned firms.¹³⁸ Following recommendations by the IMF and World Bank, Nigeria implemented the IMF Structural Adjustment Program in the late 1980s and the early 1990s which

¹³⁴ See <https://www.stockexchangeofmauritius.com/about-us/sem-at-a-glance> Accessed 11 June 2021.

¹³⁵ Funso Tajudeen Kolapo and Anthony Olugbenga Adaramola, 'The Impact of the Nigerian Capital Market on Economic Growth (1990-2010)' (2012) 1(1) *International Journal of Developing Societies* 11.

¹³⁶ Tajudeen A Odetayo and Ademola Samuel Sajuyigbe, 'The Impact of the Nigerian Capital Market on Economic Growth and Development' (2012) 1(5) *International Journal of Arts and Commerce* 1.

¹³⁷ Jefferis (n 105) 66.

¹³⁸ For further reading, see Chibuzo S.A Ogbuagu, 'The Nigerian Indigenization Policy: Nationalism or Pragmatism?' (1983) 82(327) *African Affairs* 241-66.

included privatisation of some of the state-owned enterprises.¹³⁹ It issued privatisation decrees ¹⁴⁰which sought to reverse this trend and privatise the state-owned enterprises. The privatisation included the government's commitment to completely divest the shares that it has in cement plants, banks, and oil companies that were listed on the stock exchange. It is, therefore, no wonder that the exchange is dominated by firms in financial services, oil and gas, and consumer goods.

The Nigerian exchange is unique in terms of indices as it has over 10 official indices, many of which track market performance by sector. This includes the Pension Index, the Banking Index, the Consumer Goods Index, the Industrial Index, the Insurance Index, the Oil and Gas Index, the Lotus Islamic Index, the Premium Board Index, the Main Board Index, with the All-Share Index being the main index. In November 2021, the exchange rebranded from the Nigerian Stock Exchange to the Nigerian Exchange as part of the Nigerian Exchange Group.

2.5.4 The Bourse Regional des Valeurs Mobilières (BRVM)

West Africa is also home to a regional stock exchange. The BRVM is a regional stock market established in 1988 that serves Benin, Burkina Faso, Cote d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo. It is one of two regional stock exchanges in Africa and all its member states are Francophone countries who share a common political history as former colonies of the French and are members of the West African Economic and Monetary Union. Although headquartered in Abidjan, it has a branch in each of the countries it services and all the branches are interconnected through a central electronic trading system. It is regulated by Conseil Régional de l'Epargne Publique et des Marchés Financiers (CREPMF) and is a demutualised stock exchange.

Ivory Coast dominates this Exchange and all the 35 initial listed companies on this stock exchange were Ivorian. This is not surprising considering that before the creation of BRVM, Cote d'Ivoire was the only country in that region

¹³⁹ Ibid.

¹⁴⁰ The Privatisation and Commercialization Decree No. 25 of 1988 and the Public Enterprises Privatisation and Commercialization Act of 1999.

that had a stock exchange. The original Bourse des Valeurs d'Abidjan (BVA) had been opened in 1976 to encourage foreign companies to float their shares to Ivorians.¹⁴¹ The bourse was central to enabling the privatisation program that the government implemented between 1991-1994 and in 1999, 16 out of 35 listed companies on the bourse had been former state-owned enterprises. When the West African Monetary Union (WAMU) was formed, the BVA transformed into a regional exchange, taking with it all the securities that were quoted on the BVA at the time.

2.5.5 The Nairobi Securities Exchange (NSE)

The East African region made up of Kenya, Uganda, Tanzania, Rwanda, Burundi, and Southern Sudan is dominated by the NSE. The NSE was established in 1954 as the Nairobi Stock Exchange after the London Stock Exchange officials agreed for an overseas exchange to be established in Nairobi under the Societies Act in Britain. Trading was being conducted at the Stanley Hotel until 1991 when it adopted the open outcry system. Kenya became independent in 1963 and the NSE experienced rapid growth within the first three years after independence which was evidenced by the number of oversubscribed issues.¹⁴² Having been affected by the inflation arising out of the 1972 oil crisis, the tax reforms including the introduction of the capital gains tax in 1975 and its suspension in 1985, the Capital Markets Authority was formed in 1989 to assist in creating an environment in which capital markets could flourish.¹⁴³ With the government's privatisation actions including selling its stake in Kenya Commercial Bank and Kenya Airways, the capital markets in Kenya started to experience steady growth which has largely persisted to date.

In 2011, the Nairobi Stock Exchange changed its name to Nairobi Securities Exchange and became a self-regulatory authority (SRO). Having listed its shares on the Main Market in September 2014, it became the second African stock exchange to be self-listed, after the JSE. It was also the first Exchange

¹⁴¹ Kathryn Lavelle, 'Architecture of Equity Markets: The Abidjan Regional Bourse' (2001) 55(3) *International Organisation* 727.

¹⁴² Josiah Aduda, Jacinta Mwelu Masila and Erick Nyakundi Onsongo, 'The Determinants of Stock Market Development: The Case of the Nairobi Stock Exchange' (2012) 2(9) *International Journal of Humanities and Social Science* 216.

¹⁴³ Ibid.

in East and Central Africa to be admitted as a full member of the World Federation of Exchanges (WFE). NSE is the largest securities exchange in East and Central Africa by market capitalisation. The figure below shows the market capitalisation of the NSE over 6 years.

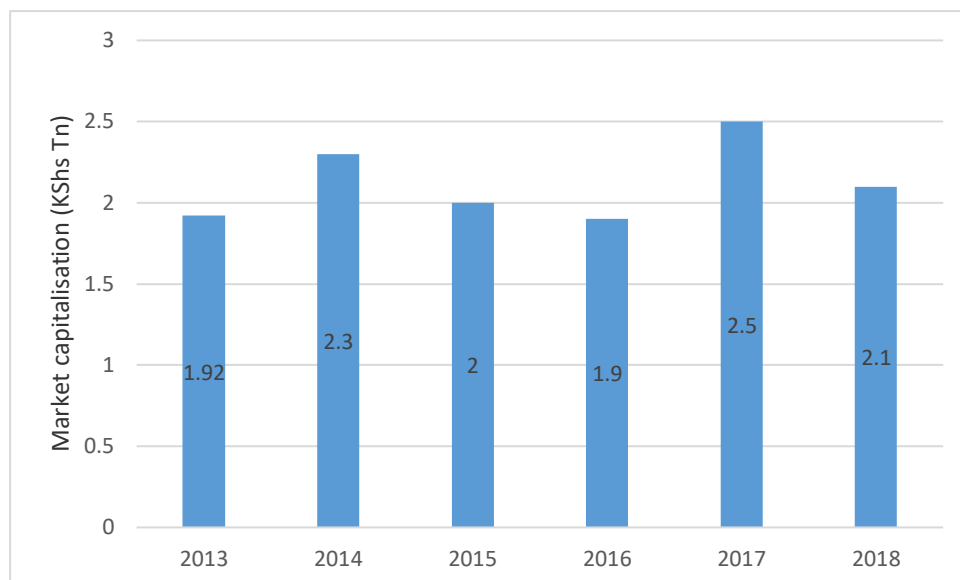


Figure 4: Market capitalisation of the Nairobi Securities Exchange 2013-2018¹⁴⁴

The NSE remains one of the more developed stock markets on the continent and has entered into several memorandums to extend its reach and improve its services. In October 2019, the NSE signed an MOU with the Shenzhen Stock Exchange of China to encourage seamless cross-border market access hence deeper markets.¹⁴⁵ The NSE also has various MOUs with the LSE with regards to ELITE, a business support and capital raising programme of the LSE. It has also signed MOUs with NASDAQ Dubai to facilitate the issuance of Sharia-compliant securities.

2.5.6 Bourse des Valeurs Mobilières d'Afrique Centrale (BVMAC)

The BVMAC is a creature of the Economic Community of Central African States under Regulation N° 06/03-CEMAC-UMAC of 11 November 2003 on the Organization, Functioning and Supervision of the Financial Market of Central

¹⁴⁴ The statistics have been extracted from the Annual Reports of the NSE for 2013, 2014, 2015, 2016, 2017 and 2018.

¹⁴⁵ APA, 'Kenya and China Stock Exchanges ink MOU' (African Markets, 17 October 2019) <https://www.african-markets.com/en/stock-markets/nse/kenya-and-china-stock-exchanges-ink-mou> accessed on 2nd November 2019.

Africa.¹⁴⁶ It was created to service six member states namely Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon. All the member states are former French colonies and they came together to form CEMAC in 1994. The CEMAC states share a currency: the African Financial Community franc (CFA Franc) which is pegged to the Euro and guaranteed by the French treasury. The influence of France in both BVMAC and BRVM remains substantial¹⁴⁷ and the shared colonial history is credited for the ability of these states to unite and form the two regional stock exchanges.

BVMAC is headquartered in Libreville and regulated by the Surveillance Committee of the Financial Market of Central Africa (CONSUMAF) and the Regional Securities Depot Bank (CRDV) provides safe custody of all securities issued on the Exchange. Although Cameroon is located in the same region and is a member of CEMAC, it still went ahead to establish its own stock exchange, the Douala Stock Exchange (DSX) by an Act of Parliament. No 99/015 in 2003. This move was due to the last-minute decision to locate the headquarters of BVMAC in Gabon rather than Cameroon, although the latter is the unquestionable economic leader of the region. This co-existence was always problematic and undesirable. With two supervision organs and two regulatory frameworks, it led to legal uncertainty and confusion, and duplication of the scarce resources in a region with limited stock exchange activity.¹⁴⁸ For example, in the period 2013-2017, only one IPO occurred on the BVMAC while the DSX had only had 3 listed companies and reported no turnover in either 2016 or 2017. This led to talks that culminated in the

¹⁴⁶ Prior to this regulation, the CEMAC legislator adopted Additional Act N° 11/00-CEMAC-C-CE-02 of 14 December 2002 fixing the headquarters of the CEMAC stock exchange at Libreville, Gabon, Additional Act N° 03/01-CEMACCE-03 of 8th December 2001 creating the commission of supervision of the Financial Market of central Africa (COSUMAF) and Additional Act N° 08/CEMAC-CE-04 of 23rd January 2003 fixing the headquarters of COSUMAF at Libreville. There is also Additional Act N° 03/01-CEMAC-CE of 8 December 2001 creating the supervisory commission of the Financial Market of Central Africa (COSUMAF), Additional Act N°100/00-CEMAC-C-CE-02 of 14th December 2000 fixing the headquarters of BVMAC, Regulation N° 14/07-UEAC-175-CM-15 of 19th March 2007 instituting a specific tax regime applicable to quotation operations on the Stock Exchange of Central Africa (BVMAC).

¹⁴⁷ See IJ Benneyworth, 'The Ongoing Relationship Between France and its Former African Colonies' (E-International Relations, June 11, 2011).

¹⁴⁸ African Development Bank Report, Financial Sector Integration in Three Regions of Africa: How Regional Financial Integration Can Support Growth, Development and Poverty Reduction https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/AfDB%20Regional%20Financial%20Integration%20REPORT_EN.pdf Accessed on 20th June 2019.

headquarters being moved to Douala and the DSX merging with BVMAC in September 2020.

2.6 Conclusion

The discussion above has achieved three crucial things. It has demonstrated the importance of capital markets for the development of Africa. First, it revisited the debate on the presence of a nexus between financial sector development and economic growth. This explains why stock exchanges are increasing in Africa from the six (6) in 1989 to the 27 official member exchanges of the African Securities Exchanges Association (ASEA) which includes two regional exchanges servicing a total of 14 countries. It is partially a recognition of the important role that exchanges can play in financing Africa's financial development and economic growth and hence why it is important to make capital markets work for Africa.

Secondly, it has demonstrated the link between stock market development and colonialism in Africa. Whereas the first exchange was established as early as 1531 in Antwerp and whereas the securities market was thriving in London in the 1600s and the London Stock Exchange was formally established in 1801, the oldest exchange in Africa, the Egyptian Exchange, was established in 1883. Even then, all pre-colonial and colonial exchanges were established to facilitate colonial trade. The thesis calls for the recognition of the role of colonialism in the development of Africa's initial capital markets as the first exchanges were purely for the advancement of the colonial trade in natural resources such as gold in Witwatersrand in 1886 leading to the creation of the Witwatersrand Club and Exchange Company Limited in 1887.

The discovery of Diamond in South Africa in 1867 paved the way for the then Kimberley Royal Stock Exchange in 1881 to facilitate the trading of shares in the diamond mining companies. The gold rush in Namibia paved the way for the setup of the Namibian exchange in 1905 and once the rush passed, the Exchange was closed in 1910. An argument can hence be made that exchanges only sprouted in areas where colonial powers needed them for trade. In doing so, the discussion has provided an alternative view to the effect that the lack of stock exchanges during colonialism could also be attributed to the absence of 'formal' recognised money due to the prevalence

of barter trade and absence of a 'sound' monetary and financial policy framework in most of the colonial states.

Thirdly, the discussion explained the emergence of regional exchanges in regions where there is a shared colonial history, shared language, and shared heritage. The 14 member states of both BVMAC and BRVM are all Francophone countries who share borders and have greatly benefitted from the French's continued involvement in their financial system. This has led to a term known as 'French monetary imperialism' and the CFA Franc used in the regional exchange being viewed as a symbol of colonial continuity. In addition, the French support of the Eco (a short form of ECOWAS and the proposed name of the ECOWAS currency before it was hijacked) and expansion of the CFA Franc Zone is criticised as an attempt to undermine the EU's recognised ECOWAS and further perpetuate the multiple existences of different regional groupings in Africa, a concept discussed in full in Chapter 4 of the thesis.

Post-independence, stock exchanges sprouted but it wasn't until the 1990s that exchanges increased in Africa. Until then, states focused on undoing the harms of colonialism, fighting for independence, and building a post-independent Africa. As a result, stock markets are a late arrival in Africa and can explain the low levels of development of capital markets discussed in Chapter 3. Countries shifted their attention to stock markets in the 1990s for several reasons. These included their importance as tools for privatisation and the extensive financial sector adjustment programs of the IMF and World Bank, the growing dissatisfaction with bank-based finance, the calls for focus on financial sector development, and lastly the promotion of investment into Africa. These are demonstrated in the discussion relating to the development of individual stock exchanges.

This Chapter then provided an overview of selected stock exchanges in Africa including Johannesburg Stock Exchange (JSE), the Nairobi Stock Exchange, Nigerian Exchange, the Egyptian and Morocco Exchanges, and the two regional exchanges: The Bourse Régionale des Valeurs Mobilières (BRVM) and Bourse des Valeurs Mobilières d'Afrique Centrale (BVMAC), to paint a picture of the state and nature of stock exchanges in Africa as well as the level of development of these exchanges. This discussion sets the stage for Chapter

3 which discusses the landscape of the post-independence stock markets. It looks at the role of the Bretton Wood institutions in the development of these exchanges, picking up from the discussion on privatisation provided in this chapter. It also discusses the market developments in these exchanges and the state of the African financial markets generally.

CHAPTER THREE

THE STATE OF AFRICAN EQUITY MARKETS

Literature on the state of African stock markets tends to be comprised of summarised and general statements on the problems of specific markets. Rarely does this indictment undertake a critical analysis of these challenges and in instances where it does, there is a focus on economic analysis theories. The discussion in this Chapter does not reinvent the wheel when it comes to determining the state of African stock exchanges. Rather, it delves into a justification of the sentiments that African stock markets are small, underdeveloped, underutilised, and unable to make a substantial contribution to economic growth. Rather, this chapter makes an original contribution by providing the evidence and data to back these sentiments and deliberates on the state of the stock markets to present the basis for solutions to the challenges they face in the next chapter.

Chapter 2 involved a discussion on the emergence of stock exchanges in post-colonial Africa. Part 3.1 of this chapter builds on that discussion and interrogates the role that the Bretton Wood institutions played in the growth of stock exchanges in Africa. This is through the discourse on structural adjustment programs and privatisation programs and how these inspired the establishment of stock markets in Africa. In Part 3.2, a factual and evidence-based analysis of the state of stock markets in Africa is provided. This includes a discussion on aspects of stock market development such as liquidity and market capitalisation as well as the level of market activity (inbound, outbound, domestic, and cross-border). It also incorporates analysis on market infrastructure and lastly an interrogation of capital markets regulation and policy (securities market regulation and macro-economic and fiscal policy) on the continent. A conclusion is then provided in Part 3.3.

3.1 The role of the Bretton Wood institutions in the emergence of and growth of stock exchanges in Africa.

What is unique about the story of stock markets in Africa is the critical role that the Bretton Wood institutions played through the imposition of privatisation policies. In 1984 before the privatisation program, there were 92 listed companies in Nigeria with the number increasing to 174 at the end of the first privatisation program in 1993 as a result of the divestiture of 35

public entities.¹ This kind of growth is not unique to Nigeria but is the story of many African stock exchanges which can attribute their initial establishment and growth to the privatisation policies of the 1990s. Today, privatisation programs are used by governments primarily to raise revenue and improve the economic efficiency of state-owned enterprises.² But that was not their initial rationale. So how did privatisation become so central to the growth trajectory? The following discussion answers that question.

After African states gained independence, the focus was on rebuilding political structures, recovering economically, and safeguarding their newly gained freedoms. The governments took center stage in controlling the economy and the role of the private sector was very limited. As a result, the majority of the stock markets were only established in the 1990s. Ducker refers to them as 'the 1990s equivalent of National anthems and flags in Africa.'³ Governments established state-owned enterprises with some being leftovers of colonial rule. In the decades that followed after independence, African countries struggled to grow their economies, and this was evidenced in the declining per capita GDP with many states being relegated to lower-income status.⁴

3.1.1 The advent of structural adjustment programs

In 1989, John Williamson, an economist, came up with the 'Washington Consensus' which laid down 10 economic policy reforms that had achieved consensus among Washington as prerequisite changes for developing countries to recover economically. These policies ranged from fiscal policy, privatisation, tax reform, interest rates, exchange rates, trade liberalization, and deregulation which would involve removing policies that impeded market entry or restricted competition.⁵ This Consensus required the support of Washington-based agencies like the World Bank and the IMF.

¹ See Muhammad Tanko, 'The Impact of Privatisation on Capital Market Development and Individual Share Ownership' (SSRN, 17 April 2005) 10. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=689702 accessed 11 Jun 2021.

² Maria K. Boutchkova and William L. Megginson, 'Privatisation and the Rise of Global Capital Markets' (2000) 29(4) *Financial Management* 31.

³ K Ducker, 'Developments in African Stock Markets' (1996) 16(3) *International Capital Markets* 18.

⁴ Robert H Wessel, 'Privatisation in Africa' (1991) 2 *African Review of Money Finance and Banking* 181.

⁵ See generally, John Williamson, 'The Strange History of the Washington Consensus' (2004-2005) 27(2) *Journal of Post Keynesian Economics* 195.

Around this period, the growth that African states had experienced with a state-led economy started to decline tremendously. In response, two sets of policies were drawn up; the Lagos Plan of Action and the Regional Food Plan for Africa, but these did not receive support from the Bretton Wood Institutions and ultimately failed. Faced with a possible collapse of the economies and having failed to receive support from the West, African states were left with only one option which was approaching the IMF and World Bank for financial help.⁶ In turn, the IMF and World Bank took this opportunity to impose conditionalities and advance some of the reforms in the Washington Consensus such as trade liberalization, privatisation, and deregulation. States that requested funding were required to make these neo-classical economic policy changes in what is commonly known as the Structural Adjustment Programs (SAP).⁷

3.1.2 FINSAP, privatisation and stock market development in Africa

Many countries had to undertake economic reform in line with the SAP which included financial sector reforms aimed at reducing the influence of the state in the economy and strengthening the private sector.⁸ The Financial Sector Adjustment Programs (FINSAP) reforms often included establishing new stock markets or improving the environment under which already-established markets operated.⁹ In response to the World Bank conditionalities, the first Council of a Stock Exchange was constituted in Ghana to pave way for the exchange although a legislative framework for its creation had existed as

⁶ Franz Heidhues and Gideon Obare, 'Lessons from Structural Adjustment Programmes and Their Effects in Africa' (2011) 50(1) *Quarterly Journal of International Agriculture* 56-7.

⁷ Although it is not the intention of this thesis to launch into a discussion on the merits and demerits of the SAPs, the IMF and World Bank have been heavily criticised for the ideological basis of the SAPs, the high handedness and the excessive political, social and economic outcomes of their implementation. See Thomas Callaghy, 'The Political Economy of African Debt: The Case of Zaire' in John Ravenhill (ed), *Africa in Economic Crisis* (Columbia University Press 1986) 307; Giovanni Cornia, Andrea Helleiner and Gerald K (eds), *From Adjustment to Development in Africa: Conflict, Controversy, Convergence, Consensus?* (MacMillan 1994); Jonathan Magnusen, 'Structural Adjustment Policies and the Evolution of a New Legal Framework for Economic Activity in Ghana' in Joseph Norton and Mads Andenas (eds), *Emerging Financial Markets and the Role of International Financial Organizations* (Kluwer Law International 1996) 81.

⁸ Graham Smith, Keith Jefferis and Hyun-Jung Ryoo, 'African stock markets: Multiple Variance Ratio Tests of Random Walks' (2002) 12(7) *Applied Financial Economics* 477.

⁹ Ibid.

early as 1971.¹⁰ Privatisation became a key component of the FINSAP and governments could privatise their state entities through the sale of shares by private placement, public offers of shares, liquidation, and competitive bidding. Stock exchanges benefitted from the public offers of shares. Academic studies support a correlation between financial market development and privatisation.¹¹ There was, therefore, an expectation that privatisation programs would have an impact on already existing markets.

Privatisation sparked off a series of regulatory reforms which could impact the development of the stock market. For example, these included the exchange rate reforms in FINSAPs and changes in monetary and fiscal policies. Some of the markets that benefitted from the FINSAP regime include the Casablanca Stock Exchange ('CSE') where deregulation occurred and restrictions on foreign ownership were removed. In 1993 before the privatisation programs started in Morocco, the CSE had a market capitalisation of US \$ 1,869M which was 7% of the country's GDP, with 69 listed companies, of which 25 of these were largely dormant.¹² In 1989, King Hassan II embarked on privatisation which meant large-scale divestitures and the establishment of the Securities and Exchange Commission.¹³ Further changes included privatising the stock exchange in 1995, allowing free movement of capital across borders, and improving accounting standards. The state started privatising its companies and listed some of them on the CSE including the bus company CTM-LN, CIOR (the largest cement plant), General Tire Morocco, among others. The result was that the market capitalisation, trading volume, and the number of shares traded increased as illustrated below;¹⁴

¹⁰ Jonathan Magnusen, 'Structural Adjustment Policies and the Evolution of a New Legal Framework for Economic Activity in Ghana' in Joseph Norton and Mads Andenas (eds), *Emerging Financial Markets and the Role of International Financial Organizations* (Kluwer Law International 1996) 108.

¹¹ Boutchkova and Megginson give an example of the US which grew from over 3 basis points in 1983 to over 24 in 1998 while the privatisation plans were taking place. See Mary Boutchkova and William Megginson, 'The Impact of Privatisation on Capital Market Development and Individual Share Ownership' (2000) 29 *Financial Management* 67-77.

¹² World Bank, *Privatization and Emerging Equity Markets* (World Bank 1998) 50.

¹³ Ibid.

¹⁴ These figures have been extracted from the annual reports of the Casablanca stock exchange for the period.

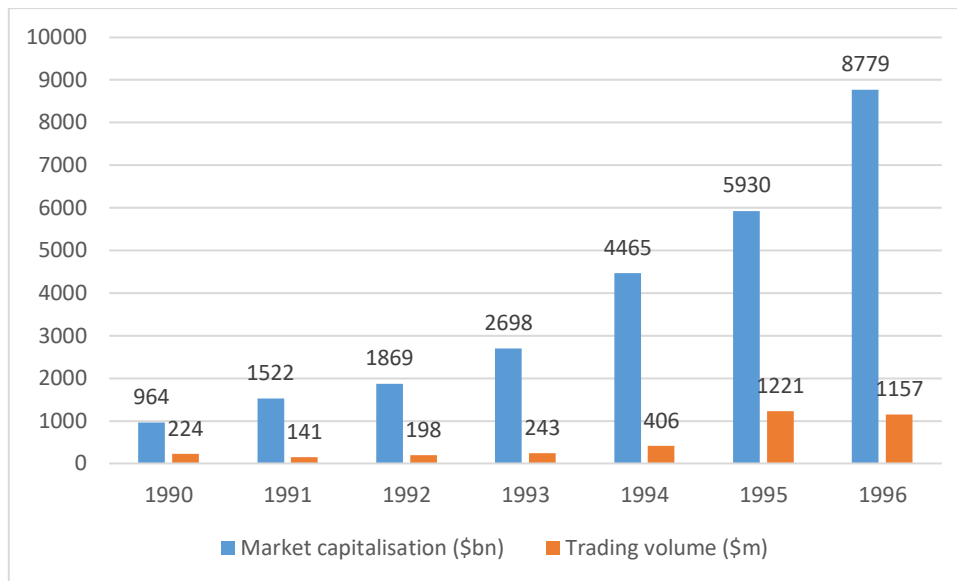


Figure 5: Market capitalisation and trading volume of the CSE from 1990-1996

The Zimbabwe Stock Exchange (ZSE) had been established as early as 1894 but closed in 1924 and reopened in 1946. The market remained slow and sometimes inactive until the Economic Structural Adjustment Programme of the IMF was implemented in 1991. Due to these programmes, the ZSE became open to foreign investment in 1993, and exchange controls were relaxed.¹⁵ The situation is similar for the Nairobi Securities Exchange which also greatly benefitted from the privatisation reforms and the relaxation of exchange controls. In such cases, privatisation improved the liquidity of the domestic stock markets as well as increasing turnover by expanding the free float. The Kenyan government divested 11 firms onto the Nairobi Stock Exchange under its Privatisation Program Strategy and Policy Framework.¹⁶ The Dar es Salaam Stock Exchange ('the DSE') was formed in 1996 as part of the Tanzanian government's economic reforms necessitated by the structural adjustment programs which required the government to transform the economy into a private sector driven economy.¹⁷

¹⁵ Smith et al (n 8) 66.

¹⁶ Otieno Martin Kelly, 'Contribution of Privatization to Capital Market Development: The Case of Companies Privatised at the Nairobi Stock Exchange' (Masters Thesis, University of Nairobi 2003) 5.

¹⁷ Norman Adamson Sigalla King, 'The Role of the Dar es Salaam Stock Exchange in Safeguarding Securities Investors in Tanzania' (2010) 4(4) *International Business Management* 222.

The IMF also played a direct role in the establishment of new stock markets. The Lusaka Stock Exchange was established in 1993 through the efforts of the IFC and World Bank who provided technical assistance to set up the Exchange.¹⁸ The Privatisation Act No 21 of 1992 allowed the government to privatise shares of state-owned enterprises and empower citizens to own shares among other provisions. The Exchange was seen as a means of fulfilling this ambition, anchored in the IMF SAP reforms. The BRVM was also seen as a mode of completing the structural adjustment programs of the member states.¹⁹ The much-needed funding for the setup of the Malawi Stock Exchange in 1996 was provided by the IMF.

Therefore, privatisation deepened and broadened the stock market in the countries where FINSAPs were applied. It led to an increase in listings and trading volumes and affected overall market capitalisation. In a study of 31 emerging markets including those in Africa, researchers found that the use and intensity of privatisation contributed to enhancing stock market development although the extent varied from region to region.²⁰ In the African context, privatisation either launched the exchanges or enabled them to increase their listings. By extension, and notwithstanding their criticism, credit is given to the Bretton Woods institutions which were the advocates for SAPs in Africa paving the way for privatisation.

3.2 Aspects of Stock Market Development in Africa

The discussion below delves into the current state of stock markets in Africa. There is a consensus that capital markets in Africa are underdeveloped and hence calls for legal, economic, and political changes to enable these markets to flourish. But how do we measure stock market development and what are the indicators of stock market development? When is a stock market deemed to be developed? This is crucial in justifying the sentiments that the stock

¹⁸ See Heloisa Marone, 'Small African Stock Markets – The Case of the Lusaka Stock Exchange' (2003) International Monetary Fund Working Paper No 6/ 2003, 9 <https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Small-African-Stock-Markets-The-Case-of-the-Lusaka-Stock-Exchange-16229> accessed 13 June 2020.

¹⁹ Kathryn Lavelle, 'Architecture of Equity Markets: The Abidjan Regional Bourse' (2001) 55(3) *International Organisation* 735.

²⁰ See Sami Ben Naceur, Narjess Boubakri and Samir Ghazouani, 'Privatisation and Financial Market Development in Emerging Countries' (2010) 2(2) *Middle East Development Journal* 229.

markets in Africa are underdeveloped in comparison to other global markets. The presence of a correct measure is also important for formulating the appropriate policy response, actions and measures.

Unfortunately, there is no consensus on the yardstick and parameters to measure stock market development. There is also no clear definition of what 'developed' means for purposes of stock markets. Different studies focusing on this aspect have used different measures. Beck, Demirguc-Kunt, and Levine used the ratio of capitalisation as a percentage of GDP, market activity as a ratio of the value traded as a percentage of GDP, and turnover ratio.²¹ Garcia and Liu's research acknowledged that stock market development is usually measured by 'stock market size, liquidity, volatility, concentration, integration with world capital markets, and the legal rule (regulation and supervision) in the market' but only focused on market capitalisation in the study.²² Levine and Zervos use a multifaceted approach of size, risk diversification, and liquidity.²³ El-Waasal notes that growth and development are not the same with growth referring to an increase in size and liquidity while development refers to the ability to satisfy economic needs.²⁴ He thus proposes using the market size, liquidity, performance, concentration, and linkage to real sector performance as the measures.²⁵

It is not the intention of this legal thesis to embark on an economic theory exercise to determine an effective measure of stock market development. As a result, the following discussion will consider different measures as have been suggested by the different researchers. The intention is to demonstrate how African stock markets fare on the yardsticks discussed below.

3.2.1 Liquidity and market capitalisation

These are two of the most common yardsticks applied in studies on measuring the level of stock market development. Market capitalisation generally refers

²¹ Thorsten Beck, Asli Demirguc-Kunt and Ross Levine, 'A New Database on the Structure and Development of the Financial Sector' (2000) 14(3) *World Bank Economic Review* 597.

²² Valerino F Garcia and Lin Liu, 'Macroeconomic Determinants of Stock Market Development' (1999) 11(1) *Journal of Applied Economics* 29.

²³ Ross Levine and Sara Zervos, 'Stock Market Development and Long-Run Growth' (1996) 10(2) *The World Bank Economic Review* 323.

²⁴ Kamal A. El-Waasal, 'The Development of Stock Markets: in Search of a Theory' (2013) 3(3) *International Journal of Economics and Financial Issues* 609.

²⁵ *Ibid.*

to the value of the listed shares and is calculated by multiplying the total number of shares by the price of each share. Market capitalisation is useful in measuring the size of the stock market (using the ratio of market capitalisation divided by the GDP).²⁶ It is also helpful in determining the size of the listed company. Liquidity, on the other hand, looks at how easy it is to buy and sell a stock in the market with a limited impact on the price. Liquidity is usually used in reference to the secondary market. A secondary market will be described as liquid if licensed agents can buy or sell stocks with little to no price concession.²⁷

Since the financial crisis, liquidity has become an important aspect of the financial markets. The mere establishment of a stock exchange is of no value if there is no liquidity. It is central to the development and the functioning of any stock market²⁸ as an allocator of capital and risk, a generator of information for investors and issuers, and financial stability.²⁹ Liquidity is multi-dimensional and has five attributes; immediacy, market depth, resilience, market breadth, and tightness.³⁰ Breadth looks at size; many orders in large volumes with very minimal impact on prices. Depth considers the abundance of orders both below and above the current trading price of a security.³¹ Immediacy deals with the speed at which orders can be executed and settled while resiliency focuses on the ability of the new orders to flow quickly and correct order imbalances.³² Tightness refers to the 'magnitude of

²⁶ Ross Levine and Sara Zervos, 'Stock Market Development and Long-Run Growth' (1996) 10(2) World Bank Economic Review 328.

²⁷ Timothy C Johnson, 'Liquid Capital and Market Liquidity' (2009) 119(540) *The Economic Journal* 1374. Also see Michael J Brennan, Tarun Chordia, Avanidhar Subrahmanyam and Qing Tong, 'Sell-Order Liquidity and The Cross-Section of Expected Stock Returns' (2012) 105(3) *Journal of Financial Economics* 523.

²⁸ Lemma Senbet, 'African Stock Markets' (African Finance for the 21st Century High-Level Seminar, Tunisia, 4-5 March 2008) 5.

²⁹ PricewaterhouseCoopers LLP, 'Global Financial Markets Liquidity Study' (12 August 2015) 8, <https://www.pwc.se/sv/pdf-reports/global-financial-markets-liquidity-study.pdf> accessed 4 June 2020.

³⁰ Abdourahmane Sarr, Tonny Lybek, 'Measuring Liquidity in Financial Markets' (2002) International Monetary Fund Working Paper 02/232) 5. <https://www.imf.org/external/pubs/ft/wp/2002/wp02232.pdf> accessed 4 June 2021.

³¹ Ibid.

³² Ibid.

risk premiums required by market-makers for holding inventories of securities, is usually gauged by the width of bid-ask spreads.’³³

For equity markets, liquidity is provided by both sale and buy orders. High levels of demand and supply trigger continuous trades which facilitate liquidity. Any price change affects the market capitalisation hence creating a link between liquidity and market capitalisation. African stock markets are notorious for illiquidity³⁴ and the market capitalisation of listed stocks on African exchanges has long been a subject of concern. With the exception of South Africa, the market capitalisation of African stock markets remains quite low. As of the end of 2020, the JSE remained Africa’s largest stock exchange by market capitalisation and the 16th largest stock exchange in the world. The map below demonstrates this.³⁵

³³ European Central Bank, ‘The Euro Area Financial System’ Financial Stability Review, June 2007, https://www.ecb.europa.eu/pub/financial-stability/fsr/focus/2007/pdf/ecb~cc3931849f.fsrbox200706_09.pdf accessed June 2021.

³⁴ See Issouf Soumaré, Désiré Kanga, Judith Tyson and Sherillyn Raga, ‘Capital Market Development in Sub-Saharan Africa: Progress, Challenges and Innovations’ (2021) ODI Working Paper 2 of 2021 <https://odi.org/en/publications/capital-market-development-in-sub-saharan-africa-progress-challenges-and-innovations/> accessed 6 June 2021; Godfrey Marozva, ‘Monetary Policy and Stock Market Liquidity: Empirical Evidence’ (2020) 8(2) *International Journal of Economics and Business Administration* 265; Tom Trimble and John Bryant, ‘Illiquidity in African Stock Markets: A Challenge for Private Equity’ (2019) 28 EMPEA Legal and Regulatory Bulletin, https://www.globalprivatecapital.org/app/uploads/2019/11/LRB_No28_2019_Articles_WinstonStrawn.pdf accessed 1 September 2021.

³⁵ This map has been extracted from the PWC 2020 Report. See PWC, Africa Capital Markets Watch 2020, February 2021. <https://www.pwc.co.za/en/assets/pdf/africa-capital-markets-watch-2020.pdf> accessed March 2021.

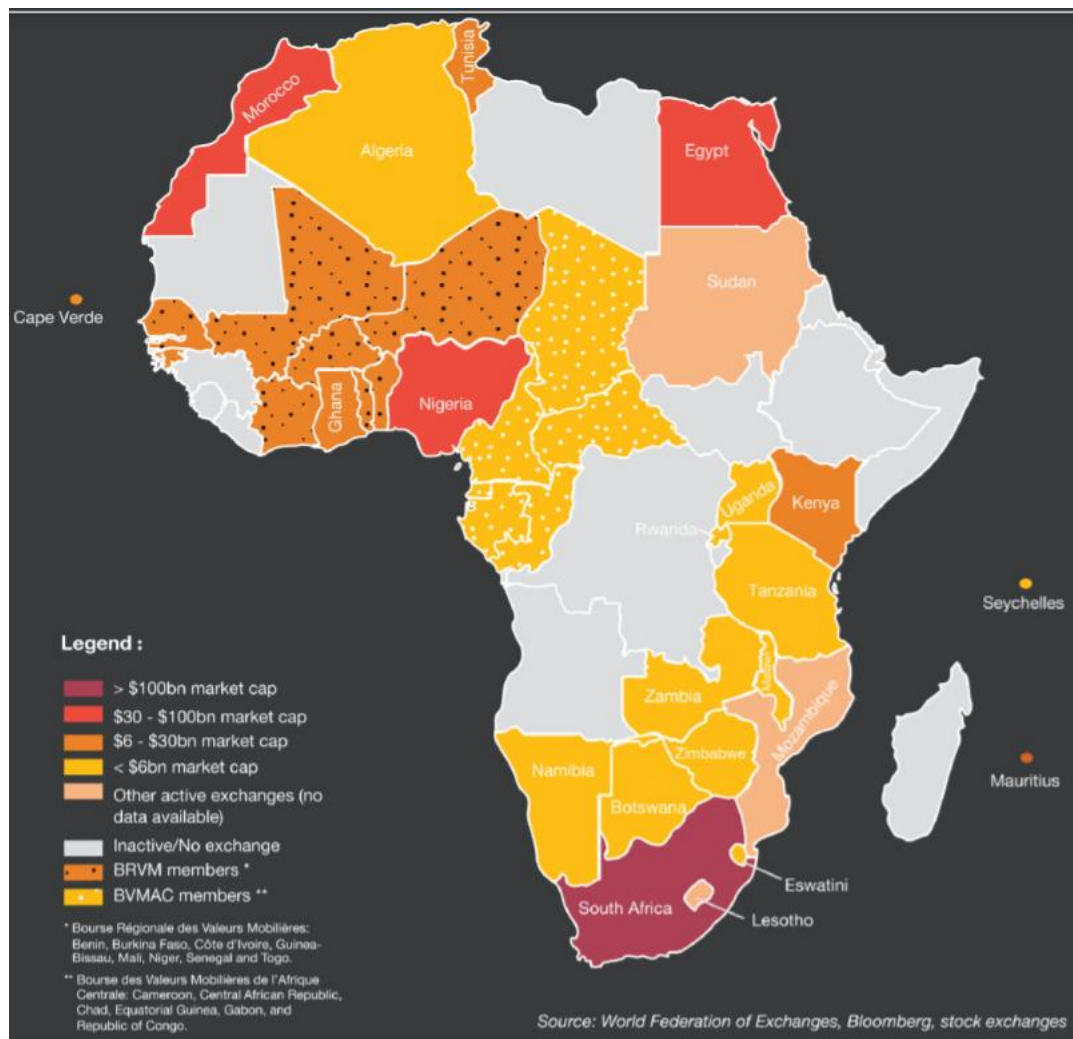


Figure 6: Market Capitalisation in Africa at the end of 2020

From the map above, one can note that only one stock exchange in Africa has a market capitalisation of over US \$100billion. Market capitalisation is largely concentrated at the JSE which raises serious concerns for the state of stock markets in Africa if the JSE was to close shop for any reason. The two regional exchanges have a total of 14 member countries with six in BVMAC and eight in BRVM. Despite this, the total market capitalisation of the BRVM and BVMAC is negligible. This may raise questions as to whether mergers and stock exchange integration can actually increase liquidity and market capitalisation. Simply merging to form a regional exchange on its own, cannot translate into substantial changes in liquidity and the scenario of the two regional exchanges may support such a proposition.

The map also indicates South Africa, Morocco, Egypt, and Nigeria as the largest stock exchanges by market capitalisation since their market

capitalisation is more than US\$ 30billion. The absence of credible data is also a concern as PWC was unable to collect or confirm data from certain African exchanges even though these have an existing stock exchange. Without data, it is difficult for investors to make investment decisions in these exchanges or even for companies to choose to list. This has the trickle-down effect of further affecting liquidity and market capitalisation.

In addition, the markets are illiquid, volatile, and only contribute a negligible component to the GDP of the countries.³⁶ The market capitalisation to the GDP ratio measures the total value of all the publicly listed companies divided by the country's GDP, hence enabling an assessment of whether the stock market is undervalued or overvalued compared to a historical average. The formula for calculating the market cap to GDP is as follows:

$$= \text{Value of all listed companies} \div \text{GDP of country} \times 100$$

If the result is above 100, it is interpreted as the country being overvalued and if it is below 50, the market is undervalued. The average market capitalisation to GDP ratio of African stock markets is still low, although it has increased in the recent past. Even then, the contribution of the JSE to these figures is evident. For example, the ASEA President noted that this ratio stood at 103.3% in 2017 as compared to 83.3% in 2014.³⁷ However, the figure substantially drops once South Africa is excluded from the statistics leaving a growth from 37.6% in 2014 to 41.0% in 2017.³⁸ South Africa remains the only country in Africa whose market cap to GDP ratio exceeds 100 and therefore it explains why without the inclusion of South Africa in the statistics, the values drop substantially. The figure below looks at the trend of market capitalisation to GDP ratio in selected countries including the top exchanges in Africa.³⁹

³⁶ Nicholas Addai Boamah, 'Regional and Global Market Integration of African Financial Markets' (2016) *African Review of Economics and Finance* 239.

³⁷ Oscar N Onyema, 'President's Report' 2017 Annual Report of the African Securities Exchange Association (ASEA 2017) 11.

³⁸ Ibid.

³⁹ Table extracted from Issouf Soumaré, Désiré Kanga, Judith Tyson and Sherillyn Raga, 'Capital Market Development in Sub-Saharan Africa: Progress, Challenges and Innovations' (2021) ODI Working Paper 2 of 2021, 10. <https://odi.org/en/publications/capital-market-development-in-sub-saharan-africa-progress-challenges-and-innovations/> accessed 4 September 2021.

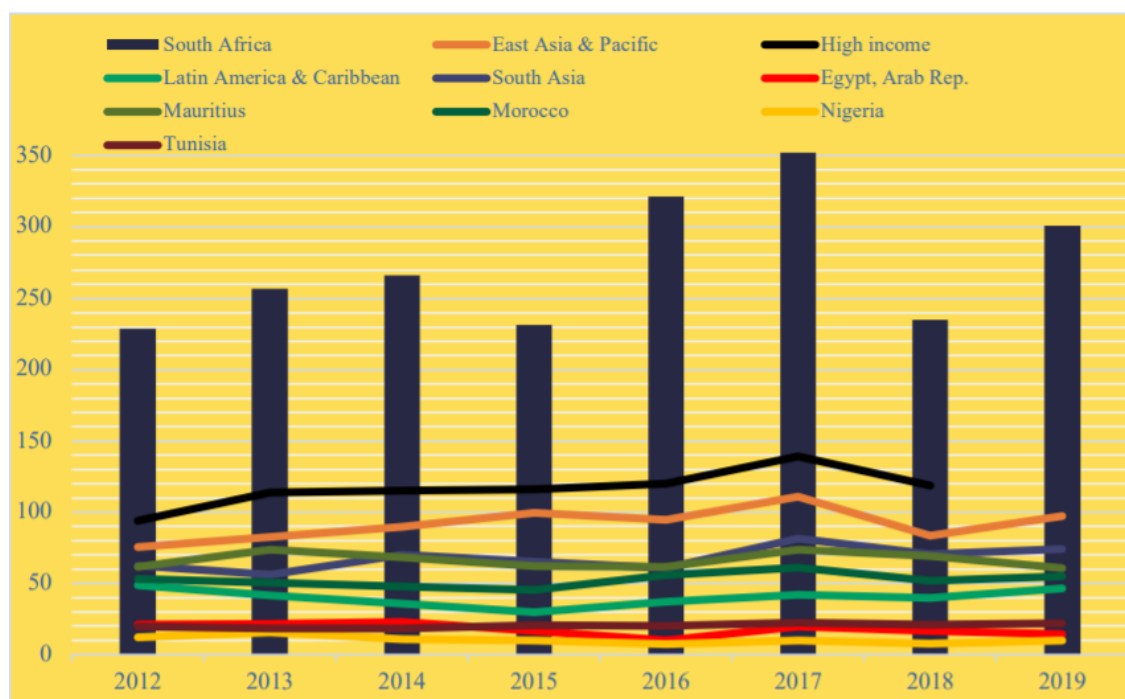


Figure 7: Market Capitalisation to GDP Ratio Trends in Selected Countries 2012-2019

Below, a comparison is provided of the equity market capitalisation as a percentage of the GDP in selected African exchanges.⁴⁰

Country	Market capitalisation, % of GDP	Country	Market Capitalisation, % of GDP
South Africa	275.4	Senegal	29.1
Botswana	178.4	Malawi	27.9
Seychelles	88.6	Kenya	20.0
Morocco	45.2	Namibia	17.6
Mauritius	42.4	Uganda	16.4
Rwanda	35.6	Ivory Coast	15.4

⁴⁰ See OMFIF, ABSA Africa Financial Markets Index 2020 (OMFIF, 2021) <https://www.omfif.org/wp-content/uploads/2020/10/Absa-Africa-Financial-Markets-Index-2020.pdf> accessed 10 September 2021.

Senegal	29.1		

Table 3: Market Capitalisation, % of GDP in selected African countries

Applying Schumpeter's theory of the nexus between financial sector development and economic growth, it is easy to understand the need to focus on the growth of stock markets, as part of the financial sector. The low market capitalisation to GDP ratio is a testimony to the underdevelopment of the markets. Turnover remains quite low and even in instances where trades occur, they are limited to a few stocks hence a large portion of the market capitalisation is usually attributed to a small number of stocks.⁴¹

Stock market activity is boosted by trading activity, and this includes trading on both primary and secondary markets. Hence the absence of an IPO may not affect a market that has consistent trading activities. Many of the stock markets in Africa do not receive listings and coupled with low trading volumes and values, the liquidity challenges persist. With the exception of the older and most developed stock markets in Africa, the number of listed companies is quite low. Nothing perhaps demonstrates the situation better than the fact that the two regional stock exchanges covering over 10 countries have less than 50 listed companies. The BVMAC which is the stock exchange of CEMAC and covers 6 countries, had a mere 5 listed companies at the end of 2020. The BRVM on the other hand, covering the 8 Francophone countries of West Africa has 45 listed companies with the majority of those from the Ivory Coast. The Sierra Leone Stock Exchange formed in 2009 has only 3 listed companies to date and trading only takes place once a week on Monday. The Somali stock exchange has 2 listed companies, in a country experiencing political instability. In addition to having few listed companies on stock markets in Africa, the rate of delisting is quite high, mainly due to failure to observe corporate governance standards and continuing listing obligations.

Therefore, African stock markets are in a dire liquidity situation demonstrated by the lack of listings, low market capitalisation, shallow depth of the market, low volumes, and turnover. Whereas the continental-wide view may look

⁴¹ Lemma W Senbet and Isaac Otchere, 'African Stock Markets: Opportunities and Issues' in Marc Quintyn and Genevieve Verdier (eds), *African Finance in the 21st Century* (Palgrave MacMillan 2010) 104.

somewhat normal, the real situation becomes visible once the JSE is taken out of the statistics. Without the JSE statistics, research into the African stock markets' liquidity and market capitalisation would paint a graver situation.

3.2.2 The level of market activity

Market activity can be viewed from multiple angles. It can be seen as activity on local exchanges (domestic activity), activity from local exchanges to other African exchanges (cross-border), activity from African exchanges to exchanges out of Africa (outbound), or activity from other foreign exchanges into African exchanges (inbound activity). Majorly, activity refers to initial public offers and secondary offers such as rights issues. All of these are collectively put into consideration when determining the number of listings that each of the Exchanges has had year-on-year as shown in the table below.

Number of IPOs							
Country of the exchange	2014	2015	2016	2017	2018	2019	2020
South Africa (JSE)	9	12	7	12	3	0	1
Egypt	1	4	4	4	4	3	1
Morocco	1	2	1	0	2	0	1
Nigeria	2	1	0	0	0	2	0
BRVM	2	1	3	2	1	0	0
BVMAC	0	0	0	0	0	0	0
Malawi	0	0	0	0	0	1	2
Ghana	1	4	2	0	2	0	0
Mauritius	1	0	1	3	0	0	0

Kenya	1	1	0	0	0	0	0
Uganda	0	0	0	0	1	0	0
Tanzania	2	1	3	1	0	0	0
Namibia	0	0	0	2	0	1	0
Zimbabwe	0	0	1	0	0	0	0
Botswana	0	1	1	2	1	0	0

Table 4: Number of IPOs on selected exchanges between 2014-2020

From the table above, it is evident that there are very few IPO happening in Africa and like everything else, many of these end up on the JSE. Below, the market activity is further broken down in the table and explained in detail thereafter.

Year	Outbound ECM volume	Inbound ECM volume	Cross-border ECM volume	Domestic listing only
2020	11	4	1	39
2019	13	7	2	59
2018	11	6	1	78
2017	14	10	6	94
2016	10	13	6	68
2015	14	12	6	93
2014	17	12	1	72
2013	10	10	1	52

Table 5: Cross-border, inbound and outbound ECM volume 2014-2020⁴²

3.2.2.1 Domestic capital markets activity

With approximately 28 stock markets on the African continent, there is an expectation that there would be several public offers or secondary offers happening every year. Unfortunately, there is limited domestic capital market activity, and this continues on a downward trajectory over the last five years. The JSE continues to be the anchor exchange for the continent, hosting some of the largest deals and issuers. For example, when ECM activity dropped in South Africa by 69% in terms of value and 46% in terms of volume as compared to 2018, the overall ECM on the continent dropped by 44% in value and 29% in volume.⁴³ A review of the top ten IPOs between 2011 and 2019 shows the JSE in the lead with seven of the top ten IPOs including two of the largest IPOs by value (Steinhoff Africa and Vivo Energy).⁴⁴ Even during a difficult 2020, the largest IPO by value in Africa took place on the JSE i.e, Bytes Technology Group's US\$ 467m. In addition, 58 IPOs occurred in South Africa between 2011-2020 raising a sum of US\$ 7,671m, an amount higher than the sum of all IPOs in Sub-Saharan Africa (excluding JSE) in the same period.⁴⁵

Outside of South Africa, domestic market activity is seen on the Egyptian Exchange which dominated the top five IPOs in terms of volume in 2019 with the listing of Tenth of Ramadan for Pharmaceutical Industries and Diagnostic Reagents (Rameda) S.A.E (raising US\$ 109m) and Fawry for Banks Technology and Electronic Payments S.A.E (raising US\$99m) in 2019.⁴⁶ The

⁴² These figures have been extracted from the PWC, Africa Capital Markets Watch 2020, February 2021. <https://www.pwc.co.za/en/assets/pdf/africa-capital-markets-watch-2020.pdf> accessed March 2021.

⁴³ See PWC, 2018 Africa Capital Markets Watch (PWC, 2018) 12, <https://www.pwc.com/ng/en/assets/pdf/africa-capital-markets-watch-2019.pdf> accessed 14 June 2021.

⁴⁴ Ibid 14.

⁴⁵ See PWC, 2020 Africa Capital Markets Watch Report, (PWC, 2021) 12, <https://www.pwc.co.za/en/assets/pdf/africa-capital-markets-watch-2020.pdf> accessed 15 June 2021.

⁴⁶ PWC, 2019 Africa Capital Markets Watch Report (PWC, 2020) 16 <https://www.pwc.com/ng/en/assets/pdf/africa-capital-markets-watch-2019.pdf> accessed 14 June 2021.

smaller exchanges see very few to no IPOs as illustrated in Table 7. The table below shows the trends of IPOs and their values from 2011 to 2020.⁴⁷

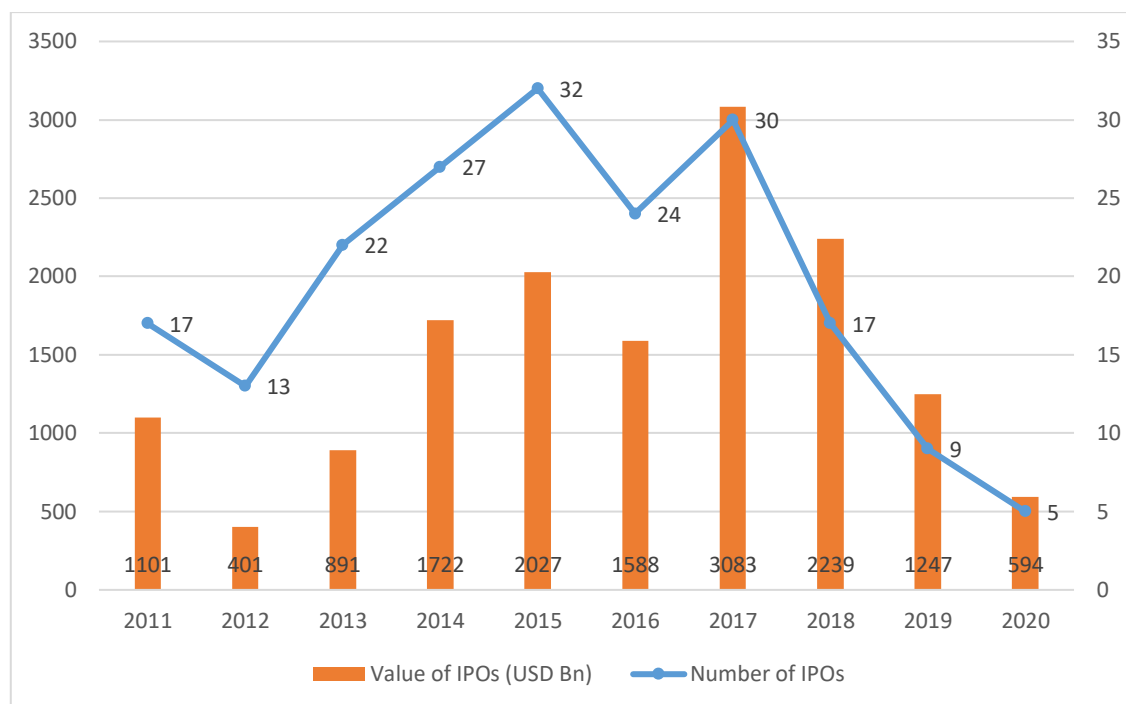


Figure 8: IPO activity in African markets (2011-2018)

To further explain this, a comparison can be made between the entire African continent IPO count and other countries. An example is China which reported 381 IPOs in 2015, 378 IPOs in 2016, 631 in 2017, 354 in 2018, 404 in 2019, and 561 in 2020.⁴⁸ Europe as a continent had 348 IPOs in 2017, 313 in 2018, 172 in 2019, and 197 in 2020.⁴⁹ The table below provides further examples for comparison with Africa to demonstrate the low levels of domestic market activity in Africa.⁵⁰

	2017	2018	2019	2020
Japan	92	93	89	93

⁴⁷ The information in the table has been sourced from Annual reports of the relevant stock markets, the PWC Africa Capital Markets Watch Reports 2015-2018 and ASEA Reports 2011-2017.

⁴⁸ PWC, China IPO Watch 2020 (PWC, 2021) <https://www.pwccn.com/en/ipo/china-ipo-watch-2020.pdf> accessed 10 July 2021.

⁴⁹ Ibid 20.

⁵⁰ These figures have been extracted from the PWC 2020 Report. See PWC, China IPO Watch 2020 (PWC, 2021) <https://www.pwccn.com/en/ipo/china-ipo-watch-2020.pdf> and PWC, China IPO Watch 2019 (PWC, 2020) <https://www.pwccn.com/en/ipo/china-ipo-watch-2019.pdf> accessed 10 July 2021.

NASDAQ	127	133	126	171
NYSE	78	57	32	39
LSE	103	82	35	37
Malaysia	13	22	30	19
Australia	114	98	62	85

Table 6: Number of IPOs in selected countries 2017-2020

3.2.2.2 Cross-border market activity

A cross-listing refers to a listing by a company on a different exchange other than its primary exchange. The cross-border market activity category looks at cross-listings by African exchanges on other African exchanges. Firms engage in cross-listings for different reasons. These include a desire to go into more liquid markets, increase reputation, avoid barriers to investment, increase investor numbers and type, increase analyst coverage, widen sources of capital, diversification or even go to markets where there is greater shareholder protection.⁵¹ Shareholders put pressure on firms to increase the value of their companies so that the shareholders can maximize their investment. This leads companies to explore opportunities for cross-listings.

The country of secondary listing also benefits from cross-listing. It may improve liquidity in the market and attract investors. In addition, it allows for portfolio diversification, improves the employment level, enhances business reputation, reduces the spread on interest rates, lowers information asymmetry, and enhances corporate governance.⁵² It is, therefore, a win-win situation for the company, the country of primary listing and the country of secondary listing.

⁵¹ For a discussion on advantages of cross-listing, see Juliet D'Souza, William Megginson and Robert Nash, 'Effect of Institutional and Firm-Specific Characteristics on Post Privatisation Performance: Evidence from Developed Countries' (2005) 11(5) *Journal of Corporate Finance* 747-66; Samuel Onyuma, 'Regional Integration of Stock Exchanges in Africa' (2006) *African Review of Money Finance & Banking, Supplementary Issue of Savings & Development* 97.

⁵² Olatundun Janet Adelegan, 'The Impact of the Regional Cross-Listing of Stocks on Firm Value in Sub-Saharan Africa' (2009) WP/09/99 (International Monetary Fund 2009) 8.

Cross-listings in Africa, and especially Sub-Saharan Africa, have come to be associated with the expansion efforts of companies. This is evidenced by the fact that many of the firms that cross-list first set up operations in their host countries and then seek a cross-listing.⁵³ Cross-listings are therefore seen as a mode of entering new markets and expanding the reach for products and services offered by the company. An example of a cross-listing for purposes of market access is the cross-listing of East African Breweries Ltd from Kenya to Uganda and Tanzania which was viewed by many as a move to increase its product reach in the region and increase sales of its beers. In 2006, Ecobank Transnational Inc Limited was simultaneously listed on the Ghana Stock Exchange, Nigeria Exchange, and BRVM, where it had extended its banking services.

Cross-listings in Africa can be traced back to November 1993 when the JSE's Mutual and Federal Insurance cross-listed on the Namibia Securities Exchange (NSX). As of the end of 2020, 37 of the 51 listed companies in Namibia are cross-listed from the JSE, 2 from Mauritius, 2 from London, 5 from Australia, and 2 from Toronto.⁵⁴ There are only 13 local companies listed on the NSX out of the 51 listed companies. The NSX has continued to attract cross-listings for various reasons. First, it has positioned itself to mirror the LSE regulatory framework and maintains close ties with South Africa. In addition, the government has taken deliberate efforts to create a favorable regulatory framework. Since 1994, pension funds are required to invest 35% of their assets into Namibian assets and the latter is defined to include dual-listed shares on the NSX. Pension funds realized that their investments in South African firms cross-listed on the NSX would qualify as Namibian Investments. In turn, the South African firms were assured of successful IPOs. In a 2021 paper, Atuna and Adusei found that the NSX is the destination that attracts most foreign listings in Sub Saharan Africa with the majority of these emanating from the JSE.⁵⁵

⁵³ Ibid.

⁵⁴ See NSX Annual Report 2020, 54. <https://nsx.com.na/images/reports/rKs9wz.pdf> accessed 15 July 2021.

⁵⁵ Lawrence Madewe Atuna and Michael Adusei, 'Key Determinants of Cross-listing in Sub-Saharan Africa' (2021) *Transnational Corporations Review* 2.

Outside the NSX, cross-listings were more common in the East African region. Due to the shared history as members of the EAC that dates back to 1967 and subsequent MOUs signed between the Uganda Securities Exchange ('USE'), the Nairobi Securities Exchange, and the Dar es Salaam Stock Exchange (DSE), firms in the region have been able to pursue cross-listings between the 3 partner states. Today, out of 17 listed companies on the USE, 8 of those are cross-listed companies from the NSE. These include EABL, Kenyan Airways PLC (KQ), Jubilee Holdings Limited (JHL), Kenya Commercial Bank (KCB), Nation Media Group, Centum Kenya Ltd, Uchumi Supermarkets Ltd (USL) and Equity Bank Kenya Ltd. 6 of these 8 cross-listed companies are also listed on the DSE. In addition, two of these Kenyan-listed companies, Centum and KCB, are also cross-listed on the Rwanda Stock Exchange. UMEME Ltd, Uganda's main electricity distribution company, is also dual-listed on the NSE.

It should be noted, however, that cross-listings have become rarer in recent times, as demonstrated in Figure 5. There have been only 28 cross-listings between 2011 and 2020 and whenever they arise, they have been dominated by the JSE and the NSX. 16 out of the 21 cross-border transactions between 2013-2018 happened on the JSE. Aduna and Adusei also found that it takes between 3 to 15 years before a listed firm in SSA cross lists elsewhere.⁵⁶ With fewer domestic activity and IPOs, it is no surprise that fewer companies are cross-listing outside the NSEX-JSE bubble. In addition, in comparison to outbound activity, discussed in iii) below, the cross-border listings are of less value. Figure 9 below demonstrates this.⁵⁷

⁵⁶ Ibid.

⁵⁷ Information extracted from the PWC, 2020 Africa Capital Markets Watch Report, (PWC, 2021) 14 <https://www.pwc.co.za/en/assets/pdf/africa-capital-markets-watch-2020.pdf> accessed 15 June 2021.

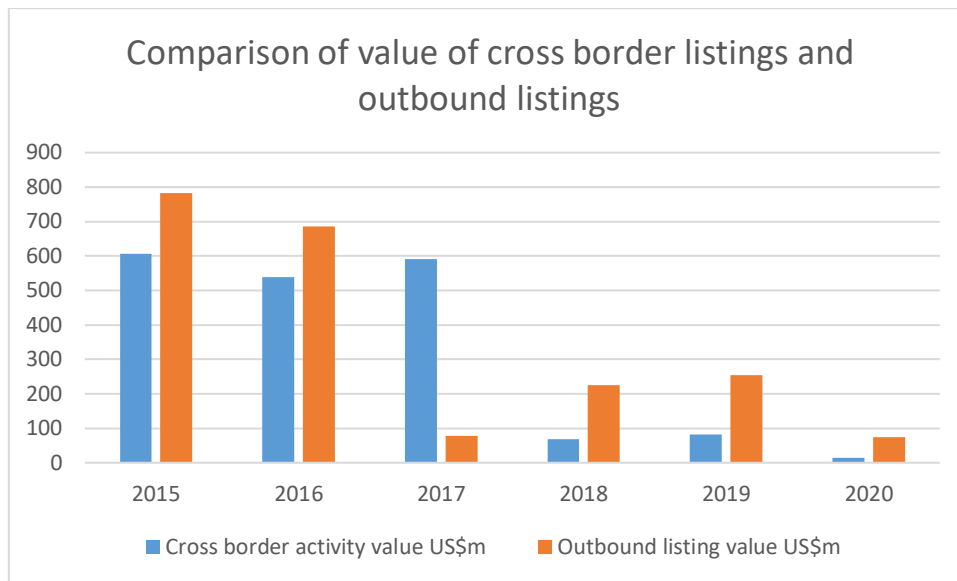


Figure 9: Comparison of Value of Cross-border Listings and Outbound Listings

3.2.2.3 Outbound activity

In some instances, African companies seek listing on exchanges outside Africa. Although outbound activity can be beneficial to the issuers, it represents a challenge for African stock markets which lose these opportunities for listing. It also signals that issuers may not have faith in the African stock exchanges to achieve the values required for capital raising and may point to a lower reputation of the African exchanges in comparison with the destination exchanges of the issuer.

The London Stock Exchange ('the LSE') remains the preferred location for outbound activity with the first African listing on the LSE in 1938 and 115 African companies listed as of 31 May 2019. Many African companies look to the LSE to raise capital and hence there have been several cross-listings and dual listings on the LSE by African companies. On one hand, this can be attributed to the colonial links between Britain and much of Africa, a relationship that remains despite the evolution of the nature of the relationship. On the other hand, the LSE has made a conscious and deliberate effort to pursue African listings. In 2016, the LSE established the LSEG African Advisory Group, composed of leading policymakers, investors, and business leaders, whose role is to identify the challenges and opportunities that arise from the development of African capital markets.

The LSE also produces the 'Companies to Inspire Africa' report on an annual basis. This report identifies the fastest-growing companies on the continent, hence making these companies a target for private equity and venture capital as well as shining a spotlight on them. Such a reputation is valuable when they choose to list. In addition, the LSE has entered into multiple partnerships and collaborations with African stock exchanges including stock markets in Nigeria, South Africa, JSE, Botswana, Tanzania among others. The LSE also launched Elite in Africa, which is an incubator hub targeting the fastest-growing companies with the potential to become listed companies. To track the progress of African companies listed on the LSE, the FTSE UK Listed Africa Index was launched on 20 February 2020. All of these partnerships and innovations have given visibility to the LSE which in turn has made the LSE an attractive destination for listing by African companies.

3.2.2.4 Inbound activity

In rare cases, foreign domiciled companies have sought a listing on a stock exchange in Africa, for the same reasons as to why another African exchange would seek a listing outside its country of domicile. In addition, firms are attracted by the capital control regime in place and the size of the foreign exchange market. Low levels of capital controls usually lead to increased investment flows. Firms consider the amount of foreign exchange trading in the interbank market to determine how liquid the foreign exchange market is.

The JSE leads as a preferred stock exchange for inbound activity. This is not surprising as the OMFIF Indexes rank South Africa at number 1 for market depth, access to foreign exchange, market transparency, tax and regulatory environment, and macro-economic opportunity.⁵⁸ The ABSA Africa Financial Markets Index 2020 placed South Africa's market capitalisation as a percentage of GDP at 275% (2019: 275.4%).⁵⁹ Although South Africa has had a compound annual growth rate over the last five years of just under

⁵⁸ OMFIF, ABSA Africa Financial Markets Index 2020 (OMFIF, 2021) <https://www.omfif.org/wp-content/uploads/2020/10/Absa-Africa-Financial-Markets-Index-2020.pdf> accessed 10 August 2021.

⁵⁹ Ibid 16.

1%, the external debt to GDP ratio at the end of 2019 stood at 22% and is going further to remove currency exchange controls.⁶⁰

The country also has large pension fund assets which create a strong shareholder base for companies seeking a listing on the JSE. Pension funds are a source of capital and since they are usually long term investments, they are attracted to equities markets and hence can increase activity and provide liquidity. It is one of the 4 exchanges in Africa that have pension assets per capita that exceed US \$1,000.⁶¹

In addition, the JSE has a sophisticated financial market infrastructure and is the only stock exchange on the continent with Millennium Exchange, a multi-asset trading platform, similar to that of the LSE, which was launched in June 2019. The JSE also has a real-time clearing platform that simplifies settlement and reduces the settlement risk. These factors make the JSE the exchange of choice for foreign listed companies. However, even with these factors, inbound listings are still very rare, usually two to none in a year, and even with the few that come in, trading volumes are still low as illustrated in Table 5.

3.2.3 Capital markets regulation and policy

Regulation is very important in the development of financial markets as it instills confidence in the market. It is for this reason that the International Organization of Securities Commissions (IOSCO) was formed with membership of the different bodies that regulate securities markets globally. According to IOSCO, regulation fulfils three objectives; protection of investors, reduction of systemic risk, and ensuring that markets are fair, efficient, and transparent.⁶² Regulation remains one of the controversial aspects of the markets. Whereas advocates of investor protection require the imposition of stringent rules on the market, the industry advocates for deregulation or less stringent regulatory frameworks. In this discussion of regulation and policy, consideration shall be made of securities market

⁶⁰ Ibid, 33.

⁶¹ Ibid 28.

⁶² International Organization of Securities Commissions, Objectives and Principles of Securities Regulations, June 2010. <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> accessed 1 October 2019.

regulation i.e., the regulation made exclusively for the securities market and other regulations by the government which have an impact on securities markets such as tax regimes, macro-economic and fiscal policies.

3.2.3.1 Securities market regulation

When it comes to determining what regulatory system to adopt, the regulator has to strike a delicate balance between investor protection and market development. Sparrow notes that 'the essence of the [regulatory] craft lies in picking the right tools for the job, knowing when to use them in combination, and having a system for recognizing when the tools are inadequate so that new ones can be invented.'⁶³ Traditionally, there are two regulatory frameworks; self-regulation and government-led regulation. For many years, securities regulators adopted the US model of securities regulation that stems from the 1933 Securities Act. Under this model, Exchanges are seen as self-regulating organisations (SRO) but in the wake of the Enron scandals, regulators are rethinking regulation models. In 2000, for example, the Financial Services Authority was created in the UK, superseding the self-regulatory model that existed and creating a centralized oversight regime presided over by the government.

Due to colonialism, many regulatory frameworks for securities markets in Africa borrowed heavily from that of the colonial masters. When Kenya sought to set up a stock exchange in 1953, the proposal was sent to the British government (since the country was still a colony) and the Nairobi Stock Exchange was only set up on clearance of the LSE as an overseas stock exchange.⁶⁴ The first rules of the NSE were therefore transplanted from Britain. The transplant of regulation from elsewhere remains a real challenge for securities markets to date.

African financial markets have not been able to sever the cord with their former colonial masters. The electronic trading system of the Bourse de Tunis was established with the assistance of Euronext Paris.⁶⁵ In South Africa, the

⁶³ Malcolm Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (The Brookings Institution Press 2000).

⁶⁴ Sheilla Nyasha, NM Odhiambo, 'The Dynamics of Stock Market Development in Kenya' (2014) 30(1) *The Journal of Applied Business Research* 74.

⁶⁵ Bruce Hearn Jenifer Piesse, 'Sector Level Cost of Equity in African Financial Markets' (2009) *Emerging Markets Review* 261.

LSE was very instrumental in the upgrade of the JSE's sophisticated trading system which is also used for the NSX. The settlement system of the JSE is based on technology used in the Swiss Stock Exchange.⁶⁶ Benchmarking on regulation from other jurisdictions is not necessarily a bad thing but the real challenge arises when the stock markets are not at the same level of development or sophistication and the regulation is not domesticated for the local context. Stock markets are still at an embryonic stage in Africa and therefore are not as sophisticated and developed for certain regulatory frameworks to apply.

The challenge with the regulatory frameworks is that either the regulations are too stringent or inadequate for the level of development or state of the market. Regulation should promote rather than inhibit innovation in the securities market. Pardy has noted that one of the building blocks of a sound securities market is a legal, regulatory and institutional infrastructure capable of supporting the efficient operation of the securities market.⁶⁷ One of the commonly given examples is the fact that other than the JSE, exchanges in Sub Saharan Africa do not require environmental, social, and governance (ESG) reporting which is essential for the creation of transparent and efficient markets and enabling an efficient flow of information.⁶⁸ Between 2017 and 2018, South Africa was wrecked with several corporate scandals⁶⁹ and in response, in 2019 the JSE introduced proposed amendments to enhance disclosures and strengthen corporate governance standards.⁷⁰

Regulation is particularly important for SMEs and startups. SMEs make up 99% of all firms in developing countries and the situation is not any different

⁶⁶ Ibid 262.

⁶⁷ Robert Pardy, 'Institutional Reform in Emerging Securities Markets' (1992) Policy Research Working Paper 907, 3 <https://documents1.worldbank.org/curated/pt/384111468739250527/pdf/multi-page.pdf> accessed 4 June 2021.

⁶⁸ See ACCA, 'Stock exchanges in Sub-Saharan Africa: Capturing Intent Towards ESG Requirements' (ACCA Global, July 2014) <https://www.accaglobal.com/ab108> accessed 9 August 2020.

⁶⁹ See 'Appendix F: Summary of Select Corporate Scandals in South Africa' in Warren Maroun and Dannielle Cerbone, *Corporate Governance in South Africa* (De Gruyter Oldenbourg 2020).

⁷⁰ The Draft Companies Amendment Bill first published for public comment in September 2018 was further revised and a new bill released on 1 October 2021. See Department of Trade, Industry and Competition, 'Companies Amendment Bill, 2021' https://www.gov.za/sites/default/files/gcis_document/202110/45250gen586.pdf accessed 14 October 2021.

in Africa.⁷¹ SMEs are seen as the heart of African economies but have immense financing needs. They struggle to access capital for growth, a need that stock markets would adequately meet. However, the securities regulatory framework makes this avenue impossible to navigate for such SMEs. Admission requirements are stringent requiring detailed and audited financial statements for prolonged periods, profitability, the appointment of various transaction advisors such as selling agents, underwriters, sponsoring brokers, reporting accountants, and auditors, and large sums of money in listing and transactional fees. For ambitious SMEs starting, these requirements are impossible to fulfil.

In certain instances, stock markets have created alternative boards where SMEs can be admitted. Such boards can be found in Ghana, Kenya, Nigeria, Tanzania, and Uganda. However, these boards have attracted few companies. For example, having failed to attract any company to list on the Alternative Investment Market Segment, the Uganda Securities Exchange introduced the Growth Enterprise Market Segment in 2012 and nine years later, there has been no listed company on this segment. The Ghana Alternative Market (GAX) established in 2013 has only attracted eight companies with six of these listed by 2015 and no listing in 2017, 2019 or 2020. The Nigeria Exchange's Alternative Securities Market has attracted four companies while its Growth Board has attracted five companies. The Botswana Tshipidi SME Board, Malawi Stock Exchange's Alternative Investment Market and Rwanda's Alternative Market Segment have not attracted any companies.

The other challenge relates to dual regulation which increases the regulatory burden for issuers. For example, an investment advisor and fund manager may be regulated by the Capital Markets Authority, the stock market, and the pensions/retirement benefits authority. Fund managers on the Uganda Securities Exchange face this challenge where they are required to obtain permits/authorization from the Uganda Retirement Benefits Regulatory Authority and the Capital Markets Authority to conduct fund management. In

⁷¹ Sveinung Fjose, Leo A Grunfeld and Chris Green, 'SMEs and growth in Sub Saharan Africa' (2010) MENON Publication No 14/2010, <https://www.norfund.no/archive/Bilder/Publications/SME%20and%20growth%20MENON%20.pdf> accessed 8 June 2021.

addition, in the era of SROs, intermediaries find themselves regulated by both the exchange and the regulator which increases the regulatory burden.

For the public to have confidence in the market and for information efficiency, stock markets need transparent and credible financial disclosure rules.⁷² Corporate governance standards are important as they not only attract investors but also determine how much investors would be willing to pay for a share.⁷³ Research shows that investors are more willing to pay a premium for companies with sound corporate governance systems over their counterparts with bad corporate governance even though the two companies may be at the same level of financial performance.⁷⁴ In addition, enforcement systems must be functional. Instances of market abuse and market manipulation must be investigated, and fines imposed to preserve the integrity of the market. However, there are very few successful prosecutions of insider traders and very few penalties issued to those who do not comply with regulation. As a result, investors are likely to lose confidence in the enforcement systems at exchanges and authorities.

3.2.3.2 Macro-economic and fiscal policy

Although macroeconomic stability is an issue outside the control of the stock market regulators, it is crucial for the development of the stock market. The second building block of a sound securities market is a macroeconomic and fiscal environment conducive for demand and supply.⁷⁵ The stability of the macroeconomic environment is crucial because macroeconomic volatility worsens information failure, and this is particularly the case when adverse macroeconomic announcements are made.⁷⁶ Information asymmetry leads to stock market volatility as it affects trading volumes which in turn affects the

⁷² Lemma W Senbet and Isaac Otchere, 'Financial Sector Reforms in Africa: Perspectives on Issues and Policies' (World Bank Conference on Development Economics, Dakar, Senegal, January 2005) 47.

⁷³ Senbet (n 41) 134.

⁷⁴ Paul A. Gompers, Joy Ishii and Andrew Metrick, 'Corporate Governance and Equity Prices' (2003) 118(1) *The Quarterly Journal of Economics* 107.

⁷⁵ Pardy (n 67) 2.

⁷⁶ Goeij and Marquering used the daily returns on the S&P 500 index and the NASDAQ index to study the impact of macroeconomic news announcements on the conditional volatility of stock and bond returns. They found that asymmetric volatility can be largely explained by 'macroeconomic announcement shocks.' See Peter DeGoeij and Wessel Marquering, 'Do Macroeconomic Announcements Cause Asymmetric Volatility?' (2002) ERIM Report 2002-103, <https://ideas.repec.org/p/ems/eureri/254.html> accessed 5 June 2021.

general stock market.⁷⁷ Inflation rates are key as investors will generally be unwilling to invest in stock markets where the inflation rates are either unpredictable or generally high.⁷⁸ Therefore, governments are required to establish macro-economic policies that are conducive to the development of the securities markets.

Financial markets generally require a sound taxation and accounting regime and provisions for the protection of investor rights. They require low inflation rates and a good rate of GDP per capita. In the wake of the 1990s structural adjustment policies of the IMF, many stock markets in Africa were either set up or boosted as they benefitted from the financial sector reforms. The reform package included interest rate liberalizations, privatisation of state-owned enterprises, and removal of credit ceilings, all of which were a reversal of post-independence regressive financial regimes. The implementation of the structural adjustment policies in Ghana led to not only interest rates reform but also deregulation of the foreign exchange regime which included the devaluation of the Cedi, the introduction of a floating system where the foreign exchange was auctioned at two windows and strengthening the role of market forces in determining the exchange rate.⁷⁹

These changes were also accompanied by further changes in monetary policies such as improved resource mobilization through enforcement of taxes and an improved fiscal discipline.⁸⁰ The Financial Sector Adjustment Programme (FINSAP) in Ghana substantially contributed to the development of the securities industry. Although the regulatory framework for a securities market had existed since 1971, the first Council of the Exchange was only instituted during the FINSAP in 1990 and it is this Council that issued the regulations that laid the foundation for the operation of the stock exchange and paved the way for further regulations such as the Securities Industry Law

⁷⁷ See Mutalib Anifowose, 'Information Asymmetric Effect on the Stock Return Volatility in Nigerian Capital Market' (2012) 14(2) *Accounting Frontier* 47.

⁷⁸ Charles Amo Yartey and Charles Komla Adjasi, 'Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges' IMF Working Paper WP/07/209 (International Monetary Fund, 2007) 16.

⁷⁹ Joseph J Norton and Mads Andenas, *Emerging Financial Markets and the Role of International Financial Organizations* (Kluwer Law International 1996) 96.

⁸⁰ *Ibid.*

of 1993 which established the Securities Regulatory Commission responsible for regulation, supervision, and oversight.⁸¹

Although the macroeconomic and fiscal policies are important for stock market development, many African countries are still struggling with maintaining a stable macroeconomic environment and/or enacting the relevant fiscal policies that may favor the stock market. Philip Hans Franses studied the annual inflation rates in 47 of 54 African countries between 1960-2015 and found high rates of inflation in the majority of the countries usually due to devaluation of the local currency, poor economic and monetary policy, falling world commodity prices as well as reduction in demand for main export products.⁸² Aliyu explored the impact of inflation on stock returns and volatility in Nigeria and Ghana and found that the countries needed to enact measures to restrain inflation to improve stock market returns and boost investor confidence.⁸³ In Kenya, the government was forced to repeal Section 33b of the Banking Act in 2019 and hence repeal the interest rate cap that had been imposed by the government.⁸⁴ All of these show the importance of good macroeconomic and fiscal policies to the development of the stock market.

The taxation regime has been identified as a factor that can either hinder or lead to the development of capital markets.⁸⁵ The taxation regime also determines the volume and inflows of foreign portfolio investment in emerging markets.⁸⁶ Investors seeking to make an investment in any jurisdiction and any issuer intending to raise capital and pay dividends need to factor in the taxation regime. Many African jurisdictions impose securities transfer taxes (STTs) and although the concept in itself is not unique or wrong

⁸¹ Ibid 108.

⁸² Philip Hans Franses, 'Inflation in Africa, 1960-2015' (2018) 57 *Journal of International Financial Markets, Institutions and Money* 261.

⁸³ Shehu Usman Aliyu, 'Does Inflation have an impact on stock returns and volatility? Evidence from Nigeria and Ghana' (2011) 4 *International Conference on Economics and Finance Research IPEDR* 1.

⁸⁴ The government had kept the lending rate by commercial banks at 4 basis points above the Central Bank of Kenya rate since 2016. Having seen the negative impact of the cap, the President of the Republic of Kenya refused to approve the 2019/2020 Budget unless the cap was removed.

⁸⁵ Eno L Inanga and Chidozie Emenuga, 'Taxation of Financial Assets and Capital Market Development in Nigeria' AERC Research Paper 47/1996 (African Research Consortium, 1996).

⁸⁶ Shah A and J Slemrod, 'Do Taxes Matter for Foreign Direct Investment?' (1991) 5(3) *The World Bank Economic Review* 473-91.

per se, the application and rate of the STT can act as a deterrent and make the market unattractive.⁸⁷ Economic theory suggests that imposition of STTs harms the efficiency of the securities market by 'choking off trades that would be beneficial to parties to the transaction.'⁸⁸ In Sweden, for example, the government imposed STTs starting in 1984 but ultimately had to scrap the tax in 1990 as it became largely unpopular, was seen as a deterrent to investment, and had a negative effect on trading in Swedish stocks.⁸⁹ Stamp duty on share transactions in the UK started at 1% in 1974, increased to 2%, and then reduced to 1% in 1984 and finally to 0.5% since 1986, reflecting sentiments of the public.⁹⁰ STTs are also seen as a deterrent to investment as they impact the return on investment. Therefore, the presence of high rates on STTs could deter growth of the stock markets.

Apart from taxes on dividends, governments impose capital gain taxes on the disposal of shares as well as registration. The table below provides an overview of the applicable tax regime to transactions on the stock markets of select African countries.

Country	Dividend rate	tax	Capital gains tax rate	Other taxes
Mauritius	0%		0%	
Morocco	15% for residents and non-residents	both and	0%	20% VAT
Namibia	20% for residents 10% if a resident owns	non- a owns	0%	10% withholding tax on interest income except if the entity making the payment is the state.

⁸⁷ A Securities Transfer Tax (STT) is a tax that is payable on the transfer of the beneficial ownership of a security such as a share and is usually payable by the broker who then recovers it from the buyer.

⁸⁸ Mike Hawkins and Julian McCrae, 'Stamp Duty on Share Transactions: Is There a Case for Change?' (2002) *The Institute of Fiscal Studies* 7.

⁸⁹ John Y Campbell and Kenneth A Froot, 'International Experiences with Securities Transaction Taxes,' in Jeffrey A Frankel (ed), *The Internationalisation of Equity Markets* (University of Chicago Press 1994) 277-308.

⁹⁰ Mike Hawkins and Julian McCrae, 'Stamp Duty on Share Transactions: Is There a Case for Change?' (2002) *The Institute of Fiscal Studies* 3.

	25% of the share capital.		
Nigeria	10% for non-resident recipients; 7.5% for residents of countries that have double tax agreements with Nigeria.	0%	10% interest tax rate (7.5% if the resident is from a country with a double tax agreement with Nigeria) 0.075% stamp duty 5% VAT on securities transactions
Zambia		20%	0% 20% interest tax rate for non-residents and 15% for payments to residents.
Egypt	10% for non-residents in relation to unlisted shares. 5% if the non-resident is a corporate shareholder of listed securities.	10% for residents disposing off listed shares and 22.5% for unlisted shares. No CGT on non-residents disposing off listed shares but 22.5% for unlisted shares.	0.3% levy on acquiring 33% or more of the shares in a resident company .
Kenya	5% for residents of the East African community. 10% for foreign owners	0%	For residents holding less than 12.5% shareholding, exempt while non-residents pay 15% regardless of shareholding.

JSE	15%	10%	0.25% STT
Rwanda	5% for residents of the East African Community 15% for foreign owners		
Zimbabwe	10% for residents and non-residents	1%	15% interest tax
Malawi	10%	30% if the shares have been owned for less than 12 months.	

Table 7: Tax rates applicable to securities transactions on selected African exchanges.

Companies still have to pay the traditional corporate income tax on top of withholding taxes on payment of dividends and interest payments. This is worsened by the fact that many African countries do not give incentives for listing such as relief from corporate tax or tax holidays for a stated period. Considering the high costs involved in coming to the market as well as in remaining compliant with the continuing listing obligations, issuers may be discouraged from pursuing a listing. In addition, investors will generally avoid investments in countries with high tax rates or they will conduct their affairs in a way as to gain from tax avoidance schemes.

3.2.4 Market infrastructure.

Stock markets cannot exist without the necessary infrastructure which includes trading systems, settlement systems, and clearing houses as well as the intermediaries in this chain especially custodians, broker-dealers, and market makers. Infrastructure also encompasses regulatory institutions including the SROs and authorities in charge of the SROs. Other institutions that are required include well-functioning, impartial and knowledgeable judiciary, and enforcement bodies.

Regulatory institutions in Africa have been criticised for being unable to offer adequate supervision of the market.⁹¹ These regulatory institutions are the stock exchanges and capital markets authorities. The legal status of stock exchanges has long been an area of concern. Some African stock markets are organised as mutual associations. Mutualisation is criticised for breeding bad corporate governance practices since the ownership of the Exchange is not distinct from trading rights. The intermediaries who are supposed to be regulated are also the owners of the regulator (the stock exchange) which poses a conflict of interest and erodes investor confidence.

Since the first demutualisation of a stock exchange in 1993 (the Stockholm Exchange) the trend to demutualise has spread rapidly into Canada, Europe, and parts of Asia. As of the end of 2018, only 10 stock exchanges in Africa were demutualized.⁹² Even in cases where stock exchanges are demutualised, the journey to demutualisation has been long. Even though the demutualisation process for the Nigerian Exchange started in 2002, the Demutualisation Act was only passed and assented to on 29th August 2018 to allow the Nigerian Exchange to convert into a public limited company. The demutualisation was finally concluded in March 2020, 18 years later. In Kenya, a demutualisation committee was formed as early as 2005 but demutualisation was only completed in 2014. It, therefore, makes demutualisation a long process in exchanges that have to fulfil other critical functions such as surveillance and regulation. The table below shows the status of demutualisation for the African stock markets that have successfully undergone a change in legal status.

	Year of demutualisation	Year of self-listing
Mauritius Stock Exchange	2000	-

⁹¹ Senbet et al (n 28).

⁹² This number includes stock exchanges that were formed, from the onset, as demutualized entities. These include the stock exchanges of Rwanda, Seychelles, Lesotho and BRVM.

Uganda Securities Exchange	2017	-
Dar es Salaam Stock Exchange	2015	2016
Nairobi Securities Exchange	2014	2014
Rwanda Stock Exchange	2011	-
Bourse de Casablanca	2016	-
BRVM	1998	-
Johannesburg Stock Exchange	2005	2006
Botswana Stock Exchange	2018	-
Nigeria Exchange Limited	2020	-

Table 8: Selected demutualised stock exchanges in Africa

Akpesey argues that the era of mutual exchanges is long gone and that exchanges have recognised that trading infrastructure and corporate governance standards and structures are essential to reducing transaction costs and attracting investors as well as issuers.⁹³ Demutualisation improves corporate governance, diversifies shareholding of the Exchange, and enables the Exchange to self-list and raise the necessary capital.⁹⁴ In addition, the

⁹³ Prince Akpesey, 'Publicly Owned Stock Exchanges - Prospects and Challenges' *Daily Graphic* (Ghana, 11 June 2008) <http://www.modernghana.com/news/169336/1/publicly-owned-stock-exchanges-Prospects-and-chall.html> accessed on 12th November 2020.

⁹⁴ Alfredo Mendiola and Maureen O'Hara, 'Taking Stock in Stock Markets: The Changing Governance of Exchanges' (SSRN, August 2003) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=431580 accessed 19 September 2021.

move to for-profit status may give the much-needed push to exchanges to diversify their product offerings and make a profit for shareholders.⁹⁵ Without demutualization, stock exchanges continue to exhibit bad corporate governance and a clear conflict of interest, all of which make them undesirable to institutional investors.

In addition, the change to a demutualised exchange is usually accompanied by conversion to an SRO. SRO status confers on exchanges the right to set regulations governing their members and the activities that take place on the exchange. At the same time, the capital markets authorities maintain supervisory oversight over the exchange and the members, which creates a dual regulatory system. Dual regulatory systems are common in African stock markets and increase the regulatory burden on intermediaries. There is a potential for conflict of interest between the regulator's requirements and the exchange's requirements. For cross-border security traders and issuers, this is a nightmare as they have to conform to even more regulations that are not similar. Therefore, regulators and exchanges find themselves at the crossroads: needing to co-exist and still maintain their regulatory powers and without procedures to manage potential conflicts of interest, the intermediaries and issuers have had to shoulder the regulatory burden as more exchanges demutualize.⁹⁶

Another challenge that stock markets face is related to the trading and settlement systems. Clearing and settlement of securities involves confirming the trade, clearing the trade and the delivery and settlement take place simultaneously. Where cross-border settlement is required, the parties must all have access to the systems so that delivery and receipt can happen. For years, stock markets used manual trading and settlement systems and for Africa, this continued until the mid-2000s. The settlement was done through physical delivery of certificates as well as funds in order to complete the

⁹⁵ For further reading on demutualization, see Oliver Hart and John Moore, 'The Governance of Exchanges: Members' Cooperatives versus Outside Ownership' (1996) 12(4) *Oxford Review of Economic Policy* 53; Jonathan R Macey and Maureen O'Hara, 'Globalization, Exchange Governance and the Future of Exchanges' (1999) 2 *Brookings-Wharton Papers on Financial Services* 1; Reena Aggarwal, 'Demutualization and Corporate Governance of Stock Exchanges' (2002) 15(1) *Journal of Applied Corporate Finance* 105-13.

⁹⁶ CFA Institute, 'Self-Regulation in Today's Securities Markets: Outdated System or Work in Progress?' (CFA Institute Centre for Financial Market Integrity, 2007) 14.

transaction which was not ideal where the volume of transactions was large, and it was also not safe to handle large sums of money and distribute it to the different sellers.

Stock markets now use automated systems to conduct both trading and settlement. For emerging markets, a good clearing and settlement system is particularly important as it enables a seamless and efficient system of buying and selling securities especially for international investors who make up the majority of investors in stock markets in Africa. Clearing and settlement systems must remain proactive rather than reactive and must always evolve to respond to the demands of globalization.

In 1992, IOSCO released a Blueprint for clearing and settlement in emerging markets which recommended several measures to be fulfilled by exchanges by 1992. These included trade comparisons on T+1, a Delivery versus Payment (DVP) system, removal of barriers to securities lending, development of a depository, payment on the same day, and a settlement on T+3. The Blueprint also identified key legal issues that must be explored when establishing centralized clearing and settlement mechanisms. These legal issues included the use of netting arrangements where participants would be able to complete transactions higher than they would have achieved due to a netting arrangement, dematerialization of securities, and immobilization.⁹⁷ In 2001, IOSCO released further recommendations for securities settlement systems which included clear and transparent regulatory frameworks, settlement cycle of T+3 and trade confirmation on T+0 for direct market participants, corporate governance arrangements for depositories, the need for transparency and clear communication procedures and standards as well as regulation and oversight. Most importantly, depositories settling cross-border trades were required to design and operate these links in such a way that risks associated with cross-border settlement are minimized.⁹⁸

⁹⁷ See International Organization of Securities Commissions, 'Clearing and Settlement in Emerging Markets: A Blueprint' October 1992. <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD21.pdf> Accessed on 14th November 2019.

⁹⁸ See Technical Committee of the International Organization of Securities Commissions, Recommendations for Securities Settlement Systems (Bank for International Settlements, 2001)

Today, many settlements and clearing systems in Africa are not in compliance with these recommendations. Securities have not been immobilized or dematerialized and physical share certificates are still common. This raises safety and efficiency concerns and slows down the settlement system as well as trading. Whereas the settlement cycle in the USA and most of Europe is T+2, African countries are either using T+3 or T+5. As a result, they have not harmonized with global standards and cannot compete on a global level. The table below shows the settlement cycle of select African stock exchanges as of December 2020.

Stock exchange	Settlement	Stock exchange	Settlement
Ghana	T+3	Botswana	T+3
BRVM	T+3	Malawi	T+5
JSE	T+3	Egypt	T+2
Lusaka	T+3	Rwanda	T+2
Nairobi	T+3	Zimbabwe	T+3
Casablanca	T+3	Uganda	T+3
Nigeria	T+3	Casablanca	T+3
Mauritius	T+3	Namibia	T+5

Table 9: Settlement cycles of selected African stock exchanges

In instances of cross-border settlement, it becomes hard to clear and settle in jurisdictions that have different settlement cycles and currencies, and hence the risk of default is high. It also increases the cost of compliance and reduces the efficiency of the clearing and settlement system. Therefore, although the discussion may have focused on problems in the individual stock exchange, such problems become magnified when issuers and intermediaries seek to conduct cross-border trading and settlement across African countries. Infrastructure also encompasses market participants such as intermediaries. Stock markets need brokers, market makers, custodians, registrars, and

investment advisors to conduct business. Each of these parties plays a crucial role in the survival of the stock market. The market makers buy and sell specified securities to enable an orderly and stable market. The brokers execute client orders while custodians settle trades and ensure the safekeeping of client securities. The registrars offer secretarial and bookkeeping services to the issuers.

Large stock exchanges such as the JSE, Nigeria Exchange, and the EGX tend to have many intermediaries. However, the rest of the stock markets have few intermediaries. For example, as at the end of 2018, there were just nine stockbrokers on the Stock Exchange of Mauritius, six on the USE, twenty-four on the NSE, fourteen on the DSE, four on the Malawi Stock Exchange, and six on the Lusaka Stock Exchange.⁹⁹ Few brokers mean that investors have limited choice and hence low bargaining power. As a result, transaction costs may increase and discourage investment and market activity.

3.3 Conclusion

Zig Ziglar once said that 'the first step in solving a problem is to recognise that it does exist.' In deciding a solution, one must not only identify the problem but also quantify the problem to determine how serious or minor it is. In addition, this requires digging at the roots of the problem rather than just hacking the leaves.¹⁰⁰ Much of the literature on African stock markets makes a quick list of all the challenges facing the markets with no attempt at a deep interrogation of these challenges. In fact, there is almost an assumption that everyone knows the challenges and hence they do not require a thorough examination. This chapter took an alternative view to show what exactly the challenges are and how serious these challenges are, using a data-based analysis.

It is clear from the preceding analysis that there is a concrete basis for the concerns that stock markets raise for regulators, policymakers, potential issuers, and market participants. The advent of structural adjustment policies and especially the FINSAP and privatisation gave a much-needed boost to the

⁹⁹ Information about the number and identity of brokerage firms as well as other market intermediaries can be found on the individual websites of the stock exchanges and/or regulatory authorities.

¹⁰⁰ This is a quote from Anthony J D'Angelo.

stock markets by requiring states to divest state enterprises with listing as one of the privatisation modes. Today, the story of stock market development in Africa is gloomy. It is a story of illiquidity, low market capitalisation, low levels of activity, weak and inadequate regulatory systems, unfavourable macro-economic and fiscal policy, adverse tax policy, and unsuitable and underdeveloped market infrastructure. The various data sets in this chapter have demonstrated these challenges extensively.

The analysis in this Chapter on the challenges facing stock markets in Africa hence lays the basis for Chapter 4. As one of the solutions to these challenges, regulators and policymakers in Africa are currently engaged in stock market integration projects which are discussed in Chapter 4 in detail. The analysis in this Chapter also explains the efforts to resolve the impediments to integration in Chapters 5 and 6 and lastly the calls for harmonisation of regulatory frameworks as the alternative proposal to integration that is suggested in Chapter 7.

CHAPTER FOUR

REGIONALISM AND INTEGRATION OF CAPITAL MARKETS IN AFRICA: ASPIRATIONS AND REALITIES

A discussion on the integration of capital markets in Africa can never be complete without a discourse on regionalism and regionalisation. Almost all stock market integration projects are based within regional groupings and regional economic communities (RECs) and are based on the treaties, directives, and protocols of the RECs. The RECs on the other hand are not only the building blocks of an integrated Africa but also the conduits for the formation of the African Economic Community (AEC), the flag post of economic integration in Africa. Therefore, the integration of capital markets is in furtherance of the creation of the AEC by the RECs and hence necessitate a discussion of the RECs and their place in stock market integration. I explore these complex relationships and history in this chapter.

In Part 4.1 of the Chapter, the origins of regionalism and regional integration are revisited. To understand the integration of stock markets in Africa, it is important to understand regionalism since it is the basis of such pursuits. The discussion commences with the Organisation of the African Union (OAU) which was the first formal attempt at a continental level display of unity, a concept that has been at the forefront of a post-colonial Africa. Due to the importance of RECs to the stock markets integration, Part 4.2 examines the concept of RECs and regional groupings (RGs) which includes origin, activities, successes, and failures with a focus on economic integration. In Part 4.3, the focus shifts to the integration of stock markets in Africa. Specifically, the discussion delves into the advantages of integration for stock markets before examining the different stock market integration models applied in Africa. A conclusion is then provided.

4.1 The Concept of Regionalism in Africa

For decades, social scientists have failed to agree on a definition of regionalism based on the fact that regionalism and incidental terms such as region, region-building, and regional cooperation are seen as moving targets

whose definition changes as their signals also change.¹ When defining regions, there is a general acknowledgement that the definition of a region will vary depending on how the political actors construe it but a more comprehensive view looks at regions as consisting of 'states which have some common ethnic, linguistic, cultural, social and historical bonds.'² Regional integration refers to 'processes of complex social transformations characterised by the intensification of relations between independent sovereign states.'³ It connotes a move from different isolated units to one unit.⁴ On the other hand, Bourenane defines regional cooperation as a 'collaborative venture between two or more partners with common interests in a given issue.'⁵

Regionalism, which is used interchangeably with regionalisation,⁶ is mainly used to refer to a specific project hence defined as a 'state-led or states-led project designed to reorganise a particular regional space along defined economic and political lines.'⁷ Regionalism is not a new phenomenon. It has existed for centuries although the type of regionalism that is the focus of many studies is the one that emerged post the Second World War and the Cold War.⁸

4.1.1 History of Regionalism in Africa

¹ Bjorn Hettne, 'Beyond the 'New' Regionalism' (2005) 10(4) *New Political Economy* 544.

² Louis. J. Cantori and Steven L Spiegel, *The International Politics of Regions: A Comparative Approach* (Prentice Hall 1970).

³ Philippe De Lombaerde (ed), *Assessment and Measurement of Regional Integration* (Routledge 2006) 9.

⁴ Luk Van Langenhove, 'Regionalism as a Political Vision' (2005) UNU-CRIS Occasional Paper 0-2005/15 <https://cris.unu.edu/regionalism-political-vision-possibilities-and-limits-global-approach-issues-regional-integration> accessed 20 August 2021.

⁵ Naceur Bourenane, 'Theoretic and Strategic Approaches,' in Réal Lavergne (ed), *Regional Integration and Cooperation in West Africa: A Multidimensional Perspective* (Africa World Press 1997) 50-51.

⁶ Fawcett argues that these two are not necessarily the same and calls for a distinction between the bottom-up approach of regionalisation (undirected socio-economic interactions between non state actors) and the top-down approach (the regionalism that occurs at the level of making political decisions to cooperate in different areas including economically. Louise Fawcett and Helene Gandois, 'Regionalism in Africa and the Middle East: Implications for EU Studies' (2010) 32(6) *Journal of European Integration* 619.

⁷ Anthony Payne and Andrew Gamble, 'Introduction: The Political Economy of Regionalism and World Order' in Andrew Gamble and Anthony Payne (eds), *Regionalism and World Order* (Macmillan 1996) 2.

⁸ Fredrik Soderbaum, *The Political Economy of Regionalism: The Case of Southern Africa* (Palgrave Macmillan 2004) 16.

Africa has a very long and complex history of regionalism endeavours⁹ involving parallel attempts to integrate at both the continental level and the regional level. This multi-level regionalism can be attributed to Africa's colonial history that dates back to the Berlin Conference of 1884-1885. Until the Berlin Conference, Africa did not have mapped borders although kingdoms knew where their geographical influence stopped. At the Berlin Conference, the colonialists who were strangers to this arrangement embarked on a process of designating boundaries,¹⁰ which did not take into consideration the arrangements that existed at the time.¹¹ The creation of territories was the only way to reconcile the competing interests of the British, French, Belgians, Portuguese, Italians, Germans, and Spanish who all wanted a piece of the 'dark continent.'¹² Harrison Church notes that most of the current political map of Africa was drawn between 1885 and 1904 and completed by 1919.¹³ There are a few exceptions such as the division of the former German colonies after the end of the first World War¹⁴ and the division of nations such as Sudan and South Sudan.

⁹ For purposes of this Chapter and thesis in general, the terms regionalism, regional integration and regionalisation are used interchangeably.

¹⁰ However, the view that the Berlin conference started the partition is disputed by Crowe and Pakenham who argue that the Scramble precipitated the Berlin Conference and that the colonial powers had already embarked on the race to get a piece of Africa. The conference has been subject of many writings, all of which give some form of account of what took place. See Sybil Eyre Crowe, *The Berlin West African Conference 1884-1885* (Longmans Green & Co 1942); Rosemarie Julie Gavin and J A Betley, *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884/1885* (Ibadan University Press 1973); Stig Forster, Wolfgang Mommsen and Ronald Robinson (eds), *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press 1988); Thomas Pakenham, *The Scramble for Africa: 1876-1912* (Abacus 1991).

¹¹ Lord Salisbury admitted this mistake when he noted that '[we] have been engaged in drawing lines upon maps where no white man's foot ever trod; we have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where the mountains and rivers and lakes were.' See Adkunle Ajala, 'The Nature of African Boundaries' (1983) 18(2) *Africa Spectrum* 180.

¹² The Conference culminated into the General Act which had four Declarations and two Acts of Navigation (for the Congo and Niger rivers) and established free trade in the Congo Basin, forbade monopoly and noted that the Congo Basin would not belong to any one state. However, the Act did not have a clause expressly partitioning the continent but the Conference in itself encouraged those with interests in the continent to take position and lay claim to the territories they were interested in. See Matthew Craven, 'Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade' (2015) 3(1) *London Review of International Law* 31.

¹³ Ronald James Harrison Church, 'African Boundaries' in William Gordon East and A.E. Moodie (eds), *The Changing World: Studies in Political Geography* (George G. Harrap 1956) 740.

¹⁴ See John Robert Victor Prescott, *The Geography of Frontiers and Boundaries* (Aldine 1965) 134.

The colonial masters took over a demarcated region such as the British in Southern Africa (covering Bechuanaland, Northern Rhodesia, eSwatini, Basutoland), the British in East Africa, the Belgians in Congo, and the French in West Africa. It was common for the colonies to adopt the same language as their masters, have the same regulations, the same governance structure, and for there to be cooperation among countries that were ruled by the same colonial master. That may, to some extent, explain why it was easier to establish a regional stock exchange in West Africa and Central Africa after all these countries shared the same colonial past and had the same language.

4.1.2 Pan Africanism: The Birth of the Organisation of African Unity (OAU)

With the end of colonialism and African states gaining independence, leaders grappled with the idea of how to move forward, recover from the effects of colonialism and work towards the economic socio-political development of the new nations. The answer lay in unity. Celebrated Pan Africanist and Ghana's first President, Dr. Kwame Nkrumah, in his famous speech entitled 'Africa Must Unite' noted that; 'our freedom stands open to danger just as long as the independent states of Africa remain apart.'¹⁵ Unity was the central theme of Pan Africanism and the six Pan African conferences held between 1900 and 1953.¹⁶ Pan Africanism advanced the notion of a United States of Africa and the signing of the Charter of the Organisation of African Unity ('the Charter') in 1963 was the culmination of years of efforts by the Pan-Africanists to front a united Africa; a grouping of sovereign states, rather than one political kingdom called Africa, which Kwame Nkrumah and other radicals had hoped for. Even those who opposed this approach joined in and signed the Charter, after being promised that their ideas would be explored at a later stage.¹⁷ Article 1(1) of the Charter lists the objectives of OAU as, among others, to promote the unity and solidarity of the African states.

¹⁵ Kwame Nkrumah, *Africa Must Unite* (Frederick A Praeger 1963) xvii.

¹⁶ Marika Sherwood, 'Pan-African Conferences, 1900-1953: What Did 'Pan Africanism' Mean?' (2012) 4(10) *The Journal of Pan African Studies* 106. Also see George Shepperson, 'Pan-Africanism and 'Pan Africanism' Some Historical Notes' (1962) 23(4) *Phylon* 346-58.

¹⁷ Zdenek Cervenka, *The Unfinished Quest for Unity: Africa and the OAU* (Julian Friedmann Publishers Ltd 1977) 9.

With political independence achieved for most of the countries, the focus widened to include economic development. In the 1960s, regional initiatives started to rapidly emerge in every corner of the continent to the extent that over 120 sectoral organisations and intergovernmental organisations emerged.¹⁸ These regional groups continued unregulated and undeterred in their numbers. In 1974, the United Nations General Assembly Resolution on the New International Economic Order (NIEO) was passed, drawing attention to the need for economic cooperation among the developing countries, which included Africa.

In 1980, the Lagos Plan of Action (LPA) was promulgated which was an attempt by both the OAU and the United Nations Economic Commission for Africa (UNECA) to develop a strategy for African economic development.¹⁹ The LPA sought to establish an African Economic Community (AEC) by the beginning of the 21st century. The AEC had been the subject of various resolutions including the Kisansha Declaration and the Monrovia Declaration of Commitment of the Heads of State and Government of the Organisation of African Unity on the Guidelines and Measures for National and Collective Self-Reliance in Economic and Social Development for the Establishment of a New International Order. Finally, on 3rd June 1991, the Treaty Establishing the African Economic Community ('The Abuja Treaty') was signed by 51 heads of African states, agreeing to coordinate and harmonise policies among states so that the AEC can be established.²⁰

Partner states agreed to strengthen the existing regional communities and strengthen sectoral integration and then after a period not exceeding 10 years, establish a Free Trade Area and establish a Customs Union with a view to an African Common Market, 14 years later. The final stage of the integration would lead to the establishment of a single domestic market, a single central bank, and a common currency by 2028.²¹ It is important to note, that at this point, there were already existing regional arrangements

¹⁸ Adedeji Adebayo, 'History and Prospects for Regional Integration in Africa' (Third Meeting of the African Development Forum, Addis Ababa, 5 March 2002) 2.

¹⁹ For further reading on the Lagos Plan of Action, see Rose M D'sa, 'The Lagos Plan of Action-Legal Mechanisms for Co-operation Between the Organisation of African Unity and the United Nations Economic Commission for Africa' (1983) 27(1) *Journal of African Law* 4-21.

²⁰ See Objective 1 of the Abuja Treaty.

²¹ Article 6 of the Abuja Treaty.

and communities in Africa. The Treaty, therefore, recognised the Economic Community of West African States (ECOWAS), Arab Maghreb Union (AMU), Economic Community of Central African States (ECCAS), Common Market of Eastern and Southern Africa (COMESA), and South African Development Community (SADC). The East African Community (EAC) which had been established in 1967 had collapsed in 1977 hence its absence in the initial AEC Treaty.

4.1.3 From the Organisation of African Unity (OAU) to the African Union (AU)

By 2000, the flaws of the OAU had caught up with it leading to its collapse.²² Led by the late Libyan President Muammar Qaddafi, African leaders met in Sirte, Libya, and established the African Union in March 2001. The Constitutive Act of the Union ('the AU Act') came into force on 26 May 2001 and formally replaced the OAU in July 2002. The objectives of the AU include accelerating the political and socio-economic integration of the African continent.²³ Article 3 of the AU Act noted that one of the objectives of the Union was to 'coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.'²⁴ In the Preamble to the AU Act, the leaders noted that a concerted effort, rather than a lone fight, was the way forward in order to attain the aspirations that they had for their people.²⁵ The AU had learned from the mistakes of the OAU and this time around, it created more robust institutions and widened its scope to include social, economic, and political objectives.²⁶ The vision of the AU is 'an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena.' The AU's Agenda 2063 is the framework that will deliver an Africa that is free, unified, and one that prospers collectively.

²² See generally Kofi Oteng Kufuor, 'The Collapse of the Organization of African Unity: Lessons from Economics and History' (2005) 49(2) *Journal of African Law* 132-144

²³ Article 3 of the AU Act.

²⁴ Emphasis mine.

²⁵ See Konstantinos D Magliveras and Gino J Naldi, 'The African Union- A New Dawn for Africa,' (2002) 51(2) *International and Comparative Law Quarterly* 416.

²⁶ Oteng Kufuor (n 22) 132.

However, not every leader jumped onto the bandwagon of a unified continent. To some, this dream of a united Africa is far-fetched and unrealistic. The late Mwalimu Julius Nyerere, the first President of the Republic of Tanzania expressed his reservations in his speech in Zambia:

I believe that a real dilemma faces the Pan-Africanist. On the one hand, is the fact that Pan-Africanism demands an African consciousness and an African loyalty; on the other hand, is the fact that each Pan-Africanist must also concern himself with the freedom and development of the nations of Africa.²⁷

He saw the tension between nationalism and Pan-Africanism and acknowledged that although in the long run, unity would better serve the interests of the entire continent, it would also impact the sovereignty of states. He warned that African unity would not merely be achieved by signing agreements and being part of regions but through determination, sacrifice, and loyalty.²⁸ These sentiments of the conflict between sovereignty and integration are the same concerns that reoccur when discussing stock market integration. In the next two chapters, I discuss the centrality of sovereignty for African states and place sovereignty as the stumbling block to efforts to merge infrastructure and supervision of stock markets at the regional level. This clash of sovereignty also reveals itself in judicial attempts to apply regional law and in attempts to enforce regional law amongst member states.

4.2 Regional Groupings (RGs) and Regional Economic Communities (RECs)

The end of colonialism not only marked the death of certain RGs that had been formed for political objectives but also the strengthening of those that had economic objectives. The signing of the Abuja Treaty played an important role in the formation and recognition of existing RECs. It conveyed the RECs not only as the conduits for the establishment of the AEC²⁹ but also as the

²⁷ Julius K Nyerere, 'The Dilemma of the Pan-Africanist' (Address to the University of Zambia Congregation, 13 July 1966).

²⁸ Ibid.

²⁹ See Article 88 of the Abuja Treaty.

building blocks of the same.³⁰ The Abuja Treaty divided Africa into the 5 regions recognised by the OAU i.e., North Africa, West Africa, Central Africa, East Africa, and Southern Africa.³¹ It is therefore unsurprising that RECs are aligned to one of the regions.

The AU expressly recognises eight regional groupings and also views them as the building blocks of the AU.³² In 2008, a Protocol on Relations Between the African Economic Community and the Regional Economic Communities was signed between the AEC on one side and six RECs on the other side, where the parties agreed to work together towards achieving the AEC.³³ They include the Arab Maghreb Union, the Common Market for Eastern and Southern Africa, the Community of Sahel-Saharan States, the East African Community, the Economic Community of Central African States, Economic Community of West African States, Intergovernmental Authority on Development and Southern African Development Community.³⁴ There are other RECs recognised by the AU but which are excluded from this discussion as they focus on security.³⁵

4.2.1 The Arab Maghreb Union (AMU)

The AMU caters to the North region and is made up of 5 member states (Algeria, Libya, Morocco, Mauritania, and Tunisia) which were largely colonised by the French.³⁶ These countries share a similar language, similar dialect, and similar faith. The origins of this Union can be traced back to the need to create a unified front in combatting French colonialism.³⁷ As early as 1915, a Committee was set up to fight for the independence of Algeria and

³⁰ Iwa Salami, *Financial Regulation in Africa: An Assessment of Financial Integration Arrangements in African Emerging and Frontier Markets* (Ashgate Publishing Ltd 2012) 8.

³¹ See Article 1(d) of the Abuja Treaty.

³² These regional groups were also recognised in the Preamble to the Lagos Plan of Action to pave way for the eventual establishment of the African Common Market and the AEC.

³³ For a detailed discussion on Africa's history with integration arrangements, see Percy Mistry, 'Africa's Record of Regional Co-operation and Integration' (2000) 99 *African Affairs* 553-73.

³⁴ Post the Abuja Treaty, two further regional communities emerged; WAEMU and UCGLR.

³⁵ Some of the RECs recognised by the AU are not geared towards economic integration and these include the Eastern Africa Standby Force Coordination Mechanism (EASFCOM) and North African Regional Capability (NARC) which are more security oriented. The International Conference on the Great Lakes Region, which is made up of 12 partner states, addresses security and stability related conflicts in the Great Lakes Region.

³⁶ Libya is the exception, having been colonised by the Italians.

³⁷ Djallil Lounnas and Nizar Messari, 'Algeria-Morocco Relations and their Impact on the Maghrebi Regional System' (2018) MENARA Working Paper, No 20 of 2018 <https://www.iai.it/sites/default/files/menara_wp_20.pdf> accessed 4 December 2019.

Tunisia and it is this Committee that proposed to establish the North African Republic.³⁸ On 17th February 1989, the Treaty Instituting the Arab Maghreb Union was signed in Marrakech and the Union aimed at among others, working towards achieving free movement of people, capital, and services.³⁹ However, the countries did not seem to be on the same page as Libya wanted a political union while Algeria and Morocco wanted an economic union like the EU, with the political union coming at a later stage.

This Union was initially viewed as the most likely to succeed in economic integration due to the states' shared past, language, faith, trade.⁴⁰ However, the Union has largely been a failure, due to the long-standing Sahara dispute between Algeria and Morocco. This conflict stems from Algeria's continued support for the POLISARIO, a liberation movement that established the Sahrawi Arab Democratic Republic (SADR), a land that Morocco considers to be its territory and has annexed since 1975. This dispute has seen the two close their borders to each other at some point, recall their diplomats and the political tension continues to date.⁴¹ Between 1994 and 2017, the members of the Union did not meet for a Summit. During this period, the region was also politically unstable, and this was worsened by the Arab spring and the demise of Col Muammar Qaddafi who was the biggest advocate of the Union. In Tunisia, President Zine El Abidine Ben Ali was ousted during the Spring, and Morocco had to implement constitutional reforms to avoid political chaos.

³⁸ Paul Balta, 'Le grand Maghreb: Des indépendances à l'an 2000,' [1990] *Éditions La Découverte* 19.

³⁹ See Article 2 of the Treaty Instituting the Arab Maghreb Union.

⁴⁰ See May Barth 'Regionalism in North Africa: the Arab Union in 2019' (2009) Brussels International Center for Research and Human Rights, 17 <https://www.bic-rhr.com/sites/default/files/inline-files/Regionalism%20in%20North%20Africa%20-%20the%20Arab%20Maghreb%20Union%20in%202019%281%29.pdf> accessed on 9 August 2019. A study has established that there is a strong cointegrating relationship between the Maghreb countries and that they are unifiable on the economic and financial front. See Ali F Darrat and Anita Pennathur, 'Are the Arab Maghreb Countries Really Integratable? Some evidence from the Theory of Cointegrated Systems' (2002) 11 *Review of Financial Economics* 79-90.

⁴¹ For a detailed understanding of the Algeria-Morocco relations and how these have led to the failure of the Union, see Alf Andrew Hegoy, 'Colonial Origins of the Algerian-Moroccan Border Conflict of October 1963' (1970) 13(1) *African Studies Review* 17; Djallil Lounnas and Nizar Messari, 'Algeria-Morocco Relations and their Impact on the Maghrebi Regional System' (2018) MENARA Working Paper No 20 of October 2018, https://www.iai.it/sites/default/files/menara_wp_20.pdf accessed 14 June 2021; Miguel Hernando de Larramendi, 'Doomed Regionalism in a Redrawn Maghreb? The Changing Shape of the Rivalry between Algeria and Morocco in the Post 2011 Era' (2019) 24(3) *The Journal of North African Studies* 506.

Although the states continue to declare their support for the Union, their actions show a commitment far placed from the Union. Mauritania, for example, was one of the founding members of the ECOWAS and remained a member until 2000. Tunisia, on the other hand, is a member of COMESA and ECOWAS. This may lead to greater African unity but weakens the AMU as a bloc.⁴² Integration efforts in this region have been lacklustre at best with the last summit taking place in 1994 and the region focused on its alliances with the EU. There are no capital markets integration projects in this region and hence this REC does not merit further discussion.

4.2.2 The Community of Sahel-Saharan States (CEN-SAD)

The Sahel, composed of 10 states, has had problems spanning decades ranging from armed conflicts (in the Lake Chad Basin, Niger, Burkina Faso, and Mali) to food insecurity due to the drought and famine as well as extreme weather conditions due to the semi-arid climate. The UN predicted that these problems would only get worse in 2019 and beyond.⁴³ The Sahel is also described as one of the world's poorest regions.⁴⁴

The origins of the CEN-SAD are telling of the dominance of one state over others. In 1998, the late Libyan President Muammar Gaddafi convinced other states to establish the CEN-SAD as a tool for further economic unity and the free movement of people, capital, and goods and services. This was in pursuance of his vision for the United States of Africa. Because his vision had not succeeded, he initiated his own REC in Tripoli with the signing of the Treaty on the Establishment of CEN-SAD together with 6 states who were not members of AMU at the time.⁴⁵ The Community was later joined by Eritrea, Central African Republic, Senegal, Gambia, Djibouti among others making it 18 members who all seemed to belong to other regional groupings such as

⁴² Yasmina Allouche, *Regional Power Rivalry and the Failure of the Arab Maghreb Union* (TRT World Research Center 2019) 8.

⁴³ See Climate Center, 'UN: Sahel region one of the most vulnerable to climate change' The Climate Center News 14th November 2018. <https://www.climatecentre.org/news/1066/un-sahel-region-one-of-the-most-vulnerable-to-climate-change> accessed on 13 August 2019.

⁴⁴ Andrew Lebovich, 'Bringing the Desert Together: How to Advance the Sahel-Maghreb Integration' (European Council on Foreign Relations, 18 July 2017) https://ecfr.eu/publication/bringing_the_desert_together_how_to_advance_sahelo_maghreb_integration_7215/ accessed on 13 November 2019.

⁴⁵ Kathryn Sturman, 'The Rise of Libya as a Regional Player' (2003) 12(2) *African Security Review* 111.

ECOWAS, ECCAS, and COMESA. Article 1 of the Treaty establishing the Community refers to the establishment of an overall economic union based on the implementation of a strategy utilizing development plans that are complementary to the national development plans of member States. However, the Libyan ruler turned the REC into an opportunity for him to exert Libya's financial and political influence which he maintained, injecting money into the community, and hosting its headquarters until he was killed during the Arab spring.

If the death of Gaddafi was not enough to slow down the community, there was an even bigger problem. The endless conflicts between Morocco and Algeria that date back to the Sand War of 1963 rendered any chance of integration an illusion.⁴⁶ With the political conflicts and the serious humanitarian crisis among others, this Community was in its last days and ultimately did not survive the Arab Spring. Therefore, although it is still recognised as a REC on the books of the AU, the reality is different. It has not held a summit since 2010 and therefore there is no economic integration to speak of, let alone a REC. Most of its members have either found solace in ECOWAS or the AMU.

4.2.3 The Economic Community of West African States (ECOWAS)

ECOWAS is the main REC in West Africa for purposes of advancing the economic integration agenda of the AU. Although the Treaty establishing ECOWAS was signed in 1975, calls for a West African Community had been in the pipeline since the 1960s. The Anglo-French nations of West Africa had for long tried, unsuccessfully, to form economic groupings.⁴⁷ On 28th May 1975, 14 heads of state met in Lagos, Nigeria, and signed the Treaty

⁴⁶ The Sand War that lasted from September 1963 to 1964 was as a result of Algeria refusing to return territories that it had taken from Morocco during French colonial rule in Algeria. Morocco took up arms and fought Algeria and since then, the animosity started and has not ended to date with a number of conflicts arising between the two states. In 2017, Morocco attempted to block officials of the Sahrawi Arab Democratic Republic from attending an AU meeting. See Malek Bachir, 'Morocco Provokes Crisis by Blocking Western Saharan from AU meeting,' *Eye* (Middle East, March 28, 2017). Also see Djallil Lounnas and Nizar Messari, 'Algeria-Morocco Relations and their Impact on the Maghrebi Regional System' (2018) MENARA Working Paper No 20, https://www.iai.it/sites/default/files/menara_wp_20.pdf accessed 15 November 2021.

⁴⁷ For a more detailed discussion, see Bruce Zagaris, 'The Economic Community of West African States (ECOWAS): An Analysis and Prospects' (1978) 10(1) *Case Western Reserve Journal of International Law* 93.

Establishing ECOWAS. Guinea Bissau acceded to the Treaty in 1976, followed by Cape Verde in 1979. Initially, the objectives of this Community were purely economic but these were expanded in the Revised Treaty of 24th July 1993.

Article 3 of the Revised Treaty describes the aims of the Community as promoting co-operation and integration which would lead to the establishment of the West African Economic Union (WAEU). This would be achieved through harmonisation and coordination of policies and promotion of integration programmes, adoption of common economic and financial policies, creation of a monetary union, and the harmonisation of national investment codes.⁴⁸ Article 78 of the Treaty noted that the integration of ECOWAS was an essential component to the integration of the entire continent and hence undertook to harmonise their policies with those of the AEC.

To ensure free movement of capital, Article 53 of the Treaty provided for a Capital Issues Committee which was tasked with ensuring that capital flowed unimpeded and efficiently in the Community through, among others, the encouragement and establishment of national and regional stock exchanges and the interlocking of capital markets and stock exchanges.⁴⁹ The Committee would also establish a mechanism for dissemination of stock listings in member states as well as ensure that nationals of member states would also be able to acquire shares in companies listed in partner states.⁵⁰

Since 1975, ECOWAS is still going strong in its pursuit of economic integration. The 2019 Africa Regional Integration Index placed ECOWAS as the highest performing REC on financial and macroeconomic integration. In 2012, at a meeting convened by the West African Monetary Institute (WAMI) with BRVM, Ghana, and Nigerian exchanges, the idea of an integration council was fronted. The West African Capital Markets Integration Council (WACMIC) was inaugurated with a Charter for the Integration of Capital Markets in West Africa in January 2013 as the governing organ for the integration of the capital markets of West Africa. It covers the member states of BRVM, Sierra Leone, Nigeria, and Ghana. The integration of these markets is to be achieved

⁴⁸ Article 3(2) of the Revised ECOWAS Treaty.

⁴⁹ Article 53(3) of the Revised ECOWAS Treaty.

⁵⁰ Article 53(3)(b)-(c) of the Revised ECOWAS Treaty.

through harmonisation of trading and settlement platforms, rules, and mutual recognition of capital markets operators who meet the set minimum capital requirements. This would be achieved through three phases; sponsored access, then direct access to qualified stockbrokers in West Africa, and finally an integrated West African Securities Market (WASM). The latter is the virtual exchange and central depository on which all securities would be traded and settled. The timelines were not met⁵¹ and the Project is currently at Phase 2 which is focused on harmonising regulations for trading and settlement and the development of a common platform for listing and trading.⁵²

Although ECOWAS declared itself as the 'sole economic community in the region for the purpose of economic integration and the realisation of the objectives of the African Economic Community' under Article 2 of the Treaty, this has not stopped other groups from emerging. Two of the most recognised groups that have emerged are the West African Economic and Monetary Union (WAEMU) and the West African Monetary Union (WAMU) none of which are recognised as part of the traditional RECs by the AU but operate as RECs. Under the auspices of WAMU, the Central Bank of West African States (BCEAO) has been established and it serves 8 of the member states using the CFA Franc as the common currency. WAEMU, on the other hand, is a currency and customs union, created by the 1994 Dakar Treaty with the goal of economic convergence, harmonisation of laws, and coordinating policies. These two bodies continue to have parallel functionality as WAEMU did not intend to replace WAMU but to propel convergence amongst the member states of WAMU and strengthen the enforcement mechanism of WAEMU.⁵³ WAEMU may not be a recognised REC but it has progressed much quicker in integration than ECOWAS. In addition, there is the WAMI-monitored West African Monetary Zone (WAMZ) formed in 2000, which although under the

⁵¹ West African Monetary System, 'Financial Integration in the West African Monetary Zone: A Stock Take of the Journey so Far' (2016) WAMI Occasional Paper Series No 10, 51 < http://www.wami-imao.org/sites/default/files/OccassionalPapers/Financial%20Integration_June%202016_English.pdf> accessed 4 December 2019.

⁵² See Press Release, GPN - Multinational - West African Capital Markets Integration (WACMI) Phase 2 Project (African Development Bank, 31 May 2021).

⁵³ Salami (n 30) 24.

auspices of ECOWAS, only has 6 member states, who hope to introduce their own currency, the Eco.⁵⁴

Nigeria dominates ECOWAS and is undoubtedly the anchor of this REC and it is for this reason that in April 1973, the *Communaute economique de l'Afrique de l'ouest* (CEAO) was formed by 6 of the West African French-speaking countries, in a bid to counterbalance Nigeria's influence and position in the region.⁵⁵ This Community may long have ended but the spirit in which it was formed is still alive and is not forgotten as attempts to link the continent and the region continue. Because of Nigeria's dominant position, a scenario in which Nigeria leaves ECOWAS would be detrimental to the continued survival of this REC and may lead to disintegration.

4.2.4 Common Market for East and Central Africa (COMESA)

COMESA is made up of 21 countries in the East and Central part of Africa, making it the largest regional group in Africa. This REC, which replaced the Preferential Trade Area (PTA), was established in November 1993 in Kampala to pursue economic prosperity through regional and market integration, with the end objective of achieving the AEC.⁵⁶ Under Article 4 of the Revised COMESA Treaty, the partner states agreed to establish a customs union and a common external tariff and abolish all non-tariff barriers to trade among themselves. The member states also agreed to remove obstacles to the free movement of capital as well as services and to harmonise their macroeconomic policies.⁵⁷

A region-wide capital market development programme was to be implemented and national stock exchanges would be established as well as an association of those national stock exchanges.⁵⁸ The Treaty is silent on the possibility of a merger of the different stock exchanges but rather mentions the need for a concerted and coordinated manner of pursuing the objectives of those different stock and a requirement on states to allow persons resident

⁵⁴ The habit of having institutions that only have a handful of member states of ECOWAS rather than all the members, has entrenched itself in ECOWAS. For example, only 6 member states of ECOWAS are members of WAMI.

⁵⁵ Daniel C Bach, 'The Politics of West African Economic Co-operation: CEAO and ECOWAS' (1983) 21(4) *The Journal of Modern African Studies* 605.

⁵⁶ See Article 3 of the Revised COMESA Treaty.

⁵⁷ Ibid.

⁵⁸ Article 80 of the Revised COMESA Treaty.

in member states to freely acquire securities and stocks in other member states and to encourage cross-border trade in government securities.⁵⁹ This is in contrast to the treaties establishing certain RECs, such as the EAC, where consolidation of stock exchanges was expressly mentioned.

COMESA is viewed mainly as a customs and trade union. Trade is the priority of COMESA which is evidenced by its activeness in trade summits as well as the USA's Africa's Growth and Opportunity Act (AGOA) and the EU's Everything but Arms (EBA) initiative.⁶⁰ However, there has been some limited progress in the banking sector with attempts to harmonise supervision and regulation of this sector. Nevertheless, there are no stock markets integration projects ongoing and hence the limited referral to COMESA in this thesis.

4.2.5 Economic Community of Central African States (ECCAS)

ECCAS is the regional community of the Central African states, covering Cameroon, Gabon, Congo, Chad, Central African Republic, Angola, Burundi, Equatorial Guinea, Rwanda, and Sao Tome and Principe. ECCAS was formed by the Treaty Establishing the Economic Community of Central African States ('the ECCAS Treaty') signed in October 1983 in Libreville, Gabon. The ECCAS Treaty entered into force in December 1984 with the primary objectives of promoting Member States' economic and social development and improving people's living conditions.⁶¹ Following internal crises in many member states, ECCAS ceased activities between 1992 and 1998 only resuming in the 1998 Summit in Libreville. The 1999 Malabo Heads of State and Government Conference set out four priority fields for the organisation; develop capacities to maintain peace, security, and stability as essential prerequisites for economic and social development; develop physical, economic, and monetary integration, develop a culture of human integration, and establish an autonomous financing mechanism for ECCAS.

Just like West Africa, Central Africa has other regional groupings born from historical relationships and political dynamics. These include the

⁵⁹ Article 81 of the Revised COMESA Treaty.

⁶⁰ Alemayehu Geda and Haile Kebret, 'Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA' (2007) 17(3) *Journal of African Economies* 360.

⁶¹ See Article 4 of the ECCAS Treaty.

Communauté Economique et Monétaire de l'Afrique Centrale (Central Africa Economic and Monetary Community or CEMAC) and the International Conference on the Great Lakes Region (ICGLR) all of whom share member states with ECCAS. CEMAC is a grouping of six countries that share a common currency, the Franc. The CEMAC Treaty of 2008 stated the aims of CEMAC to include economic and monetary integration. Regulation No. 06/03-CEMAC-UMAC of 2003 set up the Central African Financial Market Supervisory Commission (COSUMAF) to oversee, regulate and monitor the regional financial market and it is this Commission that regulates the regional stock exchange, BVMAC.

The member states of ECCAS tend to be members of other RECs.⁶² The stakeholders in the region are alive to this complexity and in 2007, ECCAS and CEMAC leaders met at the 13th Conference of Heads of State and Government to try and form a single REC and this culminated into the formation of a steering committee known as Comité de Pilotage de la Rationalisation des Communautés Economiques Régionales en Afrique centrale (COPIL/CER-AC or in English, Committee for the Restructuring of Regional Economic Communities in Central Africa). This Committee identified 12 key areas in which harmonisation was required and made progress on five (5) of those areas. Nevertheless, there is a general understanding that there is very limited political traction for economic integration in this region and that integration is not likely to materialise soon.⁶³ Like AMU and COMESA, there are no stock market integration projects in this region at the moment.

4.2.6 The East African Community (EAC)

The history of regional cooperation in East Africa dates back to as early as 1919 when the then three states, Tanganyika, Kenya, and Uganda formed a customs union.⁶⁴ After independence in 1967, the EAC was formed but due

⁶² For example, Burundi and Rwanda are also members of the EAC, Angola and DRC are members of SADC and Burundi, DRC and Rwanda are members of COMESA. ECCAS also shares members with the Lake Chad Basin Commission, the Economic Community of the Great Lakes Countries and CEMAC, with the latter being its biggest rival in the region.

⁶³ See Bruce Byiers, 'ECCAS and CEMAC: Struggling to Integrate in an Intertwined Region' (ECDPM, December 2017)

⁶⁴ Stefan Reith and Moritz Boltz, 'The East African Community: Regional Integration between Aspiration and Reality' (2011) KAS International Reports 9/10/2011 <https://www.kas.de/c/document_library/get_file?uuid=5cafe0b2-05e8-f22d-f634-6d5ce8e37d65&groupId=252038> accessed on 12 August 2019.

to, among others, political differences especially between Uganda's Idi Amin Dada and Tanzania's Julius Nyerere, the Community collapsed in 1977.⁶⁵ Nevertheless, conversations around unity continued and culminated into the signing of the Treaty for the Establishment of the East African Community ('EAC Treaty') which entered into force on 7th July 2000.⁶⁶

The objective of the Community, under Article 5 of the Treaty, is to 'develop policies and programs aimed at widening and deepening co-operation among the Partner States.' The Partner states undertook to do this through 4 pillars; a Customs Union, a Common Market, a Monetary Union, and a Political Federation, in that order.⁶⁷ Specifically, under Article 85 of the Treaty, partner states undertook to harmonise their capital markets policies, their regulatory and legislative frameworks relating to capital markets, and to promote the establishment of a regional stock exchange with trading floors in each of the partner states.

Progress has been made on the 4 pillars of integration in the community especially on the customs union and common market. Although there is a Protocol on the Establishment of the East African Customs Union, the Customs Union is not yet operational due to disagreements on the collection of taxes and required harmonisation to tax laws. In February 2019, a diplomatic feud between Rwanda and Uganda led to the latter closing the Katuna one-stop border which caused concerns about the spirit of integration, considering that the President of the AU (at the time) and the EAC also happened to be the President of Rwanda.

The term common market is defined under the Treaty as the integration of the markets of partner states into a single market with free movement of capital, labour, goods, and services.⁶⁸ The EAC Common Market, established

⁶⁵ See Agrippah T Mugomba, 'Regional Organisations and African Underdevelopment: The Collapse of the East African Community' (1978) 16(2) *Journal of Modern African Studies* 261; Arthur Hazlewood, 'The End of the East African Community: What are the Lessons for Regional Integration Schemes?' (1979) 18(1) *Journal of Common Market Studies* 40.

⁶⁶ Rwanda and Burundi became full members by acceding to the Treaty on 18 June 2007 and South Sudan became a full member on 15 August 2016.

⁶⁷ Article 5(2) of the EAC Treaty.

⁶⁸ Article 1(1) of the EAC Treaty. It is also defined as an 'arrangement whereby member or partner countries of a regional economic community operate as a single market for goods, services, capital and labour, having common revenue and trade laws.' Kennedy Gastorn and Wanyama Masinde, 'The EAC Common Market' in Emmanuel Ugirashebuja, John Eudes

by the Protocol on the Establishment of the EAC Common Market became operational on 1st July 2000. The third pillar of integration in the EAC is the Monetary Union which is provided for by Articles 82-88 of the EAC Treaty. The monetary union and the free movement of capital (under the common market) are closely correlated and this was acknowledged in Article 86 of the EAC Treaty.⁶⁹ Article 28 of the Common Market Protocol defines capital to include equity and under Annex VI to the Protocol, states agreed to liberalise the free flow of capital relating to securities operations include securities transactions on official stock exchanges.

The Monetary union was established in 2015 with a roadmap that provided for a single currency to be achieved in the Community by 2024. However, UNECA and ADB have expressly warned against rushing the process of a single currency, noting that the Community needs to fully implement all aspects of its common market and customs union and further harmonise all policies before attempting to come up with a common currency.⁷⁰ The final pillar of integration is the Political Federation, which is reinforced by Vision 2050, EAC's plan for regional integration by 2050.

The Community has been described as 'a marriage of convenience due to geographical proximity and nothing close to an organic regional alliance that synergises on economic development, regional security, and stability.'⁷¹ This analysis was based on the different conflicts between member states leading to the closure of the border between Uganda and Rwanda and Burundi accusing Rwanda of sponsoring rebels to destabilise the Burundi government and Tanzania deliberately absconding a meeting that was supposed to discuss the EAC-EU economic partnership deal. So, although the idea of the Federation was endorsed in 2017 at the 18th EAC Summit, its actual implementation is still a long road ahead, if any.

Ruhangisa, Tom Ottervanger, Armin Cuyvers (eds), *East African Community Law* (Brill 2017) 285.

⁶⁹ Elvia Mbembe Binda, 'Free Movement of Capital and the East African Monetary Union' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger, Armin Cuyvers (eds), *East African Community Law* (Brill 2017) 392.

⁷⁰ African Development Bank, *East Africa Economic Outlook* (African Development Bank, 2019) 22.

⁷¹ Tony Watima, 'Is EAC Political Federation Viable?' *The Business Daily* (Nairobi, 4 February 2019) <https://www.businessdailyafrica.com/analysis/columnists/Is-EAC-political-federation-viable-/4259356-4966540-rbvktc/index.html> accessed on 13 August 2019.

The EAC is perhaps the only REC that has followed up on its promise of consolidation of its stock exchanges with a Project involving partner states. The Project, discussed in detail hereinafter, under the integration models, is aimed at linking the infrastructure of partner stock exchanges and depositories with the end goal of one day having a regional joint stock exchange.

4.2.7 Southern African Development Community (SADC)

Southern Africa has always been fertile ground for the emergence of regional groupings, many of which arose in opposition to the colonial policies in South Africa especially apartheid. In 1980, the Southern African Development Co-ordination Conference (SADCC) was formed as an economic bloc with its members seeking to counter South Africa's influence in the region.⁷² On 17th August 1992, the Declaration and Treaty of the Southern African Development Community ("the SADC Treaty") was adopted. The SADC Treaty recognised the role played by SADCC and the need for further progress on economic integration. Under Article 5 of the SADC Treaty, the states agreed to harmonise their socio-economic policies and cooperate on a regional level. In 1995, South Africa joined SADC and this called for the objectives of SADC to be rearranged and hence a revised SADC Treaty was adopted. The Treaty noted that its objectives were to be achieved, among others, through the development of policies that would eliminate the impediments to the free movement of labour, capital, goods, and services.

The Regional Indicative Strategic Development Plan (RISDP), a framework meant to guide the regional integration agenda of SADC, outlined the milestones which were to be achieved and these included a free trade area by 2008, a customs union by 2010, a common market by 2015, a monetary union through macro-economic convergence by 2016 and a single currency by 2018. In 1997, the SADC Committee on Stock Exchanges (CoSSE) was formed under the auspices of SADC and its role was to fast track the development of the exchanges that existed in SADC and this was to be done

⁷² See Fadzai Gwaradzimba, 'SADCC and the Future of Southern African Regionalism' (1993) 21(1/2) *A Journal of Opinion* 51-9.

by improving liquidity hence making SADC more attractive to investors.⁷³ Key to note is that the Committee's strategy was to keep the different exchanges autonomous but with some level of cooperation through cross-listing, dual listing, and sharing of skills. However, there would be harmonisation of the policy, legal and regulatory frameworks for the capital markets by 2008.⁷⁴

In 2006, the Protocol on Finance and Investment came into force and was signed by 14 countries in SADC and it sought to foster harmonisation of financial and investment policies of member states by among others, facilitating the development of capital markets in the region and 'co-operating in the area of SADC Stock Exchanges.'⁷⁵ Annex 11 sets out the framework for co-operation in SADC stock exchanges to achieve 'an integrated real-time network of the national securities markets in SADC.' It is therefore clear that the aim of SADC is not to create one regional stock exchange but rather to empower the national stock exchanges, with a harmonised regulatory framework at the regional level.

Southern Africa has other regional groups not recognised as RECs. These include the Southern Africa Customs Union (SACU) which is the oldest customs union in the world and dates back to 1889.⁷⁶ In addition, SADC is also home to the Common Monetary Area (CMA) a monetary union established in July 1986 and which is the predecessor to the 1974 Rand Monetary Agreement (RMA) which formalised the currency union and constituted of countries using the rand.⁷⁷

The above are the recognised RECs of the AU and the AEC. Key to note is that none of the Treaties aforementioned or any of the regional groups restrict members from joining a parallel regional group or joining more than one regional group. Therefore, states are free to join as many regional economic

⁷³ Southern African Development Community, Regional Indicative Strategic Development Plan https://www.sadc.int/files/5713/5292/8372/Regional_Indicative_Strategic_Development_Plan.pdf 67, accessed on 25th November 2019.

⁷⁴ Ibid.

⁷⁵ See Article 2 of the Protocol.

⁷⁶ Salami (n 30) 26.

⁷⁷ See Jian-Ye Wang, Iyabo Masha, Kazuko Shirono and Leighton Harris, 'The Common Monetary Area in Southern Africa: Shocks, Adjustment and Policy Challenges' (2007) IMF Working Paper WP/07/158, 8, <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/The-Common-Monetary-Area-in-Southern-Africa-Shocks-Adjustment-and-Policy-Challenges-21004> accessed 20 October 2021.

communities as they wish and as a result, 39 out of 53 countries in Africa belong to two regional groupings.⁷⁸ The discussion above has also pointed to the emergence of other RECs and RGs in the recognised regions of the continent. An example is Central Africa where there are 3 groupings; ECCAS, CEMAC and the Economic Community of Great Lakes Countries (CEPGL). North Africa also has two regional groupings; the AMU and the CEN-SAD. These overlaps and multiple memberships present unique challenges in the use of RECs as conduits of integration and in the pursuit of integration of capital markets.⁷⁹ These challenges are discussed in detail in Chapter 5 hereafter.

4.3 Integration Of Capital Markets and Stock Exchanges in Africa

4.3.1 Potential benefits of regional integration of stock markets

Stock markets are said to be integrated if there are 'identical returns on assets for a particular risk factor.'⁸⁰ Markets can be partially integrated or fully integrated with the latter occurring where 'assets with same risk have identical expected returns irrespective of the market.'⁸¹ The integration process is gradual and commences with stock markets coming together to form an integrated market and then the risk-adjusted returns in a common currency are equal in all the markets.⁸² The evaluation of integration has been

⁷⁸ Economic Commission for Africa, 'Assessing Regional Integration in Africa' ECA Policy Research Report (Addis Ababa, 2004) 40. The figure given by this report of 20 has been adjusted putting into consideration developments that have happened since 2004, with more countries joining more than one regional group.

⁷⁹ William Lyakurwa, Andrew McKay, Nehemiah Ng'eno and Water Kennes, 'Regional Integration in Southern Africa: A Review of Experiences and Issues,' in Ademola Oyejide and Paul Collier (eds), *Regional Integration and Trade Liberalization in SubSaharan Africa: Framework, Issues and Methodological Perspectives* (St. Martin's Press 1997) 196; Ernest Aryeety and Abena Oduro, 'Regional Integration Efforts in Africa: an Overview' in Jan Joost Teunissen (ed), *Regionalism and the Global Economy: The Case of Africa* (Forum on Debt and Development 1996); Rene Robert, 'The Social Dimension of Regional Integration in ECOWAS' (2005) International Labour Organisation Working Paper No 49, 6 http://www.ilo.int/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079141.pdf accessed 9 November 2021.

⁸⁰ Guntur Anjana Raju and Velip Surja Pavto, 'Stock Market Integration: A Review of Literature from a Global Perspective' (2019) 25(3) *IUP Journal of Applied Finance* 66.

⁸¹ Ibid.

⁸² Heimonen Kari, 'Stock Market Integration: Evidence On Price Integration And Return Convergence' (2002) 12(6) *Applied Financial Economics* 416.

the subject of different economic studies⁸³ but the determination of integration remains a complex endeavour.⁸⁴

There are numerous reasons as to why states choose to integrate their stock markets, either on a regional level or with another country (where that country is not in the same region). With globalisation comes the increase in movement of goods, services, and capital and hence a need for economic interdependence between countries.⁸⁵ This means that markets have to abandon their traditional operational methods and styles and reach out to their neighbours, create alliances, and integrate their operations.⁸⁶

Integration may increase market visibility and hence attract more investors and issuers. When markets integrate, the number of listed companies and market capitalisation increases and this new status would attract investors and issuers who had shunned them previously. An increase in size comes with an increase in trading volumes and market turnover which raises liquidity in the market.⁸⁷ In addition, the influx of investors as a result of visibility has an impact on foreign direct investment (FDI) into both the stock market and the country as a whole, leading to economic growth. Other than economic growth, increased FDIs may facilitate the 'transfer or diffusion of managerial and technological know-how...and improve the skills composition of the labour force.'⁸⁸

The lack of liquidity means that large corporations choose foreign exchanges to list rather than their domestic exchanges. In addition, even those that are listed end up delisting when liquidity becomes a persistent challenge. A prime example of this is the decision of Bermuda-based Shore Capital which chose

⁸³ See a summary of these studies in Kari, *ibid*.

⁸⁴ See Ekaterina Dorodnykh, 'Determinants of Stock Market Integration' in Ekaterina Dorodnykh (ed), *Stock Market Integration: An International Perspective* (Palgrave MacMillan 2014) 50-83.

⁸⁵ Michael Hitt, Duane Ireland and Robert Hoskisson, *Strategic Management Cases: Competitiveness and Globalisation* (10th edn, Cengage Learning 2016).

⁸⁶ Beatruz Yepes-Rios, Kelly Gonzalez-Tapia, Maria Alejandra Gonzalez- Perez, 'The Integration of Stock Exchanges: The Case of the Latin American Integrated Market (MILA) and its Impact on Ownership and Internationalisation Status in Colombian Brokerage Firms' (2015) 20 *Journal of Economics, Finance and Administrative Science* 85.

⁸⁷ Therese Fish and Nicholas Biekpe, 'Regional African Stock Markets Indices' (2002) 33(1) *South African Journal of Business Management* 11-9.

⁸⁸ Pierre-Richard Agenor, 'Benefits and Costs of International Financial Integration: Theory and Facts' (2001) World Bank Policy Research Working Paper WPS2699, 103. <<http://documents.worldbank.org/curated/en/240401468766831345/Benefits-and-costs-of-international-financial-integration-theory-and-facts>> accessed on 26th November 2019.

to delist from the London Stock Exchange's AIM segment in 2019 over continued liquidity challenges. For African corporations, a move to more liquid markets abroad or even in a different region of the continent has become a necessity rather than a luxury. The decision of UMEME Ltd, Uganda's electricity distributor company, to list on the Nairobi Stock Exchange was inspired by access to a more liquid market in Kenya. Integration can resolve the liquidity challenge and hence open up a platform for large corporations to list in Africa. The presence of liquidity may then lead to a reduction in bid-ask spreads (the difference between the highest price that the buyer of a security is willing to pay and the lowest price that the seller is willing to accept) especially for those firms that are highly visible. The lower the trading volume, the lower the liquidity, and the lower the liquidity, the wider the bid-ask spread.

Integration is hailed for reducing the cost of capital and this is particularly the case where vertical integration is adopted. Where the exchanges are acting as a single entity, transaction costs such as brokerage fees, settlement fees, and in some cases advisory fees, are set and uniformly apply. In addition, the costs are certain which enables proper budgeting and greater transparency. Further, by eliminating the duplication of costly infrastructure, the average cost of processing a trade will reduce and hence overall reduction in costs for the investor. An investor will usually face two types of costs: explicit costs (brokerage commissions, trading fees imposed by the exchange and settlement commissions) and implicit costs (the impact of the bid-ask spreads). When an exchange integrates, the duplicate exchange and brokerage commissions are removed and hence the investor only has to pay one set of fees.

A 2017 study on the effects of stock market integration on the cost of equity and corporate investment using the Brazilian equity market as a case study confirmed that increased levels of stock market integration reduce the cost of equity capital for firms.⁸⁹ However, it is acknowledged that vertical integration may actually increase some costs rather than reduce them due to

⁸⁹ David Hillier and Tiago Loncan, 'Stock Market Integration, Cost of Equity Capital and Corporate Investment: Evidence from Brazil' (2017) 25(1) *Review of Financial Economics* 181.

new costs springing up such as managerial costs for managing the large entity made up of the stock exchanges. It is also seen as complex, risky, and prone to failure hence requiring resources in order to make the concept work.

In cases where integration reduces or eliminates the role of intermediaries and allows for direct market access, investors can make a saving as they do not have to pay broker commissions. However, this can only work in developed markets and may not be ideal for emerging markets where there is limited specialist knowledge on securities markets and local investors are not sophisticated enough to conduct their own trades and monitor markets to make wise funding decisions.

Integration offers greater financial deepening and maximises investor choice since more financial products are available for investment.⁹⁰ This allows for product diversification, especially for fund managers. In many African countries, the choice of products is limited to shares and government bonds, with only a handful of countries like South Africa, Kenya and Nigeria expanding into derivatives, Exchange Traded Funds (ETFs), green bonds, infrastructure bonds, Exchange Traded Notes (ETNs), depository receipts and warrants. These are normally referred to as specialist products and are not widespread due to the lack of knowledge about these products and the complexity of structuring them. Information sharing in an integrated market would enable technical expertise to be utilised to increase public interest and the interest of intermediaries to trade in these products.

4.3.2 Stock market integration models in Africa

In July 2001, African leaders at the 37th Summit of the AU met in Lusaka and endorsed the New Partnership for Africa's Development (NEPAD), an economic development plan of the AU, aimed at accelerating economic cooperation and integration among African states. One of the principles enshrined in NEPAD is an integrated Africa by 2063. Under Aspiration 7 of an Africa that is a strong and influential global player and partner, one of the strategies adopted was to 'promote policies that will lead to linkage of national capital market to regional, continental and global capital markets' so that

⁹⁰ Jacqueline Irving, 'Africa's Struggling Stock Exchanges: Boost to Economic Development or Costly Irrelevance?' (2000) 14(3) *African Recovery* 1-5.

stock exchanges can contribute at least 80% of the development capital needed by the individual countries.⁹¹ By 2030, an integrated African capital market is expected to be in place, funding at least 30% of Africa's development, and a Pan African Stock Exchange should also be in place by 2030. However, the formulation of NEPAD, its origins, and its current status have not been without criticism.⁹² In addition, NEPAD does not mention how this integration is to be undertaken or what model is to be used to reach this integration and establish a Pan African Stock Exchange.

Since integration is a process, dating integration is complex and often, one cannot put an exact date to when a market became integrated.⁹³ Integration is more common in the area of trade and it is from the area of trade integration that economic integration arrangements have emerged.⁹⁴ Economic integration is defined as the 'unification of monetary [and] fiscal policies [requiring] the set up of a supranational authority whose decisions are binding on member states.'⁹⁵ Kahnert defines it as 'the process of removing progressively those discriminations which occur at national borders'⁹⁶

States seeking to integrate may be at different stages. The traditional stages of integration are 'the freeing of barriers to trade ('trade integration'), the liberalisation of factor movements ('factor integration'), the harmonisation of national economic policies ('policy integration'), and the complete unification of these policies ('total integration').'⁹⁷ However these stages and forms have

⁹¹ African Union, Agenda 2063. <https://www.nepad.org/agenda-2063/publication/agenda-2063-framework-document> accessed 3rd October 2019.

⁹² See Sally Matthews, 'Investigating NEPAD's Development Assumptions' (2004) 31(101) *Review of African Political Economy* 497; Jimi Adesina, 'NEPAD and the Challenge of Africa's Development: Towards the Political Economy of a Discourse' (2004) 35(1) *Society in Transition* 125; Osita Agbu, 'NEPAD: Origin, Challenges and Prospects' (2005) 64(1) *The Indian Journal of Political Science* 97; Kwadwo Appiagyei-Atua, 'Bumps on the Road: A Critique of How Africa got to NEPAD' (2006) 6(2) *African Human Rights Law Journal* 524; Zeynep Bostan, 'Another False Dawn for Africa?' An Assessment Of NEPAD' (E-International Relations, 19 July 2011).

⁹³ Geert Bekaert, Campbell R Harvey and Robin Lumsdaine, 'Dating the Integration of World Equity Markets' (2002) 67 *Journal of Financial Economics* 204.

⁹⁴ Salami (n 30) 5.

⁹⁵ Bela Balassa, *The Theory of Economic Integration* (Greenwood Press Westport 1961) 2.

⁹⁶ Richards F Kahnert, *Economic Integration Among Developing Countries* (Organisation for Economic Co-operation and Development 1969).

⁹⁷ Bela Balassa, 'Types of Economic Integration' in Fritz Machlup (ed), *Economic Integration: Worldwide, Regional and Sectoral, Proceedings of the Fourth Congress of the International Economic Association held in Budapest, Hungary International Economic Association Conference Volumes, Numbers 1-50* (Macmillan 1986) 17.

been heavily criticised as not only blind to the 21st-century reality that integration does not require the presence of all⁹⁸ but also that integration in developing countries does not always take this sequence.⁹⁹ Balassa, therefore, categorizes integration arrangement types depending on where they can be found. For example, he discusses the European Common Market or European Economic Community (EEC) as the dominant integration scheme for developed market economies and then the Council for Mutual Economic Assistance (CMFA) as the common integration model in socialist countries.¹⁰⁰ When it comes to integration models in developing countries, he looks at different schemes that he considers to be attempts at integration but does not provide a useful criterion for determining what would be considered integration. His analysis however clearly shows the difficulty in determining a common and acceptable definition of integration for everyone regardless of the level of development of the economy.

There is no one accepted list of integration models that can be adopted. For example, some literature refers to horizontal versus vertical integration¹⁰¹ although these models are studied in the context of industry-wide acquisitions of businesses in the same supply chain. This may not be very instructive for the kind of integration anticipated by the AEC and the AU Act. The next instructive list of integration models for stock markets is provided by the United Nations Economic Commission Africa (UNECA). UNECA proposed six different models of financial markets integration that could be adopted, and these include a single formal regional regulator and stock exchange, cross-listing, cross-border trading, the European Union model, the Euronext model

⁹⁸ Kitamura argued that in certain cases, integration can be accomplished without the removal of trade barriers. See Hiroshi Kitamura, 'Economic Theory and the Economic Integration of Underdeveloped Regions' in Miguel Wioczek, *Latin American Economic Integration* (Praeger 1966) 45.

⁹⁹ See Andrew Axline, 'Underdevelopment, Dependence and Integration: The Politics of Regionalism in Third World Countries' (1997) 31(1) *International Organisation* 83. Pinder on the other hand suggested that the definition of economic integration should not only look at non-discrimination but also coordination of policies between the states. See John Pinder, 'The Case for Economic Integration' (1965) 3(3) *Journal of Common Market Studies* 246.

¹⁰⁰ Bela Balassa, *Types of Economic Integration* (Wiley 1976).

¹⁰¹ See Jens Tapking, Jing Yang, 'Horizontal and Vertical Integration and Securities Trading and Settlement' (2004) European Central Bank Working Paper No 387, <<https://www.econstor.eu/bitstream/10419/152821/1/ecbwp0387.pdf>> accessed 3rd December 2019.

of a virtual exchange, and Pan-African institutions.¹⁰² All of these may not be present in an African context although they might be an option. The following discussion considers the stock market integration models that are either in progress in Africa or have been given as viable options.

4.3.2.1 **Single regional exchange and/or regulator**

This model is the rarest of the integration models as it requires a merger of the different exchanges into one exchange under the same regulator. This includes the merger of exchanges in the same country (where more than one exchange exists in a country) as well as the merger of exchanges in different countries. The former is easier to achieve than the latter. An example of the former is the Bolsa de Madrid (BME) where operations of various trading and settlement platforms in Spain were merged under a national consolidation initiative.¹⁰³ The Athens Stock Exchange and the Athens Derivatives Exchange merged in August 2002 into the Athens Exchange. This enabled both shares, bonds, and derivatives to be traded and settled on the same exchange. In Spain, the two central depositories (SCLV and CADE) merged in June 2000 to create IBERCLEAR which is the central depository for all equities, bonds, and government securities. In this merger, SCLV owns 55% of IBERCLEAR and the Spanish central bank owns the remaining 45%. The Amsterdam Stock Exchange, the EOE-Optiebeurs (the derivatives exchange), the settlement operations of those exchanges as well as their two depositories (Necigef and Niec) merged into the Amsterdam Stock Exchange on 1 January 1997.¹⁰⁴

A merger of stock exchanges in different countries to create a regional exchange is a complex matter that bears serious political and economic consequences. Ramos notes that participants on the sell-side have vested interests as they would like to protect their own businesses in the individual countries and hence would oppose any calls for a single regional regulator

¹⁰² Economic Commission for Africa, 'Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa' (UNECA, 2008) 271. https://www.uneca.org/sites/default/files/PublicationFiles/aria3_eng.pdf accessed 27 November 2019.

¹⁰³ Ekaterina Dorodnykh (ed), *Stock Market Integration: An International Perspective* (Palgrave MacMillan 2014) 32-33.

¹⁰⁴ Alberti Cybo-Ottone, Carmine Di Noia, Maurizio Murgia, 'Recent Development in the Structure of Securities Markets' (2000) Brookings-Wharton Papers on Financial Services, 256 < <https://muse.jhu.edu/article/26617/pdf> > accessed 3 December 2019.

and exchange.¹⁰⁵ For many states, a stock market is a symbol of sovereignty and hence why many states resist any attempt to merge their stock markets.¹⁰⁶ As a result, there are only two regional stock exchanges in the world (BRVM and BVMAC) and they are both found in Africa.

After gaining independence, the 5 former French colonies of West Africa (Benin, Senegal, Burkina Faso, Ivory Coast, and Niger) sought to have some form of monetary cooperation amongst themselves. This paved way for the 1962 Treaty Establishing the West African Monetary Union (UMOA) and the 1973 Treaty by the members of the West African Monetary and Economic Union ('Union économique et monétaire ouest-africaine' or UMOEA'). The UMOA Treaty recognised the Franc as the common currency of the member states with a common Central Bank, the Central Bank of West African States (mostly known by its French acronym BCEAO). The countries in this region did not establish individual stock markets and kept their ties to the French monetary system.¹⁰⁷ However, Cote d'Ivoire became the exception and developed its own national stock exchange. The Bourse des Valeurs d'Abidjan (BVA), which was the Ivorian stock exchange, had been open since 1976 and was somewhat active, dominated by foreign firms.

Although the idea of a regional stock market had been fronted since the 1973 Treaty, it did not materialise for a while. When BCEAO was no longer able to provide member states with the credit they needed at low interest rates, a recommendation was made for the establishment of a regional bourse, and this mandate was given to the bank.¹⁰⁸ Until this point, the integration was only targeted towards the monetary aspects and hence the reason the organisation was called the West African Monetary Union. In 1995, this organisation was then renamed Union Economique et Monetaire Ouest Africaine (UEMOA) and economic integration was added to the agenda.¹⁰⁹ On

¹⁰⁵ Sofia Ramos, 'Competition Between Stock Exchanges: A Survey' (2003) International Center for Financial Asset Management and Engineering Research Paper No 77, 21. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.602.1103&rep=rep1&type=pdf> Accessed 15th October 2019.

¹⁰⁶ Robert Schwartz, John Aidan Byrne, Lauren Wheatley (eds), *The Economic Function of a Stock Exchange* (Springer 2015) 119.

¹⁰⁷ Kathryn Lavelle, 'Architecture of Equity Markets: The Abidjan Regional Bourse' (2001) 55(3) *International Organisation* 727.

¹⁰⁸ Ibid 733.

¹⁰⁹ Ibid 734.

18th December 1996, the members of the bank reached an agreement on the creation of the regional stock exchange and with this, the Conseil Régional de l'Épargne Publique et des Marchés Financiers (The Regional Council for Public Savings and Financial Markets or the 'CREPMF') was formed as the organ of the Union responsible for creating the regional financial market. One year later in 1998, the Bourse Regionale des Valeurs Mobilières (BRVM) was opened as the world's first regional stock exchange. With the BRVM, the Ivorian BVA ceased to exist as the exchange was opened in Cote d'Ivoire.

The BRVM serves Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo. It has a central clearinghouse, the Banque de Règlement, and is headquartered in Ivory Coast. It has an automated trading system that enables brokers from each of the different countries to send orders to the central trading system in Abidjan. These orders are then executed and settled in Abidjan. The role of Ivory Coast in this coalition cannot be underestimated and the majority of the companies listed on the exchange are Ivory Coast domiciled and incorporated companies.

This regional exchange is one of the only two in the world and the circumstances surrounding its creation explain why. First, the countries in this region (except Cote d'Ivoire) had not created individual stock markets, and therefore from the very start, the countries agreed that one stock exchange would be created to serve the entire region. Secondly, Lavelle notes that 'the economic integration followed the monetary union, which was the opposite of the trajectory from the European Common Market (integration) to the euro (monetary union).'¹¹⁰ Before the creation of a stock market, the region already had a monetary union in place and was actively pursuing monetary integration. The monetary zone is also backed by a convertible currency, the CFA Franc which is issued by the bank. This currency is anchored onto the Euro which gives it stability and credibility. In addition, the member states have adopted the Convergence, Stability, Growth, and Solidarity Pact which establishes a surveillance system to ensure that all member states are adhering to the economic policies agreed at the regional level.

¹¹⁰ Ibid 727.

The second regional exchange, the Bourse des Valeurs Mobilières d'Afrique Centrale (BVMAC) is found in Central Africa. Like West Africa, Central Africa has been home to several economic arrangements starting with the Customs and Economic Union of Central Africa (UDEAC) to the Economic and Monetary Community of Central Africa (CEMAC) which has both the Central African Monetary Union (UMAC) and the Central African Economic Union (UEAC). CEMAC was formed in 1994 as a customs and monetary union of six (6) member states; Congo, Equatorial Guinea, Gabon, Cameroon, Chad, and the Central African Republic. The Convention establishing UMAC also established a common bank, the Bank of Central African States (BEAC) which issues a common currency, the CFA Franc.

In 2003, the countries of CEMAC undertook to create a regional stock exchange, BVMAC which was then set up in Libreville, Gabon. This decision infuriated Cameroon which is seen as the unquestionable economic leader of CEMAC and as a result, Cameroon decided to establish its own stock exchange, the Douala Stock Exchange (DSX) in protest. The existence of two stock exchanges in this region remained a point of concern and a constant agenda item at the meetings of Heads of State of CEMAC. With this co-existence, BVMAC could not be considered to be a fully integrated regional exchange. At an extraordinary summit of the CEMAC Heads of state in October 2017, it was agreed that the DSX and BVMAC would merge. A decision was also taken to move the headquarters of BVMAC from Gabon to Douala in the hopes that this would make Douala reconsider its position. In return, COSUMAF (Financial Market Supervisory Commission of Central Africa) would be headquartered in Libreville. Nevertheless, it still took 2 years before progress would be seen. On 31 July 2019, DSX officially closed its doors to the public, and COSUMAF (Financial Market Supervisory Commission of Central Africa) is now the regional regulator for the stock market while BVMAC is now the regional stock market of Central Africa.

The Abuja Treaty makes mention of regional stock exchanges although it is not clear if these would be as a result of mergers of national exchanges or whether such exchanges would be mere virtual exchanges through which brokers trade securities on different local exchanges. The latter may be easier to achieve as virtual exchanges and order routing systems are already being

pursued in the EAC and ECOWAS. The former is currently unattainable as there have been no mergers of exchanges in Africa other than the two regional exchanges. This method would face the challenge of sovereignty concerns and a lack of political will.

In addition, from a competition law perspective, such mergers may severely impact competition on the smaller or individual exchanges and could also induce competition harm such as reduced innovation in service delivery.¹¹¹ There is limited literature on stock exchange mergers and competition law generally¹¹² and almost none in an African context. This could be explained by the fact that although there is a dedicated competition law regime in at least 26 African countries, the regimes are largely dormant and unenforced.¹¹³ However, this regime is more developed in Europe with the European Commission actively enforcing merger control rules and blocking mergers that are deemed contrary to the EU Merger Regulation.¹¹⁴ It will certainly be interesting, as competition law develops in Africa, to see how competition law interfaces and regulates stock exchange mergers. Stock mergers may also adversely affect investors' choice to diversify their risk portfolio. There is also a danger that such mergers may lead to migration of liquidity and loss of the price discovery mechanism which are two of the pivotal functions that stock exchanges play.¹¹⁵ Despite public nods to mergers, the evidence shows otherwise. When the management of the JSE continued to make calls for integration in SADC, officials from the Botswana exchange publicly expressed their frustration at JSE's overbearing nature in what they deemed 'trying to force regional exchanges into a South African

¹¹¹ Ioannis Kokkoris and Rodrigo Olivares-Caminal, 'Some Issues on Cross-Border Stock Exchange Mergers' (2007) 29(2) *University of Pennsylvania Journal of International Law* 455.

¹¹² For example, see Mahmood Bagheri and Chizu Nakajima, 'Competition and Integration among Stock Exchanges: the Dilemma of Conflicting Regulatory Objectives and Strategies' (2004) 24(1) *Oxford Journal of Legal Studies* 69.

¹¹³ See Deloitte, 'Competition Law in Africa: Maximising Competitor Advantage' (Deloitte Touche Tohmatsu Limited, 2016) https://www2.deloitte.com/content/dam/Deloitte/za/Documents/risk/ZA_Competition_Law_in_Africa_RA_071116.pdf accessed 11 July 2021.

¹¹⁴ An example of a merger that the Commission have blocked is the €29bn proposed merger between Deutsche Börse and London Stock Exchange.

¹¹⁵ See generally Bruce Hearn and Jenifer Piesse, 'A Reassessment of Stock Market Integration in SADC: The Determinants of Liquidity and Price Discovery in Namibia' (2013) 23(2) *Applied Financial Economics* 123.

dominated bourse to boost its own trading volumes and revenues'.¹¹⁶ Therefore although there are calls for mergers of exchanges in Africa, it appears that this method would be the least likely to gain any support and should be explored only as the last stage of stock market integration.

4.3.2.2 Euronext Merger Model ('A Virtual Exchange')

Mergers may be horizontal (systems and institutions offering the same service in different countries e.g., depositories) or vertical (institutions providing different but integrated services e.g., a depository and exchange). Such mergers are more common in Europe. The Euronext is a result of the merger of the French, Dutch, Belgian, and Portuguese stock exchange which started in September 2000 and was completed in November 2003. This merger is largely viewed as successful as it enabled Euronext to rationalise its operations, reduce operation costs and improve efficiency.¹¹⁷ The merger into Euronext was underpinned by a common rule book which provides for harmonised listing rules as well as harmonised rules governing market participants and intermediaries. This process was gradual and backed by intermediaries.

Under this model, a single exchange exists but with different subsidiaries or trading floors in different member states. When the discussions for Euronext commenced, there were eight European exchanges involved. However, this merger failed and that left the three exchanges looking for a different merger which then gave birth to the idea of Euronext, which in itself took a further three years to accomplish due to the differences in the trading platforms used and the various mergers that took place in the region especially in Portugal.¹¹⁸ The merger was also supported by a common currency; the Euro which reduced currency fluctuation risk, and also the absence of capital account restrictions.

¹¹⁶ See Ngoni Chanakira, Southern Africa: SADC Stock Exchange Bosses Meet (All Africa, 26 March 2004).

¹¹⁷ Marco Pagano, Jorge Padilla, 'Gains from Stock Exchange Integration: The Euronext Evidence' (May 2005), 4.
<<https://st.ilsol24ore.com/art/SoleOnLine4/Finanza%20e%20Mercati/2006/05/padilla-pagano.pdf>> accessed 4 December 2019.

¹¹⁸ Ibid 10.

Today, Euronext covers Amsterdam, Brussels, Dublin, Lisbon, Milan, Paris, and Oslo and maintains local stock exchanges in each of these cities. All these markets benefit from a single order book, harmonised rule book for trading and listing, and one College of Regulators who include regulators of all the markets. It allows for market operators licensed in any of the member exchanges to operate in any other market, subject to the supervision of the local regulator. There is no equivalent of the Euronext model in African stock market integration. The closest is the use of virtual central trading platforms to trade securities in different member states, such as the one being pursued in the EAC Capital Markets Infrastructure project which will use a smart order routing system. It is also important to note that Euronext was largely a private venture, not backed by treaty or state shareholders which may have contributed to its success. The NYSE Euronext which owns the European Euronext exchanges is a public company whose majority shares are held by a group of eleven institutional investors. The lack of government shareholding and/or control in stock exchanges in Europe is contrasted to the intimate involvement of government in decisions taken by stock exchanges in Africa and would hence resurrect sovereignty concerns where there are attempts to merge the same.

4.3.2.3 Cross-listing

Cross-listing is one of the models put forward by UNECA. Cross-listing involves the foreign listing of a firm already listed on a home exchange. In the context of this discussion, the foreign exchange on which the shares are listed is another African exchange, either in the same region or another region. However, most cross-listings in Africa are on foreign stock exchanges, usually the LSE or NYSE. Companies cross-list their shares for various reasons. Large companies choose to list on markets that have better liquidity and an ability to absorb the transaction. Companies also consider investor reach and will cross-list to exchanges that have more active investors or investors with an appetite for such listings. Hence a firm gets greater access to lower cost equity finance and a wider investor base at the same time.

Companies may also cross-list to jurisdictions where the cost of raising capital and/or compliance costs are lower.¹¹⁹

Firms may also cross-list for purposes of legal and regulatory bonding. Burns and Bill used a sample of foreign acquisitions of US targets to examine the extent to which cross-listing in the US leads to legal and regulatory bonding and found support for the importance of reputational and legal bonding.¹²⁰ Firms may enhance their reputation by choosing jurisdictions that have good regulatory frameworks such as corporate governance standards, ESG reporting, and stringent financial disclosure requirements. In Africa, firms tend to cross-list in equity markets that are geographically close to their initial country of listing.¹²¹

The cross-listing trend in Africa is credited to the JSE whose companies started cross-listing on the Namibia Stock Exchange (NSX) when the latter opened its doors for trading in 1992.¹²² Since then, the concept has spread into other regions but remains prevalent in East and Southern Africa. In Africa, the trend has been for firms to use cross-listings as a way to expand their business operations into the country in which they cross-list. An analysis of all cross-listed companies on the NSE, USE, and DSE demonstrates this point. For example, East African Breweries which is a Kenyan company listed on the NSE, is also cross listed on the USE since it established Uganda Breweries in Uganda. Jubilee Insurance is listed on the NSE and cross-listed on both the USE and the DSE, and this is the same for Uchumi Supermarkets and Kenya Airways Ltd. A study by Olatundun on the impact of regional cross-listings of stocks on firm value in Sub-Saharan Africa found that as of 2009, all the 28 firms that had been cross-listed in South Africa and Namibia had

¹¹⁹ Karolyi analyses the new literature that has emerged which challenges the conventional view that firms will benefit from a lower cost of capital when they cross list and their shares become more available to global investors. See Andrew Karolyi, 'The World of Cross-listings and Cross-listings of the World: Challenging Conventional Wisdom' (2006) 10 *Review of Finance* 99.

¹²⁰ Natasha Burns, Bill Francis, Iftekhar Hasan, 'Cross-listing and Legal Bonding: Evidence from Mergers and Acquisitions' (2007) 31(4) *Journal of Banking and Finance* 1003-31.

¹²¹ See Lawrence Madewe Atuna and Michael Adusei, 'Key Determinants of Cross-Listing in Sub-Saharan Africa' (2021) *Transnational Corporations Review* 1.

¹²² Olatundun Janet Adelegan, 'The Impact of the Regional Cross-Listing of Stocks on Firm Value in Sub-Saharan Africa' IMF Policy Discussion Paper WP/09/99 (International Monetary Fund, 2009) 5.

operations in both countries.¹²³ In 2018, the NSX had 43 listed companies but half of those were either dual-listed or cross-listed from the JSE. In Chapter 3, a discussion was provided on the status of cross-listings in Africa which showed that only 28 cross-listings took place between 2011 and 2020 from one African exchange to another African exchange and that even when they arose, they were dominated by the JSE and the NSX.

Other than a few instances where cross-listing is a result of policy (such as the cross-listing of South African firms onto the NSX to qualify as Namibian investments and benefit from the large pension and insurance funds sector in Namibia), cross-listing is usually by agreement of the countries involved. Different countries have signed MOUs to facilitate cross-listing. These agreements have then paved way for regulatory amendments recognising cross-listing. In East Africa, USE, NSE, and DSE signed an inter depository transfer agreement which paved way for cross-listings in the region. However, the agreement was suspended when it became apparent that there was no real benefit for any other country other than Kenya.

Agreements related to cross-listings are a common occurrence in Africa and most stock exchanges have signed at least one with either a local exchange or a foreign exchange. For example, in October 2019, the NSE signed a memorandum of understanding with the Shenzhen Stock Exchange (SZSE), the China stock exchange to facilitate seamless access between the capital markets in Nairobi and China and grant investors a diversified portfolio and allow companies to access a wider base of investors/shareholders.¹²⁴ The BRVM, JSE, and EGX all have MOUs with the Shanghai Stock Exchange. In September 2019, the Botswana and Zimbabwe Stock Exchanges signed a memorandum of understanding to facilitate cross-border listings and smoothen out any regulatory bumps that companies seeking to cross-list in these jurisdictions are likely to face.¹²⁵ The Nigerian Exchange has also signed an MOU with the Luxembourg Stock Exchange to expand its green

¹²³ Ibid 8.

¹²⁴ APA Nairobi, 'Kenya and China Stock Exchanges ink MOU' (African Markets, 17 October 2019) <<https://www.african-markets.com/en/stock-markets/nse/kenya-and-china-stock-exchanges-ink-mou>> accessed 2 December 2019.

¹²⁵ AT Editor, 'Botswana, Zimbabwe Stock Exchanges Confirm Cross-Border Plan' (Africa Times, 18 September 2019) <<https://africatimes.com/2019/09/18/botswana-zimbabwe-stock-exchanges-confirm-cross-border-plan/>> Accessed 28 October 2019.

bond markets.¹²⁶ The JSE and the Stock Exchange of Mauritius have an MOU for knowledge sharing and cross-listings.¹²⁷ The JSE also signed an MOU with the Egyptian Exchanges in Cairo and Alexandria to offer technical support and information amongst the two exchanges.¹²⁸

Onyuma views cross-border listings and MOUs as 'the building blocks in integrating exchanges into regional and later Pan African stock markets' but no further discussion is made to support his assertion.¹²⁹ It is therefore not clear how cross-listings as a method of integration would lead to the fulfilment of the aspiration for an integrated Africa and a Pan African exchange. Cross-listing may merely make access easy but on its own, it is doubtful that the aspirations of unity would be fulfilled through this method of integration. With cross-listings, no harmonisation is required, and it is usually based on mutual recognition of approvals already granted by the other stock exchange or regulatory authority. Therefore, different systems with different exchanges would not necessarily help in the integration agenda. However, their success may point to their acceptance by stock exchanges in Africa.

It is important to point out that destination matters when it comes to cross-listing. Companies will not cross-list merely in the name of integration if the destination markets are not desirable for issuers, investors, and intermediaries. Cross-listing in itself would be cosmetic where the destination exchange suffers from illiquidity and low market capitalisation, poor regulatory frameworks, and an unfavourable macroeconomic policy. This has been evident in the dormancy of all cross-listed entities on the USE from the NSE. There is no secondary trading of cross-listed entities on the USE which

¹²⁶ LuxSE, 'The Nigerian Exchange and the Luxembourg Stock Exchange sign MOU to Expand the Green Bond Markets' (African Markets, 11 October 2019) < <https://www.african-markets.com/en/stock-markets/ngse/the-nigerian-stock-exchange-and-the-luxembourg-stock-exchange-sign-mou-to-expand-the-green-bond-markets> > accessed 2 November 2019.

¹²⁷ The Johannesburg Stock Exchange, 'JSE Signs Memorandum of Understanding with the Stock Exchange of Mauritius' (JSE, 17 September 2015) < <https://www.jse.co.za/articles/jse-ca;signs-memorandum-of-understanding-with-the-stock-exchange-of-mauritius> > accessed 2 November 2019.

¹²⁸ The Johannesburg Stock Exchange, 'JSE Signs Memorandum of Understanding with Cairo/Alexandria Stock Exchange' (Mondaq, 21 July 2000) < <http://www.mondaq.com/southafrica/x/8908/listing+rules+flotation/PRESS+RELEASE+JSE+Signs+Memorandum+Of+Understanding+With+CairoAlexandria+Stock+Exchange> > accessed 2 November 2019.

¹²⁹ See Samuel Onyuma, 'Regional Integration of Stock Exchanges in Africa' (2006) *African Review of Money, Banking and Finance* 106.

has led to the suspension of the inter depository transfer mechanism between Kenya and Uganda. In addition, vast research has shown that cross-listing in East Africa did not result in increased liquidity for the firms despite the increase in trade volume.¹³⁰ Literature from other jurisdictions shows mixed results. While studying the cross-listing of Indian companies on the LSE, NYSE, and Luxembourg exchange, the research found no support for the hypothesis that cross-listing improves liquidity for cross-listed stocks.¹³¹

Silva and Chavez posit that cross-listing does not necessarily provide a liquidity advantage for firms that cross-list as opposed to those that do not but that the effect on liquidity varies depending on the firm's size and country of origin such that the larger the firm, the greater the probability of improved liquidity.¹³² All these studies cast a doubt on Onyuma's enthusiasm for cross-listings as crucial for integration of markets as available evidence discredits the ability for this method to resolve the inherent challenges facing capital markets in Africa.

4.3.2.4 Cross-border trading

Cross-border trading refers to a system where market participants in one country are allowed to trade in shares of companies listed elsewhere in the region. This could be facilitated through sponsored access or direct market access. UNECA argues, and I entirely agree, that this is the fastest route to market integration as it 'encourages and promotes parallel development of local markets and deeper regional integration.'¹³³ It is not difficult to see why UNECA reached this conclusion. Both the EAC and ECOWAS that have advanced stock market integration projects have commenced with projects

¹³⁰ See Stephen Matheka Makau, Samuel Owino Onyuma and Agatha Nabwire Okumu, 'Impact of Cross-border Listing on Stock Liquidity: Evidence from East African Community' (2015) 3(1) *Journal of Finance and Accounting* 10-8; Purity Maina, 'Effect of Cross-listing on Stock Liquidity in East Africa Security Exchanges' [Masters Thesis, Strathmore University 2019]; Calvin Wanjiru, 'The Relationship Between Cross-listing and Liquidity: A Study of Shares Cross Listed in the East African Securities Exchanges' [Masters Thesis, University of Nairobi 2013]; Irene Mumbi Makanga and Mary Wanjiku Gateri, 'Effects of Cross-listing on Valuation and Firm Performance' [Masters Thesis, University of Nairobi 2014].

¹³¹ Tejasvi Dabhane, 'The Impact of Cross-Listing on Stock Liquidity in the Home Market: A Comparative Study of Indian Companies Cross-Listed in US, UK and Luxembourg' [Masters Thesis, Auckland University 2018]

¹³² See Ana Cristina Silva and Gonzalo A Chavez, 'Cross-listing and Liquidity in Emerging Market Stocks' (2008) 32(3) *Journal of Banking and Finance* 420-33.

¹³³ UNECA (n 102) 272.

focused on cross-border trading. The African Exchanges Linkage Project and the EAC CMI follow this method. These are discussed in detail hereafter.

Cross-border trading has been popularised by the advancements in technology which ensure that the investors and intermediaries are unrestricted by geographical location. Sponsored Access is powered by order routing systems and networked electronic trading platforms. This could be through a 'hub and spoke' model where all exchanges are connected to a hub or router or a 'spaghetti model' where there is a direct link between the trade books of the different exchanges.¹³⁴ In adopting the 'hub and spoke' model as in the EAC-CMI Project, the ownership of the hub must be agreed on as well as the modalities of connecting the spokes i.e., the individual trading venues. This model would undoubtedly be powered by a rule book and harmonised framework applicable to the use of the hub as well as an agreement on how such trades would be settled. The 'spaghetti' model is an advanced step from the 'hub and spoke' as it required direct access which could raise oversight challenges and make it harder to detect, prosecute and control market manipulation and market abuse and encourage money laundering. An IOSCO Report found that to deal with the jurisdictional challenges, regulators in most markets require intermediaries seeking to trade on their markets to be licensed or registered and used MOUs to share information.¹³⁵ However, the report found that such cross-border trading was negligible and that many of the surveyed jurisdictions did not have a registered foreign intermediary and that there was no capacity to enforce laws in such cross-jurisdictional scenarios. Key to note is that this is a 2005 report when cross-border trading had not gained momentum and many of the projects discussed herein had not been conceived at the time.

On 14 August 2019, ECOWAS and Morocco signed a Plan to commence cross-border trades of securities in 2020.¹³⁶ Morocco's bid to join ECOWAS was

¹³⁴ Ekaterina Dorodnykh (ed), *Stock Market Integration: An International Perspective* (Palgrave MacMillan 2014) 22-3.

¹³⁵ Emerging Markets Committee of the International Organisation of Securities Commissions, *Report on Cross-Border Activities of Market Intermediaries in Emerging Markets* (May 2005) <<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD193.pdf>> accessed 21st October 2019.

¹³⁶ Leanne de Bassompierre, 'West Africa Sets 2020 for Start of Cross-Border Securities Trade' (Bloomberg, 30 October 2019) <<https://www.bloomberg.com/news/articles/2019-10-30/west-africa-sets-2020-for-start-of-cross-border-securities-trade>>

surprising as Morocco is in North Africa and was treated suspiciously. Yet the increased trade deals with West Africa over the last decade were the preamble to this action.¹³⁷ It hence paved way for the regulators of ECOWAS and Morocco financial markets to indicate that they would be seeking approval of this plan to facilitate cross-border trades although details of the Plan have not been worked out. Below, I discuss two other projects that are currently focused on cross-border trading.

i) The African Exchanges Linkage Project (AELP)

The AELP is a joint initiative of the African Securities Exchanges Association (ASEA) and the African Development Bank (AfDB), with sponsorship from the Korea- Africa Economic Cooperation (KOAPEC), which is meant to facilitate the trading and settlement of securities across seven stock exchanges in Africa. These seven stock exchanges are the Nigerian Exchange, the NSE, JSE, the CSE, the BRVM, the Stock Exchange of Mauritius, and the EGX. These stock exchanges jointly account for at least 85% of Africa's entire capital markets capitalisation and have more than 1,050 listed companies between them. As a result, developments in this Project deserve full attention and scrutiny. The easing of trading between these exchanges is anticipated to resolve the liquidity issue, attract larger companies to list, and deepen Africa's capital markets.

Unfortunately, not much is known about the modalities of this project since it is in its initial stages. However, during the first stakeholder round table held in April 2019 in Abidjan, Cote d'Ivoire, the exchanges agreed that the linkage would be implemented using a 'Sponsored Access trading model in the first phase, which is supported by the existing legal and regulatory frameworks in the participating jurisdictions.'¹³⁸ An order routing system is to be installed to enable orders to be routed to the different stock exchanges and by virtue of the sponsored access, a resident registered broker will be expected to

¹³⁷ Neil Munshi, 'Morocco's ECOWAS Bid Sparks African Fear and Suspicion' *Financial Times*, (24 January 2019) < <https://www.ft.com/content/f17bf958-f96b-11e8-a154-2b65ddf314e9>>

¹³⁸ African Development Bank, 'African Development Bank, Partners Meet over Securities Exchanges Linkage Project' (AfDB, 26 April 2019) <<https://www.afdb.org/en/news-and-events/african-development-bank-partners-meet-over-securities-exchanges-linkage-project-19240>> accessed 14 October 2019.

sponsor the trade on the host exchange with settlement taking place on the host exchange in line with its trading and settlement rules.

Although this sponsored access helps regulators to deal with risk and jurisdictional issues, it does not deal with the cost of trading across borders. This Project is also not under a regional grouping or one of the recognised RECs by the AU and hence it is unclear whether it will be legitimised by the AU in its quest for integration. However, a Project of this magnitude that is not under a REC is also an indication of the move away from the AU's anticipated integration under the auspices of regional groupings, to building coalitions of the willing. The means to integration may not be what the Treaties anticipated but it may be a scenario where the end justifies the means.

ii) The East African Community Capital Markets Integration Project

The CMI Project which commenced in November 2015, is the brainchild of the EAC under CMIPC with support from EASRA and EASEA. It is being implemented under the FSRDP 1 with funding from the World Bank. In 2011, the World Bank approved US \$ 16M for the project before the EAC sought a further US \$ 10.5M and an extension of time for the project until September 30, 2019. However, this deadline too was not met, and although states are committed to the project, the timelines of completion are uncertain.

The FSDRP 1 has six components which included financial inclusion and strengthening market participants, harmonisation of financial laws and regulations, mutual recognition of supervisory agencies, integration of financial market infrastructure compatible at the regional level, development of a regional bond market, and capacity building. All these activities are carried out at the same time and not in stages. For example, as the stock markets are linked, other technical working groups are drafting Directives to harmonise the regulatory framework while at the same time payment systems are being harmonised. This Project is also on the back of a decision by the EAC member states to sign a Monetary Union Protocol which included a commitment from member states to 'integrate their financial systems and adopt common principles and rules for the regulation and supervision of the financial system' and have a single currency by 2024.

The overall objective of the CMI is to allow a seamless movement of securities and payments between the different EAC capital markets, compatible at the regional level, in order to enable the creation of a regional capital market in the EAC. This would be accomplished through the creation of a technological linkage between the stock exchanges and central securities depositories of the partner states; Kenya, Uganda, Tanzania, and Rwanda¹³⁹. The linkages would be achieved through a Smart Order Router (SOR), Central Depository System Interface (CDSI) for the East African Community, and a Messaging Platform for the Securities Market.

Although the CMI Project started with all member states, Kenya subsequently withdrew from the Project due to allegations of irregularities in the contracting of the systems provider, InfoTech Private Ltd. Subsequently, Kenya returned to the negotiating table as an observer but is not participating in the integration. With the largest player and strongest economy in the region out of the project, concerns have arisen as to the relevance and sustainability of the project.¹⁴⁰ Other concerns relate to the compatibility of the platforms for trading and settlement in the partner states. For example, the RSE shares a depository with the Central Bank of Rwanda while the other partner states each have their own depositories. During testing, it emerged that the messaging platform technology used by the USE and DSE (Microsoft Server Message Que) is incompatible with that used by the CMI provider (IBM WebSphere Message Que). These technological differences have contributed to the delay of the linkages. Uganda has also expressed reservations on the linkage of its central securities depository to those of partner states based on prior experiences with the defunct inter depository mechanism that existed between USE and Kenya. The development of the CMI Interface for Rwanda and Burundi stalled for a while due to non-cooperation from the CMI vendor who was unhappy about the lack of a live contract and hence decided not to

¹³⁹ Burundi and South Sudan are also members of the EAC. However, they are in the process of establishing their stock markets with support from the FSDRP 1 and therefore they are not included in the initial process of integration.

¹⁴⁰ Kenya is the giant of the region, having the largest number of listed companies (63 in comparison to Uganda's 19, Rwanda's 8 and Tanzania's 28) and the largest market capitalisation of all.

commit further resources until an Addendum 3 to the initial contract was agreed.

Perhaps the biggest disagreement with this Project has been the proposed fee structure and the financial sustainability of the Project post-go-live stage. The proposed system is owned by the EAC and member states still maintain their own trading and settlement systems. Therefore, the partner states needed to agree on access fees, taking into consideration that whatever fee was charged would end up being passed down to individual investors. This would increase the transaction costs and defeat the purpose of integration. The EAC, therefore, proposed that no fees would be charged to participants which in turn meant that the partner exchanges and depositories would have to meet the cost of maintaining the system after it went live. Considering that not all exchanges would use the entire suite of the infrastructure, fees have to be further broken down and charged according to usage. For example, market access fees would only be charged to exchanges that used the CMI as a matching engine. Those exchanges using the SOR would then pay annual maintenance fees for the SOR only. These proposed fees then raised concerns as to sustainability as the exchanges needed to justify additional expenses in a region where trading volumes are low and, hence affecting turnover.

Related to the fee structure is the issue of brokerage commissions. In cross-border trading, policymakers grapple with how to incentivise intermediaries so that they can be attracted to use the trading and settlement systems. This is important because, in cases of sponsored access, there are separate brokers involved who charge separate fees hence increasing costs for the investor and making the market and the system unattractive. Therefore, consensus must be reached on a revenue sharing ratio where the brokers can share commissions in established ratios. For example, under the SADC model, the broker who refers the equity trade receives 33.3% of the trading commission and the balance is for the broker who executed the trade. It is not clear if the CMI would require sponsored access and this will depend on the provisions of the Rulebook for the usage of the CMI.

4.4 Conclusion

What is unique about stock market integration in Africa? Unlike other pursuits of alliances and mergers of stock markets globally, stock market integration

arrangements in Africa are premised on the concept of unity which is evident throughout the Treaties that underpin the African Union and the various regional economic groupings and communities. Unity was the answer to the years of colonialism and the need to safeguard the newfound political, social, and economic freedom. The quest for unity saw the birth of regional and continental initiatives including the creation of the Organisation of African Unity and its successor, the African Union. It also led to RGs and RECs and with their recognition by the Abuja Treaty, they were propelled forward as the conduits of this newfound unity and of the concept of the African Economic Community.

Integration bears many benefits for capital markets, especially in emerging markets. It may improve liquidity for markets, reduce the cost of capital and allow for product diversification. The Abuja Treaty mentions regional stock exchanges although it does not substantiate how these exchanges would be formulated. Hence, it is understandable why this topic deserves a research analysis such as this to determine why, when, and how it can be done. Stock market integration projects in an African concept mostly occur at the regional level through both recognised (by the AU) and unrecognised RECs and RGs. Of these, the most amount of progress has been seen in ECOWAS, EAC, and SADC. There is no one accepted model of integration which opens up questions on the most suitable way to integrate in order to maximise benefits and contribute to the reduction of the challenges facing stock markets in Africa.

There is an option for markets to pursue a model that involves a merger into a single regional exchange and/or regulator. This has been explored in other jurisdictions in Europe and is also the model for the formation of Africa's two regional exchanges, BVMAC and BRVM. The creation of the regional exchanges, however, should not be fronted as proof that such mergers can work in Africa. This is because all member countries to the regional exchanges did not have national stock exchanges before their decisions to be a part of the regional exchanges. In addition, all member states have a shared history which includes colonial past, common language, and a common currency. In a scenario where member states have already established exchanges that are seen as symbols of national sovereignty, it remains to be seen how such a

merger would apply. The closest example is the decision of the Douala Exchange to close its doors and join CEMAC members on BVMAC. However, one must note that Cameroon was one of the member states that were involved in the negotiations to create BVMAC and only fell out due to conflicts including the location of the headquarters of this regional exchange. To join the regional exchange, CEMAC Heads of State had to agree to move the headquarters from Libreville to Douala.

Another option would be to pursue a Euronext model that involves trading floors in different member states with a harmonised rule book and a panel of regulators. Regulators may also pursue the cross-listing model which was common in the EAC in the early 2000s allowing companies listed on the NSE to cross-list on the USE and DSE. It is also prevalent between the JSE and the NSX where more than half of the companies listed on the NSX are cross listed from the JSE. Cross-listing requires amendments to regulatory frameworks of the involved exchanges which put the role of law in stock market development in the spotlight, creating a basis for the alternative proposal that is made in Chapter 7. Cross-listing has been posited by some authors as the building block of integrating exchanges in Africa as well as its potential to improve markets in Africa. However, there is evidence, discussed in this chapter, that cross-listing does not, on its own, improve liquidity unless the host markets take steps to put in place favourable regulatory frameworks and macroeconomic policies.

The last model discussed, is the cross-border trading model. This model has been popularised by advancements in information technology and innovation which resolves limitations in geographical location. Cross-border trading can be through either sponsored access or direct market access. This model has found acceptance among proponents of integration in African stock markets and the regional initiatives that have made the most progress follow this model. This includes the EAC CMI and the African Exchanges Linkages Project.

A further model not discussed in this chapter is the European Union model. The EU model is a law-based framework i.e., focused on the regulation of securities markets in the Union. Securities regulation in the EU is based on the objective of the Treaty of Rome to create a common market or European Economic Community. It has evolved through four different stages with the

first stage focused on harmonisation of listing and disclosure rules and the second stage centred on investment services.¹⁴¹ The third phase saw concerted efforts on securities regulation evidenced by the Financial Services Action Plan (FSAP) and a number of commissioned reports including the ground breaking Lamfalussy Report and the Commission's White Paper on the Internal Market with the fourth phase based on the White Paper on Financial Services Policy.¹⁴² The EU seeks to harmonise the rules governing securities markets which could be minimum harmonisation or maximum harmonisation. This model is the basis for the alternative proposal discussed in Chapter 7.

In discussing the REC-based integration projects, it is evident that although there are recognised RECs by the Abuja Treaty and such RECs are seen as the conduits of integration, other stock market integration projects are happening outside these RECs. In addition, member states belong to more than one REC (multiple memberships) raising concerns for the progress of integration. There are also competing new regional groupings that have emerged in areas that have an existing REC and attracted member states belonging to recognised RECs. How does this impact the integration agenda and how can these challenges be resolved? Chapter 5 and 6 provide an analysis and attempt to answer these questions.

¹⁴¹ Niamh Moloney, *EU Securities Regulation* (Oxford University Press 2008) 11.

¹⁴² *Ibid* 12-5.

CHAPTER FIVE:

MAKING STOCK MARKET INTEGRATION WORK FOR AFRICA I: RESOLVING FOUNDATIONAL CHALLENGES

Introduction

You can't build a great building on a weak foundation. The preceding chapter has provided an overview of Africa's integration agenda in the field of capital markets, specifically stock markets. This agenda is contained in the Abuja Treaty, the treaties underpinning the formation of the RECs as well as various proclamations, resolutions, and declarations of the AU, with the latest being Agenda 2063, Africa's blueprint and master plan for transforming the continent into a global powerhouse. Three common themes in the conversations on stock exchange integration in Africa are the formation of regional exchanges, a Pan African exchange, and the concept of an African Economic Community in which exchanges are integrated. Unfortunately, although these concepts attract substantial mention, there is very little analysis, research, or literature on them. This Chapter changes this status quo.

Specifically, it considers these five key concepts that I term as foundational challenges. The first concept relates to the new move from national to regional exchanges. Did the Treaties (both regional and continental) anticipate the disappearance of national exchanges to give way to regional exchanges and a Pan African Exchange or is there room for co-existence? This chapter answers this question. The second concept discussed in this Chapter is the new rush towards a Pan African Stock Exchange. The Pan African Stock Exchange is not a creature of the Abuja Treaty and yet has somehow found itself attracting attention and will be the subject of an anticipated Protocol. This part of the chapter deliberates this anomalous yet interesting concept of a continental exchange, the challenges it raises, and what the Protocol should entail in the establishment of the exchange.

These two discussions pave way for the substantial discussion on the place of the national exchange in this arrangement that includes regional and a continental exchange. The review in Chapters Two and Three pointed to the unique position of a stock exchange as a symbol of national sovereignty. Owing to this, it is crucial to provide a discussion on the sovereignty concerns

that this raises for the exchange as both a private stakeholder and a national symbol. What is the crux of this argument in an African context? Is this a challenge that can be overcome or is it one that can simply be managed? What guidance can the European Union offer on this subject?

The fourth part of this chapter reflects on the enigmatic concept of an African Economic Community in which stock markets are integrated. The thesis notes that there is very limited understanding of the concept and the impact of this pursuit for all involved. To change this, the discussion ponders on the European Community and ASEAN and their pursuit of an economic community in the area of capital markets. Are there lessons for the AU and RECs to pick in their own ambitions for the AEC?

Lastly, the importance of a robust and clear funding strategy for integration projects is discussed. Funding remains one of the biggest hurdles to the implementation of integration in Africa and this extends to stock market integration. Financing integration is crucial to fast-tracking the regional integration process, achieving the objectives of the Treaty, and consolidating gains of integration. This part of the discussion discusses the Africa Integration Fund and its modalities as a key funding tool as well as looking at how other communities, such as the EU and ASEAN fund such initiatives. A conclusion is then provided.

5.1 From National to Regional Exchanges?

The Abuja Treaty refers to stock markets only once, as part of the monetary, financial, and payment policies. Article 44 of the Abuja Treaty requires member states, within a timetable to be determined by the Assembly, to harmonise their policies, 'in order to boost intra-community trade in goods and services, to further the attainment of objectives of the Community and to enhance monetary and financial co-operation among Member States.' In Article 44(1) (d), member states are hence required to 'promote the creation of national, regional and sub-regional money markets, through the co-ordinated establishment of stock exchanges and harmonising legal texts regulating existing stock exchanges with a view to making them more

effective.¹ The question to answer here is: Does Article 44(1)(d) require a move away from national exchanges to regional exchanges? If yes, could this be the reason behind the increased interest in regional exchanges? If not, why is there a shift and where does it leave national exchanges?

There are two possible interpretations of this Article. One interpretation presupposes that the Abuja Treaty only required the creation of 'national, regional and sub-regional money markets' and that this would be achieved through the coordinated establishment of stock exchanges. This interpretation adopts the view that money markets is a wide term that encompasses both equities, debt, and banking facilities such as commercial papers, repos, promissory notes, bank deposits, treasury bills. Ordinary buying and sale of shares is not under the money market and hence an argument can be made that Article 44(1)(d) did not include stock markets in its call for national, regional, and sub-regional money market.

The establishment of stock exchanges here would be seen as one of the ways of facilitating the national, regional, and sub-regional money markets without an express requirement in the Treaty to establish a national, regional, and sub-regional stock exchange. This interpretation however may not hold given the overarching aim of the Abuja Treaty which is the formation of the AEC. The common market, being one of the objectives of the Abuja Treaty requires a community without borders, where there is free movement of capital and some level of macroeconomic policy harmonisation. Stock markets are a key component of the monetary policy.

Integration however takes many forms as discussed in the preceding chapter. In this case, a question arises as to what level then of integration could be deduced from Article 44(1)(d). The answer seems to be at the end of Article 44(1)(d): 'through the co-ordinated establishment of stock exchanges and harmonising legal texts regulating existing stock exchanges' (emphasis mine) in which case no mention of integration is made. This argument however takes cognisance of the fact that harmonisation could indeed be a key enabler of market integration. Financial integration denotes a process through which

¹ Emphasis mine.

financial markets in an economy become more closely integrated with others that are located in a different economy.² UNECA advises that:

'Whether a country chooses to integrate its financial markets formally or informally, it needs to create an enabling environment that would attract foreign participation. To this end, steps that the country could take include the harmonization of rules and regulations governing its domestic financial markets, and the creation of standards and benchmarks similar to those of international markets.'

Based on the above, the view that Article 44(1)(d) did not require the establishment of regional stock exchanges may fail since harmonisation is important to integration, and hence the appearance of the latter in Article 44(1)(d) may be seen as a referral to integration which is the overarching aim of the Abuja Treaty. However, this then raises another question of the type of integration then that the Treaty anticipated; was it policy or was it institutional? The reference to harmonisation of legal texts may denote a policy-based integration rather than an institutional-based integration.

An alternative interpretation of Article 44(1)(d) would point to the creation of sub-regional and regional stock exchanges. This position seems to be the interpretation that has been adopted and is almost accepted as the position. While writing about the Pan-African Financial Institutions of the African Union, the African Union Commission expressly indicates that stage four of the Abuja Treaty requires the creation of sub-regional and regional stock exchanges.³ In addition, the creation of sub-regional and regional stock exchanges is seen as a key task in the second stage of the strategic plan to establish the African Central Bank in 2028. Agenda 2063, which is Africa's blueprint and master plan for transforming the continent into a powerhouse, may be instructive in understanding the direction being undertaken on the national vis-à-vis

² Gordon De Brouwer, 'Monetary and Financial Integration in Asia: Empirical Evidence and Issues' in Asia Development Bank, *Asia Economic Cooperation and Integration* (Asia Development Bank, 2005). Also used by United Nations Economic Commission for Africa, *Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa* (UNECA 2008) 256.

³ African Union Commission, *Pan African Financial Institutions: Art 19 of the Constitutive Act of the African Union*, Report of the African Union, (December 2017, 26).

regional exchanges establishment. It also sheds light on the elusive concept of a Pan-African stock exchange.

The flagship projects of Agenda 2063 include the creation of African Continental Financial Institutions which is seen as crucial to accelerating integration. The Pan African Stock Exchange is listed as one of the financial institutions that would be set up in the Africa of the future. In addition, the ten-year implementation plan refers to regional stock exchanges as a way to deepen financial/capital markets with the establishment of at least two regional stock exchanges as one of the key transformational outcomes of Agenda 2063. The Pan African Stock Exchange is to be established by the year 2030. However, there seems to be confusion on the timelines and the place of national exchanges vis-à-vis regional exchanges. Under Goal 20 of Agenda 2063, the 2023 targets include regional stock exchanges but at the same time, it refers to national stock exchanges.

Under Aspiration 7, it is noted that 'the African Investment Bank, the African Credit Guarantee Facility, the African Remittances Institute and at least 2 regional stock exchanges in place by 2023 will be the major drivers for the continents growing financial self-reliance. National capital markets will contribute to at least 10% of development financing in addition to other financing avenues...' While listing the risks, threats, and mitigation strategies, Agenda 2063 notes that 'national, regional and continental stock exchanges are being envisaged.'⁴ The reference to both national and regional exchanges continues in various places in the document including under Goal 18 where it expressly states the establishment of national stock exchanges as one of the uses of the funds. The achievement of these milestones also bears different dates in different parts of the documents making up Agenda 2063 and ranging from 2016, 2023 to 2030.

It is certainly unclear, from regulatory and treaty pronouncements whether national exchanges shall continue to exist alongside the regional exchanges. It would appear that the Abuja Treaty foresaw the need to establish national exchanges and some level of harmonisation between exchanges without mergers of the same. However, the concept of a regional exchange which is

⁴ African Union, Agenda 2063, 143.

articulated in many parts of Agenda 2063 and the general idea behind the AEC may point to integrated capital markets, although the type and method of integration are still unclear. What is certain though is that Agenda 2063's reference to national capital markets and at least 2 regional exchanges points to mutual existence rather than replacement. Importantly, there has been no pronouncement either at the regional level or by the African Union that national exchanges should give way to a regional or continental exchange. Such pronouncement would have serious and far-reaching political, economic, and social consequences.

5.2 Understanding the Concept of a Pan African Exchange

5.2.1 The Origin of the Pan African Exchange

The idea of a Pan African Exchange has taken centre stage in the recent past although it has no treaty or regulatory backing. First, the Abuja Treaty mentioned only the African Central Bank. During the adoption of the AU Act, two further financial institutions were added; the African Monetary Fund and the African Investment Bank.⁵ These are the Treaty-based financial institutions. However, in January 2006 during the AU Assembly in Khartoum, the AU Commission was mandated to carry out a study to explore the feasibility of a Pan-African Stock Exchange (PASE).⁶ The study aimed at exploring ways to gradually integrate African stock exchanges into the Pan African Stock Exchange. Together with the African Investment Bank, African Monetary Fund, and African Central Bank, these four institutions would constitute the AU financial institutions.⁷ In 2012, a final report was issued on the study for the establishment of a virtual regional market way as one of the milestones to the creation of the Pan African Stock Exchange.⁸ This report did not include the input of any of the RECs as none responded to the request for

⁵ Article 19 of the AU Act.

⁶ Decision on the Establishment of a Pan-African Stock Exchange and on the Establishment of a Fund Within the African Union to Mitigate the Effects of the Increase in Oil Prices on the African Countries (Doc.Assembly/AU.8 (V1)) Add.5 and 6) Assembly/AU/Dec.92 (VI)

⁷ See Article 19 of the AU Act.

⁸ International Securities Consultancy Limited, *Consultancy Services for the conduct of Technical Study on the Establishment of a Virtual Regional Market as a milestone on the way towards a Pan African Stock Exchange*, Final Report, 29 November 2012. https://au.int/sites/default/files/documents/31787-doc-pase_ea10952_e_original.pdf accessed 19 March 2021.

comment⁹ and therefore one cannot opine on whether the RECs were open to the idea of a Pan African Stock Exchange or were against the same.

The report identified barriers to the pursuit of a Pan African stock exchange which included macro-economic barriers such as exchange controls, wide diversity in the level of development of capital markets, and low level of actual economic integration among states. Other challenges included the mutual ownership of exchanges, a less developed savings culture and savings institutions, and inappropriate and inconsistent accounting standards among others. As with all the others, the RECs were seen as the building structure of the proposed Pan African Stock Exchange.¹⁰ The Report pointed out that this exchange would be based on existing stock exchanges and result from the 'creation and connections of national or regional stock exchanges.'¹¹

It is anomalous that an alleged financial institution of the AU does not have treaty backing but is rather an outcome of a proposal by Libya and a commendation by an Assembly decision. This haphazard and simplistic way of rooting a concept with so much impact is confusing yet unexpected from the AU under the leadership of the late President Muammar Gaddafi. In addition, it shares a name with the African Stock Exchange based in Mauritius, paving way for confusion.

5.2.2 Operationalising the Pan African Stock Exchange

5.2.2.1 The position of the AU and the Protocol.

With the Pan African Stock Exchange now being recognised as one of the continental financial institutions of the African Union, it remains to be seen how this will function. The AU notes that the Pan African Stock Exchange Protocol is under development.¹² In 2020, the Technical Committee on Finance, Monetary Affairs , Economic Planning, and Integration of the African Union tendered a progress report on the financial institutions.¹³ The study

⁹ Ibid 15-16.

¹⁰ Ibid 75.

¹¹ Ibid 4.

¹² African Union, Africa Integration Report 2020: The Status of Regional Integration in Africa. Advancing Intra-African Trade for Post-COVID Recovery, January 2021, 74. <https://au.int/sites/default/files/documents/40071-doc-africanintegrationreport-englishjan28.pdf> accessed 18 April 2021.

¹³ Progress Report on the Establishment of the African Union Financial Institutions, Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration Experts'

notes that the AUC seeks to engage ASEA through an MoU to fast track the implementation of this exchange but then mentions the African Exchanges Linkage Project.¹⁴ As mentioned in the preceding chapter, the AELP's target is not to merge national exchanges into one exchange but rather to enable cross-border trading through an order routing system and capacity development for the national exchanges. In addition, AELP is limited to only seven stock exchanges i.e., BRVM, Casablanca Stock Exchange, EGX, JSE, Nigerian Exchange, NSE, and Stock Exchange of Mauritius. It could not have been the intention of an African-wide project to limit the benefits of a project to certain countries while excluding others.

As it stands, the modalities of the creation of the Pan African Stock Exchange remain unclear. The 2020 African Integration Report mentions that a Pan African Stock Exchange Protocol is under development. This Protocol should shed more light on the establishment, functioning, and operations of the Pan African Stock Exchange. From the onset, it should be clear as to the position of this exchange vis-à-vis existing national stock exchanges. The establishment of Euronext may be instructive. Euronext is the pan-European stock exchange that covers France, Ireland, Netherlands, Portugal, Belgium, Norway, and the United Kingdom. Before the creation of Euronext in 2000, there were separate stock exchanges in each of the initial member countries: Netherlands, Portugal, Belgium, and France. Discussions between eight stock exchanges ensued on the possibility of an integrated European capital market but these did not materialise leading to a separate discussion between Amsterdam, Paris, and Brussels exchanges.¹⁵ This discussion led to the merger on 22 September 2000 into a single trading and settlement platform for all the exchanges without vertical integration. Today, all Euronext equities are traded through a central system, Nouveau System Cotation (NSC), cleared by Clearnet and settled by Euroclear. Using Euronext as an example,

Meeting, 9-11 March 2020, Accra Ghana. Eco/STC/MAEPI(IV)Exp/3
https://au.int/sites/default/files/newsevents/workingdocuments/38223-wd-progress_report_on_the_au_financial_institutions_eng.pdf accessed 4 March 2021.

¹⁴ Ibid 7.

¹⁵ Marco Pagano and A Jorge Padilla, 'Gains from Stock Exchange Integration: The Euronext Evidence' May 2005 Working Paper.
<https://st.ilsol24ore.com/art/SoleOnLine4/Finanza%20e%20Mercati/2006/05/padilla-pagano.pdf> accessed 23 April 2021. Also see Ulf Nielsson, 'Stock Exchange Merger and Liquidity: The Case of Euronext' (2009) 12(2) Journal of Financial Markets 229-267

however, depends on the type of stock market integration anticipated with the creation of the Pan African Stock Exchange.

The consultancy report states that the recommendations of a workshop in 2008 were that the Pan African Stock Exchange would be based on the existing exchanges and 'result from the creation and connections of national or regional stock exchanges.'¹⁶ The same report mentions a group of exchanges establishing a virtual regional market to which companies can issue securities under the supervision of their home regulators and such securities are traded and cleared under their home rules.¹⁷ It hence seems to mirror or substantially resemble the African Exchanges Linkages Project ('AELP'). In addition, the Report speaks of using RECs but allowing member states to opt-out and for this to be a coalition of the willing. It is difficult if these recommendations are to be adopted, to see what is unique about this Pan African Stock Exchange or even what makes it Pan African. It seems to be just another virtual exchange of willing participants. However, as noted, there is a Protocol being developed that will set out the modalities of this exchange.

The Protocol must lay down clear stages for how this exchange will be achieved. As multiple stock market integration programs are happening in the RECs and RGs, the Protocol must endeavour to lay out a clear methodology for achieving the Pan African Stock Exchange. It should be clear what is unique about this exchange from existing projects to avoid duplication of projects which leads to wastage of the scarce resources. It would be absurd to develop a Protocol to regurgitate what is already taking place through the regions and projects like the AELP.

5.2.2.2 The legal status

Crucially, the legal status of the exchange must be provided for. Central to this is whether the exchange will be incorporated as a corporate body or as an international organisation. This distinction is paramount in determining the law applicable to the exchange. International organisations have rights and duties inherent in international law and this extends to matters of finance,

¹⁶ International Securities Consultancy Limited (n 8) 6.

¹⁷ Ibid.

privileges, and immunities as well as institutional structures.¹⁸ The African Investment Bank, an organ of the AU, was clothed with full international personality which allows it to enter into agreements with international organisations as well as members and non-members.¹⁹ In member states, the bank can institute legal proceedings and contract since it has a juridical personality.²⁰ In addition, the bank's property, assets, and funds enjoy immunity as well as exemption from tax.²¹ The Protocol should clarify whether the exchange will obtain the same status since it is seen as one of the financial institutions of the AU and hence subject to the African Union legal order.

5.2.2.3 The ownership structure of the exchange

Perhaps there is no more critical issue in the formation of this exchange than its ownership. The ownership of exchanges is a delicate matter and consolidation moves in the sector attract attention due to the crucial role that exchanges play in financial sector development and economic growth. There are two possibilities of an ownership structure: private entities and governments. In a case where the Pan African Exchange is seen as an institution of the AU, then it would follow that ownership of this exchange would be vested in the member states. State ownership of an exchange was common in the earlier years of the concept of exchanges but has been phased out over time.²² State ownership of exchanges served the purpose of organising liquid markets in government securities as well as oversight to prevent market manipulation and abuse.²³ Today, many exchanges are owned by private entities as mutual or demutualised entities and a move towards public listing is imminent. A move back to the ownership of the Pan

¹⁸ See Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge University Press 2015); Niels M Blokker and Nico J Schrijver, 'Immunity of International Organisations' in Niels M Blokker (ed), *Legal Aspects of International Organizations* (Brill 2015); Roberto Virzo and Ivan Ingravallo, 'Evolutions in the Law of International Organisations' in Niels M Blokker (ed), *Legal Aspects of International Organizations* (Brill 2015); Kristina Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) 31(1) *European Journal of International Law* 201-33.

¹⁹ See Article 23 of the Statute on the African Investment Bank.

²⁰ Article 24 of the Statute on the African Investment Bank.

²¹ Article 25 of the Statute on the African Investment Bank.

²² See Johannes Köndgen, 'Ownership and Corporate Governance of Stock Exchanges' (1998) 154(1) *Journal of Institutional and Theoretical Economics* 228-30.

²³ *Ibid* 241.

African Stock Exchange by member states of the AU would be out of the norm and almost a step backward.

Ownership of stock exchanges also causes an additional issue of the exercise of the rights of shareholders and members. If the Protocol presupposes that the formation of the Pan African Stock Exchange will include a merger of already existing stock exchanges, a typical roadblock will be the interests of the existing shareholders who exercise their voting rights to give direction to the decisions of the exchanges. When the London Stock Exchange Group sought to acquire the TMX Group (which owns the Toronto Stock Exchange), the shareholders of the exchange rejected it and with the failure to obtain the two-thirds majority votes of the shareholders, the acquisition bid failed.²⁴ A similar scenario from African exchanges would prove fatal for the setup of the Pan African Stock Exchange.

Mergers towards a continental exchange will also encounter nationalistic concerns. Voicing nationalistic concerns about an acquisition by London, other Canadian-based groups formed a consortium to counter the LSE's offer to buy Canada's TMX Group.²⁵ The same fate awaited the Singapore Exchange Limited's bid for ASX Limited, the Australian Stock Exchange.²⁶ The Australian government blocked the \$8.3bn bid on grounds that such an acquisition would be contrary to national interest²⁷ with Wayne Swan, the Treasury stating: '...This is not a merger, it's a takeover that would see Australia's financial sector become a subsidiary to a competitor in Asia.'²⁸ The nationalistic spirit has been credited for frustrating and delaying regional

²⁴ Pav Jordan and Luke Jeffs, 'LSE, TMX Abort Their Merger, Leaving Both in Play' *Reuters* (London, 29 June 2011); Boyd Erman and Karen Howlett, 'Shareholders Reject Proposed Merger of TMX and LSE' *The Globe and Mail* (Toronto, 29 June 2011).

²⁵ Bloomberg, 'Canadian Banks Try To Thwart TMX Deal' *Wall Street Journal* (Toronto, 26 May 2011). <https://www.wsj.com/articles/SB10001424052748703864204576323410618652604> Accessed 9 April 2021.

²⁶ Editorial, 'Singapore, Australian Stock Exchanges Merge' VOA News (East Asia Pacific, 24 October 2011) <https://www.voanews.com/east-asia/singapore-australia-stock-exchanges-merge> accessed 9 April 2021.

²⁷ BBC News, 'Australia Rejects Singapore's bid for Stock Exchange' (8 April 2011) <https://www.bbc.com/news/business-13008839> accessed 9 April 2021; Michael Smith and Charmian Kok, 'Singapore Exchange Ends Bid after Australia Rebuff' *Reuters* (Sydney, 8 April 2011). <https://www.reuters.com/article/us-asx-sgx-idUSTRE7370LT20110408> accessed 9 April 2021.

²⁸ Editorial, 'How the ASX-SGX Merger Failed' *The Sydney Morning Herald* (Sydney, 21 April 2011) <https://www.smh.com.au/business/how-the-asx-sgx-merger-failed-20110421-1dqb2.html> accessed 9 April 2021.

initiatives and hence it would not be surprising for nationalistic tendencies to drive rejection of such mergers.

5.2.2.4 Competition law concerns

If the creation of the Pan African Stock Exchange is through a merger of existing stock exchanges, policymakers must carefully consider how this interacts with the competition law regime of other countries. When NYSE-Euronext attempted to merge with Deutsche Börse, the EU blocked it on grounds that the merger would lead to a monopoly in the trading of derivatives.²⁹ The European Commission later blocked another merger between Deutsche Börse and the London Stock Exchange on grounds that such a merger would reduce competition and create a monopoly in the clearing of fixed income instruments.³⁰

Although Africa does not have a continental centralised competition law regime, substantial developments in competition law have taken place at both the national and regional levels. Today, there are competition law regimes in most of the countries with the biggest stock markets in Africa including Nigeria, Kenya, South Africa, Botswana, Angola, Ghana.³¹ In addition, there are RECs and RGs with competition law regimes such as CEMAC's Regulation N. 06/19-UEAC-639-CM-33 of 7 April 2019 which among others, considers mergers and concentrations between companies as having an impact at the community level and hence fall under the exclusive competence of the Community if they exceed 10bn francs. Others include the COMESA Competition Commission which is the competition regulatory authority in COMESA as well as the EAC's competition regime which seeks to establish an EAC Competition Authority. Any attempt to create the Pan African Stock

²⁹ European Commission, 'Mergers: Commission blocks proposed merger between Deutsche Börse and NYSE Euronext' Press Release (Brussels, 1 February 2012) https://ec.europa.eu/commission/presscorner/detail/en/IP_12_94 accessed 9 April 2021 ; Editorial, 'NYSE Euronext merger with Deutsche Boerse Blocked by EU' BBC World News (1 February 2012) <https://www.bbc.com/news/business-16838793>

³⁰ European Commission, 'Mergers: Commission blocks proposed merger between Deutsche Börse and London Stock Exchange' (Brussels, 29 March 2017)

³¹ See Competition Amendment Act, No. 18 of 2018 (South Africa), Competition Act and Competition (General) Rules 2019 (Kenya), The Federal Competition and Consumer Protection Act (Nigeria), Competition Act (Botswana).

Exchange through mergers must therefore carefully consider the roadblocks present in nationalistic concerns and competition law regimes.

5.2.2.5 Regulation, Supervision, and Enforcement on the exchange

The Protocol should also provide for the agreements and commitments required to implement the exchange and the legal standing of the exchange's rules and regulations. A rule book is crucial to the success of any such exchange. The rule book is the regulatory blueprint of an integrated stock market as it regulates membership and conduct of intermediaries, the listing of securities as well as trading and settlement systems. For the Pan African Stock Exchange, a Euronext style Rulebook would be beneficial in ensuring regulatory transparency and consistency. However, if the recommendations of the consultancy are to be followed, then trading and settlement would be governed by host countries where the securities are located. This raises complexities of its own due to the multi-jurisdictional nature of such transactions.

The Protocol should also put in place institutions to monitor and enforce the framework of the Pan African Stock Exchange. The governance and management structure should be carefully laid out. The Protocol may borrow from the Statute of the African Investment Bank which makes shareholders of the bank members of the General Assembly, which is one of the governing structures of the bank.³² It is the General Assembly that will then determine the composition of the board of directors. Suspension and termination of membership must be provided for as well and this should extend to conflict resolution since it is not the member states that conduct the trading and settlement or list their securities but rather non-state actors such as listed entities and brokerage firms. Ensuring that these non-state actors (the exchanges) are adequately regulated and that they conform to the provisions of the Protocol to which they are not signatories will be crucial.

5.2.2.6 Financing the exchange

The sustainability of this exchange should be carefully considered given the many projects that have met their demise in Africa due to financial

³² See Article 13 of the Statute of the African Investment Bank.

challenges. Funding for the operations of the exchange may be obtained through shareholder funds (subscription by member states) as well as a specified percentage on fees and charges levied on trades executed through the stock exchange. If the exchange is incorporated as demutualised entity, profitability will become a factor in the operations of the exchange which may drive expansion and growth by the management of the exchange to return shareholder value. The Protocol must also consider exit mechanisms and how the operations can be terminated and the exchange wound up. In such instances, the liability of the members needs to be provided for as well as the distribution of any assets at winding up.

Ultimately, many unknowns surround the new Pan African Stock Exchange as an AU financial institution. The danger of the unknown is that it affects many knowns such as the already existing stock exchange, the current stock market integration programs as well as the other regional exchanges anticipated by both AU and certain REC treaties. The Protocol on the Pan African Stock Exchange will go a long way in clarifying the establishment, purpose, and operations of the exchange and it is essential that drafters of the Protocol carefully consider all facets of the exchange to avoid confusion and further complexity in an idea that is already convoluted.

5.3 The status of existing stock exchanges and sovereignty concerns

Economic integration in Africa is more of a political matter than an economic proceeding. The politics have and will always take centre stage, which is anticipated considering the history of the defunct OAU and its successor the AU. It is also a political matter because it touches upon an arena that the politicians consider crucial to statehood: the stock market. Anything that threatens the survival of that symbol quickly causes a web of complexities. This interaction between the exchange and the state is unique as the exchange is both a private stakeholder (with regards to the shareholding structure) and a national symbol. Yet despite these two distinct positions, any threat to the presence of that stock exchange evokes concern at the national level. This begs the question of how these can be dealt with, and the following discussion provides some approaches.

5.3.1 The Exchange as a private stakeholder

Treaties are signed by member states. The REC Protocol was signed by the AU on the one hand and the RECs on the other hand. At no time has any stock exchange been invited to become a signatory to any of the treaties, protocols, and statutes at the AU level. This raises challenges of implementation. Stock exchanges are privately held and owned and the decision-making lies in the shareholders and individual boards of each exchange. This, therefore, raises a question of whether the governments and RECs, which are not shareholders and/or owners of the exchanges, can make decisions that bind exchanges that are privately held. Considering that exchanges are not international organisations and hence do not fall under the umbrella of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, it also raises the question of the ability of these exchanges to enter into a merger that benefits the non-existent AEC.³³

Paragraph 6 of the AU Treaty romanticised the need to 'build a partnership between governments and all segments of civil society, in particular women, youth and the private sector in order to strengthen solidarity and cohesion among our peoples.' Despite this, there is no evidence that non-state actors were consulted in the treaty-making process as well as the process of making the REC Protocol and the Abuja Treaty. As a result, there are no documented views of the stock exchanges which are the subject of continental pronouncements that impact their operations. The failure to involve citizens and non-state actors in treaty-making processes in Africa is however not new. It is the norm for African leaders to make decisions at the AU level with little to no input from the people affected by such decisions. At the World Economic Forum in January 2001, President Thabo Mbeki retorted, while speaking of NEPAD, that 'it is significant that in a sense the first formal briefing on the progress in developing this programme is taking place at the World Economic

³³ For a comprehensive understanding of treaty making by extra national actors, see Duncan B Hollis, 'Why State Consent Still Matters – Non-State Actors, Treaties and the Changing Sources of International Law' (2005) 23(137) *Berkley Journal of International Law* 161-65; James Summers and Alex Gough (eds), *Non State Actors and International Obligations* (Brill 2018).

Forum.³⁴ During the consultation for the setup of the Pan African Stock Exchange, views on the exchange were only received from six stock exchanges and seven capital markets authorities which represents a tiny fraction of the market and the exchanges as important actors in this agenda. Incidentally, nearly 80% of all respondents to the survey were of the view that the idea of the Pan African Stock Exchange was premature.³⁵ Despite this, the Assembly went ahead to explore a largely unpopular concept.

The concept of a state taking centre stage in treaty-making is premised on the belief that international law can only be based on states, a view that is seen as problematic.³⁶ It is based on the perspective that states have the citizen's best interest at heart and hence represent these interests substantively in the treaty-making process. Ryngaert rebuts this view:

*'That we consider the state-based system as best representing the individual is the product of a particular world view which, assisted by the development of modern cartographic maps, considers territorially delimited states to be the only relevant actors that can have a legitimate representative function. This naturalized myth of the state, also characterized as 'the territorial trap', renders inevitable, and not subject to contestation, the link between the physicality of the observable landscape and the state as a means of organizing a polity. While this myth lingers on in international legal scholarship, it has been debunked in other disciplines, notably in critical political geography.'*³⁷

The focus on the state as the actor in the stock market integration agenda in the limited legal scholarship in this field bears some merit. Any integration,

³⁴ Quoted in Nsongurua J Udombana, 'A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development' (2002) 13(1) *Indiana International and Comparative Law Review* 219.

³⁵ International Securities Consultancy Limited, *Consultancy Services for the conduct of Technical Study on the Establishment of a Virtual Regional Market as a milestone on the way towards a Pan African Stock Exchange*, Final Report, 29 November 2012, 16.

³⁶ See Cedric Ryngaert, 'Non-State Actors in International Law: A Rejoinder to Professor Thirlway' (2017) 64 *Netherlands International Law Review* 155-62.

³⁷ Ibid 156. Also see Cedric Ryngaert, 'Non State Actors: Carving out a Space in a State Centred International Legal System' (2016) 63 *Netherlands International Law Review* 183-95.

of any nature, is impossible without the state. Therefore, the propensity to have a state-centric approach is understandable to a large extent. However, a state-centric approach ignores the uniqueness of stock market integration, which for example, is different from integration of trade in which the state has substantial control. By no means should this argument be interpreted as an attempt at demanding that stock exchanges be included as signatories to the treaties and protocols that threaten their very existence. Rather, law-making process at the regional and AU level should take into consideration the views of the exchanges as non-state actors. This is particularly important since the treaties and protocols, by extension, create and impose obligations on stock exchanges to integrate. This call also finds its footing in the new regionalism approach and the calls for increased involvement of non-state actors.³⁸

The direct involvement of stock exchanges in the decisions on the integration of capital markets is relevant in preventing a potential deadlock. As privately owned entities, the government may find it tough to require stock exchanges to become part of these regional projects that threaten their very existence. Of course, this argument takes into consideration the effect of government regulation on the stock exchange including the legislative ability of the government to make domestic rules that require stock exchanges to do or refrain from doing. However, early involvement and consultation of the stock exchanges may avoid a combative approach and aid the integration process at the regional and continental levels. The engagement of the stock exchanges may be instrumental in clarifying the position and existence of national stock exchanges in an integrated AEC as well as with the presence of the AEC.

³⁸ See Björn Hettne and Fredrik Söderbaum, 'The New Regionalism Approach' (1998) 17(3) *Politeia* 6-21; Fredrik Soderbaum, 'Introduction: Theories of New Regionalism' in Fredrik Soderbaum and TM Shaw, *Theories of New Regionalism* (Palgrave Macmillan 2003) 1; Fredrik Söderbaum and Andrew Grant, 'New Regionalism, States and Non-State Actors in West Africa' in Fredrik Söderbaum and Andrew Grant (eds), *New Regionalism* (Routledge 2003); Alexander C Chandra, 'Indonesia's Non-State Actors in ASEAN: A New Regionalism Agenda for Southeast Asia?' (2004) 26(1) *Contemporary South East Asia* 155-74; Leon Mwamba Tshimpaka, Christopher Changwe Nshimbi and Inocent Moyo, 'Towards a People-Centred Approach to Regionalism in Africa and Southern Africa' in Leon Mwamba Tshimpaka, Christopher Changwe Nshimbi and Inocent Moyo, *Regional Economic Communities and Integration in Southern Africa: Networks of Civil Society Organisations and Alternative Regionalism* (Palgrave Macmillan 2021).

5.3.2 The stock exchange as a national symbol

Establishing the status of the national exchange in the overall theme of stock market integration also carries socio-political implications. Mshomba notes that 'part of what makes economic integration in Africa an interesting subject for research...is the wide gap between the rhetorical support of politicians and the real state of economic integration.'³⁹ The rhetoric is strong but the actions are minimal and this can be attributed to the realities that integration requires a transfer of power.

The pooling of power in the region denotes the reduction of the power of the sovereign. Any state that seeks to be part of a regional integration initiative must be alive to the realities of the cessation of sovereignty. The cessation of power to the regional system comes in various forms; judicial, legislative, economic, and even political. The pursuit, therefore, is a delicate matter mostly comprised of contemplating the decision and attempting to hold onto whatever is left. A failure to understand the politics of integration is fatal for the pursuit of economic integration.

Integration in Africa is more of a political issue than an economic issue. Initial integration efforts in Africa were born out of a desire to achieve independence from colonialism⁴⁰ and conversations around economic integration came at a later stage. The success of integration depends on the political will of member states. Oppong notes that the commitment of member states, more than anything, is central to making any economic community work.⁴¹ An economic community, just like any coalition, should be one of 'the willing' rather than a forceful amalgamation or forced cooperation and co-existence. During the reign of the late Col Muammar Gaddafi as AU Chairman, the debates quickly shifted to the political union which was vehemently opposed by other member states.

³⁹ Richard Mshomba, *Africa in the Global Economy* (Lynne Rienner Publishers 2000) 75.

⁴⁰ Catherine Hoskyns, 'Pan Africanism and Integration' in Arthur Hazelwood (ed), *African Integration and Disintegration: Case Studies in Economic and Political Union* (Oxford University Press 1967) 369.

⁴¹ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 38.

Libya led the coalition that called for political structures in the AU including Ministerial appointments but this led to more divisions with the then Vice President of Botswana, Mompoti Merafhe lashing out at President Gaddafi:

*'The chair has no respect for established procedures and processes of the African Union and this may be motivated by his burning desire to coerce everyone into the premature establishment of an African Union government... It was clear that the chair was not prepared to entertain opposing views or opinions calling for a gradual approach to continental integration.'*⁴²

This criticism was not surprising and represented the growing discontent among heads of state. It also pointed to a dangerous trend where the AU Chair did not follow the steps of integration indicated in the Abuja Treaty but rather quickly skipped to the last stage of a political union, causing immense confusion and annoyance.

Central to this dilemma is the sore issue of state sovereignty and the fear that integration arrangements require states to cede some sovereignty to regional bodies and ultimately to the AU.⁴³ After decades of colonialism, sovereignty became a prized possession, and leaders have generally rejected any proposal that would impact the idea of a nation-state. This rejection manifested itself in the collapse of the initial efforts towards a union including the OAU and the weakening of the commitment to Pan-Africanism.⁴⁴ Stock market integration entails a conflict between national sovereignty and supranational law. Oppenheim enumerated the four factors that were important for a state to exist; a country, a government, the people, and sovereignty.⁴⁵ Therefore, states view sovereignty as crucial for the existence

⁴² See SAPA, 'AU Summit Failed Africa' Botswana VP (Polity, 7th July 2009) <https://www.polity.org.za/article/au-summit-failed-africa-botswana-vp-2009-07-07>

⁴³ For example, Mathieson explores the politics of integration in the East African Community REC. See Craig Mathieson, 'The Political Economy of Regional Integration in Africa: The East African Community Report' ECDPM, January 2016 <https://ecdpm.org/wp-content/uploads/ECDPM-2016-Political-Economy-Regional-Integration-Africa-EAC-Report.pdf> Accessed 23rd November 2020.

⁴⁴ Jaime De Melo and Yvonne Tsikata, 'Regional Integration in Africa: Challenges and Prospects,' Foundation Pour les études et Recherches sur le Développement International, February 2014, 4.

⁴⁵ Lassa Francis Lawrence, Oppenheim, *International Law: Treatise* (Longmans, 1955) 118.

of a state. On the other side of the spectrum stands the idea of a supranational. The concept of supranational denotes 'a particular type of international organisation that is empowered to exercise directly some of the functions otherwise reserved to states.'⁴⁶ Schiavone observes that "supranational organizations have the ability to make decisions which are directly binding upon member states, public and private enterprises, as well as individuals within these states, whereas traditional international organizations can act or execute decisions only by or through member states."⁴⁷ Integration requires a transfer of certain competencies and allegiances from the member state to the supranational.⁴⁸

The supranational is not a state in itself and just a concept rooted in a legal framework i.e., a treaty. As such, researchers have sometimes questioned the democratic quality of a supranational.⁴⁹ Ionescu's article is set in 1974 when the integration of the EU was still in its initial stages with only 9 countries at the time⁵⁰ but it makes important points on the conflict between sovereignty and integration in the early EU.⁵¹ He explores how the UK ended up as part of the EU integration project, recounting a Britain that had just emerged from years of its foreign policy (or colonialist conduct) and trying to

⁴⁶ Lawrence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107(2) *Yale Law Journal* 287. Also see Forest Griebes, *Supranationalism and International Adjudication* (University of Illinois Press 1969) wherein the author notes that the term supranational 'signifies that signatory states have transferred to an international institution certain limited decision-making powers normally exercised only by the governmental organs of a sovereign state.'

⁴⁷ Giuseppe Schiavone, *International Organizations: A Dictionary and Directory* (3rd edn, Palgrave Macmillan 1993) 3.

⁴⁸ The EU context, which may be instructive for the AU, is explained in Simon Bulmer and Jonathan Joseph, 'European Integration in Crisis? Of Supranational Integration, Hegemonic Projects and Domestic Politics' (2016) 22(4) *European Journal of International Relations* 725-48.

⁴⁹ Eriksen and Fossum deal with these arguments extensively in Erik Oddvar Eriksen and John Erik Fossum, 'The European Union and Post-national Integration,' (1999) ARENA Working Paper 09/1999, https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/1994-2000/1999/wp99_9.htm accessed 20 October 2021.

⁵⁰ This was after the Segre Report but before the 1985 White Paper, the 1986 Single European Act, the 1999 Financial Services Action Plan, the Maastricht Treaty as well as the Lamfalussy Report. See European Commission, *Financial Services: Implementing the Framework for Financial Markets Action Plan* (Commission of European Communities, 1999); Commission of the European Communities, *Completing the Internal Market* White Paper from the Commission to the European Council COM(85)310, Milan 28-29 June 1985; Lamfalussy Committee, 'Final Report of the Committee of Wise Men on the Regulation of European Securities Markets,' Brussels 15 February 2001. A comprehensive history of the origins of the EU can be found in Wofram Kaiser, Brigitte Leucht, Morten Rasmussen (eds), *The History of the European Union: Origins of a Trans- and Supranational Polity 1950-1972* (Routledge 2009).

⁵¹ Ghita Ionescu, 'Between Sovereignty and Integration: Introduction' in Ghita Ionescu (ed), *Between Sovereignty and Integration* (Government and Opposition Ltd 1974) 7-24.

re-establish itself and its economy but also struggling to respond to the grave problems of governability.⁵² The Pound was unstable, its rule over Northern Ireland was being challenged and the British economy was being hampered by social conflicts so Britain saw the idea of integration as a way to reduce the national crises and focus on assessing and tackling the challenges it was facing through collaboration.⁵³ He credits the 'homogeneity of size and status' of the initial member states as factors that facilitated the integration and that the lack of a super power and dominating state at the time allowed for meaningful and equal discussions.⁵⁴ On the other hand, an argument has arisen to the effect that it is not fair to compare Europe and Africa with regards to sovereignty, mainly due to the different political-social contexts, especially as Africa grapples with the aftermath of colonialism.⁵⁵

Many changes have occurred since Ionescu's article and may be worth mentioning. The UK emerged as the dominant nation of the EU and made the decision not to join either the Eurozone or the Banking Union, despite being a member of the Capital Markets Union (CMU).⁵⁶ The UK always insisted that questions of integration under the CMU should be centred around policy rather than institutions. In response to the Green Paper, the Bank of England noted that institutional change was not necessary to achieve the objectives of the CMU.⁵⁷ The UK's opposition to any attempts to centralise supervision is credited for the absence of institutional measures in the 2015 Green Paper and Action Plan⁵⁸ as colliding with the largest financial market in the EU would neither be wise nor desirable.

⁵² Ibid 13.

⁵³ Ibid 14.

⁵⁴ Ibid 15.

⁵⁵ Also see Sunday Babalola Ajulo, 'The Economic Community of West African States and International Law' (1989) 27(2) *The Journal of Modern African Studies* 247.

⁵⁶ TheCityUK, 'Capital Markets Union: The Perspective of European Growth Companies' <https://www.thecityuk.com/assets/2015/Reports-PDF/e19f0aa227/Capital-Markets-Union-The-perspective-of-European-growth-companies.pdf>

⁵⁷ Bank of England, 'The Bank of England's Response to the European Commission Green Paper: Building a Capital Markets Union' (London, May 2015) <https://www.bankofengland.co.uk/-/media/boe/files/paper/2015/response-to-the-european-commission-green-paper-building-a-capital-markets-union.pdf>

⁵⁸ Nicolas Veron, 'Europe's Capital Markets Union and the new Single Market Challenge' (Bruegel, 30 September 2015) <https://www.bruegel.org/2015/09/europes-capital-markets-union-and-the-new-single-market-challenge> Accessed 14 September 2020.

This fragile situation was exacerbated by the results of a UK referendum on EU membership wherein the UK left the EU on 31 January 2020 and the aftermath in which the finer details of its relationship with the EU post-December 2020 are fleshed out. With the UK owning FTSE Russell which is the leading index provider that enables investors to track firm performance, it is essentially a gatekeeper for global finance.⁵⁹ The LSE also owns the world's largest clearinghouse, LCH Clearnet and is part of the elite group of six that dominate the equity financial markets.⁶⁰

In addition, not everyone has jumped on board the CMU idea among the member states. The question of national sovereignty over financial infrastructure and supervision continues to linger on. Veron further notes that 'there are also ideological obstacles, especially in countries where anti-capitalist and anti-market rhetoric has broad public appeal such as France or Italy'⁶¹ In addition, Faull and Gleeson write that 'a fully-fledged CMU requires the harmonisation of many policies. These include major areas of national policy-making such as insolvency, corporate and tax laws, in which resistance from national governments to harmonisation is formidable.'⁶² There is still work to be done and hurdles to be overcome in the pursuit of the CMU and with Britain out of the EU, full market integration remains elusive but not impossible. So, with all the above, what does sovereignty entail in an African and EU context, and how are these conflicts resolved?

5.3.3 Sovereignty in an African context

Whereas there is a general understanding of the immense benefits that integration may bring for the continent and individual countries, there seems to be no real intention for member states to actively and usefully engage in any integration effort that may lead to convergence, if such convergence will involve cessation of power. The whole scenario is reminiscent of a pendulum,

⁵⁹ Johannes Petry, 'London Stock Exchange Vs EU: Refinitiv Battle reveals unease over power of modern stock markets' (The Conversation, 28 August 2020). <https://theconversation.com/london-stock-exchange-vs-eu-refinitiv-battle-reveals-unease-over-power-of-modern-stock-markets-145215> accessed 14 September 2020.

⁶⁰ The others are NASDAQ, CME, ICE, Cboe, and the German Deutsche Bourse.

⁶¹ Veron (n 58).

⁶² Jonathan Faull, Simon Gleeson, 'The Capital Markets Union: Should the EU Shut out the City of London?' (Center for European Reform, 15 July 2019) <https://www.cer.eu/publications/archive/policy-brief/2019/capital-markets-union-should-eu-shut-out-city-london> Accessed 15 September 2020.

constantly swinging between the attachment to the national and desiring the benefits of the supranational integration without fully embracing it.

Proponents of integration in Africa either fail to grasp the importance of statehood or underestimate how statehood influences the opposition to integration. Certain historians have argued that the idea of a state has outlived its historic usefulness and called for people to embrace globalisation.⁶³ Authors like Darbon have attacked African states' insistence on sovereignty and statehood noting:

*'The increasing inability of African states to meet their obligations and international responsibilities and to manage and lead their own societies, coupled with the financial bankruptcy and socio-economic collapse of most of them, makes it necessary to re-examine the relevance of the state model in Africa and to reformulate the apparently 'hackneyed' theories of regionalism.'*⁶⁴

Darbon's views merit a critical analysis. First, this view is blind to the complexities of governance in Africa and the impact of external players in Africa's governance. Secondly, his criticism is based on the failures of the people in the system rather than the system itself. Thirdly, the theories of regionalism are not a creature of African scholars. Therefore, the argument that the state needs to be reconceptualised may not hold in that regard. Darbon, like many others, draw attention to the concept of boundaries and how these were a creature of colonialism and hence call upon Africans to reimagine their territories. Unfortunately, this ignores the fact that African states existed even before the physical boundaries drawn as a result of the Berlin scramble and partition. In addition, it is not about territorial borders but rather the idea of a centralised authority over a group of people who have subscribed to that centralised authority.

⁶³ See Robert Boyer and Daniel Drache (eds), *States Against Markets: the Limits of Globalisation* (Routledge 1996).

⁶⁴ Dominique Darbon, 'Crisis of the State and Communalism: New Ideological Stakes in African Integration' in Daniel C Bach (ed), *Regionalisation in Africa: Integration and Disintegration* (James Currey 1999) 41.

Proponents of this view also look to the impact of globalisation and how it is transcending boundaries. However, this in itself ignores the fact that the state continues to outlive globalisation and all similar concepts and that indeed, the two continue to co-exist. Keet notes:

*'Statements about the demise of the roles of government [state] are a political obfuscation of the very different international impact of powerful, less powerful, weak and weakest governments [states], and the very different weight of their respective national, economic and strategic interests in the new international order.'*⁶⁵

The importance of sovereignty is viewed in the Constitutive Act of the African Union where one of the objectives is listed as the defence of 'the sovereignty, territorial integrity, and independence of its member states.'⁶⁶ When the then President of the AU, the late Col Muammar Gaddafi as AU Chairman, floated the idea of a political union, tempers flared. The then Vice President of Botswana, Mompoti Merafhe lashed out at President Gaddafi for attempting to coerce everyone into a premature concept.⁶⁷ This sentiment had two reasons; one, the President attempted to skip the stages of integration and fast track to the political union which is the last stage of integration. At the same time, sentiments had been building from the start over the sovereignty compromises those states would make. Cession of power from the state to a supranational, in any integration process, including financial integration, will always attract fierce criticism and opposition, a situation not unique to Africa, but most certainly one that requires a careful understanding and compromise.

5.3.4 Sovereignty in an EU context

Ceding sovereignty to a supranational may seem foreign to many African states but the EU may offer some guidance in the economic arena.

⁶⁵ Dot Keet, 'Integrating the World Community: Political Challenges and Opportunities for Developing Countries' in Dot Keet (ed), *Southern African Perspectives* (Center for South African Studies 1998) 7.

⁶⁶ Article 3(b) of the AU Act.

⁶⁷ See SAPA, 'AU Summit Failed Africa' Botswana VP (Polity, 7th July 2009) <https://www.polity.org.za/article/au-summit-failed-africa-botswana-vp-2009-07-07>

Membership of the EU requires member states to recognise the precedence of EU law over domestic legal systems in those areas where nations have ceded to the EU. As a result, if national law is inconsistent with EU law, the national law is declared null and void to the extent that it is inconsistent. The process of constituent units (the 28 member states) converging into the EU has taken over 50 years and is nowhere near completion which reiterates the fact that this is a process rather than an event.

The question of ceding sovereignty took centre stage in the early stages of the integration. States grappled with the acceptance that being a member of the EU meant that the regional EU law took precedence over national legal systems including Constitutions.⁶⁸ Generally, there is an acceptance that EU law has precedence over domestic legal systems but with the understanding that such supremacy does not extend to the constitutions of member states. Besselink notes that:

*'in most Member States, the precedence of EU acts over national constitutions is not (or at least not unconditionally) recognised. The precedence of European acts above ordinary legal rules of a lower rank than the national constitution is usually recognised, but precedence is not recognised if application of the EC or EU act (or norm) would lead to conflict with a national constitutional norm.'*⁶⁹

The process of ceding sovereignty may be complicated by the nature of state constitutions. In instances where state constitutions do not allow cessation of sovereignty, an attempt to cede to a supranational may place the state in a legally awkward situation. Mangiameli argues that when it comes to the EU, it is up to member states to define the boundaries of their identity that must not be crossed by European Law, whereby the content of their identity would become a composite comprising a European level and a national level.⁷⁰ In

⁶⁸ See William Phelan, 'The Limited Practical Relevance of National Constitutional Rights as a Constraint on the National Application of European Law in the Early Decades of European Integration' (2014) 17(1) *Irish Journal of European Law* 43.

⁶⁹ Leonard Besselink, *A Composite European Constitution* (Europa Law Publishing 2007) 9-10.

⁷⁰ Stelio Mangiameli, 'The European Union and the Identity of Member States' in *L'Europe en Formation* (Centre International de Formation Européenne 2013) 155.

France, Article 54 of the French Constitution notes that where provisions of an international undertaking such as a treaty are contrary to the French Constitution, the Head of State cannot ratify or approve it until the Constitution has been amended.

As a result, the French had to hold a referendum before the Treaty of Maastricht would be ratified.⁷¹ The Court in France took the view that its Constitution allowed limitation of sovereignty in certain instances and never a transfer of sovereignty.⁷² For a while, the French courts challenged the jurisdiction of the European Court of Justice and in *Cohn-Bendit*,⁷³ the Conseil d'État rejected the principle of direct effect which is embedded in EU jurisprudence.⁷⁴ The French also ignored Community directives which forced the Commission to bring enforcement proceedings in certain instances. It was not until the decision in *Nicolo* that the courts accepted the primacy of the EU Law over the domestic statute.⁷⁵

After signing the EEC Treaty, a fierce debate raged in Germany as to the constitutionality of this Treaty.⁷⁶ Although later the Bundesverfassungsgericht was able to reconcile national law and EU law and recognise the supremacy of EU law, it shifted goalposts in the 1970s-2010s and started placing limits on the transfer of sovereignty after the European Court of Justice asserted its supremacy over national constitutions.⁷⁷ The Court reacted by reasserting its control over EU law stating that EU law did not have supremacy over the German Constitution and especially when it came to the Bill of Rights.⁷⁸ With

⁷¹ See Peter Oliver, 'The French Constitution and the Treaty of Maastricht' (1994) 43(1) *The International and Comparative Law Quarterly* 1-25.

⁷² See Case Elections to the European Parliament Decision No 76-71 DC (French Constitutional Council, 30 December 1976).

⁷³ Case *Ministre de l'Intérieur c. Cohn-B*, CE Assemblée, 22 December 1978.

⁷⁴ For an evolution of EU law in the French legal system and courts, see David Pollard, 'European Community Law and the French Conseil d'état' (1993/1995) 28(30) *Irish Jurist* 79-120.

⁷⁵ See Philippe Manin, 'Nicolo Case of the Conseil d'Etat: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law over Subsequent National Statute Law' (1991) 28 *The Common Market Law Review* 499-519.

⁷⁶ Camille White, 'National Constitutional Courts and the EU: The Evolution of the Conseil Constitutionnel and the Bundesverfassungsgericht' (Institute for the Study of Civil Society, 2014) 12. <https://www.civitas.org.uk/content/files/NationalConstitutionalCourtsandtheEU.pdf>

⁷⁷ See *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70 Judgment of the Court of 17 December 1970.

⁷⁸ See *Re Wünsche Handelsgesellschaft* (22 October 1986) BVerfGE 73, 339. Also see Frank Meyer, 'The German Federal Constitutional Court and the European Arrest Warrant (and how the CJEU Responded)' (2016) 7(3) *New Journal of European Criminal Law* 277-94.

the coming into force of the Maastricht Treaty, the Court reasserted into legal position finding that the Court had the right to 'examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them.'⁷⁹

Denmark's membership in the EU has also been rocky, mainly due to questions of identity and sovereignty.⁸⁰ Denmark did not join the Eurozone and it notified the Council that it would not take part in the third stage of the Economic and Monetary Union hence maintaining control over its monetary policy.⁸¹ The Danish also voted No in the Maastricht Treaty Referendum of 1992 stalling its ability to join the EU. As a result, the Edinburgh Agreement had to be negotiated which then provided Denmark with four exceptions allowing it to finally ratify the Treaty after the Danish voted yes in the subsequent referendum.⁸²

After the first rejection, Pascal Lamy, Chef du Cabinet for the then President of the EC remarked:

*'Europe was built in a St Simonian way from the beginning, this was Monnet's approach. The people weren't ready to agree to integration, so you had to get on without telling them too much about what was happening. Now St Simonianism is finished. It can't work when you have to face democratic opinion.'*⁸³

This statement points to the different methods through which integration can be achieved; strategic bargaining, functional adaptation, or deliberation.⁸⁴

⁷⁹ Re Maastricht Treaty BVerfGE 89, 155 (1993). Also see Steve J Boom, 'The European Union After the Maastricht Decision: Will Germany Be the 'Virginia of Europe?' (1995) 43(2) *The American Journal of Comparative Law* 177-226.

⁸⁰ Lykke Friis, 'The Battle Over Denmark: Denmark and the European Union' (2002) 74(3) *Scandinavian Studies* 379-96.

⁸¹ Denmark and the Treaty of European Union (92/C/348/01) *Official Journal C* 348 , 31/12/1992 P. 0001 – 0001.

⁸² Maarten Hillebrandt, 'Rejection by Referendum: a New Expression of Discontent in the EU', (2008) 1(2) *Reinvention: a Journal of Undergraduate Research* 1; Lizaveta Dubinka, 'Evolution of the Danish Foreign Policy towards the EU' (2008) 3 *Brest State University Journal* 113-20.

⁸³ This statement is quoted in Erik Oddvar Eriksen and John Erik Fossum, 'Post-national Integration' in Erik Oddvar Eriksen and John Erik Fossum (eds), *Democracy in the EU: Integration Through Deliberation?* (Routledge 2000) xii.

⁸⁴ Erik Oddvar Eriksen and John Erik Fossum, 'The European Union and Post-national Integration' (1999) ARENA Working Paper 09/1999,

Eriksen and Fossum point to the importance of deliberation in swaying argument towards harmonisation as seen with Denmark's membership in the EU and the Edinburg Agreement. The authors note:

*'Deliberative democracy does not preclude voting or bargaining, but it places the emphasis on obtaining a shared sense of meaning and a common will, both of which are the product of a communicative process...'*⁸⁵

The EU however created compromises in its founding documents which can be seen as an attempt to quieten discontent. The concept of competence enables the EU to share powers with the member states in areas where the Union does not have exclusive competence i.e., areas outside Article 3.⁸⁶ Under Article 2(2) of the Treaty on the Functioning of the European Union (TFEU):

'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.'

Areas of shared competence in the EU are listed under Article 4(1) of the TFEU to include the internal market, environment, transport, agriculture, and economic, social, and territorial cohesion. Member states are required to coordinate their economic policies within the Union (Article 5). The principle of shared competence has two facets; it takes away the exclusive right of the state to legislate in that area but on the other hand, the state still has a say

https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/1994-2000/1999/wp99_9.htm accessed 12 November 2021.

⁸⁵ Ibid.

⁸⁶ For a reading on the development of the competence, see Mark Pollack, 'The End of Creeping Competence? EU Policy Making Since Maastricht' (2000) 38(3) *Journal of Common Market Studies* 519-38.

in the legislation through the EU negotiation and decision-making process. The EU also has the competence to support, coordinate, or supplement actions of the member states under Article 6. In this third category, the EU cannot extend its powers to harmonisation of the legislation of the member states as its role is strictly one of support or coordination.

Has the EU resolved its sovereignty challenges? The answer is no. However, it has put in place structures to manage the politics of integration, allowing for flexibilities where necessary and a legislative and judicial system to monitor implementation and achieve compromises where necessary. Some of these legislative and judicial systems are discussed in Chapter 7. These are some of the lessons that African policy makers can pick.

The centralisation of politics post-independence is understandable but certainly a hinderance to meaningful integration. A national stock exchange is viewed as a symbol of national pride and mergers are viewed as threats to sovereignty.⁸⁷ An argument can be made that mergers operate strictly in compliance with the mandates that have been given by the member states through treaties and protocols and hence involve state decision-making. However, that does not resolve the scenario where the national exchange dissolves into a regional exchange; out of the exclusive control of national structures.

Therefore, the status of existing stock exchanges must be clarified. Where such exchanges are to remain operational alongside regional exchanges and the Pan African Stock Exchange, discussions should be had to resolve potential clashes and to demonstrate that the newer regional-based exchanges are complementary to existing structures. This conversation will not be complete without putting in place compromises such as exit mechanisms in treaties, substantive stakeholder consultation processes, and a cost-benefit analysis that demonstrates that the benefits of regional stock market integration outweigh the cost of losing a national stock exchange or establishing a competitive exchange in the same region.

5.4 The creation of an Economic Community

⁸⁷ See Aihwa Ong, 'Powers of Sovereignty: State, People, Wealth, Life' (2012) 64 *Focaal* 30.

The need for African states to pursue economic integration is a widely accepted concept but there is no consensus on the methodology of that pursuit, the level of economic integration that is viable, or the timelines that this would realistically take i.e., the 'how,' 'when' and 'what' are contentious. This explains why there is a long history of integration in Africa as seen through Treaties and Protocols, Heads of State Summits, and the various interstate and inter-regional alliances. In all the above, the end goal is the creation of an African Economic Community and the pursuit of stock market integration under the auspices of the Abuja Treaty is in furtherance of the goal to achieve the AEC. Hence, there is merit in understanding the concept of the AEC.

An economic community, such as the one anticipated by the African treaties and existing in other places such as the European Union, is a legal system and has both law-making and enforcement powers.⁸⁸ A legal system of this nature requires four elements; rules of conduct to regulate behaviour, entities to whom the rules apply, a source from which the rules derive legitimacy, and an obligation to comply with these rules which can be enforced both publicly and privately.⁸⁹ The creation of a community also presupposes some form of power cession to the community to enable it to function. States as signatories are expected to cede some level of powers and sovereignty to the community and in return, there is an expectation that the benefits will outweigh the costs. The creation of an economic community is a complex matter, that requires difficult not only conversations and immense stakeholder support but also a critical understanding of what an economic community, like the one anticipated under the AEC, entails. The EC and ASEAN Communities are instructive in understanding these concepts.

5.4.1 The making of the European Union

The origins of the European Community (EC) integration is usually tied to the decision of six European countries to pool together their coal and steel

⁸⁸ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 37.

⁸⁹ Ibid 37. Also see Ronald Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, on the importance of principles and policies in a legal system.

industries after the Second World War.⁹⁰ However, Borchardt notes that the idea of having an association of countries in Europe had been floated even before the Second World War including a 1929 proposal by the French Foreign Minister Aristide Briand to create a European Union within the auspices of the League of Nations.⁹¹ However all those efforts did not bear fruit as countries were more concerned with nationalism and war and it is only after the Second World War that the 1951 Treaty Establishing the European Coal and Steel Community (ECSC), the Treaty of Paris was signed.⁹² This Treaty came into force on 25 July 1952 and recognised that Europe could be built 'through the establishment of common bases for economic development' and resolved to establish an economic community.

In 1957, the Treaty Establishing the European Economic Community ('the Treaty of Rome') was signed and it created a European Economic Community (EEC)⁹³ whose aim was to establish a common market which would be achieved through a common customs tariff, free movements of persons, services, goods, and capital among others. The Treaty of Rome was subsequently revised by the Single European Act (SEA), signed on 17th February 1986 and which entered into force on 1st July 1987. The SEA showed optimism in achieving an internal market by 31 December 1992⁹⁴ and emphasized the importance of involving the Parliament in all activities aimed at achieving a single market. The initial deadline of 31 December 1969 anticipated by the Treaty of Rome for the completion of a common market was not met and neither was SEA's 31 December 1992.

In July 2000, the European Commission tasked Baron Alexandre Lamfalussy and his Committee of Wise Men with the task of identifying ways to best approach the urgent question of integration of the regulation of financial services. The Lamfalussy Report published in November 2000 criticised the differences in member states' rules on disclosure and recommended that the

⁹⁰ A comprehensive history of the origins of the EU can be found in Wofram Kaiser, Brigitte Leucht, Morten Rasmussen (eds), *The History of the European Union: Origins of a Trans- and Supranational Polity 1950-1972* (Routledge 2009).

⁹¹ Klaus-Dieter Borchardt, *European Integration: The Origins and Growth of the European Union* (Office for Official Publications of the European Communities 1995) 5.

⁹² Ibid.

⁹³ See Article 1 of the Treaty of Rome

⁹⁴ Article 13 of the Single European Act.

process of adopting legislation be quickened and interpretation standardised.⁹⁵ Despite the good recommendations of the initial Lamfalussy Report, there was still hesitation at the EU level. The European Parliament, for example, expressed reservations noting that the 4-level approach would lead to a dilution of its right to make co-decisions under the Treaty.⁹⁶ Although substantial progress has been made on achieving an economic community in Europe, a Capital Markets Union remains elusive, a situation worsened by the exit of the UK from the European Union. Therefore, even though the EU is widely viewed as the most successful economic integration pursuit, it is also important to recognise the challenges that it has faced and continues to face, especially in the field of financial services and capital markets.

5.4.2 The creation of the ASEAN Community

The ASEAN Community is another example of a pursuit for economic integration. In 1967, with just five members and through what was known as “sports-shirt diplomacy,” referring to the style of deliberation characterised by informal decision making, through corridor chats and golf games,⁹⁷ the Association of South East Asian Nations (ASEAN) was birthed. The Bangkok Declaration listed the objectives of ASEAN as ‘to accelerate the economic growth, social progress and cultural development in the region through joint endeavour and partnership in order to strengthen the foundation for a prosperous and equal community of South East Asian nations...’⁹⁸ The ASEAN Alliance is praised for initially focusing more on building confidence and establishing trust among members rather than insisting on legalistic structures and cutthroat rules as well as for pursuing integration at a pace

⁹⁵ Rudiger Veil (ed), *European Capital Markets Law* (Hart Publishing 2013) 6.

⁹⁶ European Commission, *Financial Services: Implementing the Framework for Financial Markets Action Plan* (Commission of European Communities, 1999) 21. The co-decision procedure means that both the European Parliament and Council of the European Union must agree before any legislation on the internal market becomes effective.

⁹⁷ The ASEAN Declaration, also known as the Bangkok Declaration, is the founding document of ASEAN. See ‘The Formation of a Southeast Asian Association’ in ‘ASEAN 50: Regional Security Cooperation through Selected Documents’ https://www.worldscientific.com/doi/pdf/10.1142/9789813221147_0001; Also see Katerina Francisco, ‘Look Back: How ASEAN was Formed’ *Rappler* (Manilla, April 17 2017); Yoshiyuki Hagiwara, ‘Formation and Development of the Association of the Association of Southeast Asian Nations’ in Vic Carlton, Wiley Blackwell (eds), *The Developing Economies* (ASEAN 1973) 443-65.

⁹⁸ See Bangkok Declaration.

that the states were comfortable with and willing to pursue rather than a timetable format.⁹⁹ This is the first crucial lesson for African proponents of integration.

2003 was a monumental year as the Declaration of ASEAN Concord II was made to establish the ASEAN Economic Community by 2020. To operationalise the Community and achieve integration, the ASEAN Economic Community Blueprint was adopted which identified the characteristics and elements that would make up the economic community.¹⁰⁰ The ASEAN Economic Community was viewed as 'the realisation of the end goal of economic integration as espoused in the Vision 2020, which is based on a convergence of interests of ASEAN states to deepen and broaden economic integration through existing and new initiatives with clear timelines.'¹⁰¹ One of the objectives was the strengthening of the capital market development and integration and to achieve this, member states would pursue harmonisation of their capital markets frameworks, facilitate mutual recognition, facilitate efforts to establish linkages to enable cross-border listings, and review the tax structure.¹⁰² In 2008, the ASEAN Finance Ministers endorsed the proposals of the ASEAN Capital Market Forum which included an agreement to develop an 'Implementation Plan to promote the Development of an Integrated Capital Market to achieve the objectives of the ASEAN Economic Community Blueprint 2015.'¹⁰³

The formation of the ASEAN Capital Markets Forum (ACMF) marked a major milestone. The ACMF is made up of the capital markets regulators of all ten countries and is tasked with developing a deep, liquid, and integrated capital market. The fundamental difference with integration in this region is the concept of 'opt-in' which allows countries to join the capital markets initiatives if they deem their markets ready for such an initiative. The ability for states

⁹⁹ Siow Yue Chia, 'The ASEAN Economic Community: Progress, Challenges, and Prospects' (2013) Asian Development Bank Institute Working Paper Series No 440 of 2013, 5, <https://www.adb.org/sites/default/files/publication/156295/adbi-wp440.pdf> accessed 21 October 2021.

¹⁰⁰ Association of Southeast Asian Nations, ASEAN Economic Community Blueprint (Jakarta, January 2008).

¹⁰¹ Ibid 5.

¹⁰² Ibid 15.

¹⁰³ Datuk Ranjit Ajit Singh, *ASEAN: Perspectives on Economic Integration: ASEAN Capital Market Integration: Issues and Challenges* (London School of Economics and Political Science IDEAS Reports 2009) 25.

to opt-in according to their level of development may prove beneficial in the formation of the AEC and cure the resentment as well as member states to own their decisions. This is an alternative that African regulators should consider.

The ACMF Vision 2021 prioritises 'increasing transparency and disclosure, capacity building, strengthening cooperation and coordination, and continuing with regulatory harmonisation'.¹⁰⁴ Having a vision that lays down the priority areas in a given period is crucial for keeping track of commitments, monitoring compliance, and also leaving room for focus on specified objectives. It is certainly an approach that would be helpful for the AEC. Various working groups have been established to pursue integration and these include the ASEAN Exchanges Working Group, the ACMF ASEAN Market Development Programme Working Group, and ACMF Industry Consultative Panels, an approach that favours market consultation and inclusion and allows participants to take ownership of the projects. All of these working groups have a reporting mechanism to monitor the progress of their roles.

In summary, the integration efforts of the EU and the ASEAN shed critical light on the modalities of creating an economic community, especially in the field of financial services. It is an uphill task, that requires an understanding of the type of community being pursued, but also domestication of the concept of an economic community.¹⁰⁵ The ASEAN Economic Community seeks to pursue integration using an opt-in mechanism, focusing on policy rather than institutions, cooperation rather than initial full integration, and allowing member states the flexibility to take on initiatives based on their priorities. On the other hand, the EU, which is seen as the most successful integration model in the world, is still grappling to achieve full capital markets integration and is on the path to finally tackle the long-standing issue of the Capital Markets Union.

¹⁰⁴ See ASEAN Capital Markets Forum Action Plan 2021-2025, 9 December 2020. https://www.theacmf.org/images/downloads/pdf/ACMF%20ACTION%20PLAN%202021_updated%20as%20at%2020%20April%202021.pdf accessed 21 January 2021.

¹⁰⁵ For example, it wasn't until 1992 that the free trade area was operationalised. Michael G Plummer, 'Creating an ASEAN Economic Community: Lessons from the EU and Reflections on the Roadmap' in Denis Hew Wei-Yen (ed), *Roadmap to an ASEAN Economic Community* (Institute of Southeast Asian Studies 2005) 32.

The complexity of an economic community eludes policymakers in Africa. The idea is embraced in words but the evidence on the ground suggests a limited understanding of the processes involved in achieving an economic community as well as a lack of commitment in the pursuit of an integrated financial market in Africa. Rather, achieving the AEC has become an exercise in shifting the goalposts, abandoning initiatives, and commencing new ones without picking lessons, and subscribing to the old age referral of the Bourbon monarchy that learned nothing and forgot nothing.

In the Sirte Declaration of 1999, the members of the AU called for an acceleration of the integration process and voted to shorten the time frames that the Abuja Treaty had fixed, although not much progress had been achieved since the Abuja Treaty. The East African Community presents a compelling example of rebirthing integration dreams without resolving the issues that crashed those initial dreams. In 1977, the old East African Community collapsed majorly due to political differences and complaints on the unequal distribution of the benefits of integration.¹⁰⁶ Today, the East African Community's level of integration seems somewhat impressive with a customs union and a common market and hopes of a monetary union by 2023. This is not to say, however, that all is well. Whereas plans for an integrated capital market have been in place for over 10 years, partly funded by the World Bank under the Financial Sector Development and Regionalization Project (FSRDP), Kenya, which accounts for over 90% of market capitalisation in the region, quit the project at the onset. Due to an ongoing political conflict, the borders between Rwanda and Uganda have been closed since 28 February 2019 as well as the border between Rwanda and Burundi. Despite having a customs union, Kenya levied an additional levy on

¹⁰⁶ See Aggripah T Mugomba, 'Regional Organisations and African Underdevelopment: The Collapse of the East African Community' (1978) 16(2) *The Journal of Modern African Studies* 261-72; Richard E Mshomba, 'The Rise and Fall of the Former East African Community' in Richard E Mshomba, *Economic Integration in Africa: The East African Community in Comparative Perspective* (Cambridge University Press 2017) 49; John A Mgaya, 'Regional Integration: The Case of the East African Community' (Master Thesis, The Australian National University 1986); Arthur Bainomugisha and Sabastiano Rwengabo, 'The Promise and Efficacy of the East African Community' (2016) ACODE Briefing Paper Series No 41/2016 https://media.africaportal.org/documents/Promise_and_Efficacy_of_E_African_Community1.pdf accessed 12 January 2021.

dairy products from Uganda to protect its farmers whereas Tanzania banned the import of Ugandan-produced sugar, maize, and timber.¹⁰⁷

These occurrences call into question the states' understanding of economic communities and the commitment to achieving an economic community in which stock markets are integrated. This is further complicated by the complex web of having the AU, AEC, and RECs, all pursuing the same goal of integration while simultaneously pausing to deal with peace-keeping challenges. Trade remains a key priority for Africa and hence the idea of an economic community in Africa has become synonymous with the pursuit of trade integration and states are always willing to come together for trade-related matters. This culminated in the formation of the African Continental Free Trade Area. This leaves stock markets left out of the conversation and with very limited funding and resources allocated to capital market integration.

In making this observation, one must be cognisant of the stages of integration as developed by Balassa. Under this formulation, a free trade area is the first stage of integration with a customs union and common market coming in second and third place respectively.¹⁰⁸ Although new models of integration have emerged that may not always conform to the Balassa model,¹⁰⁹ the latter remains the widely accepted authority on integration models. Drawing on the Balassa model, it would seem plausible that policymakers are focused on achieving the free trade zone before tackling the common market. However, it must be stressed that there are linkages between the stages of economic integration and interdependency. Therefore, there arises an expectation that as trade is pursued, similar efforts would be placed on the pursuit of an integrated capital market, which may also facilitate trade in the

¹⁰⁷ Editorial, 'East African Dairy Sector Trade War Continues to Simmer' (EPA Monitoring, 20 May 2020) <https://epamonitoring.net/east-african-dairy-sector-trade-war-continues-to-simmer/> accessed 16 December 2020. Also see VOA, 'Uganda, Rwanda Trade Accusations Over Border Crossings Dispute' *Voice of Africa* (Africa, 1 March 2019); Ivan R Mugisha, 'Uganda, Rwanda Feud Restricts Free Movement' *The East African* (Nairobi, 1 March 2019); Ivan R Mugisha, 'Rwanda, Uganda Trade Barbs as Dispute Grows' *The East African* (Nairobi, 14 March 2019).

¹⁰⁸ Bela Balassa, 'The Theory of Economic Integration: An Introduction' in Brent F. Nelsen Alexander C-G. Stubb (eds), *The European Union: Readings on the Theory and Practice of European Integration* (Palgrave 1994) 125-37.

¹⁰⁹ Patrick M Crowley, 'Is There a Logical Integration Sequence after EMU?' (2006) 21(1) *Journal of Economic Integration* 4.

long run. At the moment, sadly the capital markets are peripheral to the plans of policymakers.

5.5 Financing integration

5.5.1 Efforts to finance integration

Integration projects require a large number of resources to accomplish. As a result, any integration project must, from the onset, have an extensive financing mechanism. Self-reliance has always been one of the goals of the AU and is seen as a continuation of the virtues of Pan Africanism.¹¹⁰ The Heads of State were always keen on Africans financing African solutions and hence in July 2011, the AU Summit adopted a decision that required the setting up of a High-Level Panel that would explore and identify funding sources for the activities of the AU.¹¹¹ This Committee was led by the then Chairperson of the AU, HE President Olusegun Obasanjo of Nigeria and it suggested that the AU be funded through a US\$2 levy per hotel stay on the continent, a US\$5 airfare levy on all international flights to and from Africa and US\$0.05 levy per text message.¹¹² With this idea not gaining the much-needed traction and lack of consensus among the member states, the AU found itself once again deliberating on the issue of financing. With the death of President Muammar Qaddafi who was the AU's largest financier, states quickly had to focus on financing to sustain the AU.

In January 2016, Dr. Donald Kaberuka was appointed as the High Representative on the Peace Fund and he made proposals for funding contained in the Kigali Decision. The Kigali Decision was adopted in July 2016 by the Heads of State in the Retreat on Financing the Union.¹¹³ The Kigali Decision required member states of the AU to implement a 0.2% levy on all eligible imports and the money would be used to fund the AU as well as

¹¹⁰ See Philomena Apiko and Faten Aggad, 'Analysis of the Implementation of the African Union's 0.2% Levy' (2018) ECDPM Briefing Note No 18/2018, 1 <https://ecdpm.org/wp-content/uploads/BN98-Apiko-Aggad-November-2017.pdf> accessed 12 February 2021.

¹¹¹ Ibid 2.

¹¹² African Union, *Progress Report of the High Level Panel on Alternative Sources of Financing the African Union* (Assembly of the African Union, 15-16 July 2012, Addis Ababa, Ethiopia).

¹¹³ Decision on the Outcome of the Retreat of the Assembly of the African Union, Assembly/AU/Dec.605 (XXVII).

contribute to the Peace Fund.¹¹⁴ The funds would also enable the member states to reduce their redundancy on partner funds in pursuit of integration.¹¹⁵

To implement and oversee the new level, a group of ten Finance Ministers was set up with the mandate to review the AU budget, propose an implementation, and review the status of compliance.¹¹⁶ This levy had faced criticism as lacking legal standing since the AU is not a trade zone but certain member states have taken steps to implement it through domestic legislation. As of 16 June 2020, only 17 of Africa's 55 countries had taken steps to domesticate the levy, and only US \$7,419,039 had been received from the levy.¹¹⁷ The amount received represents less than 10% of the amount needed, which is in contrast to the 68% funds received for the Peace Fund. Other challenges facing the levy include the lack of an enforcement mechanism, as well as conflicting commitments to the WTO.¹¹⁸ However, it has become clear that integration projects are not one of the priorities for the usage of the Fund and hence the funding of integration projects requires alternative arrangements. Considering that integration projects take place regionally through the RECs and are overseen by the AU Secretariat, financing is required for both the RECs and the AU.

The Minimum Integration Program (MIP) consists of the activities that have been agreed upon by the RECs to fast-track integration. To finance MIP, an 'Integration Fund' was suggested which would be financed by internal sources, external sources, and African financial institutions.¹¹⁹ This fund known as the Africa Integration Fund (AIF) would provide grants to RECs to meet integration targets, technical support, advisory support, and

¹¹⁴ Decision on the Outcome of the Retreat of the Assembly of the African Union, Assembly/AU/Dec.605 (XXVII).

¹¹⁵ Ibid.

¹¹⁶ Philomena Apiko and Faten Aggad, 'Analysis of the Implementation of the African Union's 0.2% Levy' (2018) ECDPM Briefing Note No 18/2018, 4 <https://ecdpm.org/wp-content/uploads/BN98-Apiko-Aggad-November-2017.pdf> accessed 12 February 2021.

¹¹⁷ These countries are Kenya, Mali, Togo, Guinea, Benin, Cameroon, Sierra Leone, Sudan, Nigeria, Ghana, Gambia, Ivory Coast, Chad, Djibouti, Congo Brazaville, Rwanda and Gabon.

¹¹⁸ African Union, Financing the Union: Towards the Financial Autonomy of the African Union, 16 June 2020, 4 https://au.int/sites/default/files/documents/38739-doc-report_on_financing_of_the_union_jun_2020_002.pdf accessed 14 May 2021.

¹¹⁹ Apiko and Aggad (n 116) 8.

institutional support.¹²⁰ Initially, the estimated cost of implementing MIP was US\$110.9M which would cover all phases of implementation from 2009-2021 but this cost rose to US\$300M in 2013.¹²¹ The AIF was Africa's attempt to catch up with the world of integration funds.

5.5.2 Financing of integration in the AU and ASEAN: A comparative

The European Structural and Investment Funds and the ASEAN Development Fund are examples of integration-related funds. The European Structural and Investment Funds are made up of five main funds which include the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund. Although none of these was created specifically to finance Europe's initial integration, the Funds support various projects which further strengthens integration. An example is the European Regional Development Fund which promotes balanced development in the EU.¹²²

The ASEAN Development Fund, on the other hand, serves as 'ASEAN's common pool of financial resources to support the implementation of the Vientiane Action Programme (VAP) and its successor documents.'¹²³ An ASEAN Fund was initially created in 1964 to finance ASEAN collaborative programs and finance projects to enhance ASEAN cooperation. In 1969, an Agreement for the Establishment of a Fund for ASEAN and the Rules Governing the Control, Disbursement, and Accounting of the Fund were formulated. In 1982, a Protocol was executed to amend the Fund by which the contribution amount was increased from US\$ 2,500 to US\$ 10,000.¹²⁴ In 1994, a further agreement was signed in Bangkok, Thailand which created an ASEAN Fund that consisted of US\$ 6M, contributed by the 6 ASEAN members. The Fund was to be utilised in accordance with Article 4¹²⁵ and the Guidelines

¹²⁰ Final Report on the African Integration Fund: A Special Continental Fund for the Implementation of the Minimum Integration Program of the African Union Commission, African Union, December 2013, 12.

¹²¹ See figures in the Final Report, *ibid*.

¹²² https://ec.europa.eu/regional_policy/en/funding/erdf/ Accessed 12th December 2020.

¹²³ Terms of Reference of the ASEAN Development Fund. <https://www.asean.org/storage/images/archive/ADF-TOR.pdf> Accessed 12th December 2020.

¹²⁴ See 1982 Protocol to Amend the Agreement for the Establishment of a Fund for ASEAN, Adopted in Bangkok, Thailand, 22 October 1982.

¹²⁵ See 1994 Agreement on the Establishment of a Fund for ASEAN, Adopted in Bangkok, Thailand, 23 July 1994. <https://cil.nus.edu.sg/wp-content/uploads/2020/10/1994->

for the Utilization of the ASEAN Fund. Annex B to the Guidelines put in place a substantive management and governance framework of the Fund including a management committee, standing committees, and project manager. In 2005, the Agreement on the Establishment of the ASEAN Development Fund was signed to provide funding for the regional cooperation programs of the ASEAN region as well as to provide funding support to specified projects of a strategic or confidential nature and would be majorly funded by the ASEAN member countries, each contributing US \$1M each.¹²⁶ The Fund is held in trust by the ASEAN Secretariat and maintained in two accounts; the Endowment Fund and the Operational Account.¹²⁷ The terms of reference of the ASEAN Development Fund stipulate how the Fund is to be used, the appraisal of proposed projects as well as purposes for use of the Fund. A reporting mechanism is clearly stipulated and the terms of reference place ownership of property acquired with money from the Fund in the name of ASEAN.

5.5.3 The status of African integration funding initiatives

Despite the completion of the feasibility study and issuance of a final report in December 2013 on the AIF, there have been no further actions on this front. The result of this inaction is that the pursuit of integration continues to face resource challenges and leads to an increased dependency on donors. It is estimated that 79% of the SADC budget, 78% of the COMESA budget, 65% of the EAC budget, 20% of the ECOWAS budget, 90% of the IGAD budget, and 44% of the AU budget are funded by foreign donors.¹²⁸

The increased dependency on external funding only slows down progress as there is no certainty of funds or certainty of timelines. External funders may also attach conditions to funding arrangements that may be inconsistent with domestic objectives. That is why domestic funding solutions must be explored for integration projects as well as for RECs. The availability of a robust funding mechanism is credited for the success of ECOWAS as a REC. ECOWAS

Agreement-on-the-Establishment-of-a-Fund-For-ASEAN-1-1.pdf accessed 14 November 2021.

¹²⁶ See Article 2 of the Agreement on the Establishment of the ASEAN Development Fund.

¹²⁷ See Terms of Reference of the ASEAN Development Fund.

¹²⁸ The African Union, African Integration Report: The Status of Regional Integration in Africa, Advancing Intra African Trade for Post COVID Recovery' December 2020 <https://au.int/sites/default/files/documents/40071-doc-africanintegrationreport-englishjan28.pdf> accessed 18 April 2021.

imposes a community levy and the levy accounts for 70% of the Community's income with the balance provided by other donors.¹²⁹ To obtain external funding, ECOWAS constituted the ECOWAS Directorate of External Relations whose role, among others, is to mobilise and coordinate external funding from the development partners. The Directorate has established operational procedures which enable it to coordinate its donations by consolidating its partnerships, ensuring transparency, promoting alignment between donations and regional priorities.¹³⁰ Nevertheless, ECOWAS still faces non-compliance with payment of the levy from certain member states but it has largely been successful in collecting the levy. The availability of a dedicated levy has enabled ECOWAS to make significant advancements in its integration agenda.

To fund its integration objectives, ECCAS too imposes a levy on all its member states. The ECCAS Community Integration Contribution Agreement (CIC/ECCAS) put in place a 0.4% levy on all imports from outside the region. Initially, member states were able to contribute large sums to the fund in 2008 and 2009.¹³¹ However, this did not last long and member states have since consistently defaulted on payments of the levy, leaving the community looking for external funding to address funding shortfalls for its major integration projects.¹³² Even then, the largest proportion of funds obtained in the region goes towards peace and security due to the presence of conflicts in the DRC and the Central African Republic and the presence of post-conflict states.¹³³ In this regard, the levy, although a good policy, has not yielded the results that it intended. A community levy requires the harmonisation of national financial laws to ensure consistency in levying, collection, and remittance of the levy. It also requires states' commitment and consistency

¹²⁹ See Article 72 of the Revised ECOWAS Treaty.

¹³⁰ The African Union (n128) 103.

¹³¹ African Development Bank, 'Central Africa Region Integration Strategy Paper 2011-2015' (February 2011) Regional Department Center NEPAD, 4 <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/RISP%20CENTRAL%20AFRICA-ECCAS%20English%20FINAL.pdf> accessed 13th January 2021.

¹³² NEPAD, 'Strengthening the Institutional Capacity of the Economic Community of Central African States' (2015) NEPAD Planning and Coordinating Agency, 17. <https://www.nepad.org/publication/strengthening-institutional-capacity-of-economic-community-of-central-african> accessed 14 November 2020.

¹³³ Ibid xi.

in remittance of the levy and the ease of disbursement of the levy to fund community activities. Without all these systems in place, a community levy may only remain on policy books.

In the absence of regional-based funding, RECs have turned to external actors, in particular donors, to fund integration initiatives. CEMAC was able to raise €3.8billion to support its integration projects through its round table mobilisation drive, held in Paris in November 2020 with the funds going towards projects including the development of a common market.¹³⁴ Key to note is that the funders, Afriximbank, BDEAC, African Development Bank, World Bank, and SX Capital Holdings Limited all earmarked their funding for infrastructure development with no funding specifically set aside for capital markets and stock exchange integration. External funding poses other challenges, central of which is the ability for external forces to reshape and reimagine the integration anticipated by the Abuja Treaty and the ability to move focus away from African priorities to donor priorities. The Economic Partnership Agreements (EPAs) for example, are criticised for creating a shift that calls for new trading blocs that negotiate free trade zones with Europe rather than a focus on African trade zones such as the African Continental Free Trade Area (AfCFTA).¹³⁵

If foreign sources of funding present unique challenges, what options are left? The answer lies inwards. Regions and the AU must explore domestic funding solutions. A domestic collective resource mobilisation vehicle that is well structured, with proper oversight, transparency, and accountability mechanisms will drive integration by funding the projects that must be undertaken to achieve integration. The AU should, therefore, as a priority, monitor the implementation of the AIF. The advantages of the AIF cannot be overstated. Such a Fund allows member states to take responsibility and ownership of integration since it is funded using domestic funds.¹³⁶

¹³⁴ Projects Integrateurs CEMAC, Round Table for the Financing of CEMAC Integration Projects, Paris 16-17 November 2020. https://projetsintegrateurscemac.com/wp-content/uploads/2020/11/FINAL-PRESS-RELEASE_-CEMAC-Round-Table_191020_VF.pdf accessed 14 March 2021.

¹³⁵ See Gilbert M Khadiagala, 'Pan-Africanism and Regional Integration' in Nic Cheeseman, David M. Anderson, Andrea Scheibler (eds), *Routledge Handbook of African Politics* (Routledge 2015) 385.

¹³⁶ The African Union (n 128) 105.

However, for optimum use of the AIF, the funding needs of the RECs (including current sources of funds, shortfalls, and ability to self-fund) and the priority projects for funding must be identified which should correspond with the objectives of integration and the priorities in Agenda 2063. Once the projects have been identified, the relevant costs should be attached as well as timelines which will pave way for a strategy on how the financial resources can be mobilised. Lastly, there is a need for a clear policy on the creation, governance, and management of the AIF as well as the disbursement policy which should focus on accountability, transparency, and optimum usage of the available resources. Enforcement of the AIF is key and hence the founding documents must put in place an enforcement mechanism to ensure that the relevant finances can be collected and remitted and that projects that benefit from funding remain on track to completion. Governance and transparency remain a challenge in many African projects and the AIF must charter a different path, ensuring that project expenses can be accounted for and optimally used to pursue integration in the area of financial services.

5.6 Conclusion

This Chapter revealed the complex base of stock market integration in Africa. Specifically, this chapter showed that many concepts co-exist at the same time i.e., national stock exchanges, regional stock exchanges and a Pan African stock exchange, all without a proper understanding and proper framework to harmonise and resolve their existence. Ordinarily, national, regional, and continental exchanges can co-exist. However, in a framework where the end goal is an African Economic Community, it is important that detailed guidance is provided as to the continued co-existence and how these structures will interact. The stock exchange as a symbol of state sovereignty demands that any decisions and/or projects that threaten its very existence be carefully reviewed and elucidated. The thesis has shown that at the moment, there are many grey areas on the future of that national exchange, which ignores the historical and post-colonial sentiments of sovereignty. Creating more stock exchanges on top of existing stock exchanges without expressly providing for complementarity can only breed opposition and slow any progress towards integration.

In discussing sovereignty concerns and the politics of integration, the thesis has drawn examples from the EU and the ASEAN Community's integration agenda. Even in the EU, which is the most advanced and most successful integration project globally, sovereignty concerns still arise and the conflict between the national and supranational continues to manifest, slowing down the full realisation of the internal market. The EU has, however, devised strategies to reduce this conflict, such as shared competence and the primacy of EU law which is discussed in detail in Chapter 7. Such compromises and safeguards are crucial for the survival of integration projects and a lesson for proponents of stock market integration in Africa.

The AEC aims to create an economic community, an exercise that requires commitment and compromises. Oppong notes that the commitment of member states, more than anything, is central to making any economic community work.¹³⁷ An economic community, just like any coalition, should be one of 'the willing' rather than a forceful amalgamation or forced cooperation and co-existence. This is what African states in pursuit of stock market integration must embrace; commitment, compromise, and cooperation. The EU and ASEAN as two of the economic communities can provide valuable lessons for African regulators and policymakers on the politics and diplomacy of integration, balancing different views and domestication of the grand idea of an economic community. The hope is that the proponents of integration within the auspices of the AEC can understand this history, anticipate challenges, and put in place structures to prevent these challenges.

This Chapter has also discussed the creation of a Pan African Stock Exchange as one of the four financial institutions of the AU. Interestingly, there is no Treaty, Declaration, or Resolution for the establishment of this exchange. Article 19 of the AU Treaty only provided for three financial institutions which are the African Investment Bank, African Monetary Fund, and African Central Bank. Even when the AU Treaty was amended by the Protocol on Amendments to the Constitutive Act of the African Union, Article 19 was not

¹³⁷ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 38.

amended to include this new institution. Although this is anomalous, the AU and its Specialized Technical Committee on Finance, Monetary Affairs Economic Planning and Integration Experts recognise the exchange as its fourth financial institution and have intimated that a Protocol is being developed to set out the modalities of this institution. In the run-up to this, the AU commissioned a study on the establishment of the exchange which suggested that the exchange would be a virtual market governed by the rules of the countries in which the issuers are located. This presupposes that there is no intention to actually centralise supervision, monitoring, and regulation of trading and settlement of the Pan African Stock Exchange.

The concept of a virtual market is reminiscent of the African Exchanges Linkage Project and its intention to establish a mechanism for cross-border trading of securities. It also resembles the EAC-CMI which seeks to establish a virtual market that allows for cross-border trading of securities through a smart order routing system. What then is unique about the Pan African Stock Exchange that is being suggested? It is unclear at this point. This question would be answered by studying the Pan African Stock Exchange Protocol which is under development. The discussion has provided a high-level overview of some of the legal matters that the Protocol must consider when providing for this exchange. Crucially, matters of legal status, ownership, financing, and regulation must be considered and resolved in the protocol. In addition, the legislative drafters of the Protocol should consider how anticipated mergers would interact with the growing body of knowledge in competition law.

Lastly, financing integration is critical if any successes are to be registered. Presently, much of the funds to finance integration in Africa are from foreign donors which is not ideal as there is uncertainty around continuance, conditionalities attached to funding, and sentiments of neo-colonialism. Therefore, Africa must carefully consider domestic sources of funding these projects. The Kigali Decision to impose a 0.2% levy on all eligible imports adopted in 2016 was viewed as a key starting point but was definitely not the first attempt at a domestic solution. Led by the USA, certain members of the WTO argued that the new levy may be in breach of the WTO's General Agreement on Tariffs and Trade (GATT) since the levy applied to only non-

African imports. However, there are at least 17 countries that have either implemented the levy or are at various stages of implementing the levy and although that is less than 35% of the membership of the AU, it is still progress. Much of the funds received from the levy however cover administrative expenses as well as peace and security. Integration is not a priority for the Kaberuka Levy.

Knowing that funding for regional integration is woefully inadequate, the AU also launched a study for the AIF which would finance regional integration by providing grants to RECs to implement integration. ECCAS and ECOWAS both charge a community level to finance their integration projects although the largest proportion for ECCAS goes towards peace and security. But the use of levies for regions points to an ability for states to willingly enter into commitments for such initiatives. However, the implementation and monitoring continue to present challenges. There has been no meaningful follow-up on the AIF, leaving regional initiatives grossly underfunded. The AU and the RECs need large sums of money and they cannot continue to depend on foreign donors to fill the financing shortfalls. This research is a reminder that the implementation of the AIF and monitoring of the Kaberuka Levy is long overdue.

CHAPTER SIX

MAKING STOCK MARKET INTEGRATION WORK FOR AFRICA II: RESOLVING OPERATIONAL AND RELATIONAL CHALLENGES

Introduction

Chapter 5 of this thesis provided a discussion of some of the challenges and impediments in the stock market integration process, most of which related to the interaction between the national, region, and Pan African Stock Exchange. There are, however, even more, pertinent questions that need to be answered, which this chapter points out. First, this chapter explores the use of Regional Economic Communities ('RECs') as the conduit of integration and the various challenges that this presents, especially since RECs are the building blocks of the AEC and all their activities should have an end goal of creating an integrated economic community. States can and do belong to multiple RECs which poses unique challenges such as resource wastage and conflicting mandates and projects. How can the challenge of multiple memberships be resolved? This thesis opines that rationalisation of RECs holds the key to overcoming this.

Secondly, this chapter delves into the legalities surrounding regional integration. Substantially, this relates to the interaction between regional law, national law, and international law which is the law derived from treaties, resolutions, directives, and protocols of the African Union. The discussion looks at how international law principles can resolve the conflict of laws and considers how the European Union has dealt with the conflict between European Community law and the law of individual member states of the EU. The development of jurisprudence in the EU may be instructive for states in Africa.

Lastly, the discussion considers the presence or absence of enforcement and monitoring systems for integration in Africa. Principally, it scrutinises the institutional and judicial mechanisms including the formation of the court system and the institutions that track implementation of treaty obligations to integration. A conclusion is then provided.

6.1 The choice of RECs as Conduits of Stock Market Integration

6.1.1 The history and the practice of using RECs.

The use of RECs in Africa as conduits for cooperation and economic development has been the focus of substantial analysis and academic discourse over several years. The vibrant body of literature on the different RECs has explored their use in peacekeeping and security, development of trade as well as in the free movement of people, goods, and services.¹ However, very little has been written about the peculiar use of RECs in the efforts to integrate stock markets in Africa, despite the ongoing integration projects relating to stock markets.

The use of RECs in the pursuit of stock market integration in Africa is a surprising policy decision for both legal, political, and economic reasons, some of which are explored in detail in this research. The RECs were initially perceived 'largely as an instrument for safeguarding recently acquired political freedom' and only took on an economic development role in the 1980s.² Today, RECs have both a political role (ensuring peace and stability) and an economic role (constituting the key building blocks for economic integration in Africa).³ With the signing of the 50th Anniversary Solemn

¹ See for example: Teshome Mulat, 'Multilateralism and Africa's Regional Economic Communities' (1998) 32(4) *Journal of World Trade* 101; David J Francis, 'Linking Peace, Security and Developmental Regionalism: Regional Economic and Security Integration in Africa' (2006) 2(3) *Journal of Peacebuilding and Development* 7-20; Victor A.O Adetula, Redie Bereketeab and Olugbemi Jaiyebo, *Regional Economic Communities and Peace Building in Africa: The Experiences of ECOWAS and IGAD* (Nordiska Afrikainstitutet Uppsala 2016); Shazia Chaudhry and Sekpi Toure Otondi, 'The Role of the African Union and Regional Economic Communities as Impetus for Peace and Security: A Case Study of the Economic Community of West African States' (2018) 1(1) *International Journal of Security Studies* 1; Elizabeth Zhu, 'The Effects of the African Continental Free Trade Agreement on Africa's Regional Economic Communities: An Empirical Analysis' (2019) 16(1) *Undergraduate Economic Review* 1; Victor Adetula, Redie Bereketeab, Cyril Obi (eds), *Regional Economic Communities and Peacebuilding in Africa: Lessons from ECOWAS and IGAD* (Routledge 2020); David Owiro and Joan Akoth, 'Fundamental Lessons from Regional Economic Communities for the African Continental Free Trade Area: A Case Study of the East African Community' (Institute of Economic Affairs 2020); Wumi Olayiwola, *Governing the Interface Between the African Continental Free Trade Area and Regional Economic Communities Free Trade Areas: Issues, Opportunities and Challenges* (United Nations Economic Commission for Africa 2020); Vusi Gumede, 'The African Continental Free Trade Agreement and the Future of Regional Economic Communities' (2021) 39(3) *Journal of Contemporary African Studies* 470.

² Eugenie Rwanyange Mukamunana and Kabelo B Moeti, 'Challenges of Regional Integration in Africa: Policy and Administrative Implications' (2005) *Journal of Public Administration Conference Proceedings* 90.

³ The AU recognises eight regional economic communities i.e., CEN-SAD, COMESA, EAC, ECCAS, ECOWAS, IGAD, SADC and AMU.

Declaration,⁴ the African heads of state reiterated their commitment to the political, social, and economic integration agenda and committed to speed up the attainment of the African Economic Community ('AEC'). Specifically, they undertook to 'move with speed towards the integration and merger of the Regional Economic Communities as the building blocks of the Union.'⁵

The AU views the existence of RECs as critical to the attainment of the AEC. The 88 paged Abuja Treaty laid down six stages for the establishment of the AEC over 34 years. Each stage was assigned an objective and specific activities to be undertaken. It is expected that the outcome of this staged process is the merger of the RECs to create the AEC. The use of RECs as a conduit for stock market integration, given the end goal of the REC, i.e., the creation of the AEC, therefore, poses certain challenges.

As noted in Chapter 4, stock market integration projects have taken place at two fronts: regional level under RECs and non-REC initiatives. Integration through the RECs has become the favoured mode of integration with ECA stating that 'for financial integration to be effective in Africa, it needs to be achieved through the regional economic communities.'⁶ For regional initiatives (which are in the majority), integration is rooted in the provisions of the regional treaties. These treaties include the ECOWAS Treaty, the EAC Treaty, and the SADC Treaty. There are also a number of regional monetary unions in Africa, which have stock market-related projects including WAMZ/WAEMU and CMA.⁷ The achievement of a common currency also requires the use of RECs as the building blocks.⁸ The formation of currency unions and their role in the integration of stock markets is beyond this research but it is worthwhile to note the scepticism around achieving a currency union from both politicians and implementing agencies such as the

⁴ The 50th Anniversary Solemn Declaration was adopted by the 21st Ordinary Session of the Assembly of the Heads of State and Government of the African Union on 26th May 2013.

⁵ African Union, African Leaders Sign Declaration of OAU/AU 50th Anniversary, May 27, 2013, <https://au.int/en/newsevents/29154/african-leaders-sign-declaration-oauau-50th-anniversary> accessed 4 May 2021

⁶ United Nations Economic Commission for Africa, 'Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa' (UNECA, 2008) 257.

⁷ These unions advance the need for a common currency, which is one of the objectives of the OAU and the AU under its monetary project ambitions.

⁸ Paul R Masson, 'New Monetary Unions in Africa: A Major Change in the Monetary Landscape?' (2006) 3(107) *Dans Economie Internationale* 89.

central banks.⁹ Money and finance are dealt with in the second phase of the formation of the AEC which is now considered complete in five RECs.¹⁰

The story of the regional stock market projects vis-a-vis the national stock markets echoes the story of the egg and the chicken. The Abuja Treaty was enacted in 1991 and came into force in 1994. Article 88(1) provided that the AEC would be established mainly through the 'coordination, harmonisation and progressive integration of the activities of regional economic communities.' At the time of the enactment of the Abuja Treaty, certain RECs were already in existence¹¹ and hence already had their regulatory frameworks and regional agendas. The declaration by the AEC that the already existing RECs would be the conduits for the formation of the AEC led to a scramble to resolve a potential legal issue; the duality of two systems and the intention by a later community to use an already existing 'independent' structure to fulfil its goals. So how was this dilemma resolved?

Four years after the coming into force of the Abuja Treaty, the Protocol on Relations between the AEC, and Regional Economic Communities ('REC Protocol') was signed in 1998, which was an acknowledgement that the RECs were already in existence and the need to create a link between the two. Article 3 of the REC Protocol provided one of the objectives as promoting harmonisation as well as coordination of the RECs' measures, policies, and activities to facilitate the intended merger of the RECs into the African Common Market, which was a prelude to the AEC. The REC Protocol required the RECs to revise their treaties to include the establishment of the AEC as their final objective and for absorption of the RECs into the African Common Market.¹² This was in line with Article 88(2) of the Abuja Treaty which declared that the establishment of the AEC was the end goal of the activities

⁹ Ibid.

¹⁰ European Parliament, Economic Integration under the African Union (At a Glance, November 2017) [https://www.europarl.europa.eu/RegData/etudes/ATAG/2017/608820/EPRS_ATA\(2017\)608820_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2017/608820/EPRS_ATA(2017)608820_EN.pdf) accessed 9 January 2021.

¹¹ For example, the Arab Maghreb Union, Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS) and the Southern African Development Co-ordination Conference (SADCC) which is the predecessor of the Southern African Development Community (SADC).

¹² Article 5 REC Protocol.

of any current and future RECs. Hence the Abuja Treaty resolved the legal dilemma and cemented the place of the RECs in any integration attempt.

As conduits for the fulfilment of the AEC, financial integration is largely viewed through the RECs since they are the stewards of most of the stock market integration projects as was shown in Chapter 3. Therefore, the majority of integration processes happen at the regional level. The use of RECs for stock market integration can pose challenges to integration in itself because of the inherent problems with the structure, functions, and operations of the RECs. These challenges are discussed below.

6.1.2 Multiple memberships to RECs.

6.1.2.1 The extent of the problem

Economic integration in Africa has a long complex history, punctuated with failed economic communities whose demise has political roots. When the All-African Peoples Conference was held in December 1985, the late President Nkrumah fronted a call for African economic integration which would include removing restrictions on African trade.¹³ Since then RECs have become the order of the day in Africa's path towards the AEC. Many have come and many have gone including UDEAC, EAC,¹⁴ SADCC, and PTA. Despite this, many more sprung up periodically and keeping count of how many RECs Africa has, their membership, and their activities, is an uphill task. Central to this dilemma is the overlapping memberships in the RECs ultimately leading to overlapping mandates, overlapping memberships, and overlapping regionalism. The figure below ably demonstrates the overlap in RECs.¹⁵

¹³ S.K.B Asante, *The Political Economy of Regionalism in Africa: A Decade of the Economic Community of West African States (ECOWAS)* (Praeger 1985) 27.

¹⁴ The original EAC formed in 1967 collapsed ten years later in 1977 as a result of political and economic wrangles.

¹⁵ This figure is a reprint from Joel NG and Densua Mumford, 'The TFTA and Intra-Regional Trade in Africa' (How We Made it in Africa, 6 April 2017) <https://www.howwemadeitinafrica.com/tfta-intra-regional-trade-africa/58187/> accessed 15 April 2021.

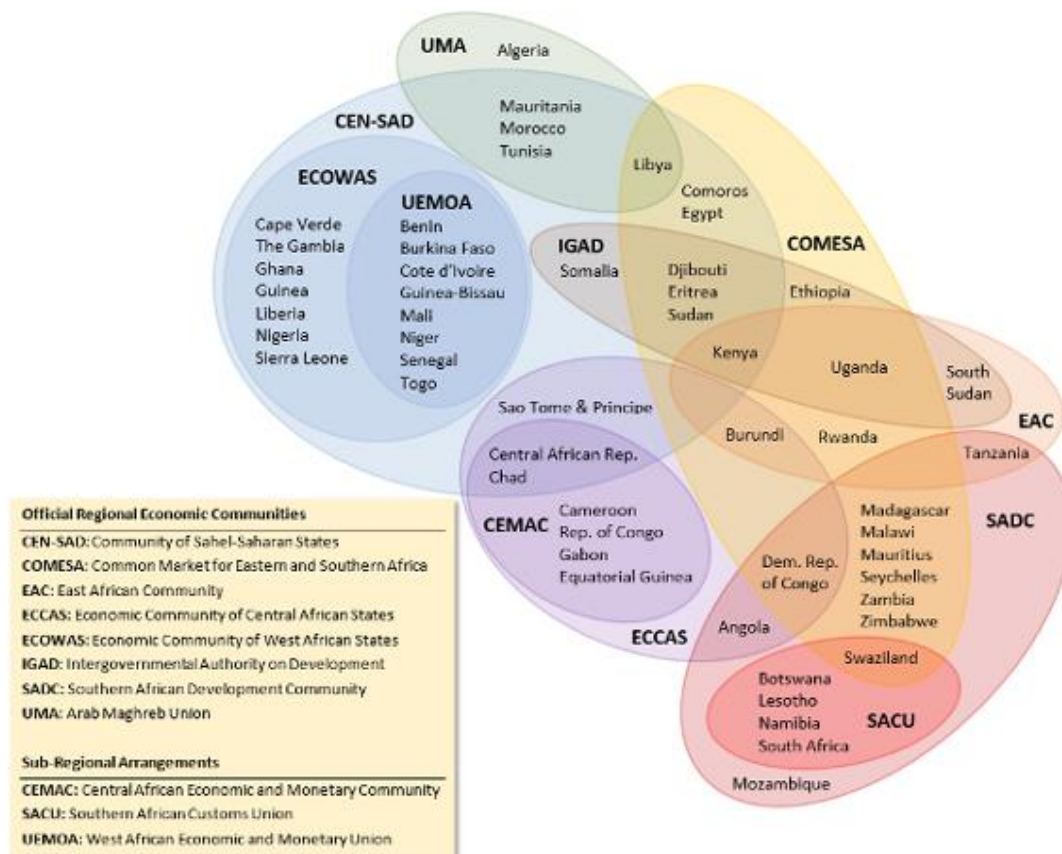


Figure 10: Overlapping Regionalism in Africa

In addition to the RECs shown in the figure, other groupings akin to RECs have also emerged. An example is the West African Monetary Zone which exists to create Eco, as the single currency among the six member states, all of whom are already members of ECOWAS. There are now customs unions, economic unions, and monetary unions, all of which also attract the same member states. Today, the DRC is a member state of 14 African regional organisations, with three of those (COMESA, SADC, and ECCAS) being recognised RECs, and currently pursuing membership to the EAC. Burundi is a member of EAC, ECCAS, COMESA, and SADC, four of the recognised RECs. In West Africa, states belong to an average of four RECs. Out of the 15 member states of ECOWAS, 13 are also members of CENSAD and eight are members of WAEMU. All members of ECCAS are members of CEMAC.

Over the years, there has been an attempt at understanding why African states tend to belong to different RECs. What inspires states to pursue memberships to different RECs? Should states be required to immediately cease this pursuit? It is simply not enough to tell countries to choose one

membership as to do so would ignore the complex political, social, economic, and geographical reasons why countries engage in 'REC shopping.'

The European Centre for Development Policy Management ('ECDPM') studied the dynamics of overlapping regionalism and found that generally, countries seek different things from different organisations.¹⁶ An example of Kenya is given which belongs to COMESA to protect its market from dumping of sugar, which it would be prohibited from doing under the EAC. The research found that states belong to different RECs in order to access larger markets and to seek objectives that were beyond the original purpose of the regional organisations.¹⁷ There is a line of argument that for complex security challenges such as in the Horn of Africa, multiple memberships may be necessary and required.¹⁸ However, for economic integration (especially capital markets), it is inconceivable what role multiple memberships would play towards the creation of the AEC.

Alnas attempted to understand why overlapping regionalism is common in Africa through the lens of Zambia's dual memberships in COMESA and SADC.¹⁹ His research found that Zambia viewed the multiple memberships as a way to increase market access, while his interviewees spoke candidly about using COMESA for trade while belonging to SADC purely for political reasons.²⁰ The Economic Commission for Africa ('UNECA') explored the issue of overlapping membership by administering questionnaires among policy members of 26 African countries. The results of the questionnaires indicated that the driving force behind multiple memberships was strategic and political reasons (50%), economic reasons (35%), complementarity, history, and geographic proximity in that order.²¹

¹⁶ Bruce Byiers, Sean Woolfrey, Alfonso Medinilla and Jan Vanheukelom, 'The Political Economy of Africa's Regional Sphaghetti Bowl' (May 2019) ECDPM Synthesis Report 5, <https://ecdpm.org/publications/political-economy-africas-regional-spaghetti-bowl-synthesis-report/> accessed 14 June 2021.

¹⁷ Ibid 6.

¹⁸ Alex de Waal and Rachel Ibreck, 'A Human Security Strategy for the European Union in the Horn of Africa and Red Sea' in Mary Kador, Iavor Rangelov, Sabine Selchow (eds), *EU Global Strategy and Human Security: Rethinking Approaches to Conflict* (Routledge 2008).

¹⁹ Robin Alnas, 'Why Overlapping Regionalism? Drivers of Zambia's Dual Memberships in COMESA and SADC: A Pluralism of Perceptions' (Masters Thesis, University of Gothenburg 2019).

²⁰ Ibid 42.

²¹ UNECA, 'Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities' (UNECA, 2006).

However, the act of merely belonging to different RECs should not be viewed as a challenge.²² The overlaps in the African context are controversial and problematic because they lead to overlapping mandates, wastage of scarce resources, conflicting loyalties, and projects. There are significant political, social, and financial costs associated with overlapping memberships. RECs have varied approaches to integration such as the focus on certain aspects of integration over others. For Central Africa, maintaining peace and stability in a heavily fragile region is at the centre of decision making whereas COMESA focuses mainly on trade. IGAD has its roots in the national reconciliation process of Sudan and hence focuses mainly on peacekeeping and security missions. States that belong to multiple RECs find themselves engaged in many different projects and unable to concentrate on priorities.

Today, successes have been registered in trade due to the creation of certain regional groupings like the SACU and WAEMU whereas the ECOWAS Passport has been key in the free movement of persons in West Africa. However, for countries that belong to all these multiple groups, and evident stretch in resources is obvious in a bid to maintain compliance with and commitment to the multiple projects of each REC.

Belonging to different RECs also bears a financial cost. For example, states that belong to ECOWAS and ECCAS find themselves required to pay two different types of community levies in addition to the Kaberuka Levy. As indicated in Chapter Six, states are consistently defaulting on their financial obligations to these RECs, and hence belonging to multiple RECs places a financial burden on member states. The sheer number of RECs also increases financing needs that cannot be met by the levies and hence require heavy reliance on unreliable donor aid. Fewer RECs would reduce the financial burden on member states and proper usage of the scarce resources. The

²² Nolte critiques the notion that overlapping mandates are problematic and examines overlaps in Latin America to demonstrate that overlaps can have both positive and negative effects. See Detlef Nolte, 'Latin America's New Regional Architecture: A Cooperative or Segmented Regional Governance Complex?' (2014) European University Institute Working Paper EUI RSCAS, 2014/89; Detlef Nolte, 'Costs and Benefits of Overlapping Regional Organizations in Latin America: The Case of the OAS and UNASU' (2018) 60(1) *Latin American Politics and Society* 148.

question then is how to resolve the issue of multiple memberships. The answer suggested by this research is rationalising RECs.

6.1.2.2 The solution: Rationalising RECs as a Proposed methodology

Since the 1980s, there have been various attempts at rationalising RECs, with West Africa being the first project. West Africa is the home of RECs including ECOWAS, UMEOA, WAEMU, WAMZ, and its members belonging to other RECs including ECCAS. Attempts were made to present ECOWAS as the sole REC in West Africa and in 1994, the African Institute for Development and Planning (under UNECA) proposed an elaborate plan to merge all RECs in West Africa under ECOWAS.²³ If anything, more regional groups have only emerged over time.

Central Africa boasts three RECS: ECCAS, CEMAC, and ICGLR. During the 2007 13th Conference of Heads of State and Government, the leaders invited CEMAC and ECCAS to set up a steering committee that would explore the merger of all of the region's RECs into one. At the July 2020 17th Ordinary Session of the Heads of State and Government, the ECCAS heads of state discussed speeding up the rationalisation of the three RECs into one.²⁴ It is obvious at this point that everyone acknowledges the difficulty that multiple memberships cause.

The critical question that must be answered is one of methodology: how can the RECs be rationalised? The Economic Commission for Africa suggested, among others, that this could be accomplished through division of labour where the bigger RECs focus on bigger projects of integration whereas the smaller RECs focus on the minor projects.²⁵ This method is unappealing as it is not clear what criteria would be used to determine what amounts to a big REC. Is it progress on integration, number of countries in the REC, market

²³ Economic Commission for Africa, 'Assessing Regional Integration in Africa II: Rationalising Regional Economic Communities' (UNECA 2006) 47.

²⁴ See Notice of the ECCAS 17th Ordinary Session of Heads of State and Government convened on July 30, 2020. <https://ceeac-eccas.org/en/uncategorized/eccas-17th-ordinary-session-of-heads-of-state-and-government-convened-on-july-30-2020/> accessed 16th March 2021.

²⁵ UNECA, 'Assessing Regional Integration in Africa II: Rationalising Regional Economic Communities' (UNECA, 2006).

capitalisation, or economic growth? Unless the criteria is clarified and widely adopted, an attempt to place labels may face stiff resistance.

In November 2009, a study for the quantification of the rationalisation of RECs was conducted.²⁶ This study extensively explored the challenge of multiple memberships among RECs and traversed different scenarios through which rationalisation could be accomplished.

a. Ignore the problem?

The first scenario considered maintaining the status quo as is and pursuing the objectives of integration under the current RECs and multiple memberships. This solution is not viable because of various negative implications of continuity. An identified problem could not be solved by simply ignoring it. There is no indication that by pointing out the problem, the RECs or member states would resolve this problem themselves.

b. Tripartite arrangements

The study also explores the possibility of the formation of a Tripartite arrangement such as the one between SADC, EAC, and COMESA. The Tripartite which was an outcome of the October 2008 Kampala Summit calls for increased cooperation and coordination between the 3 RECs which represent over half of the countries of the African continent.²⁷ The Tripartite has made substantial strides in achieving its goals and has launched the free trade zone. However, an argument can be made that this tripartite has only been somewhat successful due to the common pursuit of trade, an area where states are more open to collaborating. This may not be true for the integration of capital markets where states are less likely to engage due to the sovereignty concerns already identified and the lack of an appreciation of the critical role that stock markets play in economic development.

²⁶ African Union, 'Study for the Quantification of Regional Economic Communities: Rationalisation Scenarios' (November 2009) https://au.int/sites/default/files/newsevents/workingdocuments/12553-wd-rationalisation_study_english.2.pdf accessed 18th January 2021.

²⁷ See Agreement Establishing a Tripartite Free Trade Area Among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Agency, Sharm EI Sheikh, Egypt, 10 June 2015. Also see Tralac, 'The Institutional Arrangements of the Tripartite Free Trade Area' (Tralac Blog, 13 September 2021) https://www.tralac.org/blog/article/14248-the-institutional-arrangements-of-the-tripartite-free-trade-area.html#_ftn2 accessed 19th April 2021.

Another scenario would permit the RECs of the Abuja Treaty to remain but with the modification that 'states would have to 'withdraw from-merge with' certain RECs in the event of multiple memberships.'²⁸ Examples are given from North Africa where some member states from CENSAD would want to merge with COMESA, although a disclaimer follows that states are not likely to take this action due to sovereignty considerations. In addition, this approach is based on regional proximity which strengthens the next two options.

c. One REC per region with anchorage communities

The second scenario allows for one REC per region but recognises that states can be anchored along sociological, ethnic, historical, and cultural dimensions and hence a state would belong to one REC but can also belong to other anchor communities.²⁹ So although the states would belong to a region as defined by the Abuja Treaty, they were allowed to maintain their existing memberships as long as this did not impede integration. Evidently, this scenario would still maintain multiple memberships and not resolve the problem hence it is infelicitous.

d. One Region, One REC

The last scenario, which this research considers most suitable, contemplates delineating membership along the five regions of Africa as defined by Article 1(d) of the Abuja Treaty and later by Resolution CM/464 (XXVI) of the 26th Ordinary Session of the Council of Ministers. The 5 regions are South Africa, East Africa, Central Africa, North Africa, and West Africa. According to the AU study, this scenario would translate into 5 regional communities: Economic Community of Southern African States (ECSAS), Economic Community of East African States (ECEAS), Economic Community of Central African States (ECCAS), Economic Community of North African States (ECNAS) and Economic Community of West African States (ECOWAS).³⁰

The AU study expostulates that this division would not be feasible since Article 1(e) of the Abuja Treaty defines sub-region as at least 3 states which belong

²⁸ Ibid 76.

²⁹ Ibid 77

³⁰ Ibid 74-75.

to one or more regions and that a state can therefore be a member of a REC not based on geographical proximity.³¹ Africa's complex history of geographical borders is well documented, which would lend some credence to hesitation to rationalise RECs along borders.³² Despite this, this research takes a different view. The delineation of African countries along geographical lines has been instrumental in the negotiation of Economic Partnership Agreements (EPAs) which form the focus of the commitments made by states in the 2000 Cotonou Agreement between the EU and the African, Caribbean, and Pacific (ACP) states.³³ EPAs are negotiated on a regional basis with a country belonging to only one regional group depending on geography. The regional groups under which EPAs are negotiated do not match the contours of recognised RECs.³⁴

Hence there is a West Africa Group, Central Africa group, Eastern and Southern Africa, East African Community, and SADC Group. Although the process of signing the EPAs has not been completed, substantial progress can be perceived.³⁵ The mere fact that countries are negotiating based on the assigned geographical groups points to an ability for states to belong to one REC and conduct their integration efforts as members of one regional

³¹ Ibid 75.

³² See Ieuan Griffiths, 'The Scramble for Africa: Inherited Political Boundaries' (1986) 152(2) *The Geographical Journal* 204-16; Jeffrey Herbst, 'The Creation and Maintenance of National Boundaries in Africa' (1989) 43(4) *International Organisation* 673-92; Imre Josef Demhardt, 'Evolution and Legacy of Africa's Colonial Boundaries' (1998) 6(12) *Journal of Area Studies* 102-19; Tim Hyde, 'Are Colonial Era Borders Drawn by Europeans Holding Africa Back? How the Scramble for Africa May Still be Fueling Ethnic Conflict' (American Economic Association, 13 July 2016) <https://www.aeaweb.org/research/are-colonial-era-borders-holding-africa-back> accessed 24th February 2021; Max Fisher, 'The Dividing of a Continent: Africa's Separatist Problem' (The Atlantic, 10 September 2012) <https://www.theatlantic.com/international/archive/2012/09/the-dividing-of-a-continent-africas-separatist-problem/262171/> accessed 24th February 2021;

³³ On 3 December 2020, the Cotonou Agreement was replaced by a new EU-OACPS Partnership Agreement. However, the provisions of the Cotonou Agreement were extended until 30 November 2021 unless the ACP states enter into the new deal. See European Commission, 'Post-Cotonou: Negotiators reach a political deal on a new EU/Africa-Caribbean-Pacific Partnership Agreement' (Brussels, 3 December 2020) https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2291 accessed 18 December 2020.

³⁴ See European Center for Development Policy Management, 'EPA Negotiations and Regional Integration in Africa: Building or Stumbling Blocs' Paper Presented for the Trade Policy Centre in Africa 3rd Annual Conference, 13-15 November 2008. <https://ecdpm.org/wp-content/uploads/2013/11/EPA-Negotiations-Regional-Integration-Africa-2008.pdf> accessed 19th December 2021.

³⁵ The progress in EPAs is tracked by the European Commission at https://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf accessed 19th April 2021.

grouping. In addition, membership to certain RECs such as COMESA is reserved for neighbours, which connotes geography.³⁶

However, the drawback of this arrangement is that member states, although based in one regional grouping of the EPA have been slow to sign the EPAs.³⁷ Cameroon, for example, is the only country under the Central Africa group to sign the EPA between Central Africa and the EU.³⁸ Although negotiations were successfully concluded in the East African Community group, the member states have not signed the EPA whereas, in West Africa, Ghana and Ivory Coast are the only states (out of 16) to sign the EPA. This argument however is rebutted with the fact that negotiation and implementation are two distinct concepts. Ultimately, states have not attempted to negotiate an EPA as a member of a different group than the ones they belong to by virtue of geography which points to the ability for states to be assigned one REC.

The process of rationalisation of RECs must carefully consider the legal framework that member states have already signed up to as members of a REC. This will require member states to exit the multiple RECs which will trigger exit clauses of the various RECs and transitional arrangements. It will also require extensive legislative changes as well as enormous political will. The Report argued that these disruptions were neither realistic nor desirable and that it was uncertain that these disruptions would usher in better results.³⁹

This conclusion is open to dispute. Since 2010 when this report was made, African states have entered into more treaties, protocols, and constitutions all aimed at trade, economic integration and development which debunks the myth that it would be unrealistic to expect these states to enter into new

³⁶ Article 1(2) of the COMESA Treaty provides that membership is only open to member states of the Preferential Trade Area for Eastern and Southern Africa. In Article 1(4), a state may be admitted if it is 'an immediate neighbour of a member State.'

³⁷ See Sebastian Krapohl and Sophie Van Huut, 'A Missed Opportunity for Regionalism: The Disparate Behavior of African Countries in the EPA-Negotiations with the EU' (2020) 42(4) *Journal of European Integration* 565-82.

³⁸ Cameroon signed the EPA on 15th January 2009 and the agreement entered into application provisionally on 4th August 2014.

³⁹ African Union, 'Study for the Quantification of Regional Economic Communities: Rationalisation Scenarios' (November 2009) 76.

https://au.int/sites/default/files/newsevents/workingdocuments/12553-wd-rationalisation_study_english.2.pdf accessed 18th January 2021

arrangements to rationalise the RECs.⁴⁰ Additionally, the negotiation of EPAs under specified geographical regions, as well as the attainment of the Africa Continental Free Trade Area, signifies that a different approach to the pursuit of integration is required and that the RECs must be rationalised. It is clear that maintaining the status quo is no longer an option.

Of course, there may be a worthwhile argument that RECs should not be rationalised around region considerations. Others may argue that it should be coalitions of the willing regardless of the location of the country, as long as that country does not belong to more than one REC. There is merit in this argument as well. At the end of the day, many scenarios could be considered when it comes to rationalisation but the intention is that member states should not belong to multiple RECs pursuing the same objective. Could it be that states could belong to different RECs if those RECs only pursued certain objectives not pursued by another REC? Yes, that is a possibility. However, the Abuja Treaty gave the RECs the same end goal of the AEC and did not allocate different roles to different RECs so until the Treaty is amended, it is evident that 'one REC, one region' approach is the most feasible.

6.2 The Law of Regional Integration

The seminal works of Douglas North drew attention to the importance of institutions for economic development. North defines institutions as 'the rules of the game of a society or, more formally, the limits designed by mankind to give shape to human relationships, be they political, social or economic.'⁴¹ Because integration projects substantially take place at the regional level, this automatically raises questions of law. What law governs this integration? How does this law interact with national law? If there is a conflict between this law and national law, how can that conflict be resolved? What structures are in place or should be in place to resolve such conflicts? The foregoing discussion aims at answering some of these legal questions.

6.2.1 Multiple legal orders for one concept

⁴⁰ See the Treaties on Trade, Economic Integration and Development on the AU Tracker. <https://au.int/es/treaties/1161> accessed 19th February 2021.

⁴¹ See Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990) 1.

Because stock market integration projects happen at the regional and continental level, multiple legal frameworks interface: regional law, which refers to the treaties creating the RECs that carry out the stock market integration projects, and 'international law,' which refers to AU Treaties such as the Abuja Treaty; and national law, referring to individual state legal frameworks.

On the continental level, the AEC Treaty provides for various sources of law with the first being the Abuja Treaty itself. Article 18(3)(a) of the Abuja Treaty gives the Abuja Treaty precedence over other conflicting secondary sources of law. These secondary sources of law could include decisions, directives, and legislative measures of the organs of the AEC including the Council and Assembly, with decisions of the Assembly and Council being binding on member states and RECs. It is unclear if the decisions and regulations require legislative enactment in order for them to become binding or if they are self-executing.⁴² The application of Article 18 has not been tested in a judicial setting and hence its application remains ambiguous.

The signatories to the Abuja Treaty are sovereign states with their own sovereign legal frameworks which raise challenges of supremacy between the domestic law and law of the AEC. As a supranational community, there is an expectation that AEC Law would be supreme, a concept borrowed from the EU. To demonstrate the importance of the supremacy of EU law, the European Court of Justice ('ECJ') noted that the EU 'would be quite meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over community law.'⁴³ Although there is no equivalent jurisprudence on the AEC Law, this sets precedent for a potential understanding that the law of the AEC (as community law) is supreme to the national laws of member states. This interpretation however is a breeding ground for conflict as African states traditionally oppose any attempt at ceding sovereignty in any form. Unlike the ECJ which has expressly ruled on

⁴² Gino J Naldi and Konstantinos D Magliveras, 'The African Economic Community: Emancipation for African States or Yet another Glorious Failure' (1999) 24(3) *North Carolina Journal of International Law and Commercial Regulation* 616.

⁴³ Case 6/64 *Costa V E.N.E.L* [1964] ECR 585.

the supremacy of EU Community Law, no such guidance has been provided on the supremacy of the AEC by courts of law.

On the regional front, all of the RECs and the emerging regional groupings are a creature of different statutes which make up the regional law of the member states. This regional law includes regional treaties, regulations, directives, and opinions of regional courts. Generally, the Treaties underpinning the formation of the RECs are silent on the primacy of regional law.⁴⁴ This begs the question of whether regional law should be read in line with international law since the Abuja Treaty takes precedence over other conflicting sources of law. Other than regional and international law, there is also national/national law and how it interfaces with both regional and international law when it comes to integration.

6.2.2 Resolving the conflict of laws?

The principle of '*pacta sunt servanda*' that requires state parties to perform their commitments in good faith is a basic tenet of international law.⁴⁵ However, it does not presuppose that states must comply unless the treaties expressly require and/or demand compliance. In addition, Oppong notes that 'in the absence of a specific treaty provision (and compelling practical imperatives) requiring the parties to give effect to the treaty within their national legal systems, there is no general obligation that a treaty must be incorporated into domestic law' and that as a result, this creates a dilemma for international lawyers on the implementation of treaty law at the national level.⁴⁶

⁴⁴ Iwa Salami, 'Legal and Institutional Challenges of Economic Integration in Africa' (2011) 17(5) *European Law Journal* 670.

⁴⁵ See Article 26 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969). Also see John B Whittin, 'The Sanctity of Treaties: (Pacta Sunt Servanda),' (1935) 16 *International Conciliation* 395; Malcolm Sharp, 'Pacta Sunt Servanda' (1941) 41(5) *Columbia Law Review* 783-98; Josef L Kunz, 'The Meaning and the Range of the Norm Pacta Sunt Servanda' (1945) 39(2) *The American Journal of International Law* 180-97; Hans Wehberg, 'Pacta Sunt Servanda' (1959) 53(4) *The American Journal of International Law* 775-86; W Paul Gormley, 'The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith' (1970) 14(3) *Saint Louis University Law Journal* 367-428; Richard Hyland, 'Pacta sunt Servanda: A Meditation' (1994) 34(2) *Virginia Journal of International Law* 405-34; Daniel Davison-Vecchione, 'Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty' (2015) 16(5) *German Law Journal* 1163-90.

⁴⁶ Richard Frimpong Oppong, *Legal Aspects of Economic Integration in Africa* (Cambridge University Press 2011) 42-3.

As a result of this difficulty, drafters of regional and community treaties have sought to remedy this by introducing direct applicability, a principle most common in EU law. Where direct applicability applies, provisions of treaties and law are self-executing as soon as states ratify the treaties and hence do not require states to take any further steps to incorporate them into the national legal order. This however should not be confused with direct effect, a principle created by the European Court of Justice in *Van Gend en Loos v Administratie der Belastingen*.⁴⁷ This is important because a provision may not be directly applicable yet capable of direct effect, such as for EU Directives. The effect of direct effect is that litigants can rely on provisions of the treaties, directives, protocols, or any other community law when advancing their claims in national court and courts would be obliged to follow that law.

Different approaches have been taken by Treaties on economic integration in Africa with some embracing direct applicability while others have expressly disclaimed it. In Article 5(2) of the ECOWAS Treaty, member states undertook to ensure the enactment of the legislation formulated at the regional level into national law in order for the provisions of the Treaty to be implemented. Such a provision illustrates that the legislation at the regional level in ECOWAS is not directly applicable and hence requires domestic measures. This is echoed in Article 5(2) of COMESA, Article 8(2) of the EAC Treaty, and Article 6(5) of the SADC Treaty. These provisions on implementation should not be confused with giving regional law supremacy as these provisions are merely law implementation provisions.

One must also have recourse to the individual countries and whether they are monist or dualist in determining how regional law takes effect in member states. Dualist states require international law to be expressly incorporated into national law for it to be effective⁴⁸ while monists view international law as part of the national law (although taking precedence) and hence no need

⁴⁷ Case 26/62 [1963] ECR 1.

⁴⁸ Examples of this include the South Africa legal system where Section 231 of the 1996 Constitution of the Republic of South Africa requires international law to be domesticated. In Kenya, the advent of the 2010 new Constitution marked a switch from dualism to monism. See Makumi Mwagiru, 'From Dualism to Monism: The Structure of Revolution in Kenya's Constitutional Treaty Practice' (2011) 3(1) *Journal of Language, Technology and Entrepreneurship in Africa* 144.

for domestication.⁴⁹ Because the legislation is not directly applicable, RECs are left to the mercy of member states to exercise good faith and domesticate the regional law into national systems, failure of which the law is deemed mute. It is no surprise therefore that many commitments at the regional level have not been executed because they depend on the willingness of states and their legislature. In the EAC, member states have enacted legislation to domesticate the regional treaty. This is through the Treaty for the Establishment of East African Community Act 2000 for Kenya, the East African Community Act of 2002 for Uganda⁵⁰, and the Treaty for the Establishment of East African Community Act 2001 for Tanzania.

To enhance regional integration, the principles of direct applicability and direct effect must be carefully considered by partner states. This requires carefully reviewing the Treaties, Protocols, Regulations, and Rules of the RECs and agreeing on the parts that would have direct effect.⁵¹ This would not be new as aspects of direct effect can be found in the Free Movement Protocol of ECOWAS although its implementation has not been without controversy.⁵² There are high levels of non-compliance to treaty obligations so mere embedment of the principles of direct effect and direct applicability will not be the magic wand. However, the enactment provides a starting point for compliance to be enforced and for a discussion to commence.

As member states of the AU, and signatories to the Abuja Treaty, Article 18 of the Abuja Treaty gives that Treaty and by extension its laws, primacy over domestic law. However, for regional law, it may come down to regulatory enactments and the principle of 'pacta sunt servanda.' Where regional treaties are silent on the place of regional law, then the conflict of laws

⁴⁹ See Gerrit Ferreira and M.P Ferreira-Synman, 'The Incorporation of Public International Law into National Law and Regional Law Against the Background of the Dichotomy between Monism and Dualism' (2014) 17(4) *Potchefstroom Electronic Law Journal* 1471-96.

⁵⁰ The Act came into force on 15th January 2005 by virtue of the East African Community Act (Commencement) Instrument 2005.

⁵¹ This concept is explored extensively by Nwauche although limited to ECOWAS. See ES Nwauche, 'Enforcing ECOWAS Law in West African National Courts' (2011) 55(2) *Journal of African Law* 181-202.

⁵² See RI Onwuka, 'The ECOWAS Protocol on the Free Movement of Persons: A Threat to Nigerian Security?' (1982) 81 *African Affairs* 193; AA Afolayan, 'Immigration and Expulsion of ECOWAS aliens in Nigeria' (1988) 22 *International Immigration Review* 4; ML Brown, 'Nigeria and the ECOWAS Protocol on Free Movement and Residence' (1989) 27 *The Journal of Modern African Studies* 251.

principles may apply. This is further made difficult by the inconsistent approach of states with certain regional laws providing for supremacy of regional law whereas others are silent on the concept. A review of the SADC Treaty, as well as the SADC Protocol on the Tribunal,⁵³ shows no provision that deals with the place of regional law in the national legal systems of member states.

In sharp contrast, in Article 8(4) of the EAC Treaty, member states agreed that 'community organs, institutions, and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.' In the landmark decision of *Samuel Mukira Mohochi V the Attorney General of the Republic of Uganda*, the EACJ noted that the fundamental principles which are required for the objectives of the community to be achieved are:

*'foundational, core, and indispensable to the success of the integration agenda and were intended to be strictly observed. Partner States are not to merely aspire to achieve their observance, they are to observe them as a matter of Treaty obligation. All the six principles in the Article [Article 6] were carefully thought out, negotiated, appropriately weighted, individualized, and crafted the way they are for a particular effect. Integration depends on each of them singly and collectively.'*⁵⁴

The EACJ, therefore, determined that by signing up to the EAC Treaty, Uganda accepted that its sovereignty was now qualified by community law. This decision is a milestone due to the bold proclamation of the EACJ that states are required to comply with community law which takes precedence over domestic law. In doing so, the EACJ might have had an inclination that sovereignty concerns may arise in states and hence sought to create a balance by distinguishing between overriding sovereignty and qualifying sovereignty noting that:

⁵³ Protocol on the Tribunal in the Southern African Development Community, 7 August 2000.

⁵⁴ Reference 5 of 2011, EACJ, 17 May 2013

*'the Sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of the Partner States is not taken away by the Treaty and the Protocol but, in denying entry to such persons, the Republic of Uganda is legally bound to ensure compliance with the requirements of the relevant provisions of the Treaty and the Protocol.'*⁵⁵

Due to the wide array of treaties in the integration space, there is no consistent application or resolution of the conflict between domestic law and regional law. It depends on what the specific treaty says or doesn't say. Could international law provide consistent guidance? Maybe. Since there are other integration projects elsewhere globally, especially the EU, what can African states learn from the approach taken? The following discussion analyses how the EU has approached this conflict.

6.3 Lessons from the EU

The relationship between EU law and national law is a complex legal issue that tests the commitment of member states to the spirit of integration. This relationship is primarily tested where there are conflicts in the provisions of the legal order of the EU and that of the member states' national constitutions and acts of parliament.⁵⁶ In the financial services sector, this conflict is even more likely as securities are exchanged across borders under community law, bringing them within the confines of national law. Areas where conflict of laws may arise include the contractual aspects relating to security agreements, location of securities, the jurisdiction of governing law for purposes of enforcement, and insolvency of intermediaries and issuers.⁵⁷ For example, MiFID II and MiFIR limit freedom of contract in investment products contracting as well as the distribution agreements for investment products and the contracts for the provision of investment advice.⁵⁸ The provisions of

⁵⁵ Ibid.

⁵⁶ See generally Ulrich Drobni, 'Conflict of Laws and the European Economic Community' (1966-1967) 15(1/2) *The American Journal of Comparative Law* 204-29.

⁵⁷ On conflict of laws in finance, see generally Philip R Wood, *Conflict of Laws in International Finance* (Sweet and Maxwell 2019). Also see Olha O. Cherednychenko, 'Two sides of the Same Coin: EU Financial Regulation and Private Law' (2021) 22 *European Business Organisation Law Review* 147-72.

⁵⁸ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012; Directive

EU law may be in contrast with the principles of national law. Member states then have to apply community law based on the principle of primacy of EU law, discussed herein.

6.3.1 The primacy of EU law

The primacy of EU law, the principle that EU law shall prevail where there is a conflict between EU law and national law, has been reaffirmed and consistently upheld by the Court of Justice,⁵⁹ which is described as the 'master of treaties' because of the central role it has in protecting the EU legal framework.⁶⁰ The principle of primacy of EU law is not expressly enshrined in the EU treaties and only applies to specific instances where the EU countries have ceded legislative sovereignty to the EU such as the creation of a single market.⁶¹ Member states are instead, expressly by Treaty required to cooperate and fulfil the objectives of community law. Article 5 of the Treaty on European Union requires member states to ensure that treaty obligations are fulfilled and to abstain from measures that jeopardise attaining the treaty objectives.

The Treaty of Lisbon included a declaration of primacy which was as a result of an opinion of the Council Legal Service, which noted that '*primacy of EU law is a cornerstone principle of Union law*' and that this primacy was inherent in the very nature of the community. The opinion pointed out that the 'fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.'⁶²

2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

⁵⁹ See Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003).

⁶⁰ See Karen Alter, 'The European Court's Political Power: the Emergence of an Authoritative International Court in the European Union' in Karen J Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 1996).

⁶¹ It does not apply to matters of taxation since the EU has no powers to levy taxes and its powers with regards to taxes relate to the creation and operation of a single internal market. Although Article 110, 111, 112 and 113 of the EC Treaty lay down specific provisions on taxation, they require all members of the EU to unanimously agree, a compromise that is difficult to achieve. Other fields where primacy does not apply include social policy which is primarily left to the EU member states although Article 151 of the EC Treaty lays down the social policy objectives of the EU. Social policy in this context includes social protection, social security, employment of non-EU citizens, collective bargaining schemes among others.

⁶² Opinion of the Legal Service, 11197/07, Brussels 22 June 2007.

The European Court of Justice has affirmed the principle of primacy of EU law in various decisions over the years. In *Van Gend en Loos v Nederlandse Administratie der Belastingen*,⁶³ the European Court of Justice noted that the

'conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.'

In further cases including *Flaminio Costa v E.N.E.L*,⁶⁴ *Marleasing SA v La Comercial Internacional de Alimentacion SA*,⁶⁵ *Amministrazione delle Finanze dello Stato v Simmenthal SpA*,⁶⁶ *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel*⁶⁷ the court has entrenched the primacy of EU law and its application to national law and actions of member states whether done before or after the Treaty came into force. There is no shortage of scholarship on the primacy and supremacy of EU law and the court's approach and pronouncements.⁶⁸ The principle is now viewed as an international rule of law in Europe.

⁶³ Case 26/62, [1963] ECR 1.

⁶⁴ Case 6/64, [1964] ECR 585. This arose out of a reference by the Italian Court arising out of proceedings between Flaminio Costa and the Ente Nazionale Energia Elettrica (National Electricity Board) on the interpretation of Articles 102, 93, 53 and 367 of the Treaty. The Court held that 'it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.'

⁶⁵ Case C-106/89, [1990] ECR 4135.

⁶⁶ Case 106/77 [1978] ECR 629. The court held that 'it follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.'

⁶⁷ Case 11/70, [1970] ECR 1125. The court noted that 'recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question.'

⁶⁸ See Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003); Roman Kwieciec, 'The

6.3.2 Application of primacy and supremacy of EU law by member states

For a principle that has been subject to various judicial pronouncements, there is an expectation that it would be settled law that is universally applied in the EU. However, this is far from reality and two schools of application have emerged; states that apply the principle and states that oppose the principle. Most member states of the EU have entrenched the primacy of EU law in their national laws. The Czech Republic, for example, expressly provides for the supremacy of ratified international treaties over national law.⁶⁹ The Republic of Ireland's Constitution forbids invalidation of any laws that were enacted in compliance with EU law.⁷⁰ Article 65 of the Constitution of the Republic of Malta requires that all laws made by the Maltese Parliament must be consistent with EU law and its obligations under the EU Treaties.

However, despite the pronouncements of the CJEU, some member states have taken a different viewpoint and sought to curtail its application in their jurisdictions. Some member states have constitutional safeguards that are meant to protect their constitutional identity and which limit the transfer of their powers to the EU.⁷¹ For example, Article 34 of the Belgian Constitution allows international institutions to which certain powers have been delegated to exercise them autonomously. In an obiter dictum in the TSCG case, the Belgian Constitutional Court noted that Article 34 does not however grant international institutions a general licence to 'neither the legislator, when it

Primacy of European Union Law Over National Law Under the Constitutional Treaty' (2005) 6(11) *German Law Journal* 1479-96; Matej Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011) 17(6) *European Law Journal* 744-63; Monica Claes, 'The Primacy of EU Law in European and National Law' in Anthony Arnall, Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 178; Tomi Tuominen, 'Reconceptualising the Primacy-Supremacy Debate in EU Law' (2020) 47(3) *Legal Issues in Economic Integration* 245-66.

⁶⁹ See Article 10 of the Czech Republic.

⁷⁰ See Article 29.4 in the Third Amendment of the Constitution of Ireland of 10 May 1972 which allowed the Republic of Ireland to join the EU (then known as the European Communities) and expressly noted that the European Community law would take precedence over national law. Article 29.4 provides that '...No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or institutions thereof, from having the force of law in the State.' Also see Gerard Hogan, 'Ireland: The Constitution of Ireland and EU Law: The Complex Constitutional Debates of a Small Country' in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (ASSER Press 2019) 1323-71.

⁷¹ BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13.

approves a treaty, nor the institutions concerned, when they exercise their delegated powers' and does not allow a discriminatory 'detraction from [Belgium's] national identity, as enshrined in its fundamental political and constitutional structures, or from the core values of the protection granted by the constitution to its legal subjects.'⁷²

In Lithuania, the Constitutional Court ruled that EU law does not have supremacy over its Constitution but only over acts of Parliament⁷³ while in Poland, the Constitutional Tribunal held that EU law does not override its Constitution but can override other statutes.⁷⁴ In a case concerning an agreement of a pension scheme relating to employees in the Czech Republic and Slovakia, both initially, under Czechoslovakia, which required pensions to be determined by the state of residence of the employer hence leading to unequal treatment of Slovak employees, the Czech Constitutional Court declared the CJEU's judgement that declared the agreement to be in contravention of EU law, ultra vires and gave its national law precedence over the EU community law.⁷⁵

Other departures from this principle have been observed in Denmark where the Supreme Court refused to comply with the guidance of the CJEU to interpret national law in light of the directive on equal treatment of workers and declined to set aside provisions of its national law that conflicted with Directive 2000/78/EC.⁷⁶ Most recently, the German Federal Constitutional Court (FCC) declared the CJEU's scrutiny of the European Central Bank's decision on the Public Sector Purchase Programme (PSSP) ultra vires on the

⁷² Grondwettelijk hof - Arrest nr. 62/2016 dd, 28 April 2016.

⁷³ Ruling on the Compliance of the Provisions of the Republic of Lithuania's Law on Protected Territories, Case No 17/02-24/02-06/03-22/04. Also see Juozas Bernatoniš, Vytautas Mizaras, Agnė Verselytė, *Lithuanian Legal System Under the Influence of European Union Law* (Lithuania University 2014).

⁷⁴ Trybunał Konstytucyjny, wyrok z dnia K 19/04, Verdict of the Constitutional Tribunal, of Poland of May 11th, 2005. See Adam Lazowski, 'The Polish constitution, the European constitutional treaty and the principle of supremacy' in Anneli Albi and Jacques Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Kluwer Law International 2007).

⁷⁵ C-399/09 Landtova and the Czech Constitutional Court judgment of 20 March 2007, Pl. 4/06.

⁷⁶ Dansk Industri (DI), acting on behalf of Ajos A/S v Estate of Karsten Eigil Rasmussen Case C-441/14, Judgment of the Court (Grand Chamber) of 19 April 2016; *DI acting for Ajos A/S v. The estate left by A*, Danish Supreme Court, Judgment of 6 December 2016, no. 15/2014. Also see Sim Haket, 'The Danish Supreme Court's Ajos judgment (Dansk Industri): Rejecting a Consistent Interpretation and Challenging the Effect of a General Principle of EU Law in the Danish Legal Order' (2017) 10(1) *Review of European Administrative Law* 125-51.

ground that the CJEU has violated the principles of legal interpretation and failed to apply the principle of proportionality and declared that German bodies should not participate in the development or implementation of ultra vires acts.⁷⁷ In doing so, the FCC challenged the CJEU's understanding and application of the principle of proportionality, a continuation of the rather complex and difficult relationship between the EU and German courts.

The departure from the principle of supremacy of EU law exposes the tensions between the EU and member states and the reluctance by member states to give up regulatory, legislative, and judicial sovereignty. States have been willing to test the principle and sought to retain and preserve their judicial and legal sovereignty. Despite this, the CJEU principle of primacy has received wide acceptance and application amidst the pushbacks and the tougher stances of member states on the limit of EU law. The EU Commission has responded to such pushbacks by writing to the offending nations asking them to restrain themselves or to reconsider their positions. In certain instances, the Commission has launched legal proceedings to preserve this principle which points to the importance of the concept and the lengths that the Commission will go to preserve it.⁷⁸

6.3.3 The primacy and supremacy of EU law in financial services

As much as the primacy of EU law applies to conflict of laws generally, there has been very little jurisprudence in the field of financial services and especially in capital markets. Most of the jurisprudence in this area has been in fields that affect financial service firms especially taxes. Nevertheless, as discussed in 6.3 above, there are conflict of law situations that could arise in financial services.

An example of a scenario where conflict of laws may appear in financial services is the question of ownership of securities where the issuer and the investor are located in different member states and the securities are held by a financial institution in a different member state. This could impact timelines for clearing and settlement as ownership is ascertained. In addition, the

⁷⁷ In the proceedings on the constitutional complaints of Dr W, Dr H and Dr A 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16, 5 May 2020.

⁷⁸ See Hans Von Der Burchard, *Commission Threatens to Sue Germany over EU law Supremacy Dispute* *Politico* (Brussels, 9 June 2021).

securities may be assigned to different parties hence causing disputes on ownership. Article 14 of the Rome I Regulation provided for a rule that governed the law applicable to the voluntary assignment of claims.⁷⁹ However, in *BNP Paribas V Teambank*, the CJEU considered whether Article 14 of Rome I Regulation could be interpreted as 'determining the applicable law with regard to the third-party effects of an assignment of a claim in the case of multiple assignments, for the purpose of determining the holder of that claim? Or should its silence on same be interpreted as having been intentional (excluding such cover, leaving it to residual national conflicts rules)?'⁸⁰

The court held that Article 14 does not extend or refer to third-party effects of an assignment of a claim, leaving a lacuna in EU law. Consultation for an EU regulation that would deal with third-party effects of assignment of claims commenced in response to this gap.⁸¹ The attempt to resolve this challenge is viewed as 'potentially one of the most complicated multilateral law reform projects attempted' and concerns raised about the potential upheaval that uniformity may bring for many markets in member states.⁸²

The influence that EU law has on securities markets regulation stretches into listing such as prospectus rules, trading and settlement, and rules relating to intermediaries.⁸³ The CJEU has presided over a few matters relating to the Market in Financial Instruments Directive (MiFID) and the Prospectus Directive and although it did not have to expressly reaffirm the primacy of EU law, it can be inferred from the directions given to the references brought before it as well as its application of the principles of effectiveness.⁸⁴ There may be little jurisprudence in this area but there is no doubt that the ECJ

⁷⁹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

⁸⁰ Case C-548/18, (2019) CJEU 848

⁸¹ See European Commission, Consultation Document on Conflict of Laws Rules for Third Party Effects of Transactions in Securities and Claims, Ref. Ares(2017)1874960 - 07/04/2017 https://ec.europa.eu/info/sites/default/files/2017-securities-and-claims-consultation-document_en.pdf accessed 4 April 2021.

⁸² Rory Cochrane, 'Should the EU address conflict of laws questions thrown up by cross-border capital markets?' (2007) *Butterworths Journal of International Banking and Financial Law* 470.

⁸³ See generally Danny Busch, 'The Influence of the EU Prospectus Rules on Private Law' (2021) 16(1) *Capital Markets Law Journal* 3-30.

⁸⁴ See C-174/12 *Alfred Hirrmann v ImmoFinanz AG* ECLI:EU:C:2013:856 ; C-604/11 *Genil 48 SL and Others v Bankinter SA and Others* OJ 2013/C 225/25; *Bankia SA vs Union Mutua Asistencial de Seguros* [2021] EUECJ C-910/19.

would apply the primacy of EU law principle to cases relating to financial services.

In conclusion, the interface of domestic and regional law is bound to lead to a conflict of law situation. It is expected that where there is an intersection of multiple legal orders, policymakers and regulators should anticipate such potential conflicts and incorporate safeguards as well as principles to resolve such scenarios. The principle of '*pacta sunt servanda*' is a reminder to signatories of integration treaties to commit to performing their obligations under treaties. Legislative drafters of treaties in Africa should consider expressly including *pacta sunt servanda* principles in the text of treaties and protocols. This however is not sufficient to deal with conflict of law scenarios and does not adequately cover application issues. In such cases, expressly providing for the primacy of regional and international law in treaties may be the missing link.

This does not presuppose that judicial or treaty proclamations of the primacy of regional and international law will prevent African states from raising sovereignty concerns or will be the magic wand resolving conflicts. The EU has the most advanced judicial pronouncements on the primacy of EU law but that has not stopped member states from making contrary pronouncements contradicting judgements of the CJEU. However, the EU has put in place structures to manage such scenarios and although states do not always consistently apply the principle of primacy of EU law, the principle still receives wide judicial acceptance. What can African stock market regulators learn from all of this? The place of regional law and international law should be clarified in treaties. Where there is a conflict between national law and either regional or international law, treaties should provide for primacy over national law. However, there should be safeguards and compromises in place to balance the obligations to comply and state sovereignty. This could include limiting the application of regional law to, initially, areas of uniform acceptance or areas where states are less likely to object. This could, for example, include basic principles underpinning trading and settlement, market conduct such as insider trading and market abuse as well as accounting standards. There will certainly be clashes even in the 'low hanging fruit' areas and states may make contrary pronouncements. Like the CJEU,

consistently and constantly applying the principle of primacy of regional law is crucial. This will be supplemented by enforcement and monitoring mechanisms.

6.4 Enforcement of treaty obligations

The preceding discussion has demonstrated the role of the judicial system and the institutions in enforcing compliance with regional law. Chayes and Chayes view compliance as a 'normal organisational presumption',⁸⁵ as an outcome of states accepting the legal framework of the supranational. Compliance is twofold: initial non-compliance and then a compliance crisis.⁸⁶ Initial non-compliance may happen in different scenarios such as failure to implement directives while a compliance crisis occurs where a party outrightly disregards the laws or decisions of the supranational.⁸⁷ An integration body's regulatory framework should have adequate remedies for both initial non-compliance and compliance crises. Enforcement is particularly important due to the failure by member states to domesticate commitments made in regional treaties into their national policies, rules, and legislation. Without any monitoring and enforcement, states can avoid their regional and international law commitments.

6.4.1 The establishment of an African judicial system

Article 18 of the Abuja Treaty establishes a Court of Justice whose role is to ensure the 'adherence to law in the interpretation and application' of the treaty as well as to decide disputes between parties. The Court of Justice provided in the Abuja Treaty ('AECCJ') would decide on inter-state disputes as well as disputes brought by the Assembly on matters relating to violation of the Treaty.⁸⁸ In essence, its focus was on matters relating to the AEC. This court was separate from the African Court on Human and People's Rights

⁸⁵ Abram Chayes and Antonia Handler Chayes, 'On Compliance' (1993) 47(2) *International Organisation* 179.

⁸⁶ Jurgen Neyer and Dieter Wolf, 'Analysis of Compliance with International Rules' in Michael Zurn and Christian Joerges (eds), *Law and Governance in Postnational Europe: Compliance Beyond the Nation-State* (Cambridge University Press 2009) 45.

⁸⁷ See Babatunde Fagbayibo, 'Exploring Legal Imperatives of Regional Integration in Africa' (2012) 45(1) *The Comparative and International Law Journal of Southern Africa* 70.

⁸⁸ Article 18 of the Abuja Treaty. Also see Kwaku Danso, 'The African Economic Community: Problems and Prospects' (1995) 42(4) *Africa Today* 31-55.

(ACHPR)⁸⁹ and also differed from the Court of Justice under the AU Treaty ('AUCJ')⁹⁰ whose role was the interpretation of the Constitutive Act.⁹¹ This meant that there were 3 courts all under the auspices of the AU, a very strange arrangement.

The AECCJ was seen as crucial in ensuring the survival of the AEC since it would enable interpretation and resolution of disputes relating to the Treaty and the AEC.⁹² This court was modelled on the structure of the CJEU and bore similarities in its functions and structure⁹³ but the modalities of its operation would be elaborated in a subsequent Protocol, which was the Statute of the African Court of Justice. From the outset, there were evident loopholes. If a party was not a signatory to the Statute, they would not bring a case before the court and the court would have no jurisdiction over such cases.⁹⁴ As a result, all that states needed to do to avoid the long arm of the law was not to assent to the Statute. This was concerning since all states were already signatories to the Abuja Treaty which created this court. Secondly, since RECs were not signatories to the Abuja Treaty, they did not have standing before the court. RECs were the conduits of integration including stock market integration and hence by denying them audience rights, RECs would not be able to seek enforcement of treaty obligations under this court. They were only left with the option of enforcing regional law through judicial systems created by the respective regional treaties, if any. The failure to grant *locus standi* to individuals to commence disputes before the ACJ also created a dilemma. Generally, individuals have been instrumental in expanding the jurisprudence in African courts by bringing disputes before the court.⁹⁵ Rarely

⁸⁹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted on 10 June 1998 in Ouagadougou, Burkina Faso.

⁹⁰ See Article 18 of the Constitutive Act.

⁹¹ Protocol of the Court of Justice of the African Union, adopted on 11 July 2003 in Maputo, Mozambique. For an understanding of the African Court of Justice, see Konstantinos D Magliveras and Gino J Naldi, 'African Court of Justice' (2006) Max Planck Institute https://www.zaoerv.de/66_2006/66_2006_1_b_187_214.pdf

⁹² See A.O. Obilade, 'The African Court of Justice: Jurisdictional, Procedural and Enforcement Problems', in M.Ayo Ajomo and Omobolaji Adewale (eds), *African Economic Community Treaty: Issues, Problems and Prospects* (Nigerian Institute of Advanced Legal Studies 1993) 312.

⁹³ Compare with Article 230(2) of the EC Treaty. Also see Ben Kioko, 'The African Court on Human and Peoples' Rights' (July-September 1996) *African Legal Aid Quarterly* 25.

⁹⁴ Article 18 of the Statute of the African Court of Justice.

⁹⁵ This is evident in judgements and decisions of many of the regional courts including cases such as *Katabazi and 21 Others v Secretary General of the East African Community and Another* (Ref. No. 1 of 2007) [2007] EACJ 3 (1 November 2007); Prof. Peter Anyang' Nyong'o

do states in Africa commence legal proceedings against other states in these courts.

Later, the AUCJ and the AECCJ merged, leaving one Court of Justice to deal with interpretation of the AU Act and Abuja Treaty. In 2004, the ACHPR was merged with the AUCJ to form a single court known as the African Court of Justice and Human Rights (ACJHR).⁹⁶ The merger of the two courts by the Merger Protocol⁹⁷ would resolve the duality of institutions, prevent overlapping mandate, and prevent wastage of scarce resources.⁹⁸ Although the merger attracted criticism for undermining the cause of human rights,⁹⁹ the Merger Protocol was adopted in 2008 and clothed the ACJHR with the jurisdiction on all disputes relating to the interpretation of the AU treaties, all matters in other agreements concluded by state parties (which would include agreements executed in RECs) and other human rights instruments.¹⁰⁰ The Merger Protocol provided for two sections of the Court: the Human Rights Section and the General Affairs Section.¹⁰¹ The Merger Protocol could only come into force 30 days after ratification by 15 member states.¹⁰² As at 30 September June 2021, only 8 states out of 54 states in Africa had ratified the Protocol.¹⁰³ The Merger Protocol was subsequently amended by the Malabo

and Others v Attorney General of Kenya and Others (Reference No. 1 of 2006 (Judgment)) [2007] EACJ 6 (30 March 2007); Mwatela and Others v East African Community (Application No. 1 of 2005) [2006] EACJ 1 (1 October 2006); Olajide Afolabi Vs Federal Republic of Nigeria ECW/CCJ/JUD/01/04; Kanyama v SADC Secretariat (SADC (T) 05/2009) [2010] SADCT 1 (29 January 2010); Tembani v Republic of Zimbabwe (SADC (T) 07/2008) [2009] SADCT 3 (14 August 2009); Eastern and Southern African Trade and Development Ban and Dr Michael Gondwe Vs Martin Ogang, Application No ID/2000 COMESA Court of Justice.

⁹⁶ See Article 2 of the Protocol on the Statute of the African Court of Justice and Human Rights.

⁹⁷ Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

⁹⁸ Nsongurua Udombana, 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2003) 28 *Brooklyn Journal of International Law* 835.

⁹⁹ Frans Viljoen and Evarist Baimu, 'Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples' Rights and the African Court of Justice', (2004) 22(2) *Netherlands Quarterly of Human Rights* 254. Also see Ogwezzy Michael, 'Challenges and Prospects of the African Court of Justice and Human Rights' (2014) 6 *Jimma University Journal of Law* 1-30.

¹⁰⁰ Article 3 of the Protocol on the Statute of the African Court of Justice and Human Rights.

¹⁰¹ Article 16 of the Merger Protocol.

¹⁰² Article 9(1) of the Protocol on the Statute of the African Court of Justice and Human Rights.

¹⁰³ See African Union, List of Countries Which Have Signed, Ratified/Acceded to the Protocol on the Statute of the African Court of Justice and Human Rights,

<https://au.int/sites/default/files/treaties/36396-sl-PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf> accessed 30 September 2021.

Protocol¹⁰⁴ and the court became the African Court of Justice and Human and Peoples' Rights ('ACJHPR').¹⁰⁵

The Malabo Protocol too required the ratification of 15 member states for it to come into force.¹⁰⁶ As of 30 September 2021, only 15 states have signed the Malabo Protocol but no African state has ratified it.¹⁰⁷ Until the Merger Protocol and the Malabo Protocol come into force by ratification, the ACHPR continues to operate based on the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.¹⁰⁸ Since the Court of Justice was never operational, its functions have never been undertaken and hence there is no court for interpretation of the Abuja Treaty.

The effect of this is that without an operational AU court to interpret regional and international law in Africa, enforcement and interpretation of regional and international law becomes difficult. The principles discussed in 6.3 on resolving conflict of law scenarios in the interaction between national and regional law cannot be pronounced and jurisprudence in this area cannot develop without a dedicated court. The leadership of the AU must emphasize states ratifying the necessary Protocols for the formation and operationalisation of the courts. This court is an institutional actor in the development of regional integration and its operationalisation is of utmost importance.

Before delving further, one must also note the convoluted and complex architecture of the African Court of Justice and Human and Peoples' Rights as the successor of three different courts which include the African Court on

¹⁰⁴ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.

¹⁰⁵ Article 8 of the Malabo Protocol.

¹⁰⁶ Article 11(1) of the Malabo Protocol

¹⁰⁷ African Union, List of Countries Which Have Signed, Ratified, Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, <https://au.int/sites/default/files/treaties/36398-sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf> accessed 30 September 2021.

¹⁰⁸ For a detailed reading on the court, see Charles C Jalloh, Kamari M Clarke, Vincent O Nmeihille (eds), *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge University Press 2009); Adamantia Rachovista, 'On New Judicial Animals: The Curious Case of an African Court with Material Jurisdiction of a Global Scope' (2019) 19(2) *Human Rights Law Review* 255-89; Ben Kioko, 'Perspective from the African Court on Human and People's Rights' (2020) 12(1) *Journal of Human Rights Practice* 163-70.

Human and Peoples' Rights,¹⁰⁹ the Court of Justice of the African Union, and the African Court of Justice and Human Rights. Essentially, the court established by the Merger Protocol takes on functions of three courts and then extends its jurisdiction further to include transnational and international human rights.¹¹⁰ Although it is laudable that efforts have been made to have a one-stop centre for the resolution of African disputes, stacking treaty upon treaty cannot be encouraged and additionally, human rights are complex in themselves without adding potentially 'commercial' and 'economic' disputes as well as integration issues. It is hence questionable whether the merged court can spread itself out enough to deal with questions of interpretation of the Abuja Treaty and carry on the tasks that were anticipated by the court established by the Abuja Treaty. These questions remain unanswered as the court has not expanded into this sector but there is a growing body of literature on the convoluted mergers of these courts.¹¹¹

6.5 The judicial system of the RECs

Two African scholars have shed light on the state of affairs. Mshomba notes that 'part of what makes economic integration in Africa an interesting subject for research...is the wide gap between the rhetorical support of politicians and the real state of economic integration.'¹¹² Udombana, on the other hand, offers a stinging critique:

'member states formulate grandiose policies at the continental level and then retreat into their domestic bunkers, leaving the policies to atrophy. Lessons are quickly forgotten, mistakes are repeated and follow-through is lacking. Thus, the General Confession in The Book of Common Prayer has been

¹⁰⁹ This was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998.

¹¹⁰ See Daniel Ntanda Nsereko and Maniel J Ventura, 'Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol' in Charles C Jalloh, Kamari M Clarke, Vincent O Nmeihelle (eds), *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge University Press 2009) 260.

¹¹¹ See Nsongurua Udombana, 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2003) 28 *Brooklyn Journal of International Law* 835; Frans Viljoen and Evarist Baimu, 'Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples' Rights and the African Court of Justice', (2004) 22 (2) *Netherlands Quarterly of Human Rights* 254.

¹¹² Richard Mshomba, *Africa in the Global Economy* (Lynne Rienner Publishers 2000) 75.

*their lot: "We have left undone those things which we ought not to have done, and there is no health in us." Policy reversals and economic retrogression are the norms in Africa. Each succeeding government starts by dismantling the economic policies of its predecessor that may have been laboriously put together. It then lays its own economic foundation that it might not finish constructing before another government takes over. And so, the cycle and corresponding break upon economic progress continues.'*¹¹³

The Court of Justice of the EU is seen as an important factor in European integration.¹¹⁴ The Court plays a central role of furthering integration and has largely gained a high level of legitimacy as an authoritative interpreter of EU law. Could a proper functioning judicial and court system, such as the one in the EU, be instrumental in changing the state of affairs decried by the African scholars? In addition, there is no shortage of non-judicial institutions in the EU tasked with furthering integration in different areas. What lessons could Africa pick? The following discussion considers the court system and status of the judiciary in African regional courts as well as non-judicial institutional mechanisms.

6.5.1 Establishment of courts in the RECs

Scholars have long recognised the important role that national courts play in the enforcement of treaty obligations and international law.¹¹⁵ With the

¹¹³ Nsongurua J Udombana, 'A Harmony or a Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development' (2002) 13(2) *Indiana International and Comparative Law Review* 202. Also see United Church of England, 'Book of Common Prayer' 1928 <http://www.episcopalnet.org/1928bcp/FBSMP.html> Accessed on 2nd December 2020.

¹¹⁴ See Maurice Lagrange, 'The Court of Justice as a Factor in European Integration' (1996) 15(4) *The American Journal of Comparative Law* 709-25; Henri de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6(1) *Hanse Law Review* 1-24; Thomas Horsley, 'Reflections on the Role of the Court of Justice as the 'Motor' of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50(4) *Common Market Law Review* 931-64; Arjen Boin and Susanne K Schmidt, 'The European Court of Justice: Guardian of European Integration' in Arjen Boin, Lauren Fahy and Paul Hart (eds), *Guardians of Public Value: How Public Organisations Become and Remain Institutions* (Palgrave Macmillan 2021) 135-59.

¹¹⁵ Richard Falk, *The Role of Domestic Courts in the International Legal Order* (Sycaruse University Press 1964); Henry Schermers, 'The Role of Domestic Courts in Effectuating International Law' (1990) 3(3) *Leiden Journal of International Law* 77; Janet Walker, 'The Role of Domestic Courts in the International Legal Order: A Tribute to Richard Folk' (2005) 11(2) *ILSA Journal of International and Comparative Law* 365-70; ; David Sloss (ed), *The Role of*

advent of regional law, both domestic and regional courts now have a mutual obligation to interpret and enforce treaty obligations. At the regional level, RECs have instituted their own judicial bodies which are either tribunals or courts. These courts have been clothed with jurisdiction to apply and interpret regional law. These include the East African Court of Justice,¹¹⁶ the Court of Justice of the Arab Maghreb Union,¹¹⁷ the SADC Tribunal,¹¹⁸ the Common Market for Eastern and Southern Africa Court of Justice,¹¹⁹ the ECOWAS Community Court of Justice¹²⁰, and the ECCAS Court of Justice.¹²¹ The contribution of these courts has largely been in the human rights lens arena and much of the modest scholarship on these courts has taken a human rights law approach.¹²² The contribution of these courts in the economic law sphere and regional integration has not been fully investigated.¹²³

The presence of these courts is one thing and their legitimacy is another. The question of legitimacy has come to the forefront since these courts make

Domestic Courts in Treaty Enforcement: A Comparative Study (Cambridge University Press 2010); Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(1) *The International and Comparative Law Quarterly* 57-92.

¹¹⁶ Article 23 and 27 of the Treaty. In the case of the *East African Center for Trade Policy and Law v the Secretary General of the East African Community*, Reference No 9 of 2012, the court restated the supremacy of the EACJ over national courts on matters pertaining to implementation of the Treaty.

¹¹⁷ Article 13 of the AMU Treaty.

¹¹⁸ Article 9 of the SADC Treaty and the SADC Protocol on Tribunal in the Southern African Development Community, 7 August 2000, and Rules of Procedure of the Southern African Development Community Tribunal.

¹¹⁹ Article 7(1)(c) of the COMESA Treaty. This court became fully operational in 1998.

¹²⁰ See the Protocol on the ECOWAS Community Court of Justice.

¹²¹ Article 6(1)(c) and 15 of the ECCAS Treaty.

¹²² This could be explained by the complex human rights issues on the African continent that make their way to both domestic and regional courts and tribunals. See Solomon T Ebobrah, 'A Rights-Protection Goldmine or a Waiting Volcanic Eruption: Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice' (2007) 7 *African Human Rights Law Journal* 307; Solomon T Ebobrah, 'Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges' (2009) 17(1) *African Journal of International and Comparative Law* 79; Mwiza Jo Nkhata, 'The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflections on the Human Rights Mandate of the Tribunal of the Southern African Development Community' (2012) 20(1) *African Journal of International and Comparative Law* 87-109; Tomasz P Milej, 'Human Rights Protection by International Courts – What Role for the East African Court of Justice?' (2018) 26(1) *African Journal of International and Comparative Law* 108; Mihreteab Tsighe Taye, 'The Role of the East African Court of Justice in the Advancement of Human Rights: Reflections on the Creation and Practice of the Court' (2019) 27(3) *African Journal of International and Comparative Law* 359-77.

¹²³ Limited scholarship exists although none focuses exclusively on financial integration. See Onsando Osiemo, 'Lost in Translation: The Role of African Regional Courts in Regional Integration in Africa' (2014) 41(1) *Legal Issues of Economic Integration* 87-121; Babatunde Fagbayibo, 'Exploring Legal Imperatives of Regional Integration in Africa' (2012) 45(1) *The Comparative and International Law Journal of Southern Africa* 64-76.

decisions that have a political effect.¹²⁴ Grossman proposed a theory of legitimacy for international courts and tribunals i.e., that 'a legitimate international adjudicative body is one whose authority is perceived as justified. A legitimate international court or tribunal must possess some quality that leads people or states to accept its authority because of a general sense that the authority is justified.'¹²⁵ He further argues that such a body will be viewed as legitimate if it is fair and unbiased, interprets and applies the law in a manner that is consistent with what its member states believe it should be and is transparent.¹²⁶ Applying Grossman's theory of legitimacy, regional courts would only be legitimate if they were accepted and their interpretation was in line with what member states expected.

The drawback to this argument is that in a continent where states do not have a good record of complying with the principle of 'pacta sunt servanda,' acceptance as a yardstick of legitimacy cannot be a good standard. In the aftermath of the EACJ's decision in *Attorney General V Anyang'Nyong'o*, President Mwai Kibaki condemned the court and judgement and commenced a campaign to curtail the powers of the EACJ which he viewed as threatening state sovereignty.¹²⁷ At a meeting of the Heads of State, the President warned that member states had not ceded their sovereignty to institutions like the EACJ and that what the EACJ was doing would 'amount to gross violation of the letter and spirit of the Treaty and serve to undermine the vision" of the EAC.¹²⁸ When Uganda and Tanzania did not side with Kenya, the President demanded that the two Kenyan judges recuse themselves from the case on top of further intimidations from the Kenyan Solicitor General among others.¹²⁹ Kenya was also the architect of the amendments to the Treaty that

¹²⁴ See Richard Frimpong Oppong, 'Legitimacy of Regional Economic Integration Courts in Africa' (2014) 7 *African Journal of Legal Studies* 63.

¹²⁵ Nienke Grossman, 'Legitimacy and International Adjudicative Bodies' (2009) 41 *George Washington International Law Review* 112.

¹²⁶ Ibid 164.

¹²⁷ See Kibaki Rails at EAC Court as Rwanda, Burundi Join Up, (The East African, 5 December 2006).

¹²⁸ Speech delivered by the Kenyan President, HE Mwai Kibaki to the 8th EAC Summit, 30 November 2006.

¹²⁹ For further discussion on this, see Philomena Apiko, 'Understanding the East African Court of Justice; The Hard Road to Independent Institutions and Human Rights Jurisdiction' (2017) European Center for Development Policy Management, March 2017. <https://ecdpm.org/wp-content/uploads/EACJ-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf> accessed 20th November 2020.

restricted the powers of the EACJ and created two divisions of the court, introduced time limits for instituting cases before the court, and also procedures for removing judges of the EACJ.¹³⁰ When Gambia found itself on the wrong side of regional law before the ECOWAS Community Court of Justice and judgements made against it, it attempted to curb access of private litigants to the ECOWAS Court.¹³¹ It refused to submit to the jurisdiction of the court, refused to file documents, and acted with impunity, a decision that backfired when the Court imposed a fine of \$100,000.¹³² These actions bring to light the fragile position that regional courts find themselves in, in a continent where heads of state wield autocratic power that often comes with no check and balance. It is also a reminder that there cannot be integration without political will.¹³³ Therefore using Grossman's yardstick may produce disastrous outcomes on the legitimacy of international (in this case regional) tribunals in an African concept.

Many regional courts are established by the Treaties creating the RECs. The exception is the SADC Treaty which left matters of the court to a separate Protocol. From the outset, member states of SADC were not in support of a court but rather a process that facilitated mediation and arbitration.¹³⁴ However, as the financier of SADC, the EU pressurised the states to have a court system that they viewed as more 'effective and credible.'¹³⁵ The states

¹³⁰ Karen J. Alter, James T. Gathii and Laurence R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *The European Journal of International Law* 295.

¹³¹ In *Deyda Hydara Jr and Others v The Gambia*, a leading journalist and critic of the regime was gunned down and a case was brought by the deceased children and civil society before the ECOWAS Community Court of Justice alleging that the government had failed to properly investigate the circumstances surrounding his death hence violating the right to life. This matter followed previous judgements where the Gambia government had been criticised by the Court for torture and disappearance of journalists. Suit No ECW/CCJ/APP/36/15. The other two suits are *Manneh v. The Gambia*, ECW/CCJ/JUD/03/08, Judgement on 5 June 2008 and *Saidykhan v. The Gambia*, ECW/CCJ/RUL/05/09, Judgement on 30 June 2009.

¹³² Karen J. Alter, James T. Gathii and Laurence R. Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27(2) *The European Journal of International Law* 297.

¹³³ Johnson Omotunde, 'Economic Integration in Africa: Enhancing Prospects for Success' (1991) 29 *Journal of Modern African Studies* 1-2.

¹³⁴ See Press Release, SADCC Council of Ministers, 28 August 1991.

¹³⁵ Tobias Lenz, 'Spurred Emulation: The EU and Regional Integration in Mercosur and SADC' (2011) 35(1) *West European Politics* 155. The SADC was receiving financial support from its International Cooperating Partners and as a result, the Windhoek Declaration was passed in 2006 to formally establish that partnership. See the Windhoek Declaration on a New Partnership Between The Southern African Development Community and the International Cooperating Partners, Windhoek, Namibia, 27 April 2006.

in SADC were always wary of ceding their sovereignty to a court after decades of the fight to win independence and further, the states had not yet fulfilled the Treaty objectives of 'common political values, systems and institutions' and hence a further step of adding a court was seen as premature.¹³⁶ SADC member states had also refused to come up with a central system that would monitor compliance with treaty provisions on domestic governance and even when the Secretariat submitted a proposal for the new organ, the Ministerial Committee dismissed it as an interference.¹³⁷ A Tribunal was nevertheless established but when Zimbabwe constantly found itself with judgements against it, a campaign in SADC saw the Tribunal being suspended in 2010. This was worsened by a 2014 Protocol which eroded the powers of the Tribunal.¹³⁸ Today, all that is left are the memories of what used to be a SADC Tribunal.

6.5.2 Independence of the Bench in Regional Courts

Questions have arisen with regards to the judicial independence of judges appointed by the Heads of State to serve on regional tribunals and courts and whose salaries are determined by the same Heads of State in regional assemblies. In addition, where judges serve both in their home states and on regional courts, potential conflicts of interest may arise. In *Attorney General of Kenya v. Anyang' Nyong'o*, the Attorney General of Kenya brought an application seeking that Justice Moijo Ole who was the President of the EACJ, and Justice Kasanga Mulwa, recuse themselves from hearing the reference on grounds that the two were being investigated in Kenya and hence could not be unbiased in the reference that involved Kenya.¹³⁹ Nevertheless, the court saw this as a veiled intimidation tactic since the practice in recusal applications is for the litigant to approach the judge in chambers and seek recusal. Further, the court took the view that the investigation of the two justices was a public matter that did not require the judges to disclose. This

¹³⁶ Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 *Human Rights Quarterly* 880.

¹³⁷ See SADC Secretariat, 'The SADC Organ on Politics, Defence and Security: The Meeting of SADC Ministers Responsible for Foreign Affairs, Defence and SADC Affairs' Gaborone 18-19 January 1996. This is an unreported document quoted in Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 *Human Rights Quarterly* 881.

¹³⁸ *Ibid.*

¹³⁹ (2007) 1 EALR 12.

reasoning is troubling because it seemed to suggest that since the investigation was public knowledge, then the judges could not be partial. By allowing judges who were being investigated by the Kenyan government to sit in a matter against the Kenyan government, the court may have failed to apply the principles of judicial impartiality.

The importance of judicial independence has been the subject of many international documents including the United Nations Basic Principles on Independence of the Judiciary, the Montreal Universal Declaration on the Independence of Justice, the Mt Scopus International Standards of Judicial Independence, New Delhi Code of Minimum Standards of Judicial Independence, and the Syracuse Principles. The Burgh House Principles on the Independence of the International Judiciary, although not binding, set out useful guidelines on the independence and impartiality of the international judiciary. These include the requirement for judges to enjoy independence from their own states, freedom from undue influence from any source, impartiality, avoidance of conflicts of interests, and refraining from impropriety. Article 17 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights provides that 'the independence of the judges shall be fully ensured in accordance with international law.'

Judges on regional tribunals and courts must enjoy both institutional and individual independence.¹⁴⁰ Institutional independence refers to freedom from external influence whereas individual independence looks at the terms and conditions of service and the requirement for these to be adequately secured.¹⁴¹ Judges must be protected from retaliation by member states for decisions made against the states and they must have administrative and financial independence. This is why Principle 1.3 of the Burgh House Principles provides that courts should be free to determine their own administration including recruitment, information systems, and allocation of their expenditure. States should adequately fund the courts and security of tenure

¹⁴⁰ Also see generally Mia Swart, 'Judicial Independence at the Regional and Sub-Regional African Courts' (2014) 29 *Southern Africa Public Law* 388.

¹⁴¹ See Para 11 of the United Nations Basic Principles on Independence of the Judiciary, 1.1 of the Bangalore Principles of Judicial Conduct 2002, Para 2.2 of Montreal Universal Declaration on the Independence of Justice.

should be guaranteed. In a continent where scholarship decries the high levels of corruption and interference in judicial systems, preserving the integrity of the judiciary in regional tribunals is important.

In conclusion, why then are domestic and regional courts required for integration to work in Africa? The answer is simple: There are many treaty obligations that states have not complied with and which require enforcement and interpretation. Therefore, to further integration, especially where treaties are signed, declarations are made and policies dismantled, enforcement and interpretation may be essential to ensure accountability. Courts must be established and adequately funded and supported to perform the crucial role of interpreting international and regional law as well as developing jurisprudence to resolve conflict of law scenarios. In addition, the independence of these courts and the judiciary must be guaranteed.

6.6 Non-judicial institutional mechanisms

Actions require monitoring. There have been various calls for integration in Africa to be monitored and evaluated, in order to advance from rhetoric to action. In 2013, the 6th Joint Annual Meetings of the AU-ECA Conference of African Ministers of Finance, Planning and Economic Development as well as the 6th Conference of African Ministers in charge of Integration renewed calls for monitoring the progress made in integration. Institutions are key in monitoring and Africa has prospered in the number of institutions dedicated to integration. There are simply too many unrelated institutions that purportedly monitor the enforcement of regional and international obligations in Africa. These institutions are at three levels: domestic, regional, and continental. Before a discussion of these institutions is provided, it is also important to note that it is not about just institutions: Quality matters too.

Article 7 of the Abuja Treaty provides for seven institutions which include the Assembly of Heads of State and Specialised Technical Committees (STC). The Assembly of the Heads of State plays an oversight role while the Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning, and Integration is responsible for 'following up on the implementation of the

integration agenda on the continent.¹⁴² The latter has met a few times with its focus mainly on domestic resource mobilisation, the fight against corruption, illicit financial flows, taxes, and the AfCFTA.¹⁴³ At its November 2019 meeting, there were only a couple of lines on financial integration and the Pan African Stock Exchange.¹⁴⁴ In its 2020 report, only one paragraph tackled the Pan African Stock Exchange and its update was similar to the 2019 report i.e. that a memorandum has been finalised with ASE.¹⁴⁵

The provisions of the Abuja Treaty point to an intertwined existence with the OAU and increased dependence on the structure of the defunct OAU.¹⁴⁶ Whereas the OAU and its successor the AU, have a separate legal personality, the AEC does not and hence must rely on the AU and its bodies for the oversight of the AEC. This approach has been criticised by scholars including Asante who notes that the AEC 'has, in fact, become just a division, albeit an important one of a continental political institution'¹⁴⁷ and hence calls for a separate and distinct institutional framework for the AEC.¹⁴⁸

The Conference of African Ministers in Charge of Integration (COMAI) was institutionalised in 2006 during the Banjul Summit and was given the role of addressing all the matters pertaining to integration at both the regional and continental levels.¹⁴⁹ COMAI III made a number of recommendations pertaining to integration which included among others, establishing ministries responsible for integration, making regional integration popular, as well as

¹⁴² See African Union Website, <https://au.int/en/stcs/stc-finance-monetary-affairs-economic-planning-and-integration> accessed 19 June 2021.

¹⁴³ See African Union, Declaration of the Second African Union STC on Finance, Monetary Affairs, Economic Planning and Integration, 16-17 April 2018, Addis Ababa, Ethiopia.

¹⁴⁴ African Union, Agenda 2063 Progress Report, November 2019 https://au.int/sites/default/files/newsevents/workingdocuments/38223-wd-progress_report_on_the_implemenation_of_agenda_2063_eng.pdf accessed 14 June 2021.

¹⁴⁵ See African Union, Progress Report on the Establishment of the African Union Financial Institutions, 4th Specialized Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration Experts Meeting, 9-11 March 2020, Accra Ghana. https://au.int/sites/default/files/newsevents/workingdocuments/38223-wd-progress_report_on_the_au_financial_institutions_eng.pdf accessed 14 June 2021.

¹⁴⁶ The Secretariat of the AEC is the same as that of the OAU, Article 96 Abuja Treaty. The AEC Budget is a subset of the OAU budget, Article 82 of the Abuja Treaty. Article 98(1) also provides that the 'Community shall form an integral part' of the OAU.

¹⁴⁷ S.K.B Asante, 'Towards an African Economic Community' in S.K.B Asante (ed), *Towards an African Economic Community* (African Institute of South Africa 2001) 8-9.

¹⁴⁸ Ibid 16.

¹⁴⁹ Generally, see Rodrigo Tavares and Vanessa Tang, 'Regional Economic Integration in Africa: Impediments to Progress?' (2011) 18(2) *South African Journal of International Affairs* 223.

national commissions and 'transferring some domains of sovereignty to regional and Continental institutions within the principle of subsidiarity.'¹⁵⁰ The principle of subsidiarity, associated with EU law, confines the Union competencies in law-making to areas where the policy aims cannot be achieved effectively at lower levels of governance such as nationally. In short, it regulates the exercise of the EU's powers and is based on Article 5(3) of the Treaty on European Union and Protocol No 2 on the application of the principles of subsidiarity and proportionality. It is this principle that COMAI III sought to introduce in its recommendations.

Perhaps the biggest contribution of COMAI has been the formulation of the Minimum Integration Programme (MIP) which was adopted in 2009.¹⁵¹ As the name suggests, MIP provides agreed activities that the RECs are to undertake, as a minimum, to speed up integration. The objectives of MIP included situating RECs within the framework of the Abuja Treaty, popularising integration, and identifying and implementing priority activities for RECs among others. However, MIP allows individual RECs to still pursue their own priority areas while they endeavour to comply with the priorities laid down in MIP. During the formulation of MIP, the RECs agreed on priority sectors that were to be implemented during the first phase (2009-2012) which included, among others, free movement of services, capital, and investment. As with many other treaties, declarations, and programs in Africa, there was more emphasis on regional trade during the first phase and many of the objectives of this phase were related to trade.¹⁵² At the moment, there is very little to do with financial integration although stock market integration programs are happening on the continent.

At the regional level, RECs too have put in place institutions to advance or monitor integration. This has led to sentiments that RECs are 'a spaghetti

¹⁵⁰ African Union, 'Follow-Up Report on the Implementation of Recommendations from the Fourth Conference of African Ministers in charge of Integration' Department of Economic Affairs, July 2011, 14. https://au.int/sites/default/files/newsevents/workingdocuments/12553-wd-follow_up_report_on_the_recomm_from_comai_iv_en_v2_0.pdf accessed 4 July 2021.

¹⁵¹ Final Report on the African Integration Fund: A Special Continental Fund for the Implementation of the Minimum Integration Program of the African Union Commission, African Union, December 2013.

¹⁵² Report of the African Union on Minimum Integration Programme (Addis Ababa, May 2009) 7 <https://au.int/sites/default/files/pages/32825-file-minimumintegrationprogrammeeng.pdf> Accessed 4 February 2021

bowl that hinders regional integration by creating a complex entanglement of political commitments and institutional requirements.¹⁵³ This sentiment is derived from the fact that there is already a multitude of institutions at the AU level. Regional parliaments have been hatched to exercise both legislative and oversight functions. These include the ECOWAS Parliament, East African Legislative Assembly, SADC Parliamentary Forum, and the Network of Parliamentarians of the Economic Community of Central African States.¹⁵⁴ In addition, regional committees dedicated to integration have been set up including the Sectoral and Cluster Ministerial Committees of SADC which oversee the activities related to integration in line with the Regional Indicative Strategic Development Plan and the Capital Markets Insurance and Pensions Committee (CMIPC) of EAC. In ECOWAS, the West African Capital Markets Integration Council, inaugurated in 2013, oversees integration and is responsible for driving the creation of a common platform for listing and trading as well as harmonisation of the regulatory environment. This is separate from the Capital Market Issues Committee recommended by the ECOWAS Treaty to encourage the establishment of national and regional exchanges, among others. Other players include the Regional Council for Public Savings and Financial Markets (CREPMF) under WAEMU and the West Africa Capital Market Conference (WACMAC). All these institutions are in addition to various technical working groups, assemblies of heads of state, technical committees, and committees of ministers responsible for integration and foreign affairs. Examples of committees include the Committee of SADC Stock Exchanges (CoSSE), EAC Capital Markets Sub-Committee, and the EAC Capital Markets Development Committee. Whereas COMESA has 11 institutions and the EAC has eight, ECOWAS has six institutions and ten specialised agencies.¹⁵⁵ The multiplicity of agencies involved in integration creates an opportunity for conflict due to conflicting priorities and the sheer

¹⁵³ Peter Draper, Durrell Halleson and Philip Aves, 'SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?' Trade Policy Report No 15 (The South African Institute of International Affairs 2007) 7.

¹⁵⁴ See Ulf Terlinden, 'African Regional Parliaments – Engines of Integration and Democratisation?' Friedrich-Ebert-Stiftung, Bonn, September 2004. <http://library.fes.de/pdf-files/iez/02581.pdf> Accessed 23 March 2021.

¹⁵⁵ Jiame de Melo, Mariem Nouar and Jean-Marc Solleder, 'Integration Along the Abuja Road Map: A Progress Report' in Richard Newfarmer, John Page and Finn Tarp (eds), *Industries Without Smokestacks: Industrialisation in Africa Reconsidered* (Oxford University Press 2018).

number of agencies leads to wastage of scant resources. It also requires balancing of powers, managing conflict situations, and building consensus.

Navigating the treaty-based institutional landscape can seem daunting, yet there are other institutions whose origin is not even rooted in a treaty. A conversation on integration in Africa is not complete without a mention of the United Nations Economic Commission for Africa (UNECA).¹⁵⁶ UNECA was established in 1958 by the United Nations' Economic and Social Council (ECOSOC) as one of the UN's five regional commissions.¹⁵⁷ UNECA is supervised by ECOSOC and its role is the economic and social development of Africa.¹⁵⁸ ECA is both an arm of the UN and a crucial participant in the regional institutional landscape in Africa, predating even the OAU. UNECA has shaped the course of integration in Africa and has become a key advisor to the AU on all aspects of integration¹⁵⁹ and viewed as joined to AU's hip. In 1965, an agreement was signed between UNECA and the then OAU by which the parties agreed to consult one another on all matters of common interest.¹⁶⁰ There seems to be no hierarchy between the two and no dispute resolution mechanism in cases of conflicts, which manifested itself during the drafting of the Lagos Plan of Action.¹⁶¹ ECA has established itself as a key player and wields immense power in shaping conversations and priorities in African integration, with the most recent being the formulation of the Africa Regional Integration Index and its platform. On one hand, UNECA's constant support in knowledge management, communication, strategic direction, research, and financing has been instrumental in advancing integration. On

¹⁵⁶ The origins of UNECA are rooted in Article 68 of the UN Charter which mandated the establishment of economic commissions as well as ECOSOC Resolution 671 (XXV) which established the African Regional Economic Commission.

¹⁵⁷ See Article 68 of the UN Charter and Resolution 1155(XII) adopted on November 26th, 1957, by the General Assembly of the United Nations. Also see Terms of Reference of the Economic Commission for Africa, Resolution 671 A (XXV) adopted by the Economic and Social Council at its 1017th Meeting, 29th April 1958.

¹⁵⁸ See generally A.H Akiwumi, 'The Economic Commission for Africa' (1972) 16(3) *Journal of African Law* 254-61.

¹⁵⁹ See Gilbert Muruli Khadiagala, 'Institution Building for African Regionalism' (2011) Asian Development Bank Working Paper No 85 of 2011, <https://www.adb.org/sites/default/files/publication/29155/wp85-khadiagala-institution-building-0.pdf> accessed 4 July 2021.

¹⁶⁰ Agreement Between the UN and the OAU on Co-operation Between the Latter and the UN Economic Commission for Africa, 1965.

¹⁶¹ See Rose M D'sa, 'The Lagos Plan of Action – Legal Mechanisms for Co-operation Between the Organisation of African Unity and the United Nations Economic Commission for Africa' (1983) (27)(1) *Journal of African Law* 8-9.

the other hand, one can't help but be discontented with the tendency of the AU to embrace UNECA, a foreign body, and to allow it to shape local discourse.

In addition to institutions, a yardstick to monitor integration is required. After repeated calls for one, a Framework for Index was later approved and the African Regional Integration Index (ARII) Report was launched in 2016. Two years later, having failed to progress ARII, another yardstick was developed. The African Multidimensional Regional Integration Index (AMRII) was adopted in Kampala as the tool for monitoring and evaluating the level of integration in Africa based on the Abuja Treaty and Agenda 2063. Under financial integration as one of the eight dimensions of AMRII, the indicators are a regional stock exchange, regional clearinghouse, and macro-prudential standards, all of which RECs are required to have implemented by 2023. As with most projects, the idea of a regional yardstick is an excellent way of measuring integration outputs and UNECA has taken the lead in creating a platform to track integration against AMRII. However, without states actually taking measures to track their own compliance and to comply with the indicators, the impact of the index may be insignificant and act merely as a shaming process rather than spurring on initiatives.

In summary, what role do non-judicial institutional mechanisms play in advancing integration? Without monitoring mechanisms, commitments are quickly forgotten and rhetoric does not translate into words. The institutions provided by the Abuja Treaty and the regional treaties play a crucial role in monitoring compliance. However, the roles of and the institutions themselves must be streamlined to create certainty, avoid multiplicity of roles, and wastage of the scarce resources. Creating yardsticks to measure progress and commitment to integration in Africa is also important in advancing the agenda and hence states must commit to AMRII and the AU must dedicate resources to tracking integration using AMRII.

6.7 Conclusion

Much of the challenges that integration faces in Africa, including stock market integration, stems from the use of RECs as conduits of integration. As the building blocks of the AEC which predated the AEC and integration efforts, RECs play an important role in driving integration. By allowing member states

to belong to multiple RECs, this 'forum shopping' only encourages overlapping mandates, wastage of scarce resources, conflicting loyalties, and projects. With multiple RECs running stock market integration projects, states that belong to more than one REC find themselves at the crossroads, unable to, on one hand, opt-out of their treaty obligations and on the other hand, be a member of multiple stock market integration projects. In addition, member states that struggle to meet financial obligations to just one REC are certainly unable to meet their financial obligations to multiple RECs.

Since multiple memberships are a key barrier to achieving successes in integration, resolving this challenge should be a priority. Rationalisation of RECs is needed as a solution to aligning and organising RECs. Such rationalisation can occur in different ways discussed in this chapter. However, rationalisation along geographical location is a more suitable option since there are five accepted regions in Africa and geographical location takes into consideration the unique social, economic, and cultural history that existed before the colonial boundary delineation. The ability of states in the same region to come together to form BVMAC and BRVM along geographical location is an indicator that geographical delineation in rationalisation is a good alternative.

North's theory of institutions in 6.2 is significant in financial integration. For regional integration projects to be successful, including in financial services, a legal framework must exist which resolves conflicts between regional law and national law as well as between national law and AU law. These conflicts are bound to arise for a number of reasons. First, national law predated both AU and regional law. Secondly, the interaction between regional, AU, and national law in itself is a source of conflict. Thirdly, for African states that are yet to wash away the memories of colonialism, sovereignty is the heart of statehood and regional law is bound to contain provisions that threaten regulatory sovereignty. Therefore, mechanisms must be put in place to resolve the potential conflict of law scenarios.

The primacy of EU law is a principle advanced by the CJEU to resolve conflicts between EU law and national law. This principle stipulates that where there is a conflict between the two, EU law will prevail and hence EU law has primacy over national laws. Together with the international law principle of

'pacta sunt servanda,' a principle of primacy of EU and AU law may be instrumental in resolving conflicts between laws of African states and those of RECs and AU law derived from the Abuja Treaty and Protocols.

Closely related to this, integration requires institutions to implement programmes and projects and enforce treaty commitments. These include both judicial and non-judicial systems. The CJEU plays an important role in the process of European integration by interpreting treaty law and shaping the structure of the EU legal system including enforcement of treaty law. African integration would benefit from a dedicated court to tackle the interpretation of regional and AU law. Unfortunately, the process of ratification of the protocols establishing the AU Court is slow leading to a lack of court structure. At the regional level, certain RECs have taken actions that have led to the demise of regional courts. An example discussed is the SADC Tribunal. Courts like the EACJ are thriving but face political challenges. As a result, the operational, administrative, and financial independence of the judiciary and courts must be guaranteed by Heads of Assembly so that regional courts can discharge their treaty obligations adequately and effectively.

Non-judicial institutions play a crucial role in tracking and monitoring treaty obligations in regions. There is no shortage of such institutions in African RECs which leads to the duplicity of roles, wastage of resources and is a testimony to the saying that 'too many cooks spoil the broth.' Therefore, the roles of institutions related to integration should be defined and streamlined to maximise benefits while reducing resource wastage and mandate conflicts. In monitoring integration, the African Multidimensional Regional Integration Index could potentially play a vast role in tracking commitments and progress in stock market integration programs. However, the AU must dedicate resources to monitoring the index and to ensuring that states report on their compliance in accordance with the index.

CHAPTER SEVEN

FROM INFRASTRUCTURE INTEGRATION TO REGULATORY HARMONISATION: AN ALTERNATIVE PROPOSAL

The prior chapters have shown that there is no clear, coherent, uniform process for pursuing integration in Africa. Every REC has chosen its own *modus operandi* and the African Union has provided very little guidance on the integration of capital markets other than mentions of regional stock exchanges in the Abuja Treaty and an anticipated protocol on a Pan African Stock Exchange. Integration is generally viewed through the lens of the Abuja Treaty and the efforts of the AU and RECs to drive integration as a means to achieving the African Economic Community. Therefore, although there is some form of consensus on the need to integrate, there is no clear guidance on the methodology.

This Chapter shifts focus away from the convoluted web of integration project methodologies in Africa to one method that may hold the key to the success of integration within the treaty framework. Regulatory harmonisation, as opposed to infrastructural integration and institutional linkages, takes into account the treaty requirements for an integrated AEC while avoiding the most pertinent challenges associated with integration i.e., sovereignty concerns, political considerations, and conflicts between national law, regional law, and AU law.

The discussion identifies the 'why,' 'what,' and 'how.' This chapter is structured as follows. It first sets out the 'why' i.e., why harmonisation is fronted as an alternative solution for capital markets development as well as integration. This builds on the discussion in Chapters Five and Six on the challenges that the current integration landscape has faced. It also looks at two other harmonisation frameworks that have worked which could be instructive. These include the European Union and the United States-Canadian Multijurisdictional Disclosure System ('MJDS'). On the African front, a discussion on the Organization for the Harmonization of Business Laws is provided as the first harmonisation project involving multiple countries in Africa.

The review then shifts to the 'what' which identifies the legal areas that require harmonisation. Of course, there are vast inconsistencies in the

regulatory framework governing different stock markets in Africa and a full harmonisation would require that all legal areas converge. That position however would be in ignorance of the complexity involved in dealing with laws of fifty-four (54) countries at different stages of development. It is, therefore, more realistic to identify the most pressing areas that should be the focus of initial scrutiny. This identification is based on the areas that can make the most impact in making capital markets work in Africa. Therefore, the discussion will focus on the regulations that impact investor confidence i.e., listing, trading, payments and settlement, market abuse and manipulation, accounting, and taxation.

For harmonisation to work, there must be proper structures to do this. The 'how' hence explores the structures that are required in this process. Africa has a plethora of institutions, bodies, committees at both continental and regional levels. This thesis does not propose the creation of new structures but rather the use of current structures, in a streamlined manner, to achieve regulatory harmonisation. Specifically, the use of existing RECs and their structures is encouraged. A conclusion is then provided.

7.1 The Choice of Regulatory Harmonisation

The following discussion provides the rationale for a shift away from focusing on infrastructural linkages and operational integration to regulatory harmonisation. Why should RECs pause pursuits of infrastructure linkages and consider regulatory amendments as an alternative?

7.1.1 Revisiting the status quo

Stock market integration projects have taken different forms ranging from infrastructure linkages in the East African Community ('EAC') and the African Exchange Linkage Project ('AELP'), regional stock exchanges such as the Bourse Régionale des Valeurs Mobilières SA (BRVM) and Bourse des Valeurs Mobilières de l'Afrique Centrale (BVMAC), cross-border trading through memoranda of understanding such as in ECOWAS and cross-listing in Southern Africa. The African Economic Community ('AEC') also anticipates an integrated stock market which points to the Pan African Stock Exchange, one of the new financial institutions of the AEC. It is therefore clear that there is no consistent approach to stock market integration and that every REC has

chosen to pursue a form of stock market integration that it considers best suited for its region, regardless of the requirements of the AU and the AEC.

On one hand, the choice of a model depending on the unique factors in each REC is to be lauded. Integration should always be pursued with regard to the existing framework of regional development strategies.¹ Such frameworks take into consideration optimum use of resources and the social, economic, and political realities. For example, one of the factors for the successful formation of the Douala-based BRVM and the Libreville-headquartered BVMAC was the commonality of all members being Francophone countries and being in the CFA zone. Cross-listing in East Africa has taken advantage of the long-standing relationships between the three countries: Uganda, Kenya, and Tanzania. Yet a proposal to create a regional exchange in the EAC under the FSRDP was rejected while a proposal to boost cross-border trading and listing was embraced.

On the other hand, allowing every REC to adopt an integration method that best suits its reality may impede the achievement of the AEC. As discussed in Chapter 5, the AU is pursuing a Pan African Stock Exchange as well as regional stock exchanges in its capital markets development agenda. Where a REC chooses an integration method that does not lead to convergence of both law and the institutions, then that REC would not comply with the quest of the AU.

Requiring fifty-four sovereign states to integrate both institutions and policies is an uphill task whose complexities have been discussed in this thesis. One may argue that the presence of two regional stock exchanges points to the ability for African states to continue to pursue regional exchanges and the Pan African Stock Exchange. If six countries could come together to form a BVMAC and eight member states formed BRVM, then why can't other regions follow suit and engage in infrastructural mergers? As discussed in Chapters Two and Three, there are very unique circumstances that contributed to the successful formation of the two regional exchanges and these circumstances may not be uniform in other regions. Bankole and Mukisa warn that any

¹ Jakaya M Kikwete, 'Regional Alternatives and National Options' in OECD, *Regional Integration in Africa* (OECD Publications 2002)155.

gains in integration are on the principle of self-preservation and self-interest and states can embrace ideas today and abandon the same ideas when they no longer serve their interests.² An example is when Cameroon was heavily involved in the formation of BVMAC but once conflict arose as to the location of its headquarters, Cameroon launched its exchange, the Doula Stock Exchange. The merger of the two only took place in 2020 after the headquarters of BVMAC were transferred to Douala, Cameroon.³ This propensity to serve one's best interests and preserve the state may work against the pursuit of regional integration.

7.1.2 Justifying the shift to regulation

With a common consensus that despite all the challenges, integration, even if the lowest form, could hold the key to the growth of capital markets, it is imperative to find the compromise. In Chapter 4, the different forms and types of integration that could be pursued were discussed. The research has shown that a focus on merged institutions is blocked by political will and the guardians of state sovereignty. It has also demonstrated that the regions that have been successful at some level of stock market integration are those that are focused on legislative integration rather than institutional and infrastructural integration. Baele noted that a market is fully integrated if all of its participants abide by the same set of rules, have equal access, and are treated equally when active in the market.⁴

All the projects pursued in Africa in the capital markets space are meant to enable capital markets work for Africa. It is the end goal and hence solutions that work towards its achievement are always welcome. Time and again, there have been calls for focus to shift to 'coordination of laws'⁵ and

² Richard S. Mukisa and Bankole Thompson, 'Prerequisites for Economic Integration in Africa: An Analysis of the Abuja Treaty' (1995) 42(4) *Africa Today* 69.

³ Editorial, 'Douala becomes CEMAC's Financial Center Following the Transfer of BVMAC' *Business in Cameroon* (Doula, 1 November 2017) <https://www.businessincameroon.com/finance/0111-7528-douala-becomes-cemac-s-financial-center-following-the-transfer-of-bvmac> accessed 10 January 2021

⁴ Lieven Baele, Annalisa Ferrando, Peter Hördahl, Elizaveta Krylova and Cyril Monnet, 'Measuring Financial Integration in the Euro Area' (2004) European Central Bank Occasional Paper Series No. 14 of 2004, <https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp14.pdf> accessed 10 July 2021.

⁵ Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 310.

'appropriate legal frameworks.'⁶ Because African markets face substantial liquidity challenges as well as low market capitalisation, the focus on harmonisation of laws must be on laws that have the potential to improve liquidity.

This research focuses on harmonisation for various reasons which are necessitated by both local 'push' factors and global 'push' factors. Locally, certain RECs, such as the EAC, have taken steps to engage in the regulatory harmonisation of securities law. Secondly, the creation of OHADA is testimony to the ability for regulatory harmonisation to be undertaken in Africa. Third, globalisation and an increase in cross-border trading and listing in Africa necessitate a shift to regional focus. Although certain strides have been made in integration, there has been limited focus on the laws which are crucial to that integration to succeed. Globally, Africa is a net importer of capital, and hence an influx of international investors and increment in the level of foreign direct investment into the continent⁷ and stock exchanges are one of the entry points for both.⁸ To ensure continuity and orderly functioning of markets, each securities regulator exercises a regulatory monopoly over the transactions in its jurisdiction.⁹ Ringfencing supervision and regulation at the national level is an obstacle to the internationalisation of finance and growth of cross-border capital markets, and newer integration projects in Africa focus on increasing cross-border listing and trading while preserving the traditional stock exchange.

Harmonisation is an excellent compromise due to its ability to facilitate foreign direct investment, create a landscape for cross-border trading to

⁶ Ali Adnan Ibrahim, 'Developing Governance and Regulation for Emerging Capital and Securities Markets' (2007) 39 *Rutgers Law Journal* 119.

⁷ See World Bank statistics on foreign direct investment, net flows as a percentage of GDP in Sub-Saharan Africa. <https://data.worldbank.org/indicator/BX.KLT.DINV.WD.GD.ZS?locations=ZG> accessed 14 May 2021; Also see KPMG, 'What Influences Foreign Direct Investment into Africa: Insights into African Capital Markets' (KPMG, 2016) <https://assets.kpmg/content/dam/kpmg/pdf/2016/07/What-influences-FDI-into-Africa.pdf> accessed 14 MAY 2021

⁸ Britta Klagge and Hans-Martin Zademach, 'International Capital Flows, Stock Markets and Uneven Development: The Case of Sub-Saharan Africa and the Sustainable Stock Exchanges Initiative' (2018) 62(2) *Zeitschrift für Wirtschaftsgeographie* 92-107.

⁹ Guan Siew Teo, 'Regulatory Challenges in the Development of a Global Securities Market – Harmonisation of Mandatory Disclosure Rules' (July 2004) *Singapore Journal of Legal Studies* 175.

thrive, and may even be the first step towards the regional stock exchanges that the Abuja Treaty and other regional treaties refer to. Harmonisation reduces the cost of equity, leads to more efficient and orderly securities markets, increases disclosure and investor protection. It reduces regulatory disparities between smaller markets and generates wider access to markets. With Africa's high dependence on international investors, the move to harmonisation is seen as a natural progression. Harmonisation would play in a central role in facilitating integration projects such as cross-border listing and trading as well as the setup of regional exchanges. Regulatory harmonisation draws attention away from the politics of integration and the sovereignty questions that have long plagued stock market integration processes in Africa.

The suggestion of this approach does not ignore the challenges that harmonisation presents. One size fits approach may be inappropriate for exchanges at different levels of development and with different experiences. As a result, proponents of regulatory competition signal its ability to foster innovation and improve service delivery, which harmonisation is unable to provide. However, the discussion in this chapter points to a concept of differentiated integration, common in the EU, which recognises that the one size fits all approach may not always be the solution. In addition, the discussion herein is based on principles, allowing the harmonised laws to focus on common principles rather than intricate details.

Based on the above, this research posits that proponents of integration in Africa as well as regulators and policymakers must shift focus to regulatory harmonisation. Law is central to the success of any attempts to improve the state of financial markets. Regulation is crucial in ensuring the soundness and development of the financial markets in general and capital markets specifically. Where there is an increase in cross-border trading and listing and where states, such as in Africa, seek to increase the listing and trading of securities in the region, the law is the glue that holds it all together. Legal certainty, legal transparency, and initiatives aimed at convergence of securities laws in the regions have the potential of substantially resolving the challenges facing capital markets in Africa.

7.1.3 Defining harmonisation and its theme in treaties

Harmonisation of regulatory frameworks is a common theme in both AU and regional stock market integration treaties. Simply put, harmonisation is based on the idea of standardising regulation across different countries.¹⁰ Allot defined harmonisation as 'the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law.'¹¹ However, there are various definitions of harmonisation with approaches that are either soft or hard stances and a view that the exact outcome of harmonisation is not always predetermined.¹² In certain instances, it may merely lead to differing laws becoming easier to understand or it could lead to unification.¹³ For example, the race towards harmonisation in the EU creates common standards and requires member states to ensure harmonisation of their national laws with EU law. Harmonisation differs from unification as it does not seek to replace existing legal systems entirely although harmonisation may lead to unification. Harmonisation tends to bring legal systems as close as possible to others, without requiring oneness and hence the view that it requires complementarity rather than similarity.¹⁴ Harmonisation does not require that all differences be eliminated and a harmonised framework will still have disparities.¹⁵

To achieve harmonisation, countries can either cede the law-making authority to a central body set up for that purpose or they could agree on rules and enact them through the domestic law-making processes. This research proposes that due to the sovereignty concerns that arise whenever there is a talk of centralised supranational bodies, it will be easier and more acceptable

¹⁰ Tzung-bor Wei, 'The Equivalence Approach to Securities Regulation' (2007) 27(2) *Northwestern Journal of International Law and Business* 255.

¹¹ Antony Allot, 'Towards the Unification of Laws in Africa' (1968) 14(2) *The American Journal of Comparative Law* 377. Also see Antony Allot, 'The Unification of Laws in Africa' (1968) 16(1/2) *The American Journal of Comparative Law* 51-87.

¹² Charles Manga Fombad, 'Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond' (2013) 59(3) *Africa Today* 53. Also see Gerrit Ferreira and MP Ferreira-Snyman, 'The Harmonisation of Laws within the African Union and the Viability of Legal Pluralism as an Alternative' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 608-28.

¹³ Ibid.

¹⁴ Ronald Cuming, 'Harmonisation of Law in Canada: An Overview' in Ronald Cuming (ed), *Perspectives on the Harmonisation of Law In Canada* (The Collected Research Studies) (University of Toronto Press 1985).

¹⁵ Thomas Wilhelmsson, Elina Paunio and Annika Pohjolainen (eds), *Private Law and the Many Cultures of Europe* (Kluwer Law International 2007).

to agree on common standards at the regional level and enact them domestically. In both scenarios, the agreed common standards would take precedence over domestic legislation that conflicts with the standards.

At the AU level, Article 44(2)(d) of the Abuja Treaty provides for the creation of national, regional, and sub-regional money markets through 'coordinated establishment of stock exchanges and harmonising legal texts regulating existing stock exchanges with a view to making them more effective.'¹⁶ Article 44 therefore viewed harmonisation as the most efficient way of making capital markets work for Africa. In addition, to achieve the African Common Market, the Fifth stage requires 'harmonisation of monetary, financial and fiscal policies'¹⁷ with similar wording found in Article 44(1) of the Abuja Treaty.

At the regional level, Article 85 of the EAC Treaty requires member states to 'harmonise capital market policies on the cross-border listing, foreign portfolio investors, taxation of capital market transactions, accounting, auditing, and financial reporting standards, procedures for setting commissions and other charges as well as their regulatory and legislative frameworks, rules for market conduct and all policies relating to capital markets. It also required the establishment of a regional stock exchange that would have trading floors in each partner state.'¹⁸ Harmonisation is also a theme in almost all RECs that have programs on capital markets development.¹⁹

Most of the treaties in Africa that mention harmonisation also mention coordination i.e., 'harmonisation and coordination.' Article 3 of the Abuja Treaty, for example, contains a declaration of member states to the principles of 'inter-state co-operation, harmonisation of policies and integration of programmes.'²⁰ The objectives of the AEC are also listed as coordinating and harmonising policies of RECs.²¹ The EAC requires member states to co-operate in financial and monetary matters and harmonise macro-economic

¹⁶ Emphasis mine.

¹⁷ Article 6(1)(e) of the Abuja Treaty.

¹⁸ Article 85(h) of the EAC Treaty.

¹⁹ See Article 3 of ECOWAS Treaty, Article 4(6) of COMESA Treaty.

²⁰ This principle is re-echoed in Article 4(c) of the ECOWAS Treaty.

²¹ See Article 4(1)(d) of the Abuja Treaty.

policies in Article 82.²² Article 3(2)(a) of the ECOWAS Treaty requires 'harmonisation and coordination of policies. It hence raises the question of whether these two are one and the same or the formulators of the treaty treat them as separate concepts that are required in the pursuit of the objectives. Yet available academic literature rightfully suggests that coordination is not the same as harmonisation with the former seen as a preparatory step towards the latter.²³

7.2 Existing models of harmonisation

Harmonisation in securities regulation has followed two approaches: commonality and reciprocity.²⁴ Commonality presupposes uniformity i.e., the same legal regime is adopted by different member states of the integration project and these rules would include disclosure, taxation, listing, accounting, and regulation governing market intermediaries. In contrast, under reciprocity, jurisdictions recognise foreign legal regimes that have equivalent minimum standards or sufficiently similar legal regimes and hence adherence to one is accepted as adherence to the other.

Equivalence does not presuppose sameness or standardisation. Rather the host state takes cognisance of the fact that the home state's rules may have some differences but that such disparities are not substantial. Commonality pushes for the regulatory framework to be similar whereas reciprocity recognises differences and is open to their co-existence. From the onset, it is crucial to point out that full harmonisation based on commonality is rarely achievable.²⁵ This is due to political opposition to legal reform or merely a recognition that one size fits approach may not be ideal for all countries.²⁶ Nevertheless, commonality lessens transaction costs and improves understanding of the complex arena of securities regulation. Reciprocity too, on the other hand, is unlikely to be wholly embraced without accompanying

²² Article 82 of the EAC Treaty. However, Article 82 is headed 'scope of cooperation' and is the first article in Chapter 14 which relates to 'monetary and financial co-operation.'

²³ See generally Letlhokwa George Mpedi, 'Harmonising social security systems within the Southern African Development Community' (2009) 4 *Journal of South African Law* 703.

²⁴ Manning Gilbert Warren III, 'Global Harmonization of Securities Laws: The Achievements of the European Communities,' (1990) 31(1) *Harvard International Law Journal* 185.

²⁵ Tzung-bor Wei, 'The Equivalence Approach to Securities Regulation' (2007) 27(2) *Northwestern Journal of International Law and Business* 259.

²⁶ Ibid.

minimum standards.²⁷ Developed markets would be unwilling to merely accept and recognise states whose legal regimes contain principles that conflict with the host state. Whether one adopts commonality or reciprocity, the issue of standards remains and any successful harmonisation project should consider common standards.

For purposes of illustrating approaches taken to harmonisation, the following discussion considers two foreign harmonisation projects or pursuits in securities markets. These are the harmonisation of securities laws in the EU and the United States – Canadian Multijurisdictional Disclosure System. The discussion concludes with a home-grown harmonisation drive, the *Organisation pour l'Harmonisation du Droit des Affaires en Afrique* ('OHADA')

7.2.1 Harmonisation of securities laws in the EU

The EU's harmonisation of securities regulation is perhaps the most advanced harmonisation framework.²⁸ However, its creation has been 'a lengthy exercise in overcoming improbabilities.'²⁹ It is based on the pursuit of a single internal market in financial services in the EU which dates back to the Treaty of Rome, the 1966 Segre Report³⁰ and the 1985 White Paper.³¹ The Segre Report emphasized the importance of integration and harmonisation across the EU capital market. It studied the problems facing capital markets in the then EEC and 'identified many of the market integration and regulatory themes which continue to preoccupy the regulatory regime.'³²

The turning point in the pursuit of integration was the 1999 Financial Services Action Plan (FSAP). The FSAP noted that for an efficient EU financial market,

²⁷ Uri Geiger, 'Harmonisation of Securities Disclosure Rules in the Global Market – A Proposal' (1998) 66 *Fordham Law Review* 1794.

²⁸ Ibid 1790. Harmonisation of EU law can be traced from the Treaty of Rome and is consistently referred to in the Treaties of Maastricht, Amsterdam and Nice as well as the Single European Act.

²⁹ Manning Gilbert Warren III, 'The Harmonisation of European Securities Law' (Spring 2003) 37(1) *The International Lawyer* 211.

³⁰ See Rudiger Veil (ed), *European Capital Markets Law* (Hart Publishing 2013) 2; The European Economic Community, 'The Development of a European Capital Market' Report of a Group of experts appointed by the EEC Commission' Brussels, November 1966, 11.

³¹ Commission of the European Communities, 'Completing the Internal Market' White Paper from the Commission to the European Council (Office for Official Publications of the European Communities, 1985). Also see Brian Scott-Quin, 'European Community Regulation of Securities Markets' (1993/94) 40 *University of Reading Discussion Papers in Accounting, Finance and Banking Series D*, 2.

³² Niamh Moloney, *EC Securities Regulation* (2nd edn, Oxford University Press 2008) 12.

changes were required in the legislation³³ and it is credited for leading to extensive changes in the regulation of securities markets in the EU by paving way for not only new laws but also regulatory processes, enforcement and supervision.³⁴ Today, the harmonisation framework is based on the Lamfalussy Report model which recommended standardisation³⁵ through a four-level system that would improve the legislative process, while maintaining an institutional and democratic balance.³⁶

The four levels include: 1) a framework EU legislation which would set out the general principles, 2) adoption of implementing measures for the level 1 framework, 3) strengthening cooperation between the different regulators of member states and 4) strengthening the enforcement of community law.³⁷ On 23 March 2001, the European Council passed a Resolution welcoming and adopting the Lamfalussy Report and noted that the proposed Securities Commission should be consulted on policy issues and also function as a regulatory committee and that an independent Regulators Committee be set up to act as an advisory group to the Commission.³⁸

Post the Lamfalussy Process, the EU put in place both regulatory and institutional infrastructures which include the European Securities Committee (ESC), which advises on policy and drafts legislative proposals³⁹ as well as the Committee of European Securities Regulators (CESR) which advises on the drafting of implementing measures.⁴⁰ Therefore, based on the Lamfalussy

³³ Ibid 16-23.

³⁴ Eilis Ferran, *Building an EU Securities Market* (Cambridge University Press 2004) 1.

³⁵ Rudiger Veil (ed), *European Capital Markets Law* (Hart Publishing 2013) 6.

³⁶ Christian De Visscher, Olivier Maiscoq, Frederic Varone, 'The Lamfalussy Reform in the EU Securities Markets: Fiduciary Relationships, Policy Effectiveness and Balance of Power, (2008) 28(1) *Journal of Public Policy* 19-47. Also see Niam Moloney, 'The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime' (2003) 52(2) *The International and Comparative Law Quarterly* 511-15.

³⁷ To draft the framework under Level 1, the Wise Men recommended the creation of the European Securities Committee (ESC) and the Committee of European Securities Regulators. The latter would have more of an advisory function and the former would have the regulatory function. See Lamfalussy Committee, 'Final Report of the Committee of Wise Men on the Regulation of European Securities Markets,' Brussels 15 February 2001.

https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf

³⁸ The Resolution of the European Council on More Effective Securities Market Regulation in the European Union, Stockholm, 23 March 2001. <https://www.esma.europa.eu/sites/default/files/library/2015/11/resolutionstockholm.pdf> Accessed 15 September 2020.

³⁹ Article 2 of the Commission Decision of 6 June 2001 Establishing the European Securities Committee 2001/528/EC.

⁴⁰ Article 2 of the Commission Decision of 6 June 2001 Establishing the European Securities Regulators 2001/527/EC. This Committee was also supposed to secure cooperation between

model, the European Securities and Markets Authority (ESMA) proposes the detailed content of the framework acts which are adopted by the Commission (Level 2), ESMA issues the guidelines to the national authorities and market participants (Level 3) and ESMA supervises the implementation of those guidelines and Acts by the member states (Level 4). Schaub notes that due to the recommended four levels in the Lamfalussy Report, consultation, and adoption of regulation at the EU level is quicker than what has previously been seen.⁴¹ The Lamfalussy Report and the 1999 Financial Services Action Plan have radically transformed the regulatory landscape for securities regulation in the EU.⁴² They created a framework under which securities regulation is promulgated, signalling a new era for EU securities regulation regime. Some of the Regulations adopted include the Market Abuse Directive in 2002⁴³, Prospectus Directive in 2003, the Markets in Financial Instruments Directive in 2004⁴⁴, and the Transparency Directive in 2004.

Has this been a smooth process for the EU? Despite the good recommendations of the initial Lamfalussy Report, there was still hesitation at the EU level. The European Parliament, for example, expressed reservations noting that the 4-level approach would lead to a dilution of its right to make co-decisions under the Treaty.⁴⁵ In the final report, it was recommended that periodic reporting and full transparency to the European Parliament be maintained at all times, therefore although the European Parliament would have had its legislative powers overstepped, at least it was kept abreast with all developments. This recommendation did not appease

the national regulators, carry out peer reviews and consultations with market participants. It is hence seen as the technical committee while its counterpart is seen as the political committee. The latter Committee was replaced by the European Securities and Markets Authority (ESMA) in January 2011.

⁴¹ Alexander Schaub, 'The Lamfalussy Process Four Years On' (2005) 13(2) *Journal of Financial Regulation and Compliance* 112.

⁴² See Niamh Moloney, 'Financial Market Regulation in the Post-Financial Services Action Plan Era' (2006) 55(4) *The International and Comparative Law Quarterly* 982-92.

⁴³ This was the first FSAP measure where the Lamfalussy Process was employed with the Commission receiving the proposal for the Directive in May 2001 and it being subjected to both Parliament reading and amendments and being agreed to by the Council. The Directive was then formally adopted by both Council and Parliament on 28 January 2003.

⁴⁴ This replaced the 1993 Investment Services Directive and provides a regulatory framework for a wide range of investment services in the EU. It has undergone further amendments including the Markets in Financial Instruments Directive (MiFID II) of 2018.

⁴⁵ Ibid 21. The co-decision procedure means that both the European Parliament and Council of the European Union must agree before any legislation on the internal market becomes effective.

the European Parliament straight away. Romano Prodi, the President of the European Commission ('EC'), made a solemn declaration on behalf of the EC and reiterated that the EC would always respect the co-decision rights of the Parliament and that it would always respect the institutional balance and treat Parliament in an equal manner to the EC.⁴⁶ Hence, it is a lesson for proponents of integration that there will always be conflicts but that reaching compromises is important for the success of such projects.

In the EU, the race to harmonisation is the guiding factor in the regulation of securities and this was acknowledged in the FSAP and the Program of the Commission for 1985.⁴⁷ There is a mix of maximum harmonisation (no room for deviation from Directives) and minimum harmonisation.⁴⁸ Maximum harmonisation prevents legal fragmentation hence reducing transaction costs whereas minimum harmonisation enables flexibility, allows regulatory competition and innovation and allows member states to take into consideration their unique political, economic and social status, and also allow preservation of national identity in line with the principle of subsidiarity i.e. taking decisions at the lowest appropriate level close to those whom they affect.⁴⁹

Closely related to harmonisation is the EU 'Passport' regime or the 'Mutual Recognition' principle as seen in the Undertakings for the Collective Investment in Transferable Securities (UCITS) which allows for the sale of mutual funds across Europe based on a single authorisation from one member state.⁵⁰ Under the equivalence principle, a third country firm can provide services and perform activities in a host country as long as it is registered by

⁴⁶ See 'Implementation of financial services legislation in the context of the Lamfalussy Report' Intervention by President Romano Prodi to the European Parliament's plenary session Strasbourg, 5th February 2002.

https://ec.europa.eu/commission/presscorner/detail/en/speech_02_44 accessed 1 April 2021.

⁴⁷ Commission of the European Communities, 'Completing the Internal Market' White Paper from the Commission to the European Council (Office for Official Publications of the European Communities, 1985) 4.

⁴⁸ See generally Carsten Gerner- Beuerle, 'United in Diversity: Maximum Vs Minimum Harmonisation in EU Securities Regulation' (2012) 7(3) *Capital Markets Law Journal* 317-42.

⁴⁹ Rudiger Veil (ed), *European Capital Markets Law* (Hart Publishing, 2013) 38.

⁵⁰ This is by virtue of Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), 13 July 2009. However, this was not the first Directive on UCITS. An earlier directive existed in the form of Directive 85/611/EEC of 20 December 1985 on the on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

ESMA.⁵¹ In 2004, the revised Directive on Markets in Financial Instruments (MiFID) was adopted⁵² and it became the foundation for financial legislation in the EU. MiFID set out a regulatory regime that governs transactions in financial instruments in the EU.⁵³ MiFID II reinforces the rules on securities markets and grants the European Securities and Markets Authority ('ESMA') and competent authorities the right to monitor market activities.

Supervision of securities markets in the EU is split between ESMA and national supervisory agencies with ESMA investigating regulatory breaches, making recommendations to the national agency, and escalating matters to the EC for a formal opinion.⁵⁴ ESMA is thus described as 'the sole regulator and supervisor of key parts of the financial infrastructure and the gatekeeper for the entry of third-country CRA credit ratings into the EU market.'⁵⁵ In addition, it is the knowledge processor in the EU in the areas of standard-setting and regulatory convergence validates financial innovation, manages risk, and is the entry gatekeeper for financial products under MiFID II.⁵⁶

With all the progress made towards integration in the European Union, it remains evident the process of harmonisation is far from complete. Veron notes that 'major obstacles to capital markets integration remain untouched, including divergent accounting enforcement regimes, fragmented market infrastructure, or incompatible frameworks for the taxation of financial investments.'⁵⁷ The London Stock Exchange, just like the Johannesburg Stock Exchange for Africa, continues to be the face of European capital markets despite the UK's exit from the EU. As a response to the challenges that markets in the EU still face, calls for a Capital Market Union grew, with the

⁵¹ See Title VIII of MiFID II.

⁵² Directive 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EC. MiFID only became effective in 2007.

⁵³ MiFID I was replaced by MiFID II and the corresponding Regulation, MiFIR. See Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II); Regulation 600/2014 on markets in financial instruments and amending Regulation 648/2012, 15 May 2014.

⁵⁴ See Article 17 of the ESMA Regulation.

⁵⁵ Danny Busch, Emiliós Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (Oxford University Press 2018) 62.

⁵⁶ Ibid.

⁵⁷ Nicolas Veron, 'Europe's Capital Markets Union and the new Single Market Challenge' (Bruegel, 30 September 2015) <https://www.bruegel.org/2015/09/europes-capital-markets-union-and-the-new-single-market-challenge> accessed 14 September 2020.

idea being energised by Jean Claude Juncker's idea of a CMU during his candidature for the Commission in May 2014.

The Commission's Green Paper on Building a CMU came up with an action plan to establish it by 2019⁵⁸ viewing it as critical to creating a single market for capital in Europe, allowing SMEs access to capital, providing businesses with diverse sources of capital, making the financial system more stable and reinforcing the position of European capital markets on the global stage.⁵⁹ Post-Brexit, the Report of the High-Level Forum headed by Thomas Wieser ('the HLF Report') which had been set up by the Commission published a report on the steps towards a single EU capital market.⁶⁰ It pointed out the need for political will and provided a timetable for key deliverables as well as recommendations on how to tackle the challenges identified, which recommendations were grouped into four clusters; financing, market infrastructure, investor engagement, and obstacles to cross-border investment. Particularly the HLF Report called for smart regulation, efficient supervision, more investment into the capital markets by banks and insurers, quality and accessible information for investors, less stringent requirements for listing of SMEs, and embracing technology. It identified taxation, insolvency regimes, and supervision as barriers to integration and made recommendations for every challenge identified as well as deadlines for implementation which range from 2020 to 2024. This 121-page HLF Report lays down an ambitious plan and makes a compelling case for the CMU while providing realistic recommendations. However, just like other reports before it, it remains to be seen how this will translate into action.

In summary, there are substantial differences between the EU securities markets integration drive and the regional and AU agenda for integration. Whereas African stock market integration projects pursue mainly infrastructural and operational linkages, the EU does not pursue merged markets but rather regulatory harmonisation. Could this approach be viable for Africa? The answer is Yes and this explains the focus on regulatory

⁵⁸ European Commission, 'Green Paper: Building a Capital Markets Union' COM(2015)63, 18 February 2015.

⁵⁹ Ibid.

⁶⁰ European Union, 'A New Vision for Europe's Capital Markets' Final Report of the High Level Forum on the Capital Markets Union, June 2020.

harmonisation in this chapter. In addition, unlike many of the African integration projects, the EU has a blueprint for financial services regulation and has centralised the regulatory making process. The lack of a clear concise blueprint for stock market integration at the regions at the AU level leaves room for confusion, inconsistencies and makes it harder to monitor commitments.

The presence of ESMA as the supervision agency, a role shared with national agencies is certainly an interesting concept. The EU had about 40 public bodies (spanning the 15 member states) that were dealing with regulation and supervision of securities markets which caused confusion and fragmentation and hence the Lamfalussy Report recommended convergence of the regulatory and supervisory structures.⁶¹ Is this worth emulating in the African context? The discussions in this thesis have delved into the complexities of sovereignty claims and the hesitance by states to transfer powers to a supranational. However, this is not unique to Africa. The UK and the EU's approaches to what the CMU would look like or be comprised of have always differed. Whereas the Five President's Report argued that the CMU 'should ultimately lead to a single European capital markets supervisor,'⁶² the UK was never in favour of handing over its supervision sovereignty. The UK has always insisted that the argument should be centred around policy rather than institutions. In response to the Green Paper, the Bank of England noted that institutional change was not necessary to achieve the objectives of the CMU.⁶³ The UK's opposition to any attempts to centralise supervision is credited for the absence of institutional measures in the 2015 Green Paper and Action Plan⁶⁴ as colliding with the largest financial market in the EU would neither be wise nor desirable. The equivalent of an ESMA in the African context is a great idea whose time has not come and this is further discussed

⁶¹ Page 15 of the Report.

⁶² European Commission, 'Completing Europe's Economic and Monetary Union' 22 June 2015 https://ec.europa.eu/info/sites/default/files/5-presidents-report_en.pdf accessed 20 August 2021.

⁶³ Bank of England, 'The Bank of England's Response to the European Commission Green Paper: Building a Capital Markets Union' (London, May 2015) <https://www.bankofengland.co.uk/-/media/boe/files/paper/2015/response-to-the-european-commission-green-paper-building-a-capital-markets-union.pdf>

⁶⁴ Nicolas Veron, 'Europe's Capital Markets Union and the new Single Market Challenge' (Bruegel, 30 September 2015) <https://www.bruegel.org/2015/09/europes-capital-markets-union-and-the-new-single-market-challenge> Accessed 14 September 2020.

in the last section of this Chapter. However, certainly streamlining regulation and supervision at the regional and AU level is important so that there are no multiple non-judicial institutions, as discussed in Chapter 7 all working in the same area.

7.2.2 The United States-Canadian Multijurisdictional Disclosure System ('MJDS')

Before the MJDS, Canadian issuers seeking a listing in the US were required to prepare two sets of prospectuses; one complying with Canadian legislation and the other complying with SEC rules. With the advent of the MJDS regime, Canadian issuers can use documents approved by Canadian securities regulators to offer securities in the USA. This is what is known as the United States-Canadian Multijurisdictional Disclosure System ('MJDS'), a reciprocal arrangement between SEC and the Canadian Securities Administrators designed to facilitate cross-border listings.

Rule 144A approved by SEC in 1990 provided a limited safe harbour from the registration requirements found in the 1933 Securities Act and could only apply to certain qualifying securities by certain stated persons i.e., qualifying institutional buyers.⁶⁵ This rule opened the door for SEC to take regulatory initiatives to increase listings into the US market from foreign issuers and paved the way for MJDS. On 1 July 1991, the SEC adopted the MJDS to facilitate cross-border issuance of securities between Canada and the USA by allowing Canadian firms to issue securities in the USA using a prospectus already prepared, reviewed, and approved in Canada.⁶⁶ MJDS was also recognised in Canada and allows US issuers to make offerings in Canada on the basis of a SEC-approved prospectus. The Canadian MJDS is substantially identical to the US MJDS. So, although each country has a MJDS, they are jointly referred to as the US-Canada MJDS in this thesis.

⁶⁵ See Anna T Drummond, 'Securities Law: Internationalization of Securities Regulation – Multijurisdictional Disclosure System for Canada and the US' (1991) 36 (3) *Villanova Law Review* 778.

⁶⁶ See generally Arthur Milne, 'Towards More Encompassing Rules: Globalization and Securities Regulation in Canada' (2004) 83(3) *Canadian Bar Review* 961-2; Joseph H Callaghan, Mohinder Parkash and Rajeev Singhal, 'The Impact of the Multi Jurisdiction Disclosure System on Audit Fees of Cross Listed Canadian Firms' (2008) 43(2) *The International Journal of Accounting* 99-113.

There are requirements for companies to qualify to list under the MJDS. An issuer seeking to use the MJDS must have at least three years' history of reporting and must meet the substantiality criteria i.e., Capitalisation at the market value.⁶⁷ The MJDS is advantageous for both regulators and issuers. It reduces the regulatory compliance burden and costs and allows for time and resource efficiency in the approval of listings.⁶⁸ Since securities are issued using a prospectus already approved in the home state, regulators in the host state do not have to re-review the same and the issuer does not have to incur dual costs related to approval of the prospectus in the host state.

The MJDS does not involve harmonisation of regulation between the USA and Canada but rather a mutual recognition, reciprocal recognition, or equivalence framework. In addition, unlike the EU which has the FSAP as a guiding document, there is no formal harmonisation plan between the two. However, the advent of the MJDS forced Canadian regulators to pay increased attention to SEC regulation and in turn, commence some degree of harmonisation of their regulation so as to keep up to date with US requirements.⁶⁹ The regulatory framework is then able to benefit from an equivalence proclamation from the SEC. In some respects, therefore, the MJDS can be viewed as a harmonisation framework, although not in the strictest sense.

It would differ, for example from the EU framework and the Latin American Integrated Market which are pure harmonisation frameworks. The process of integrating the Latin American exchanges was conceptualised in 2009 between the exchanges in Colombia, Peru, and Chile⁷⁰ as part of the efforts to integrate the Pacific Alliance economies. This paved way for the eventual

⁶⁷ See Harold S Bloomenthal and Samuel Wolff, 'The Multijurisdictional Disclosure System and Other Cross-Border Offerings' (2020) 20(3) *Denver Journal of International Law and Policy* 564.

⁶⁸ See Carol Olson Houston and Roberta Ann Jones, 'The Multijurisdictional Disclosure System: Model for Future Cooperation?' (1999) 10(3) *Journal of International Financial Management and Accounting* 229; Usha R Mittoo, 'The Multijurisdictional Disclosure System and Value of Equity Offerings' (2006) 17(1) *Journal of International Financial Management and Accounting* 54-5.

⁶⁹ See Cally Jordan, 'Regulation of Canadian Capital Markets in the 1990s: the United States in the Driver's Seat' (1995) 4(3) *Washington International Law Journal* 592. Also see Geiger (n 27) 1792.

⁷⁰ Edmundo R Lizarzaburu Bolanos, Kurt Burneo, Hamilton Galindo and Luis Berggrun, 'Emerging Markets Integration in Latin America (MILA) Stock Market Indicators: Chile, Colombia and Peru' (2015) 20 *Journal of Economics, Finance and Administrative Science* 75.

establishment of the Latin American Integrated Market (MILA) which brings together the four stock exchanges of Colombia, Mexico, Chile, and Peru. This integration does not involve the merger of infrastructure which allows the individual exchanges to maintain their autonomy. Rather, MILA is a platform for routing orders. In the first phase, minimum harmonisation of the regulatory standards was undertaken and brokers were required to sign an intermediary routing agreement with a local broker through whom trades were conducted.⁷¹ In the second phase, a harmonised regulatory framework applicable to trading, payment, and settlement as well as custody of securities was implemented.⁷² However, it has not engaged in deeper and fuller integration which would require further regulatory and supervisory harmonisation.

What lessons does the MJDS present for African integration proponents? Mutual recognition of securities regulation could inspire harmonisation of regulation and in the long run, lead to deeper integration. MJDS, may not be a traditional harmonisation method but the equivalence proclamations have the effect of leading Canada into seeking an amendment of its securities regulation to bring it in line with US securities regulation. This type of mutual recognition framework could be beneficial for issuers of securities in Africa who decry the high transaction costs. It could also spur on cross-border listing such as the one that is prevalent in SADC and the EAC.

7.2.3 OHADA: An African Legal Harmonisation Experiment

The *Organisation pour l'Harmonisation du Droit des Affaires en Afrique* ('OHADA' and in English, Organization for the Harmonization of Business Laws) is seen as the first successful legal harmonisation project in Africa.⁷³ It was conceived in Burkina Faso in 1991 with a group of experts appointed to

⁷¹ Dante Figueroa, 'Integrating Latin America Stock Markets: The Mercado Integrado Latinoamericano (MILA): Innovations And Perspectives' (2014) 3(2) *American University Business Law Review* 297.

⁷² See generally Beatriz Yepes-Rios, Kelly Gonzalez-Tapia, Maria Alejandra Gonzalez-Perez, 'The Integration of Stock Exchanges: The Case of the Latin American Integrated Market (MILA) and its Impact on Ownership and Internationalisation Status in Colombian Brokerage Firms' (2015) 20 *Journal of Economics, Finance and Administrative Science* 85.

⁷³ Babatunde Fagbayibo, 'Towards the Harmonisation of Laws in Africa: Is OHADA the Way to Go?' (2009) 42(3) *The Comparative and International Law Journal of Southern Africa* 309. OHADA is created by the Treaty on the Harmonisation of Business Law which was signed on 17 October 1993 in Mauritius.

conduct a feasibility study to ascertain a form of legal collaboration geared towards economic integration.⁷⁴ OHADA was hence an experiment in unifying business laws among its member states.

OHADA is made up of 17 member states in Central and West Africa⁷⁵ that have agreed to harmonise their business laws to attract investment.⁷⁶ Incidentally, the initial signatories of the OHADA Treaty were all Francophone countries who were also members of CFA, and hence the Treaty is in French. Nevertheless, the Treaty allowed other non-Francophone states to join the Organisation⁷⁷ and by amendment to the Treaty, English, Spanish, and Portuguese were also added to French as the working languages.⁷⁸ However, to date, no English-speaking country has joined the organisation and Mauritius, where the treaty was signed, has stayed away from the alliance. It could be said that the use of civil law as a basis for OHADA laws may be a hindrance to common law, English-speaking African countries joining OHADA.⁷⁹

OHADA comprises of a Council of Ministers, Permanent Secretariat, Conference of Heads of State and Government and a Common Court of Justice and Arbitration⁸⁰ and the uniform acts are prepared by the Permanent Secretary who consults with the member states and the adoption of the uniform acts requires the unanimity of all state parties.⁸¹ Article 10 makes the uniform acts directly applicable to and binding on member states. Unlike other continental treaties, OHADA resolved the question of financial sustainability by providing for sources of funding for the organisation, namely

⁷⁴ See Barry Walsh, *In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa* (World Bank, 2010) 43.

⁷⁵ These states include Togo, Gabon, Chad, Benin, Burkina Faso, Comoros, Congo, Central African Republic, Gabon, Equatorial Guinea, Mali, Niger, Cameroon, Senegal, Guinea, Guinea Bissau and Ivory Coast.

⁷⁶ See Article 1 of the Treaty, 'The object of this Treaty is to harmonize business law in the States Parties by drawing up and adopting common rules that are simple, modern and adapted to the situation of their economies, by the implementation of judicial procedures and by encouraging the use of arbitration for the resolution of contractual disputes.'

⁷⁷ See Article 53 of the OHADA Treaty.

⁷⁸ See amendment to Article 42 of the OHADA Treaty.

⁷⁹ See generally Tapiwa Shumba, 'Harmonising Business Laws in the Southern African Development Community ('SADC'): Should SADC Member States Join OHADA?' (2019) 30(3) *Stellenbosch Law Review* 59-87.

⁸⁰ See Article 3 of the OHADA Treaty.

⁸¹ See Article 6 and 8 of the OHADA Treaty.

annual contributions of member states and donations.⁸² OHADA has full international legal personality and its employees enjoy diplomatic immunity and privileges.⁸³

OHADA has produced a series of Uniform Acts and these have covered insolvency, general commercial law, securities law,⁸⁴ carriage of goods by road, cooperative societies, execution, mediation, arbitration, labour law, and accounting.⁸⁵ The Permanent Secretariat supervises the drafting of the Uniform Acts and submits them to governments for review and comment with governments submitting their observations within 90 days and a plenary called for consensus.⁸⁶ The Common Court of Justice and Arbitration ('CCJA') reviews the draft and provides an advisory opinion within 30 days, after which the Council of Ministers adopt the Act unanimously.⁸⁷

The success in the creation of uniform laws is a great achievement in a continent with many initiatives and very few successful outcomes. The Common Court of Justice and Arbitration is active and has presided over several disputes and issued corresponding judgements.⁸⁸ However, national courts are still reluctant to send their cases to the OHADA Court for fear of losing their cases and due to an attachment to their sovereignty.⁸⁹ Nevertheless, many member states have implemented the Uniform Acts and introduced legislation to comply, where required. There is substantial evidence to show that OHADA Uniform Acts have had an impact on the areas tackled which includes increasing access to finance including private equity financing.⁹⁰ Part of this success has been attributed to the targeted focus on

⁸² See Article 43 of the OHADA Treaty.

⁸³ See Article 46-50 of OHADA Treaty.

⁸⁴ The securities law here refers to assignment of assets to a creditor as opposed to equity and debt financing.

⁸⁵ See for example, Uniform Act on the Organization of Collective Procedures for the Discharge of Liabilities, September 10, 2015; Uniform Act of General Commercial Law, December 15, 2010; Organizing Securities Law, December 15, 2010; Uniform Act on Mediation, November 23 2017; Uniform Act Relating to Accounting Law and Financial Information, January 26 2017.

⁸⁶ Renaud Beauchard and Mahutodji Jimmy Vital Kodo, 'Can OHADA Increase Legal Certainty in Africa?' (2011) Justice and Development Working Paper Series 17/2011, 15, <https://openknowledge.worldbank.org/handle/10986/18322> accessed 20 July 2021.

⁸⁷ See Article 8 of the OHADA Treaty.

⁸⁸ See decisions at <https://www.ohada.org/en/ohada-case-law/> accessed 12 May 2021.

⁸⁹ See Claire Moore Dickerson 'Harmonizing Business Law in Africa: OHADA Calls the Tune' (2005) 44(17) *Columbia Journal of Transnational Law* 57-8.

⁹⁰ See generally International Finance Corporation, 'An Impact Assessment of OHADA Reforms: Uniform Acts on Commercial, Company, Secured Transactions and Insolvency,' International

business law as programs work best when the scope matches the competencies and capacities.⁹¹ By focusing on business law and dedicating resources to that specialism, together with the help of the ministries of justice in the respective countries, OHADA has maintained a specific skill set in business law.⁹² OHADA has also involved stakeholders in the legislative process through the OHADA National Commissions. The involvement of both public and private stakeholders allows for receipt of different and targeted viewpoints which also enables uptake of legislation and increases domestic knowledge of these regional/continental initiatives.

Despite this, OHADA's monitoring mechanisms are still below average with very little follow-up on implementation and lack of a dedicated monitoring mechanism of implementation. OHADA has well-established institutions laid down in the treaty but there is very little reporting on the implementation and monitoring. In addition, the insistence on arbitration as the only alternative dispute resolution mechanism under OHADA is, in addition to its expensive and sophisticated nature, to the detriment of other methods such as mediation. Its intimate relationship to France and the influence of French law and France in providing the initial funding of OHADA has led to criticism of its legitimacy and a view that OHADA is merely French law incarnated.⁹³

OHADA faced its first challenge in Cameroon where the population felt that the OHADA framework was imposed without much discussion and consultation and hence some judges refused to apply it, only changing their stance due to government imposition.⁹⁴ The choice of the CCJA as the supreme body on all OHADA matters has led to conflicts of sovereignty which

Finance Corporation's OHADA Investment Climate Program (2007-2017) (IFC, December 2018).

⁹¹ Ibid 59.

⁹² Ibid.

⁹³ Charles Manga Fombad, 'Some Reflections on the Prospects for the Harmonization of International Business Laws in Africa: OHADA and Beyond' (2013) 59(3) *Africa Today* 66.

⁹⁴ See the ruling of Justice Paul Ayah in *Akiangan Fombin Sebastian v Foto Joseph and Others*, HCK/3/96. Also see Claire Moore Dickerson, 'Perspectives on the Future' in Claire Moore Dickerson (ed), *Unified Business Laws for Africa: Common Law Perspectives on OHADA* (GMB Publishing 2009) 45. At the Paris Court of Appeals, Cameroon brought arguments to set aside an arbitral award based on Cameroonian law. The Paris Court held that OHADA Treaty sets a supranational rule that supersedes Cameroonian domestic law. See *Cameron Vs Projet Pilote GaroubéCA*, Paris 16/25484, 20 December 2018.

manifest in domestic courts taking contrary stances in ultimate defiance.⁹⁵ This sheds light on the complexities of supranational legal systems in Africa and the fragile balance between sovereignty and commitments to alliances. Even though states were consulted in the rule-making process, this has not translated into full acceptance of this legal order.

Despite these shortcomings, OHADA brings to light an important realisation that removing legal impediments through regulatory harmonisation could be the key to unlocking investment and overcoming the challenges of globalisation. It exhibits an ability for states to come together and agree on legal principles that form the basis of regulatory harmonisation. Some new scholars argue for a shift from harmonisation to pluralism.⁹⁶ However, this would go against the spirit of the AU Treaties and almost all REC treaties and require a renegotiation of all these treaties which is premature. There is also no real evidence that legal pluralism will achieve the objectives that harmonisation would achieve for Africa. Harmonisation also allows the flexibility to have slight, moderate, comprehensive, total, minimum, or maximum hence giving leeway for customisation to individual needs.⁹⁷ OHADA has proved that harmonisation can be achieved in Africa, and in the commercial sector.

7.3 Developing proposals for regulatory harmonisation of securities laws

7.3.1 The need for a blueprint on common harmonisation principles.

Having a blueprint document is important for regulatory harmonisation as it provides guidance on the most pressing needs relevant to any region and the member states and the legal principles on which a consensus is required. This

⁹⁵ Beauchard and Kodo (n 86) 27-28. Also see Ngaundje Dris Leno, 'The Organisation for the Harmonisation of Business Law in Africa (OHADA) System: Overview of Some Benefits and Problem Areas' (2018) 2(9) *International Journal of Advances Research and Publications* 106; Renaud Beauchard, 'OHADA Nears the Twenty-Year Mark: An Assessment,' (2013) 4 *World Bank Legal Review* 328-9.

⁹⁶ Gert Marthinus Ferreira and M.P Ferreira-Synam, 'The Harmonization of Laws within the African Union and the Viability of Legal Pluralism as an Alternative' (2010) 73(4) *Journal of Contemporary Roman-Dutch Law* 608-28.

⁹⁷ See generally Charles Manga Fombad, 'Some Reflections on the Prospects for the Harmonisation of International Business Laws in Africa: OHADA and Beyond' (2013) 59(3) *Africa Today* 51.

blueprint could be created at the continental level through a capital markets protocol and RECs would be able to choose the priorities from the blueprint. This ensures some level of consistency and monitoring for the AU. In doing so, the focus should be on investor confidence and removing legal impediments to the growth of the capital markets.

The idea of a blueprint is not farfetched. All successful harmonisation drives have been preceded by a model or master plan that lays out the foundation of the drive and the priorities in harmonisation. For example, the introduction of the Financial Services Action Plan in 1999 intensified the drive towards harmonisation of financial services in the EU.⁹⁸ It laid down the priority areas and a timetable to achieve the specific strategic objectives. A blueprint is specifically necessary due to the conflicting and duplicative policies and laws in member states. The blueprint would adequately identify these areas, analyse the challenges, take into account best practices, set benchmarks, and propose robust principles as well as guidelines for reform.

A starting point for the blueprint is the recommendations of the International Organisation of Securities Commissions ('IOSCO'). IOSCO is recognised as a global setter of standards in the securities industry and sets international standards for securities regulation.⁹⁹ IOSCO posits that the objectives of securities regulation are threefold: protection of investors, ensuring that markets are fair, efficient, and transparent, and reduction of systemic risk.¹⁰⁰

Black posits that the two key elements of investor protection are disclosure of information about the listed companies and the confidence that the insiders will not cheat investors through self-dealing or even outright theft.¹⁰¹ Goshen on the other hand notes that securities regulation is divided into three broad categories: disclosure duties, restrictions on manipulation, and restrictions on

⁹⁸ See European Commission, 'Financial Services: Implementing the Framework for Financial Markets: Action Plan' COM (1999) 232.

⁹⁹ This recommendation is made with the awareness of the different debates surrounding the nature of IOSCO policy process. However, IOSCO has gained global recognition and acceptance which cannot be ignored. See Geoffrey R.D Underhill, 'Keeping Governments Out of Politics: Transnational Securities Markets, Regulatory Cooperation and Political Legitimacy' (1995) 21 *Review of International Studies* 251-78.

¹⁰⁰ See International Organization of Securities Commissions, *Objectives and Principles of Securities Regulation*, May 2003.

¹⁰¹ Bernard S Black, 'The Legal and Institutional Preconditions for Strong Securities Markets' (2001)48 *UCLA Law Review* 441.

insider trading.¹⁰² Investor protection is a dominant theme in securities regulation and it presupposes that a good investor protection regime will lead to higher payment for shares, better return on investment, and lead to more valuable stock markets with increased market capitalisation and number of listed entities.¹⁰³

Investor protection rules are evident in different sources of law such as company law (corporate governance standards), constitutional law (such as the right to property), insolvency law (rights of shareholders during winding up), accounting standards (preparation of financial statements in line with international accounting and audit standards), tax law (taxes on dividends and share transfers) as well as securities market regulations (such as rules requiring disclosure and forbidding market manipulation and abuse). Hence harmonisation based on investor protection would focus on harmonisation of all these rules found in different regulatory frameworks. However, an initial mass harmonisation exercise of all the rules that impact investor protection is quite ambitious and is neither realistic nor attainable. With the sheer number of countries in Africa, coupled with the political and legal challenges and the fragmented legal systems that have been discussed in Chapters Five and Six, such changes would be bound to fail. An exercise of such magnitude is a long-term ambition and it is strongly advised to make haste slowly. Ultimately, a harmonisation drive requires the identification of priority areas and a commitment to achieve the priority areas by stated deadlines.

So, what priority areas should regulators in Africa focus on in the quest for harmonisation? These are the areas in which common principles setting minimum standards are to be explored. Financial market infrastructures (FMIs) generally correspond to the three separate legs of a securities transaction: trading, clearing, and settlement. These three legs are important for both investors and issuers and hence easier for consensus to be achieved. As a result, the initial focus would be on harmonising principles related to the regulation of trading, clearing, and settlement. Closely related to trading is

¹⁰² See Zohar Goshen and Gideon Parchomovsky, 'The Essential Role of Securities Regulation' (2006) 55 *Duke Law Journal* 711.

¹⁰³ See Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny, 'Investor Protection and Corporate Governance' (2000) 58 *Journal of Financial Economics* 15.

the concept of free, fair, and orderly markets which brings to light requirements for rules against market abuse and manipulation. Considering that there is a consensus already on the prohibition of these vices, the harmonisation of their regulation would be an easier win. Due to the importance of disclosure to securities markets and the stock exchange being a market for information, any initial harmonisation drive would be incomplete without a discussion on disclosure standards. The importance of financial reporting cannot be overstated and hence the discussion concludes with a brief on harmonisation of financial reporting.

7.3.2 Harmonising aspects of the regulation of trading activities

Trading platforms allow for buying and selling of securities subject to specified rules and regulations. The trading process involves three key functions: 'display and comparison of buy and sell quotes, order matching and order execution.'¹⁰⁴ Trading systems are either order-driven or quote-driven and the price is determined by continuous auction, single auction, or the dealer (non-auction) market.¹⁰⁵ The operation of these functions depends on whether the environment is automated or manual. Manual trading involves human input in originating trades, which is contrasted with automated trading where programs enable the matching and trading. The traditional stock exchange employed open outcry in trading. The shouting would sometimes degenerate into disorder or confusion.¹⁰⁶

The invention of telegraphs and the telephone signalled advances in communication technology and paved the way for the switch to electronic trading and settlement systems and the use of the latter increased dramatically in the 1990s.¹⁰⁷ Electronic trading enables a continuous auction system, automatic order matching, and access to an anonymous limit order book.¹⁰⁸ It also offers flexibility by allowing large orders to be matched with

¹⁰⁴ Robert Pardy, 'Regulatory and Institutional Impacts of Securities Market Computerisation' World Bank Working Papers 866 (World Bank, 1992) 10.

¹⁰⁵ Ibid 11.

¹⁰⁶ For further reading, see Edward Stringham, 'The Emergence of the London Stock Exchange as a Self-Policing Club' (2002) 17(2) *Journal of Private Enterprise* 1-19.

¹⁰⁷ Some stock exchanges still employ the open outcry method.

¹⁰⁸ Samarth Shah and Wade Brorsen, 'Electronic vs. Open Outcry: Side-by-Side Trading of KCBT Wheat Futures' (2011) 36(1) *Journal of Agriculture and Resource Economics* 50.

several orders that may be listed in the limit order book at different prices.¹⁰⁹ Brokers can employ algorithms that allow for trades to be triggered once the pre-set thresholds are met which can be a profit-making opportunity and enable fast execution hence avoiding trade latency.¹¹⁰ The switch has also facilitated efficiency, ease of trading, and reduced time spent in executing trades.¹¹¹ In addition, the advent of internet-based securities trading in jurisdictions like the USA¹¹² shed light on the technological advancements in trading systems. Today, fintech continuously challenges traditional trading systems and has allowed the advent of trade order management systems and trade and execution management systems such as Bloomberg and Refinitiv.

Although there is a persistence of manual trading practices in major stock markets and it is easy to make an argument that manual trading should persist alongside automated trading,¹¹³ the technological revolution cannot be reversed. The Kodak story is an ever-present reminder of the dangers of ignoring disruptive technology.¹¹⁴

This thesis does not in any way suggest that trading systems should be standardised. Such an argument would be blind to the realities of trading and the wide array of trading systems present in Africa. It also doesn't suggest that all trading rules should be standardised as trading rules will always vary

¹⁰⁹ Ibid.

¹¹⁰ Chris Bummer, 'Disruptive Technology and Securities Regulation' (2015) 84 *Fordham Law Review* 1002.

¹¹¹ See Eric Clemons and Bruce Weber, 'Alternative Securities Trading Systems: Tests and Regulatory Implications of the Adoption of Technology' (1996) 7(2) *Information Systems Research* 5; ; Ian Domowitz and Benn Steil, 'Automation, Trading Costs, and the Structure of the Securities Trading Industry' in E Philip Davis and Benn Steil, *Institutional Investors* (MIT Press 2001); Marli Damiao Abade Nunes, 'Automated Trading Systems Vs Manual Trading in Forex Exchange Market' (Master's Thesis, Universidade Nova de Lisboa 2021) 7.

¹¹² See Daniel M Gallagher, 'Mover Over Tickertape, Here Comes the Cyber Exchange: the Rise of Internet Based Securities Trading Systems' (1998) 47(3) *Catholic University Law Review* 1009-056.

¹¹³ In 2001 research comparing the execution costs of trades between Paris and New York, the study found that execution costs were higher in Paris than in New York and that the then system of automation would not adequately replicate the benefits of human intermediation on the trading floor. See Kumar Venkataraman, 'Automated Versus Floor Trading: An Analysis of Execution Costs on the Paris and New York Exchanges' (2001) 56(4) *The Journal of Finance* 1445-485. However, more recent empirical evidence has been clear that manual systems lead to higher trading costs, lower returns for investors and related higher capital costs to issuers. See Benn Steil, 'Creating Securities Markets in Developing Countries: A New approach for the Age of Automated Trading' (2001) 4(2) *International Finance* 260-61; Peter Jan Engelen, 'Changes in the Securities Trading Landscape in Europe and the US' (2006) 4(1) *Competition and Regulation in Network Industries* 439-451.

¹¹⁴ See Henry Lucas Jr, Jie Mein Goh, 'Disruptive Technology: How Kodak Missed the Digital Photography Revolution' (2009) 18 *Journal of Strategic Information Systems* 49.

according to the type of security or the type of orders and segmentation of this kind 'allows exchanges to respond better to the variety of needs of both investors and firms.'¹¹⁵ What this thesis recommends is a standardisation of certain internationally accepted standards regarding trading.

For example, the blueprint on the regulation of trading would standardise the consensus on what amounts to or consists of small orders, medium-sized orders, and large orders i.e., the number of odd lots and where such orders are to be traded. Investors and dealers require certainty on types of orders to make buying and selling decisions. The standardised rules should then provide for the price determination mechanism for each of those order types. There are several odd lotters (usually trade less than 100 shares) in emerging markets due to the low levels of sophistication of investors and traders and the lack of access to resources to trade larger orders.¹¹⁶ Such traders use the odd lot board for their trading activities and their orders are not usually entered during the pre-open period or considered for execution during open auctions. Such common principles should extend to the rules governing both market and limit orders such as All or None (AON) orders, Good Till Cancelled (GTC), Good Till Day (GTD), Immediate or Cancel (IOC), Fill or Kill (FOK), among others.

To ensure transparency and consistency, the harmonised trading rules should contain provisions on access to the market for traders, regardless of whether that is through remote trading or electronic trading. This includes standardised sessions such as pre-open, opening auction, trading, and closing session and the activities to be carried out in each of the sessions. It is not realistic for the rules to impose time for each of these activities as that is market-specific and dependent on time zones and is not likely to impact decisions to invest. However, stock exchanges should indicate their specific times and display these in their trading software and electronic platforms.

In addition, the content of orders should be provided. Primarily this refers to the information that must be provided for an order to be deemed complete

¹¹⁵ Marianne Demarchi and Thierry Foucault, 'Equity Trading Systems in Europe: A Survey of Recent Changes' (2000) 60 *Annales d'Économie et de Statistique* 74.

¹¹⁶ Also see generally Hsiu-Kwang Wu, 'Odd-Lot Trading in the Stock Market and its Market Impact' (1972) 7(1) *The Journal of Financial and Quantitative Analysis* 1321-341.

and hence ready for processing. This allows brokers and traders, regardless of the country in the region, to have the same information requirements for customers hence easing the conduct of transactions. This could include the securities depository account, the quantity, price, attributes, and whether the order is a limit or market order.

Regulations on trading must ensure increased access to the market. This raises the question of whether regulation should consider direct market access (DMA). DMA has the advantage of allowing equal access to the market for all interested parties which may increase market activity. However, the disadvantage, which is a real concern in emerging markets like Africa, is the danger posed by the unsophisticated trader. Such a trader requires a high level of regulatory oversight in addition to the challenges of limited knowledge and experience in trading and the impact of investment decisions of unsophisticated traders on the stability of the market. There is a general view that DMA is not ideal for markets that have unsophisticated individual investors.¹¹⁷ As a result, DMA shouldn't be one of the initial considerations.

Additionally, the harmonised framework must permit cross-border (regional) trades and provide a framework for how brokers will access the market to carry out such trades. This could be through a local broker sponsor, direct market access, or an order routing system. Sponsored access allows brokers to trade securities in markets other than their own through local brokers in the host state. Such sponsor agreements must be approved by the regulator and include information on commissions and charges as well as be bound by the local regulations on trading and settlement. Sponsored access is usually the initial preferred mode of cross-border trading since local brokers are involved. As trading advances, brokers from a different state may be recognised by the regulators (after approval of membership applications) and hence can directly participate in foreign markets in the region. The latter is Phase Two of the WACMIC Integration Roadmap. Agreeing on the mode of access is important because cross-border trading is the basis of the more advanced integration projects in Africa such as the EAC-CMI and the ECOWAS

¹¹⁷ See Brandon Becker, Eugene Lopez, Victoria Berberi-Doumar, Richard Cohn and Alden S Adkins, 'Automated Securities Trading' (1992) *Journal of Financial Services Research* 330.

Project. It is also the basis on which the African Exchanges Linkage Project is hinged.

The harmonised trading regulation must emphasize transparency in trading operations. This centres around making trading information available for all parties which include price and volumes, daily and weekly trade reports as well as bid and ask prices. Transparency protects and attracts investors. Where trade information is made public, this encourages fairness and allows investors to calculate prices, mark up and monitor the market easily.¹¹⁸ Transparency plays a central role in liquidity, price efficiency, and fostering investor confidence, which is key to making capital markets work for Africa. A harmonised transparent framework will also 'avoid a flight to opacity' where certain investors may choose markets that are less transparent at the expense of markets that enforce international best practices in pre- and post-trade transparency.¹¹⁹

Transparency requirements should extend to pre-trade and post-trade information i.e., information available concerning the available orders and their price (pre-trade information) and the details of the executed transactions (post-trade information). An example of harmonised trade transparency requirements can be found in MiFID2 and MiFIR which require regulated markets to make public the volume, price, and time of transactions executed as close to real-time as technically possible.¹²⁰ However, a waiver regime is in place for pre-trade transparency to prevent impairing liquidity as a consequence of disclosure which is a welcome development for creating a balance between disclosure and legitimate interest.¹²¹ Therefore for legitimate reasons, the trade disclosure regime would have adequate waivers to meet these unique scenarios.

The regulations around transparency should require trade reporting within specified timelines as well as the exact information that must be reported,

¹¹⁸ Ibid 332. Also see Eric K Clemons and Bruce W Weber, 'Information Technology and Screen-Based Securities Trading: Pricing the Stock and Pricing the Trade' (1997) 43(12) *Management Science* 1693-708.

¹¹⁹ Becker (n 117) 336.

¹²⁰ See Article 3 and 8 of MiFIR and Commission Delegated Regulation (EU) 2017/587

¹²¹ ESMA has provided further guidance on the operation of the waiver regime by national competent authorities. See ESMA, 'Opinion on the Assessment of Pre-Trade Transparency Waivers for Equity and Non-Equity Instruments,' ESMA70-155-6641, 16 December 2020.

taking a cue from information that investors generally require about trades. There must be consistency in how price is arrived at for the different order types as well as priority rules (the sequence in which execution of limit orders occurs). Priority rules are important because they influence the decision of traders to provide liquidity and encourage price competition.¹²² Circumstances that warrant trade halts must be standardised and consistent so that investors regardless of the jurisdiction are aware of these scenarios. This by no way means that the percentages of price deviations must be the same but the principles must be aligned.

7.3.3 Common standards regarding clearing, payments, and settlement procedures

Clearing and settlement are central features of the efficient and smooth functioning of a securities market.¹²³ In practice, clearing and settlement involves four crucial steps: confirmation of the terms of the trade, clearance, payment by the buyer, and delivery by the seller, with the last two, referred to as settlement. The Delivery Versus Payment (DvP) method, which is the commonest, ensures that the securities are delivered only after payment has been made. This process involves parties that include the seller, buyer, central securities depository (CSD), and in certain cases, a Central Clearing Counterparty (CCP). Confirmation is usually automated and less risky. Clearance on the other hand is complex and requires a determination of the position of the parties to the trade. As a result, clearing is usually done by clearing houses or CSDs on either a gross (trade by trade) or net basis.

When discussing payments and settlement systems, this involves four elements: institutions, rules, standards, and procedures. The institutions, such as exchanges and depositories, provide the infrastructure to facilitate the process. The rules look at the legal and administrative framework governing the rights and obligations of the parties while the standards are those developed by international bodies to provide best practices in payment

¹²² Lawrence Ernest Harris, *Liquidity, Trading Rules and Electronic Trading Systems* (New York University Salomon Center 1990) 4.

¹²³ Heiko Schmiedel, Markku Malkamäki and Juha Tarkka, 'Economies of Scale and Technological Development in Securities Depository and Settlement Systems' (2006) 30 *Journal of Banking and Finance* 1784.

and settlement. Procedures are those imposed by the local institutions governing how the process is undertaken.¹²⁴

The pursuit of integrated financial markets introduces a challenge of cross-border payments and settlements. The use of various parties located in different jurisdictions carries with it increased risk and transaction costs. Risks in the payment and settlement system include legal risk arising out of uncertainty or ambiguity in regulation, credit risk from failure to settle in full, operational risk arising from the breakdown of the infrastructure systems or failure to follow the procedures put in place, and custody risk where the holder of the securities is unable to deliver the same due to fraud, insolvency or negligence.¹²⁵ In cross-border securities, an additional risk of cross-border settlement arises where the buyer may not receive the securities after payment or the seller does not receive funds after transferring ownership.¹²⁶ All these risks are mitigated by the institutions, rules, standards, and procedures which regulate the parties and the processes. Harmonised procedures therefore should consider all the four faces of payments and settlements.

7.3.3.1 Trade confirmation and settlement cycle

First, there should be common standards regarding trade confirmation. Regardless of the trading hours, trades must be confirmed as soon as is possible and, in any event, not later than the trade date, T+1. Until a trade has been confirmed, the settlement cycle cannot commence hence the importance of early confirmation, usually on T+0. It also follows that there should be a similar settlement cycle across all the markets.¹²⁷ A settlement cycle refers to the time between when the trade date (the date when the order is executed) and the settlement date (date when delivery of and payment for securities occurs). Differences in the settlement cycle in a region

¹²⁴ For a discussion on the elements of payment and settlement, see Mario Guadamillas and Robert Keppler, 'Securities Clearance and Settlement Systems: A Guide to Best Practices' World Bank Policy Research Working Paper 2581 (World Bank, 2001) 2.

¹²⁵ Ibid 15.

¹²⁶ Ibid.

¹²⁷ A settlement cycle refers to the time between settlement date and the date allotted to the parties to satisfy their obligations under the transactions. In the settlement cycle, the seller delivers the securities and receives his payment while the buyer receives securities and makes payment.

where cross-border trading occurs are undesirable as they cause confusion and uncertainties.

It is widely accepted that the longer it takes to settle the trades, the higher the settlement risk and liquidity risk.¹²⁸ If the settlement cycle is long, this carries an increased risk of default, insolvency, and the probability of price changes leading to a loss in the unsettled contract.¹²⁹ Long settlement cycles increase counterparty risk for clearing firms and for markets that experience volatility, the risk of default is elevated. In addition, the longer the settlement cycle, the higher the cost of the guarantee fund (and other collateral requirements for broker-dealers) and hence an added expense to market intermediaries, holding up cash that could be used for trading. There is no standard settlement cycle but there is a wide consensus that the appropriate settlement cycle is T+3 (three business days after the trade date), resulting from the 1989 recommendations of the G30.¹³⁰ Africa as a region has the longest equity securities settlement cycles at an average of T+5 as contrasted to T+3 in Europe and Latin America, T+2 in Asia, Middle East, USA, and Canada with talks in the latter two focused on reducing the time to T+1.¹³¹ This places the African region at a global disadvantage and makes changes in settlement cycles important. It is therefore recommended that at the minimum, the regulatory framework should require settlement at T+3.

This recommendation is made with an understanding that cross-border settlements in Africa would involve multiple jurisdictions and intermediaries which may make it impossible to have short settlement cycles such as T+1 or T+2 (employed by more developed markets). It is also cognisant of the fact that a move to T+1 or T+2 is complex in terms of infrastructure,

¹²⁸ Settlement risk is sometimes known as principal risk which means a risk of loss of payment made to a participant that defaulted before the default is discovered or the loss of securities that were delivered. Liquidity risk on the other hand refers to the risk that a seller who did not receive his/her due payment may have to borrow or liquidate their other assets in order to complete other transactions they are engaged in.

¹²⁹ Ibid 10.

¹³⁰ The G30 noted: 'A rolling settlement system should be adopted by all markets. Final settlement for all trades should occur no later than T+3.' Committee on Payment and Settlement Systems, 'Recommendations for Securities Settlement Systems' Report of the CPSS-IOSCO Joint Task Force on Securities Settlement Systems (Bank for International Settlements, 2001) 4.

¹³¹ See TMX, 'Canada's Transition to T+1' (CDS, June 2021) <https://www.cds.ca/resource/en/420>; CDS, 'CDS Move to T+2' (September 2015) <https://www.cds.ca/resource/en/174> accessed 29 July 2021.

resources, and operating systems and requires significant planning and execution, which may raise a substantial capacity burden for the emerging markets of Africa. In addition, Africa benefits from a high number of foreign investors who must convert payments into local currencies which is subject to exchange conversion timelines under the auspices of central banks. An initial change to T+3 strikes a healthy balance.

7.3.3.2 Mitigation of settlement risk and use of Central Clearing Counterparties

Harmonised regulations must include measures to mitigate settlement risk. The G30 made recommendations on managing this risk which included automating processes, standardising messaging, and communication protocols, expanding the use of central counterparties, permitting securities lending, ensuring the financial integrity of intermediaries, advancing legal certainty over security rights, and strengthening the enforceability of contracts.¹³² One of the suggested measures is the use of central clearing counterparties (CCPs). CCPs facilitate the clearing of transactions and were initially utilised in derivative markets but have been adopted in the equity markets.¹³³ CCPs interpose themselves between the parties involved in the trade (becoming the buyer to every seller and the seller to every buyer) to reduce systemic risk.¹³⁴ To manage risk, the CCP sets membership requirements (including capital) and monitors the financial position of

¹³² Group of Thirty, 'Global Clearing and Settlement: A Plan of Action' (Group of Thirty 2003) 2.

¹³³ See European Central Bank, 'The Role of Central Counterparties' Issues Related to Central Counter Party Clearing, ECB-FED Chicago Conference, 3-4 April 2006 <https://www.ecb.europa.eu/pub/pdf/other/rolecentralcounterparties200707en.pdf> accessed 14 July 2021.

¹³⁴ Linda Goldberg, John Kambhu, James M. Mahoney, Lawrence Radecki, and Asani Sarkar, 'Securities Trading and Settlement in Europe: Issues and Outlook' (2002) 8(4) *Current Issues in Economics and Finance* 2; Albert J Menkveld, 'Crowded Positions: An Overlooked Systemic Risk for Central Clearing Parties' (2017) 7(2) *The Review of Asset Pricing Studies* 209; Craig Pirrong, 'The Economics of Central Clearing: Theory and Practice' ISDA Discussion Paper 1/2011 <https://www.isda.org/a/yiEDE/isdadiscussion-ccp-pirrong.pdf> accessed 10 September 2021; Hamed Amini, Damir Filipovi, Andreea Minca, 'Systemic Risk and Central Clearing Counterparty Design' (2013) Swiss Finance Institute Research Paper No 13-34 of 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275376 accessed 20 July 2021; Christian Kubitz, Liorana Pelizzon and Mila Getmansky, 'The Pitfalls of Central Clearing in the Presence of Systematic Risk' ICIR Working Paper Series No 31/18, <https://www.econstor.eu/handle/10419/187431> accessed 20 July 2021.

members to request additional collateral to cushion against adverse market fluctuations.¹³⁵

The benefits and costs of a CCP need to be evaluated before they are adopted. A risk management failure by a CCP can prove disruptive to the operation of the market and as a result, IOSCO has made various recommendations over the years on CCPs.¹³⁶ The Basel Committee on Banking Supervision (BCBS) also issued Basel Accords and Basel III Accord which contain recommendations on regulation of CCPs.¹³⁷ CCPs are more common in Europe and only a handful in the derivatives market in Africa with none in the equities market. The reality is that African financial markets are not mature and large enough to accommodate CCPs and other risk mitigation mechanisms may be more ideal.

Many African securities regulations require market intermediaries to contribute to guarantee funds as a pre-requisite for admission to trading, clearance, and settlement. Traders may also be required to pre-position securities or cash. It is recommended that such risk mitigation measures should be prioritised and the law must require national supervisory agencies to set adequate amounts for settlement guarantee funds as a cushion where there is settlement default by traders. These could include non-conditional bank guarantees or cash contributions whose amounts should be calculated based on the average trade amounts of each broker in a corresponding 12-month period subject to a minimum amount. This amount mustn't be a static figure to guard against a scenario where the guarantee fund is below the average trades of a broker.

7.3.3.3 Immobilisation and dematerialisation of securities

There should be a requirement for securities to be dematerialised or immobilised in CSDs, to facilitate cross-border trading and settlement. Dematerialisation refers to the conversion of physical share certificates into

¹³⁵ Ibid 6.

¹³⁶ For example, see Committee on Payment and Settlement Systems, 'Recommendations for Central Counterparties' (International Organization of Securities Commissions, November 2004).

¹³⁷ Antonie Kotze, Coenraad CA Labuschagne, 'The Dilemma of a Central Counterparty Versus a Qualified Central Counterparty in a Developing Country' (2014) 14 *Procedia Economics and Finance* 350.

electronic form whereas immobilisation is the process of storing physical share certificates with a depository for safe custody. Dematerialisation has gained substantial traction and was the method chosen in the Geneva Securities Convention.¹³⁸

Dematerialisation requires an end to the issuance of securities in paper form which entails an operational risk. Physical certificates affect the settlement cycle due to manual intervention as well as the need to physically exchange certificates which may be delayed by various factors. In 2013, Thomas Murray placed the rate of dematerialisation in Africa at a little over 50% as compared to 83% in the EU.¹³⁹ Today, there are no statistics that paint a clear picture of the rate of dematerialisation in African exchanges but there are individual exchange efforts to require dematerialisation as they embrace automated trading and settlement. In addition, the Uniform Act on Commercial Companies and Economic Interest Groups under OHADA recognised the principle of dematerialisation paving the way for OHADA countries to adopt the same. Dematerialisation of African securities can reduce costs and risk, improve efficiency and in turn, positively impact liquidity.

7.3.3.4 Delivery V Payment Settlement (DvP) and Finality of Settlement

DvP is a settlement method that guarantees that securities will only be transferred after payment has been made. DvP eliminates the risk that a seller may not deliver securities yet receive payment or that a buyer receives securities but does not pay for them, both of which could affect the integrity of the market and investor protection. Strictly speaking, DvP does not involve the simultaneous transfer of both payment and security. Practically, the depository will require confirmation of payment (the cash leg) before moving securities (the securities leg). Since such securities are usually held by the depository, the depository can block access to the securities pending

¹³⁸ The Unidroit Convention on Substantive Rules for Intermediated Securities. Although this convention was adopted on 9 October 2009, it has not entered into force as only one of the 40 states signed it.

¹³⁹ Thomas Murray, 'CMI in Focus: Immobilisation/Dematerialisation of Listed Equities' (2013) <https://thomasmurray.com/sites/default/files/CMI/pdf/20130201%20CMI%20in%20Focus%20-%20Immobilisation%20%26%20Dematerialisation%20of%20Listed%20Equities.pdf> accessed 9 June 2021.

completion of the cash leg of the transaction. DvP is already the standard in many African exchanges and hence a harmonisation of this principle should be easier to implement.

Closely related to the DvP is the timing of the settlement finality. Finality limits credit risk and ensures the final, simultaneous, and irrevocable transfer of assets.¹⁴⁰ IOSCO recommended that final settlement should occur 'no later than the end of the settlement day' as a minimum requirement.¹⁴¹ Every effort should be made to avoid differing settlement finality and with the changes in payment systems, real-time settlement is becoming prevalent.

With regional integration, it might be time to explore regional payment systems as part of a broader regional integration mandate in the RECs. Such progress has been seen in the SADC Payment Integrations System Project which created the SADC Real-Time Gross Payment System. WAEMU implemented a Real-Time Gross Settlement (RTGS) system in 2004 whereas EAC's East African Payment System (EAPS) commenced operations in 2014¹⁴², although these are used mainly for the government securities. RTGS offers the greatest certainty since it simultaneously transfers securities and cash. RTGS systems are already used in many of the African banking systems including Nigeria, South Africa, Kenya, Egypt, Morocco, Uganda.¹⁴³ With the successes achieved in the RTGS systems at the regional level, it would not be farfetched to recommend central bank settlement for cross-border securities settlement in Africa.¹⁴⁴ However, there may be regions for whom central bank settlement is premature, such as CEMAC, due to small and shallow financial sectors. In such RECs, the initial development of local payment systems is crucial before adopting regional payment systems.

¹⁴⁰ Group of Thirty, 'Global Clearing and Settlement: A Plan of Action' (Group of Thirty, 2003) 41.

¹⁴¹ Committee on Payment and Settlement Systems, 'Recommendations for Securities Settlement Systems' Report of the CPSS-IOSCO Joint Task Force on Securities Settlement Systems (Bank for International Settlements, 2001) 14.

¹⁴² Although the EAPS is in place, it is relatively underutilised and banks tend to revert to their existing relationships to conduct cross-border transactions.

¹⁴³ Also see Iwa Salami, *Financial Regulation in Africa: An Assessment of Financial Integration Arrangements in African Emerging and Frontier Markets* (Ashgate Publishing Limited, 2012) 154-66.

¹⁴⁴ Also see Center for Financial Regulation and Inclusion, 'Payment Systems in Sub-Saharan Africa' December 2018 <https://cenfri.org/wp-content/uploads/2018/12/Payment-systems-in-SSA-Note-2.pdf> accessed 4 October 2021.

7.3.4 Requirements for Listing Particulars and Disclosure of Information

7.3.4.1 Justifying the need in an integration framework

From the outset, this thesis does not suggest that there should be common listing requirements for all exchanges in Africa. This level of standardisation would be impossible to achieve in all the countries. In addition, the levels of sophistication of individual markets differ and this would impact any attempt to standardise listing requirements. However, this thesis suggests that there should be common principles applicable to listing particulars. This refers to the minimum particulars that a potential issuer must provide at their listing. In this regard, listing requirements should not be confused with listing particulars. Listing requirements include the amount of share capital, the number of shares on offer and free float, size of the company, board governance among others whereas listing particulars is based on the disclosure of certain information.

Common standards for listing particulars are crucial for cross-border listings and stock markets development in the region. Familiarity tends to breed success when cross-listing and issuers are more likely to go to jurisdictions where they are familiar with the listing particulars and do not have to incur transaction costs in coming up with new prospectuses.¹⁴⁵ The success of the cross-listing between the JSE and the NSX can, in part be attributed to NSX's continuous harmonisation of its listing particulars and disclosure framework with that of the JSE. The US-Canadian MJDS also allows for the Canadian regulators to commence harmonisation of their prospectus rules in line with those of the USA to achieve mutual recognition. In the EU, Directive 2001/34/EC provides for information that must be published regarding securities seeking admission so that all investors in the EU are afforded equal protection.¹⁴⁶ All of these are testimony to the need to harmonise listing information or particulars in an integrated financial market.

7.3.4.2 Importance of disclosure

¹⁴⁵ Wang has explored this concept in her argument for harmonising accounting standards to encourage cross-listing. See Shiheng Wang, 'Familiarity Breeds Success When Cross-Listing' (Global Network for Advanced Management, 22 September 2015).

¹⁴⁶ Directive 2001/34/EC on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on those Securities.

One of the barriers to the growth of securities markets is information asymmetry i.e., one party has greater material knowledge than another party about the same market.¹⁴⁷ Information asymmetry is likely to worsen in a cross-border scenario and hence the need to back disclosure. Disclosure is also a fundamental pillar of securities regulation. The disclosure framework is central to providing investors with access to information and remedying information asymmetry.¹⁴⁸ A good disclosure regime facilitates decision-making by providing investors with full and useful information to make informed investment decisions. Disclosure serves as a 'transaction cost control device, a regulatory tool, and a governance signalling device.'¹⁴⁹ It signals to the market about the effectiveness of the corporate governance of the issuer and its ability to comply with the regulation. It provides information about the functioning of the company and allows the market to process information and make decisions. Strict disclosure requirements are hailed for leading to liquid and efficient markets and reducing the cost of capital.¹⁵⁰

Disclosure is not merely about providing information but rather about providing adequate, useful, complete, and credible information. The 'market for lemons' theory still stands true.¹⁵¹ This is fundamentally important as much of Africa's investing population is largely uninformed and not conversant with securities markets. This requires that disclosure is tailored for consumption by such an audience. All securities markets have some level of disclosure regulation although the content may differ from country to country.

7.3.4.3 Types of disclosure

Disclosure takes two forms – initial disclosure and continuing disclosure. Initial disclosure refers to the requirements of disclosure in the prospectus or

¹⁴⁷ This concept is attributed to George Akerlof, Michael Spence and Joseph Stiglitz. See George Skerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism' (1970) 84(3) *Quarterly Journal of Economics* 500; Michael Spence, 'Job Market Signaling' (1973) 87(3) *Quarterly Journal of Economics* 355-74.

¹⁴⁸ Paula J Dalley, 'The Use and Misuse of Disclosure as a Regulatory System' (2007) 34(4) *Florida State University Law Review* 1094.

¹⁴⁹ Janis Sarra, 'Disclosure as a Public Policy Instrument in Global Capital Markets' (2007) 42(3) *Texas International Law Journal* 877.

¹⁵⁰ Anat R Admati and Paul Pfleiderer, 'Forcing Firms to Talk: Financial Disclosure Regulation and Externalities' (2000) 13(3) *The Review of Financial Studies* 479.

¹⁵¹ See generally George A Akerlof, 'The Market for 'Lemons': Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488-500.

listing instrument. Continuing disclosure is concerned with the ongoing disclosure of material price-sensitive information of a listed company. In both instances, the duty to disclose is placed upon those that have the information i.e., the listed company or the intermediary.

Prospectus disclosures are most useful to institutional investors who critically analyse the information therein to determine the investment worthiness of a company seeking a listing. In a primary listing, the particulars in the prospectus provide sufficient information to the potential issuers about the security and its issuer. The question of whether disclosure should be mandatory or voluntary has been at the forefront for many years.¹⁵² However, as the securities market is essentially a market for information, the consensus is that there should be an obligation on those with material information to disclose it, hence the test of materiality. There is no current extensive academic literature on the status and quality of disclosure obligations in sub-Saharan African markets.¹⁵³ However, disclosure should be full, true, and useful, and presented in a way that is easily understandable for its audience, all under the standard of materiality. The test for disclosure, applicable to both initial and continuing disclosure, should be one of materiality.

Determining the materiality of information may be subjective. In *Matrixx Initiatives Inc v Siracusano*, the Supreme Court in the US stated that in assessing materiality, a balance should be struck between providing significant information and burying investors in 'an avalanche of trivial information.'¹⁵⁴ Materiality is hence factual and context specific but over the

¹⁵² See Ronald A Dye, 'Mandatory Versus Voluntary Disclosures: The Cases of Financial and Real Externalities' (1990) 65(1) *The Accounting Review* 1; Michael J Fishman and Kathleen M Hagerty, 'Mandatory Versus Voluntary Disclosure in Markets with Informed and Uninformed Customers' (2003) 19(1) *The Journal of Law, Economics and Organisation* 45; Erti Einhorn, 'The Nature of the Interaction Between Mandatory and Voluntary Disclosures' (2005) 13(1) *Journal of Accounting Research* 593; Zohar Goshen and Gideon Parchomovsky, 'The Essential Role of Securities Regulation' (2006) 55 *Duke Law Journal* 38; Jannis Bischof and Holger Daske, 'Mandatory Disclosure, Voluntary Disclosure, and Stock Market Liquidity: Evidence from the EU Bank Stress Tests' (2013) 51(5) *Journal of Accounting Research* 997; Urs Schweizer, 'Incentives to Acquire Information Under Mandatory Versus Voluntary Disclosure' (2017) 33(1) *The Journal of Law, Economics and Organisation* 173; Jing He, Marlene A Plumlee and He Wen, 'Voluntary Disclosure, Mandatory Disclosure and the Cost of Capital' (2019) 46(3) *Journal of Business Finance & Accounting* 307-35.

¹⁵³ One of the few instances of studies on disclosure in Africa relates to disclosure among listed banks in Nigeria and South Africa. See Araniyar C Isukul and John J Chizea, 'Corporate Governance Disclosure in Developing Countries: A Comparative Analysis in Nigerian and South African Banks' (2017) 7(3) *SAGE Open* 1-17.

¹⁵⁴ *Matrixx Initiatives Inc v Siracusano*, 131 US 1309 (2011).

years, information is considered material if there is a substantial likelihood that a reasonable investor would consider it important in making a buy or sell decision.¹⁵⁵ In many African jurisdictions, the laws require disclosure of material non-public 'price sensitive information.'¹⁵⁶ This means that if the information is likely to materially affect the price of securities of a company, it is material and hence should be disclosed to the public within the specified timelines. The test of price sensitivity is also used in the insider trading framework and in continuing disclosure requirements.

Once there is an accepted standard for disclosure, this facilitates mutual recognition and issuers can issue securities in another regional member country based on approval in a host state. It is recommended that common standards for disclosure should include a non-exhaustive list of what information should be disclosed (as it is, prima facie, material information). ISOCO has recommended principles for periodic disclosures¹⁵⁷ as well as international disclosure standards for cross-border offerings¹⁵⁸ For initial disclosures, this might include the identity of the issuer and its board, shareholders and management structure, the offer statistics, and offer table, information on the company and operating and financial review. Due to the globalisation of securities markets and the regionalisation of finance, it is recommended that disclosure should also be required in an electronic/digital format. It would ease access for investors and issuers located in another member state of the REC.

7.3.5 Tackling the Harmonisation of Market Abuse Regulation

7.3.5.1 Definition and rationale

Market abuse regulation refers to regulation against insider trading/dealing and market manipulation. The prohibition of insider trading has been the subject of vast academic discourse which has also attracted the contribution of economists through the advancement of the concepts of agency costs and

¹⁵⁵ The US Supreme Court used this test in *TSC Industries Inc v Northway Inc* 426 US 438 (1976) and *Basic Incorporated v Levinson*, 485 US 224 (1988).

¹⁵⁶ This includes countries like South Africa, Kenya, Uganda, Nigeria, Ghana, Namibia.

¹⁵⁷ See IOSCO, 'Principles for Periodic Disclosure by Listed Entities' Technical Committee of the International Organization of Securities Commissions, February 2010.

¹⁵⁸ International Organization of Securities Commissions, International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers, September 1998. <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf> accessed 1 June 2021.

efficiency dynamics.¹⁵⁹ As the stock market is described as 'a complex arrangement for the marketing of information'¹⁶⁰ the prohibition of insider trading is linked to the intrinsic value of information to the stock market. The market needs information to make price decisions and this refers to the information that has been determined to be material.¹⁶¹ The economic theory of efficient capital markets hypothesis notes that the price of an asset fully reflects the information that is available on that asset.¹⁶²

This thesis does not attempt to interrogate all the debates around the rationale for the prohibition of insider dealing but mentions the key aspects of the debate. Most jurisprudence on insider dealing has developed from the United States¹⁶³ and despite the widespread use of the term, many legal regimes do not define insider trading/dealing but rather give examples of what could amount to the vice. Those who support the prohibition of insider dealing point to the need for a level playing field which is distorted when insiders have exclusive access to information and make dealing decisions based on it to the detriment of other investors. The decision of the court in *The Matter of Cady, Robberts, and Co* is instructive on the rationale for prohibiting the same:

*'[F]irst, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing...'*¹⁶⁴

¹⁵⁹ See Niamh Moloney, *EC Securities Regulation* (2nd edn, Oxford University Press, 2008) 923.

¹⁶⁰ Henry Manne, *Insider Trading and the Stock Market* (The Free Press 1966) 47.

¹⁶¹ Also see Myron Scholes, 'The Market for Securities: Substitution Versus Price Pressure and the Effects of Information on Share Prices' (1972) 45(2) *University of Chicago Press* 179; Brenda Hannigan, *Insider Dealing* (Longman 1994); Mark Mitchell and Harold Mulherin, 'The Impact of Public Information on the Stock Market' (1994) 49(3) *The Journal of Finance* 923-50.

¹⁶² Eugene Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25(2) *Journal of Finance* 383-417.

¹⁶³ Thomas Lee Hazen, 'Corporate Insider Trading: Reawakening the Common Law,' (1982) 39(3) *Washington and Lee Law Review* 845.

¹⁶⁴ 40 SEC 907.

Fischel and Carlton summarised the justification by noting that 'insider trading creates perverse incentives by allowing corporate managers to profit on bad news as well as good, encourages managers to invest in risky projects, impedes corporate decision-making, and tempts managers to delay public disclosure of valuable information.'¹⁶⁵ In *SEC v Texas Gulf Sulphur*, the court further noted that 'the rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information.'¹⁶⁶

On the other side of the spectrum are those scholars who argue that insider trading is necessary.¹⁶⁷ They argue that insider trading is economically beneficial,¹⁶⁸ that prohibition interferes with the laissez-faire state of the market,¹⁶⁹ that the idea of equality between investors and insiders is idealistic¹⁷⁰ and that insider dealing is not as harmful as portrayed.¹⁷¹ However, the above views, especially that of Manne who leads this school of thought, have come under harsh criticism.¹⁷² These views have not gained momentum as almost all stock markets in Africa have rules that prohibit and/or regulate insider trading.¹⁷³ There is a growing body of quantitative research that supports the proposition that countries that prohibit insider

¹⁶⁵ Daniel R Fischer and Dennis W Carlton, 'The Regulation of Insider Trading' (1982) 35 *Stanford Law Review* 857.

¹⁶⁶ 258 F. Supp. 262. Also see other arguments in Prosscovia Nambatya, 'The Insider Trading Regulatory Framework in Uganda's Capital Markets: Challenges and Opportunities for Reform' (2019) 15(1) *Makerere Law Journal* 1.

¹⁶⁷ This group is led by Manne, Fischel and Easterbrook. See Henry Manne, *Insider Trading and the Stock Market* (The Free Press 1966); Daniel R Fischer and Dennis W Carlton, 'The Regulation of Insider Trading' (1982) 35 *Stanford Law Review* 857; Frank Easterbrook, 'Insider Trading as an Agency Problem,' in John W. Pratt and Richard Zeckhauser (eds), *Principals and Agents: The Structure of Business* (Harvard Business School Press 1985).

¹⁶⁸ See Henry Manne, *Insider Trading and the Stock Market* (The Free Press 1966) 85.

¹⁶⁹ Patricia H Werhane, 'The Ethics of Insider Trading' (1989) 8 *Journal of Business Ethics* 841-45.

¹⁷⁰ Lib Gil Brazier, *Insider Dealing: Law and Regulation* (Routledge 1996) 83.

¹⁷¹ Donald Arthur Winslow, Seth C. Anderson, 'From Shoeless Joe Jackson to Ivan Boesky: A Sporting Response to Law and Economics Criticism of the Regulation of Insider Trading' (1992) 81(2) *Kentucky Law Journal* 303.

¹⁷² Roy A Schotland, 'Unsafe at Any Price: A Reply to Manne, Insider Trading and the Stock Market' (1967) 53(7) *Virginia Law Review* 1425.

¹⁷³ For example, see Morris Kiruga, 'Nairobi Regulators Crack Down on Insider Trading' *The African Report* (Nairobi, 16 July 2019); Hanifa T Massawe and Mwajuma Kadilu, 'Combating Insider Trading in Tanzania: The Adequacy of the Capital Markets and Securities Act of 1994 and the Companies Act of 2002' (2014) 17 *Law in Africa* 52; Justin Mitchell and Odongo Kodongo, 'Insider Trading Law and Illegal Insider Trading in South Africa's Equity Market: Lessons from Corporate Takeovers' (2016) 18(1) *The African Finance Journal* 1; Wunmi Bewaji, *Insider Trading in Developing Jurisdictions* (Routledge 2012).

trading have more liquid stock markets and accurate stock prices.¹⁷⁴ This supports the need to regulate insider dealing and hence place insider dealing as one of the provisions of the law that should be harmonised.

Harmonisation of insider dealing regulation is even more crucial in markets that strive to increase cross-border listing and trading and pursue interconnection. With cross-border transactions, the investigation, detection, and prosecution of insider dealing becomes difficult and requires a harmonised position. As a result, the EU was the first body that established cross-border market abuse regulations which included the EU Insider Dealing Directive.¹⁷⁵

7.3.5.2 An African context

Insider dealing is generally outlawed in African financial markets and hence harmonisation in this arena should not be complex.¹⁷⁶ The regulation of market manipulation on the other hand is still in its infancy and there is no reported case of the prosecution in this area. Most regulations are silent on market manipulation, only focusing on insider dealing. The most advanced market manipulation legal regime on the continent is the JSE's Financial Markets Act 19 of 2012, which may also correspond with the sophistication of the SA financial market.¹⁷⁷ Even then, it only bars disclosure-based manipulation and commercially driven market manipulation.¹⁷⁸

Defining market manipulation is difficult and the EU's approach was refined through MAD, two second-level directives and then further guidance from the Committee of European Securities Regulators (CESR).¹⁷⁹ However, at the same time, the market abuse regulations in the EU tend to treat both market manipulation and insider dealing as two sides of one coin after all both of

¹⁷⁴ See generally Utpal Bhattacharya and Hazem Daouk, 'The World Price of Insider Trading' (2002) 57 *Journal of Finance* 75; Laura Nyantungy Benny, 'Do Insider Trading Laws Matter? Some Preliminary Comparative Evidence,' (2005) 7(1) *American Law and Economics Review* 144-83.

¹⁷⁵ Howard Chitimira, 'Selected Aspects of the Regulation of Insider Trading and Market Manipulation in the European Union and South Africa' (2015) 8 *African Journal of Legal Studies* 183.

¹⁷⁶ There is no known legal regime in Africa that permits insider trading.

¹⁷⁷ Howard Chitimira, 'A Historical Overview of the Regulation of Market Abuse in South Africa' (2014) 17(3) *Potchefstroom Electronic Law Journal* 937.

¹⁷⁸ See Article 80 and 81 of the Financial Markets Act.

¹⁷⁹ Mathias M Siems, 'The EU Market Abuse Directive: A Case Based Analysis' (2008) 2(1) *Law and Financial Markets Review* 42.

them have the same outcome which is to protect the integrity of the market.¹⁸⁰

The EU Market Abuse Directive (MAD) gives examples of conduct that amounts to market abuse such as employing fictitious devices, orders that give a false signal as to the demand, supply, and price.¹⁸¹ Any activity will be deemed market manipulation if it interferes or attempts to meddle with the free and fair functioning of the capital market.¹⁸² This could be by creating a misleading or inaccurate picture of the price or demand and supply of the shares.

7.3.5.3 Enforcement of the prohibition

*'How much enforcement is enough to adequately oversee Wall Street and the major banks? Make regulations too onerous, and firms won't pursue potentially worthwhile investments for fear of huge legal bills if they are accused of violations. Too loose, and banks and brokers will run amok like schoolchildren when the teacher leaves the room, which is what happened in the years leading up to the financial crisis in 2008.'*¹⁸³

Regulation of market abuse would be inadequate without a robust enforcement framework. This thesis does not recommend centralisation of enforcement through a regional enforcement body. National supervisory agencies are well able to conduct enforcement and any attempts to move this power to a supranational body are likely to meet fierce criticism and ultimate rejection. In addition, the scarcity of resources would work against a central body that needs staffing and access to finances to adequately monitor and enforce on a regional basis. Another option is to consider an EU framework of sharing enforcement powers between ESMA and national supervisory agencies. However, in an African context, the powers of a REC equivalent of ESMA would be curtailed to preserve supervision jurisdiction at the national level. Such agency is likely to be made up of national regulators who oversee

¹⁸⁰ Vassilios D Tountopoulos, 'Market Abuse and Private Enforcement' (2014) 11 *European Company and Financial Law Review* 300.

¹⁸¹ See Article 5 of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on Criminal Sanctions for Market Abuse (Market Abuse Directive)

¹⁸² Also see Okubor Cecil Nwachukwu, 'Top Core Elements of the Insider Trading and Market Manipulation Offences in Nigeria and South Africa' (2020) *Commonwealth Law Bulletin* 10.

¹⁸³ Peter J Henning, 'The Debate Over Wall Street Enforcement' *New York Times* (New York, 27 October 2014)

the implementation and make advisory opinions without any real powers to prosecute and enforce. Such associations already exist in RECs such as the East African Securities Regulators Association (EASRA), West Africa Securities Regulators Association (WASRA), and the Committee of SADC Stock Exchanges (CoSSE).

The harmonised provisions on enforcement should clothe regulators with broad powers to enable them to adequately supervise, regulate and enforce market abuse regulation. These powers should include powers to investigate, institute criminal and civil proceedings, and impose penalties and sanctions. Regulators should have powers to disqualify persons convicted of market abuse and restrict them from engaging in management or directorship of regulated entities. Powers should extend to search and seize, enter, and inspect, summons to answer, and interrogation.

All of this cannot be possible without surveillance and monitoring and regulatory cooperation. African securities regulators have built an extensive network of memorandum of understandings amongst themselves, some of which are rooted in regional treaties. These MOUs may prove crucial in regional supervision and enforcement. The concept of MOUs for cross-border cooperation gained momentum after 11 September 2001 and is supported by IOSCO's Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.¹⁸⁴ This MOU framework governs the information shared between regulators including the need to maintain confidentiality and increase cross-border information flows. The study by Silvers found that the use of the MOU under the IOSCO framework improved market liquidity and cross-border enforcement.¹⁸⁵ It is therefore recommended that regulation should encourage cross-border cooperation in enforcement as crucial to dealing with market abuse. The increase in cross-border cooperation through MOUs may also improve supervision and monitoring, in the absence of an ESMA-like body.

7.3.6 Financial Reporting and Accounting Standards

¹⁸⁴ See generally Roger Silvers, 'Cross-Border Cooperation Between Securities Regulators' (2020) 69 *Journal of Accounting and Economics* 1.

¹⁸⁵ Ibid 3-4.

Financial information is often the starting point of investors seeking to make investment decisions. Investors look to financial information to assess the past, present, and future of the target company.¹⁸⁶ As a result, financial reporting is crucial to securities markets and regulators require that financial information is useful, adequate, reliable, and credible. Perhaps no scenario best demonstrates the importance of the accounting and financial regime to securities markets than the accounting and auditing scandals in Enron and WorldCom which inspired the formulation of the Sarbanes-Oxley Act in the US.¹⁸⁷

Accounting standards are important in regulating how managers report a firm's financial statements.¹⁸⁸ Today, audits of financial disclosures reduce information asymmetry and provide an attestation to the financial corporate disclosures.¹⁸⁹ Firms listed on stock exchanges are required to submit financial statements which communicate financial information to investors and other stakeholders. Regulation on financial reporting is contained in individual countries' capital markets regulation.

A harmonised financial reporting regime allows for the smooth flow of capital across the different markets and eases cross-listing. It facilitates comparability and transparency of financial information. Using different national accounting standards to prepare financial information is a constraint for investors in an internationalised financial market. It is therefore important to have a coherent set of accounting standards applicable to all financial markets in the region and even on a continental level. In the search for

¹⁸⁶ See generally Arthur Levitt, 'The Importance of High Quality Accounting Standards' (1998) 12(1) *Accounting Horizons* 79.

¹⁸⁷ The Sarbanes-Oxley Act of 2002 (also known as the Public Company Accounting Reform and Investor Protection Act.) Also see Neil H Aronson, 'Preventing Future Enrons: Implementing the Sarbanes-Oxley Act of 2002' (2002) 8(1) *Stanford Journal of Law, Business and Finance* 127; Paul M Healy and Krishna G Palepu, 'The Fall of Enron' (2003) 17(2) *Journal of Economic Perspectives* 3; Jonathan R Macey, 'Efficient Capital Markets, Corporate Disclosure and Enron' (2003-2004) 89 (2) *Cornell Law Review* 394; John R Kroger, 'Enron, Fraud and Securities Reform: An Enron Prosecutor's Perspective' (2005) 76 *University of Colorado Law Review* 57; John C Coates IV, 'The Goals and Promise of the Sarbanes-Oxley Act' (2007) 21(1) *Journal of Economic Perspectives* 91; Don E Garner, David L McKee, Yosra AbuAmara McKee, *Accounting and the Global Economy After Sarbanes-Oxley* (Routledge 2008).

¹⁸⁸ Paul M Healy and Krishna G Palepu, 'Information Asymmetry, Corporate Disclosure, and the Capital Markets: A Review of the Empirical Disclosure Literature' (2001) 31 *Journal of Accounting and Economics* 412.

¹⁸⁹ Mingcherng Deng, Nahum Melumad and Toshi Shibano, 'Auditors' liability, Investments and Capital Markets: A Potential Unintended Consequence of the Sarbanes-Oxley Act' (2012) 50(5) *Journal of Accounting Research* 1181.

harmonised accounting and audit standards, African regulators do not have to look far. The International Financial Reporting Standards (IFRS) developed by the International Accounting Standards Board (IASB) are internationally accepted credible accounting standards widely used by many developed financial markets. The IASB estimates that more than 120 countries require or authorise the use of IFRS.¹⁹⁰ These standards are periodically revised and amended to provide clarity and new standards are also introduced from time to time to cater to changes in accounting and new concepts.¹⁹¹

A study of the impact of IFRS on financial market integration found a positive association between mandatory IFRS adoption and financial market integration.¹⁹² The adoption of IFRS has also decreased information asymmetry and the cost of capital while increasing stock market liquidity.¹⁹³ The adoption of IFRS has also been instrumental in promoting stock market development and performance in emerging stock markets including Africa.¹⁹⁴ Ochuko also notes that the use of IFRS helps in valuation of equity markets and reduction of the risk of adverse selection for the less-informed investors.¹⁹⁵ This supports the recommendation to harmonise accounting standards in the quest for regional integration and making capital markets work for Africa.

IFRS compliance is mandatory for companies with listed securities in the EU by Regulation 1606/2002.¹⁹⁶ This was part of the EU's move to harmonise financial information presented by listed companies 'to ensure a high degree

¹⁹⁰ See IFRS, 'Who Uses IFRS Standards?' <https://www.ifrs.org/use-around-the-world/use-of-ifrs-standards-by-jurisdiction/> Accessed 19 June 2021.

¹⁹¹ See for example Christopher J Napier, 'The Real Effects of a New Accounting Standard: The Case of IFRS 15 Revenue from Contracts with Customers' (2020) 50(5) *Accounting and Business Research* 474.

¹⁹² See Li Yan, 'Does Mandatory IFRS Adoption Facilitate Financial Market Integration?' (CAAA Annual Conference, Calgary, 2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197775 accessed 14 June 2021.

¹⁹³ See generally Leem Wook-Bin Hansung and Jee Hoon-Yuk, 'Effect of the IFRS Adoption on the Cost of Capital: Evidence from Korea' (2018) 34(2) *The Journal of Applied Business Research* 209-16. Also see Christopher S. Armstrong, Mary E. Barth, Alan D. Jagolinzer and Edward J. Riedl, 'Market Reaction to the Adoption of IFRS in Europe' (2010) 85(1) *The Accounting Review* 31-61.

¹⁹⁴ See Habib Ben Cheikh and Aymen Ben Rejeb, 'Does the IFRS Adoption Promote Emerging Stock Markets Development and Performance?' (2021) 14(1) *Macroeconomics and Finance in Emerging Market Economies* 1.

¹⁹⁵ Ochuko B. Emudainohwo, 'IFRS and Stock Exchange Development in Sub-Saharan Africa: a Logistic Model' (2020) 17(3) *Investment Management and Financial Innovations* 398.

¹⁹⁶ Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the Application of International Accounting Standards.

of transparency and comparability of financial statements and hence an efficient functioning of the Community capital market and of the Internal Market.¹⁹⁷ However, their adoption is subject to meeting the criteria of 'understandability, relevance, reliability and comparability as well as being conducive to the European public good.¹⁹⁸ Of course, there may be a danger in the use of highly sophisticated accounting standards for an emerging market.¹⁹⁹ Other countries may also prohibit the use of IFRS in favour of local accounting standards. For example, Tunisia prohibits the use of IFRS in favour of Tunisian GAAP. With international investors dominating African financial markets, the use of international accounting standards would signal best practices and attract foreign investment. It is therefore recommended that the use of international accounting standards be adopted as the harmonised framework for the financial reporting of issuers in African securities markets.

7.4 Structures for harmonisation of securities laws in Africa.

The foregoing discussion covered initial areas that should be the subject of regulatory harmonisation initiatives. However, a crucial question remains which is the how: how will this harmonisation be undertaken? Throughout this thesis, reference has been made to different models and how other jurisdictions have approached harmonisation initiatives. Can such methods be used in Africa and what are the challenges that this would pose? Secondly, how can a balance be created to accommodate differing levels of development and integration? The discussion below answers some of these questions.

7.4.1 Proposed methodology for harmonisation

7.4.1.1 Assessing the viability of the EU Methodology for Africa

Legal harmonisation takes many forms including treaties, acts, directives, regulations, recommendations, and guidelines.²⁰⁰ Harmonisation in the

¹⁹⁷ Ibid Article 1.

¹⁹⁸ Ibid Article 3(2).

¹⁹⁹ Studies by Hove and Perera have argued that IFRS may not be suitable for emerging markets. However, such studies were carried out in the late 80s and may not adequately reflect the status quo today, in contrast with the more recent 2021 study. M.R. Hove, 'Accounting Practices in Developing Countries: Colonialism's Legacy of Inappropriate Technologies' (1986) 1 *International Journal of Accounting* 81-90; M.H.B Perera, 'Accounting in Developing Countries: A Case for Localised Uniformity' (1989) 21(2) *British Accounting Review* 141-57.

²⁰⁰ Magnus Killander, 'Legal Harmonisation in Africa: Taking Stock and Moving Forward' (2012) 47(1) *The International Spectator* 94.

context of African securities law presents a unique challenge. The involvement of multiple member states presents challenges of integrating, harmonising, and accommodating diversity, which often slows or halts projects.²⁰¹ The EU is often fronted as a success story of integrating diversity and leading to a harmonised regulatory framework. Should it not follow, therefore, that African states follow the EU model? Whereas there is merit to this assertion, the fundamental historical, social, economic, and political differences of member states in Africa cannot be compared to the EU. The EU commenced its integration journey with six member states as opposed to Africa's 54 states or even the multiple memberships in the RECs. Even with just 6 member states, the July 1965 Empty Chair Crisis that arose out of the idea of a supranational common agricultural market displayed the fragility of integration and could only be resolved by the Luxembourg Compromise.²⁰² Although the Luxembourg Compromise was merely a political arrangement, the requirements for states to hold a veto right if national interests were at stake, is a reminder of the challenges of decision-making in alliances. It would be amiss, therefore, to merely adopt an EU integration methodology for Africa.

In addition, there are critical lessons from the EU that stand against a wholesale transposition of the EU Model. One is the ability of the EU to create a regime with a balancing effect supported by a concept known as differentiated integration. The EU is essentially a system of differentiated integration.²⁰³ Differentiation recognises that different member states may approach the common standard in differing ways and hence their obligations and rights about that common policy area may differ.²⁰⁴ Differentiation, therefore, allows for a degree of flexibility in the application of common standards. The Maastricht Treaty made provision for the Economic and

²⁰¹ Olufemi Babarinde, 'The EU as a Model for the African Union: the Limits of Imitation' (April 2007) 7(2) *Jean Monnet/Robert Schuman Paper Series* 9.

²⁰² See Philip Bajon, 'The European Commissioners and the Empty Chair Crisis 1965-1966' (2009) 15(2) *Journal of European Integration History* 105; Paolo Caraffini, 'De GAULLE, the 'Empty Chair Crisis' and the European Movement' (2015) 7(2) *Perspectives on Federalism* 163.

²⁰³ See Frank Schimmelfennig, Dirk Leuffen and Berthold Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' (2015) 22(6) *Journal of European Public Policy* 764.

²⁰⁴ Alkuin Kölliker, 'Bringing Together it Driving Apart the Union? Towards a Theory of Differentiated Integration' (2001) 24(4) *West European Politics* 127.

Monetary Union to commence among a few of the countries and allowed the UK and Denmark to opt-out of the measures. This was the first significant treaty-based differentiation in the EU and carried on into the Treaty of Amsterdam²⁰⁵ and the Treaty of Lisbon.²⁰⁶

Research into the concept of differentiated integration has exponentially increased over the years.²⁰⁷ This has coincided with its increased usage in the legislative regime in the EU. Differentiation has been applied in different ways including allowing opt-outs, brake and accelerator mechanisms, conditional policy participation, flexibility in the policies around the single market and has also found its way into the Schengen Agreement and the Eurozone.²⁰⁸ It has provided flexibility, allowing states to opt into arrangements at their own pace and recognising unique national realities.²⁰⁹ On the other hand, it has been criticised as threatening the very essence of the Union; an internal market and free movement of goods, capital, and services as well as labour.²¹⁰

Even with differentiation, nothing would prevent the withdrawal of the United Kingdom from the European Union.²¹¹ The UK was the champion of this

²⁰⁵ This allowed for differentiation in the application of justice and home affairs laws and allowed Denmark, Ireland, and the UK to opt out of the rules relating to immigration and asylum among others.

²⁰⁶ See Carlos Closa Montero, 'Flexibility Mechanisms in the Lisbon Treaty: A Study for the AFCO Committee' (European Parliament, 2015) [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536474/IPOL_STU\(2015\)536474_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/536474/IPOL_STU(2015)536474_EN.pdf) accessed 19 June 2021.

²⁰⁷ See Katharina Holzinger and Franck Schimmelfennig, 'Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data' (2012) 19(2) *Journal of European Public Policy* 292-305; Frank Schimmelfennig, Dirk Leuffen and Berthold Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' (2015) 22(6) *Journal of European Public Policy* 764; Benjamin Leruth and Christopher Lord, 'Differentiated Integration in the European Union: A Concept, a Process, a System or a Theory?' (2015) 22(6) *Journal of European Public Policy* 754; Katharina Holzinger and Jale Tosun, 'Why Differentiated Integration is Such a Common Practice in Europe: A Rational Explanation' (2019) 31(4) *Journal of Theoretical Politics* 642; Frank Schimmelfennig and Thomas Winzen, 'Grand Theories, Differentiated Integration' (2019) 26(8) *Journal of European Public Policy* 1172; Dirk Leuffen, Julian Schuessler and Jana Gomez Diaz, 'Public Support for Differentiated Integration: Individual Liberal Values and Concerns about Member State Discrimination' (2020) 20(1) *Journal of European Public Policy* 1; Menelaos Markakis, 'Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles' (2020) 23(2) *Journal of International Economic Law* 489.

²⁰⁸ Ibid 12.

²⁰⁹ For a discussion on how EU states have applied differentiation, see Thierry Chopin and Chrostan Lequesne, 'Differentiation as a Double-edged Sword: Member States' Practices and Brexit' (2016) 92(3) *International Affairs* 531-45.

²¹⁰ See for example, Katharina Holzinger and Jale Tosun, 'Why Differentiated Integration is such a Common Practice In Europe: A Rational Explanation' (2019) 31(4) *Journal of Theoretical Politics* 642.

²¹¹ See Frank Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union' (2018) 25(8) *Journal of European Public Policy* 1154.

concept and greatly benefitted from it over the years including opting out of the Eurozone, the Schengen Area, the Lisbon Treaty's Area of Freedom, Security, and Justice, and the EU Charter of Fundamental Rights. The UK soon turned from an advocate of integration to one of disintegration which culminated in Brexit. Although the UK always supported the EU agenda for an internal market, discomfort on the transfer of state decision-making powers to the EU persisted, and with mass hysteria on the level of immigration from the EU to the UK, Brexit was guaranteed.

Post-Brexit, leaders in the EU including French President Macron have made calls for greater differentiation of rights and obligations of member states to ensure the survival of the EU.²¹² Nevertheless, the EU is credited for recognising the complexities of harmonisation and putting in place structures to accommodate diversity which has paid off for the most part.

There are also fundamental structural differences between the EU and Africa's harmonisation drives. Africa is the home of organisations and groupings. This is complicated by the number of treaties and agreements establishing these different groups. To adopt an EU methodology would require a large-scale project of amendment of many treaties, terminating agreements, and institutions. This would be both complex and a large burden on the scarce human and financial resources. It would also require a renegotiation of both the AU Treaty and the Abuja Treaty to adopt EU-like institutions at the expense of the structures provided by the treaties. This process is not likely to receive approval in any instance.

Due to the large number of states involved in harmonisation as well as the critical lessons that the EU's harmonisation journey have provided including its continued pursuit of an internal market through the Capital Markets Union, it is recommended that an EU structural/institutional methodology may not be suitable for the African context. This however does not mean that certain aspects of that structure may not be useful for Africa in a domesticated context. For example, the concept of differentiated integration may be helpful in embracing diversity and allowing states flexibility during integration.

²¹² See Bruno De Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) 55 *Common Market Law Review* 227.

However, this would have to be applied to a vehicle suitable for pursuing harmonisation and such vehicle is not an AU-level harmonisation initiative as in the EU.

7.4.1.2 The use of RECs as conduits for harmonisation

Stock market projects take place at both regional (REC established initiatives) and AU level (the Pan African Stock Exchange). However, considering the small size of the stock markets generally and the lack of any clear direction on the newly adopted Pan African Stock Exchange, the Pan African Stock Exchange project is, at this moment in time and with the level of stock market development, an overkill and unnecessary. Nevertheless, this does not connote that the AU should have no say whatsoever in the legal harmonisation of stock market regulation and policy at the regional level, after all the overarching goal of all is the achievement of the African Economic Community.

The AU should only intervene if and in so far as the legal harmonisation cannot fulfil the objectives of the Abuja Treaty and the Constitutive Act in promoting cooperation and harmonisation as laid down in the treaties. This is similar to the subsidiarity principle found in Article 5(3) of the TFEU. The Abuja Treaty viewed the RECs as the conduits of integration, and it is hence not surprising that the most successful integration projects have taken place under RECs e.g., the EAC CMI. To adopt a different structure from the use of RECs would require an overhaul of the treaty framework and renegotiation of treaties which is likely to be a lengthy exercise with limited enthusiasm and output.

In addition, the composition of RECs is sensitive and alive to the unique regional historical and political perspectives. For example, the only two regional stock exchanges in Africa are under the auspices of RECs and are both composed of Francophone countries with a shared political, linguistic, and social history. This could stand favourably for arguments on the use of RECs despite the challenges that they face, and which have been adequately identified in this thesis. Of course, one could argue that newer integration models in Africa are outside the auspices of RECs. An example is the African Exchanges Linkages Project (AELP) which is an alliance of the seven largest stock exchanges located in different regions of the continent, representing

over 90% of the total market capitalisation of Africa and with support of both ASEA and the African Development Bank. However, all members of the AELP are still members of RECs and are still involved in REC-backed integration projects which may point to the role that RECs play. Therefore, it is recommended that RECs remain the conduits of integration and provide the implementation of integration projects.

In using the RECs as the conduits of legal harmonisation, one may question the fragmentation of this approach. This is because of the large number of RECs and the multiple memberships that they attract. However, evidence shows that increasingly, RECs are starting to come together, and this may be beneficial for the convergence of legal harmonisation initiatives on the continent. For example, the COMESA-SADC-EAC Tripartite Summit met for the first time on 20 October 2008 and has consistently met including the last Tripartite Council of Ministers on 15 February 2021.²¹³ The timelines can indicate slow progress in convergence. However, a process to converge 19 members of COMESA, 16 members in SADC and six members in the EAC (in total, representing 53% of the African Union) is not one that could happen overnight. There have been some successes in the Tripartite including trade deals such as the Tripartite Free Trade Area. In addition, the mere agreement of 26 states to accelerate economic integration through the Tripartite is a win.

A question may then arise as to how harmonisation in the region will translate into harmonisation at the continental level. It is too early at this stage to explore a continental harmonisation drive in instances where a regional harmonisation drive has not yet been fully implemented. It may be that a Lamfalussy Process structure may guide the continental level, but this thesis does not delve into this discussion as it is premature. However, there is merit for a reporting mechanism that feeds into the AU structures, allowing RECs to continuously report on the progress of their legal harmonisation.

Due to the sheer number of RECs and regional groupings, there must be a convergence point that is responsible for oversight and monitoring of the

²¹³ For more on this, see 'COMESA, EAC and SADC States Urged to Rapidly Conclude Processes Towards Ratification of TFTA to Facilitate Implementation' (SADC, 19 February 2021) <https://www.sadc.int/news-events/news/comesa-eac-and-sadc-states-urged-rapidly-conclude-processes-towards-ratification-tfta-facilitate-implementation/> accessed 21 June 2021.

activities being undertaken. This is where the AU would be of greater use to the REC-based integration projects. The AU would require a centralised body that would oversee the initiatives of the RECs in the legal harmonisation projects. In the EU, this body is the European Securities Markets Authority (ESMA). ESMA has rulemaking and enforcement mandates as well as monitoring supervisory convergence and licensing of central counterparties, credit rating agencies, and trade repositories.²¹⁴

ESMA has not been without criticism. The dual supervision framework increases compliance costs and duplication of roles. In the Final Report, the members of the HLF expressed different views on whether ESMA is necessary in light of the further supervision by national supervisory agencies.²¹⁵ This was based on some views of members that capital markets in the EU are still too fragmented for central supervision and that national supervision was a better option and that national supervision was better at catering for country specificities and removing the costs related to EU level supervision.²¹⁶ In addition, an argument was raised that national supervision agencies have more specific expertise to regulate and enforce each country's securities and would also guard against making supervision remote.²¹⁷ Based on these divergent views, the HLF sadly did not make any recommendation on changes to ESMA but rather requested the Commission to strengthen ESMA's mandate to 'enhance EU supervisory convergence.'²¹⁸

Although the idea of a body such as ESMA is welcome for the African context, the far-reaching powers of ESMA would meet both national and regional resistance. Where African states have consistently opposed the transfer of legislative powers to a supranational body, granting an African equivalent of ESMA such powers would encounter resistance.

²¹⁴ See Emiliós Avgouleas and Guido Ferrarini, 'A Single Listing Authority and Securities Regulator for the CMU and the Future of ESMA: Costs, Benefits and Legal Impediments' in Danny Busch, Emiliós Avgouleas and Guido Ferrarini (eds), *Capital Markets Union in Europe* (Oxford University Press 2018) 59.

²¹⁵ A New Vision for Europe's Capital Markets' Final Report of the High-Level Forum on the Capital Markets Union, June 2020, 24.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid 25.

In the circumstances, in the initial stages of harmonisation of regulation, a committee (whether regional or continental) would be best suited to assess progress and implementation and provide oversight while defining the medium- and long-term strategy for financial services. This Committee would be made up of the regulators of securities markets in the region as well as leading securities market experts and this Committee's powers would clearly be defined but certainly not include legislative powers.

This role is played by the Financial Services Committee (FSC) in the EU. To avoid the creation of more institutions at regional and continental levels in an already overloaded arena, policymakers must explore the existing institutional framework and identify an already existing body to take on this role. The African Union has several Specialised Technical Committees (STC) who work with departments of the African Union Commission (AUC) to monitor harmonisation of AU projects and coordination with RECs. One of these is the STC on Finance, Monetary Affairs, Economic Planning, and Integration which includes monitoring implementation of integration. Unfortunately, as already discussed, this STC's focus seems to be on other economic areas other than stock markets. It also has a wide mandate which includes tax, trade, and monetary policy which makes it a jack of all trades and master of none while also stretching its limited resources. It should also be noted that it is made up of African Ministers (who are not always experts in this area) as well as Central Bank governors who cannot make the necessary time commitments to effectively monitor implementation. Presently, the STC is only mandated to meet once a year.²¹⁹ In its current structure, the STC would not be best structured or suited to undertake the monitoring and supervisory role.

Where does this leave monitoring and supervision of harmonisation drives in RECs? A committee that incorporates aspects of the roles of the Financial Services Committee and ESMA is a viable solution. To avoid creating more institutions and committees in an already crowded area, the STC may need to be further broken down to create one responsible for monitoring

²¹⁹ See Rule 9 of the Rules of Procedure of the Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning and Integration EX.CL/1140(XXXIV), Thirty-Fourth Ordinary Session, Addis Ababa, Ethiopia, 7-8 February 2019 ('STC Rules').

harmonisation of financial services regulation. Such an STC would be staffed by the Experts contemplated in Rule 3(2) of the STC Rules and would be tasked with the important role of monitoring and assessing the implementation and reporting back through the AU structures including the AUC.

In conclusion, the use of REC institutions stands as a suitable structure for harmonisation. There is no need to reinvent the wheel and create more institutions when RECs already have established institutions which include those on finance and capital markets. These institutions would then report to the AU STC responsible for financial services.

7.5 Conclusion

Integration based on institutions and structures has either failed or has slowly progressed in Africa. This is attributed to Africa's fragile political history and the effects of colonialism that introduced an attachment to the concept of statehood. The idea of a state has extended to the structures that make up that state and the stock market has emerged as one of the symbols of the state and sovereignty. Due to this, the focus must shift away from structural integration to regulatory harmonisation.

The shift from structural integration is necessitated by various factors. First, structural integration has not worked and there is no indication that the current Abuja Treaty deadlines will be met with a choice of structural integration. Secondly, globalisation and an increase in cross-border trading necessitate tackling the regulatory landscape. Third, the most successful integration drives elsewhere including in the EU, US-Canada MJDS and ASEAN have all adopted a regulatory harmonisation approach. In Africa, the enactment of OHADA, an initiative to harmonise commercial laws among Francophone countries has been largely successful, providing hope that regulatory harmonisation can be successfully undertaken in Africa. In addition, fragmented legal regimes for securities markets pose a challenge to the entry of foreign direct investment and the participation of foreign investors who are the bedrock of many African exchanges. All these reasons justify the focus on harmonising regulatory regimes.

This chapter has explored some of the crucial areas that require harmonisation. In doing so, there is a recognition that full and maximum harmonisation is not viable at this point and that the process must be gradual and protracted. Therefore, the initial chosen areas are those for which there is likely to be consensus i.e., low hanging fruit. The rationale is that if consensus can be obtained on these areas and the process of harmonisation can be commenced with these wins, then there is likely to be momentum and a general feeling that the harmonisation drive can be accomplished, paving way for more areas to be included. In choosing areas for initial harmonisation, the focus has been on the protection of investors and ensuring that the market is fair, efficient, and transparent, which are the objectives of securities regulation according to IOSCO. This is also supported by evidence that liquidity is closely linked to the rule of law and the price discovery mechanism is highly sensitive to regulatory quality.²²⁰

Therefore, it has been recommended that in determining areas for regulatory harmonisation, the first step should be on a blueprint to guide the process. There are so many laws that may require harmonisation in the securities field. However, it is neither wise nor possible to embark on a mass overhaul of regulation of different countries. Member states must identify the most pressing regulatory needs that have the highest impact on capital markets. This concept has been borrowed from the EU's 1999 Financial Services Action Plan which identified the priority areas for harmonisation as well as a timetable for achieving these objectives. In the African context, these areas have been identified as the listing, trading, and settlement regulations as well laws relating to market abuse and accounting standards.

In determining an appropriate structure for the pursuit of regulatory harmonisation, consideration has been given to the possibility of copying the EU institutional and regulatory model. In doing so, the discussion has drawn attention to the differences in the African and EU context including the number of countries involved in harmonisation in Africa as opposed to the EU. With over 54 countries in Africa as opposed to the six-member states that

²²⁰ Bruce Hearn and Jenifer Piesse, 'A Reassessment of Stock Market Integration in SADC: The Determinants of Liquidity and Price Discovery in Namibia' (2013) 23(2) *Applied Financial Economics* 123.

commenced the EU integration journey, Africa is in a unique complex scenario. In addition, the EU model has encountered complexities including sovereignty concerns and diversity which led to the concept of differentiated integration. Differentiated integration allows for member states of the EU to opt-in or opt-out of certain policies related to the single market, hence providing flexibility. Yet not even this would prevent the UK from exiting the EU or counterarguments that differentiated integration only leads to fragmentation rather than convergence. Proponents of the EU model for Africa must understand and appreciate that despite the successes of the EU model, there are inherent complexities that would only worsen in an African context. These complexities have slowed progress in the pursuit of the Capital Markets Union.

Therefore, the thesis has recommended that there is no need to reinvent the wheel and that regulatory harmonisation drives can be adequately undertaken in regional economic communities. This recommendation is alive to the challenges that have been identified in Chapters Five and Six but is cognisant that if the solutions suggested therein are adopted i.e., rationalising of RECs, and strengthening their legal, institutional, and resource capacity, the RECs would be best placed to undertake harmonisation drives. Harmonisation will also require coordination between the member states and the RECs as well as the different regulatory structures. The use of MOUs will be beneficial in keeping the communication lines open and facilitating the sharing of information to aid enforcement and supervision.

Africa is not short of good projects and agreements. However, there is a laxity in implementation and the policymakers must avoid allowing the harmonisation drive to suffer the same fate as many of the other projects. This calls for close monitoring and supervision of harmonisation initiatives. The discussion has considered the viability of an ESMA-like regulator in an African context. However, it has drawn attention to the resistance that may be met to an ESMA-like regulator with such wide powers and has hence advised against clothing such a body with legislative powers. There is definitely merit in AU supervision of the different REC's harmonisation drives and this can be achieved through a reconstitution of the Specialised Technical Committee on Finance, Monetary Affairs, Economic Planning, and Integration.

This Committee is tasked with several areas including trade, tax, monetary policy, financial markets, and economic development, and is hence stretched. In addition, its composition of ministers and governors of central banks makes it unable to devote the needed time commitments to harmonisation initiatives. Hence, reconstituting the Committee would involve creating sub-committees of experts on financial services, which are already contemplated by its Rules of Procedure. This Sub Committee would be tasked with monitoring harmonisation initiatives against the blueprint yardstick and reporting into the current AU structures including to the African Union Commission.

Lastly, until regulatory harmonisation has been achieved in the regions, any discussion on an AU harmonisation drive (equivalent to the EU's pursuit of an internal market and single market) would be premature. If consensus cannot be obtained in the region with fewer states, there is no guarantee that consensus will be achieved on the AU stage and such AU level regulatory harmonisation drives are not likely to achieve any successes. It is hence recommended that at the initial stages, all efforts should be dedicated to member states pursuing harmonisation in their regions to boost cross-border listing and trading. This will also be supported by the requirements in many REC treaties for cooperation between member states of the REC.

In the absence of any substantial gains from structural harmonisation, regulatory harmonisation might be the key to achieving the objectives of the Abuja Treaty while boosting the growth of stock markets in the regions and Africa as a whole.

CHAPTER EIGHT

CONCLUSION

Introduction

The subject of this thesis is a complex area due to the number of countries' stock markets examined, the introduction and understanding of the different developments in Regional Economic Communities (RECs), and the interplay of the African Union, RECs. and the African Economic Community (AEC) and how these relate to the integration of stock markets. To present these complex areas, the thesis has broken down the conversation into different sub-sets of the same discussion, revisited below.

8.1 A Case for General Research into African Stock Markets

'Do not look where you fell, but where you slipped'¹

Since 1911, economists have made a case for a nexus between financial sector development and economic growth.² This implies that the level of financial sector development directly impacts and can correlate with the economic growth of a specified country. Could the underdevelopment of the financial sector explain the slow economic growth in Africa? The answer is not a simple yes as there are various factors, outside financial sector development that impact economic growth including human resources, capital formation, and technology.³ However, the underdevelopment of financial markets certainly plays a role. This hence calls upon countries to pay more attention to developing the financial sector in pursuit of economic growth.

Chapter 3 of the thesis considered the role of capital markets for Africa's development. Capital markets are important for Africa as they are a source of finance and supplement traditional financing methods i.e., the banking sector. The African Union's Agenda 2063 prioritises the development of capital markets to strengthen the ability to mobilise domestic resources and further contribute to development financing. Africa has immense financing

¹ African proverb.

² Joseph Schumpeter, *The Theory of Economic Development* (Harvard University Press 1911).

³ See Florin Teodor Boldeanu, Liliana Constantinescu, 'The Main Determinants Affecting Economic Growth' (2015) 8(57) *Bulletin of the Transilvania University of Brasov* 329.

needs ranging from infrastructure including roads, hospitals, and schools to housing and investments in agriculture which is the backbone of many countries. Governments require finance to meet these needs and the stock market can provide that avenue for both large-scale and long-term finance. Corporate entities too need capital, especially small and medium enterprises, and the growing number of start-ups. The stock market is best positioned to provide that capital on the different market segments targeted at different levels of a company's growth.

As the continent most impacted by climate change, the equity and debt markets can play a central role in financing climate change investments. Closely related to infrastructure finance, there has been a systemic reduction in concessional lending by international funding agencies and bilateral donors as over 50% of African countries become classified as middle income.⁴ The effect of this is that these countries must turn to both their debt and equity markets to close this financing gap. For these African countries, raising finance on the stock market is a necessary and viable alternative.

Africa is in a unique position in attracting foreign direct investment and investors consider it an alternative destination for diversifying risk and portfolios. The stock markets provide an avenue for the diversification of risk. These are some of the reasons why research in African capital markets law and policy is necessary for those passionate about Africa's development and economic growth.

8.2 The Impact of Colonialism on Africa's Equity Markets

*'The strange thing about Africa is how past, present, and future come together in a kind of rough jazz if you like.'*⁵

Conversations about the state of African stock markets that ignore the past miss the bigger picture and omit an understanding of the factors that have shaped the growth of capital markets in Africa. In Chapter 2, the thesis considers the emergence of African stock markets pre and post colonialism.

⁴ See Evans Osano, 'Five Reasons Why Capital Markets Matter for Africa' (FSD Africa, 7 December 2016).

⁵ Nima Elbagir, 'Magical Ben Okri Casts a Spell on His Readers' *CNN* (New York, 28 June 2011).

It explains the rationale for the late development of capital markets in Africa and the rapid establishment of stock markets after 1990. The late development is attributed to the impact of colonialism and the rapid development after 1990 is attributed to the structural adjustment policies of the International Monetary Fund (IMF) and the World Bank.

Until the 1960s, Africa remained a colonial empire and did not engage in the development of stock markets that had taken root globally in Europe and the United States. In the handful of African countries where colonialists established markets, they were mainly sources of financing for colonial economies. The trading companies on these exchanges belonged to the colonial masters and these were to be financed by the resources of the colonies.

Post colonialism, stock markets did not immediately take root as they were not a priority. The economies of Africa post-independence were small and there was limited demand for capital which could be met by the traditional banking sector and private capital. The IMF and World Bank extended the much-needed financing and until 1989, only 5 stock markets existed in Africa. It is the structural adjustment policies of the World Bank and IMF that ushered in a new era of new stock markets to support the privatisation policies required as a condition to financing by the international financing agencies.

This thesis has argued that the remnants of the effects of colonialism are still evident in the growth of capital markets in Africa today. For example, in Chapter 5, this thesis has drawn attention to the sovereignty concerns that continue to frustrate attempts at integrating stock markets today. The status of the exchange as a national symbol is rooted in attachments to post-colonial institutions and the idea of statehood. Integration is seen as a threat to statehood in general and to the institutions of statehood which include the stock exchange. Therefore, this thesis has made an original contribution to the research by identifying the basis for resistance to stock exchange integration i.e., sovereignty concerns, and demonstrated how the need to preserve the state in its post-colonial design has hindered any meaningful attempt to convert the rhetoric on integration to reality. This is a crucial nexus that academic research has largely ignored and which this thesis has identified.

In addition, colonialism is the basis for the calls of unity post-independence and the pursuits of regional cooperation and the formation of the defunct Organisation of African Unity that gave birth to the African Union (AU). The post-independence calls for unity were born in the need to preserve the independence and to advocate for economic growth. These alliances and groupings became the basis for regional economic communities (RECs) and although the basis for unity has changed (i.e., no longer preservation of independence), the alliances have become the conduits of integration. Therefore, this thesis has made a case for the recognition of the impact of colonialism on the development of African stock markets. Indeed, 'no man can know where he is going unless he knows exactly where he has been and exactly how he arrived at his present place.'⁶ Academic research on stock market development in Africa looks at the present whereas this thesis has shown how the past has influenced the present and how the challenges to integration are rooted in a colonial history.

8.3 What is the State of African Stock Markets?

*'The one who asks questions doesn't lose his way.'*⁷

This thesis' intention is not to reinvent the wheel in this area. There is existing commentary on the state of the capital markets in Africa today, although largely brief, fragmented, and focused on specific jurisdictions. What was the importance of this analysis? The central research question that the thesis sought to answer was whether the integration of stock markets in Africa can resolve the challenges facing securities markets in Africa. To answer that question, one must identify what challenges are being referred to. Since the available academic discourse does not adequately provide this information, this thesis has taken a different approach.

First, in Chapter 3, it has analysed the state of the markets by looking at specific aspects of stock market development as yardsticks to reach a meaningful conclusion. To measure market development, the discussion in

⁶ Maya Angelou.

⁷ African Proverb.

the thesis has acknowledged that there is no consensus on a yardstick that can be used. Ultimately, the thesis has used market capitalisation and liquidity as the yardsticks due to the fact that they are the most common ones applied in measuring levels of stock market development. Using statistics collected from available databases of the African Securities Exchange Association, PWC and individual stock exchanges, the thesis compared the level of market activity including inbound activity, outbound activity, domestic activity, and cross border activity. The results have indicated various findings. First, it has shown that Africa's largest stock markets are found in South Africa, Kenya, Nigeria, Mauritius, and Egypt. Outside of these, most of the markets are relatively new and struggling.

In addition, the thesis has demonstrated that stock markets are generally illiquid which poses challenges for investors. With only a handful of liquid stocks, even domestic institutional investors and pension funds are forced to seek more mature and liquid markets outside the continent and this has been demonstrated in the thesis by the volume and size of outbound listings. The lack of substantial listings also impact liquidity and when companies list, low levels of available free float impact liquidity. The level of market activity is generally limited and statistics of domestic, cross-border, outbound and inbound activity have been provided to demonstrate a periodic assessment of this. Cross-listings have substantially reduced, and cross-border trading is limited. There are few inbound listings from outside the continent in comparison to outbound listings.

Secondly, the thesis considered the level of capital markets regulation and policy. This discourse is important because of the role that regulation plays to the development of the security market. The thesis has demonstrated the challenges in the regulation of securities markets in Africa. This includes the enactment of inadequate regulation which is either too stringent or too sophisticated for the level of market development. Stringent regulation can inhibit growth and innovation. Small enterprise financing is crucial to building an ecosystem for SMEs in Africa. Stringent regulation prevents SMEs from accessing the markets and meeting the necessary listing requirements. It also identified the lack of adequate disclosure frameworks which leads to

information asymmetry and also noted instances of dual regulation which increases transaction costs and the regulatory burden.

Although this is a legal thesis, it would have been amiss not to mention macro-economic and fiscal policy as some of the impediments to the growth of markets and Chapter 3 interrogates this further. The volatility of the macro-economic environment impacts inflation which ultimately affects the demand and supply of stocks. Sound taxation and accounting regimes are important for the growth of the market and so are political stability and the rule of the law. If this was ever in doubt, this thesis has given examples of the conflicts in Central Africa and how that has impacted the growth of their stock markets as well as impacted any attempts to integrate. This is an interesting area of research and scholars should explore the nexus between political instability, the rule of law and financial sector development in Africa.

It is well known that the Johannesburg Stock Exchange (JSE) is the anchor exchange for all of Africa's market capitalisation. The analysis in Chapter 3 has demonstrated and justified this position through reference to the statistics on market activity in Africa. The JSE is the largest (by size, products, and activity) and the most advanced. What can other African countries learn from the story of the JSE? The JSE attributes its success to intentional institutional, political, and regulatory reforms of its capital markets and the constant innovation of products and advanced trading and settlement systems. This speaks to the importance of domestic reforms and national efforts to support and transform the stock markets. Even without integration, the JSE has been successful. However, the dominance of the JSE is a matter that might raise concern. It is unclear what impact the JSE would have on any integration project that it joins. Could it lead to the migration of liquidity from other countries in the project to the JSE as the dominant market? The only study in this area between Namibia and South Africa found that the smaller market ends up as a regulatory price taker and faces high transaction costs while the dominant market reaps the benefits of integration.⁸ The impact of the JSE may hence require further scholarly research. This is further

⁸ See Bruce Hearn and Jenifer Piesse, 'A Reassessment of Stock Market Integration in SADC: The Case of Namibia' (2020) 37(3) *Development Southern Africa* 501.

supported by the UK's withdrawal from the European Union and its impact on the integration of the EU and capital markets in the EU.

In addition, could a dominant player dictate the policies of other markets in the region? The Namibia and SA scenario shows a one-sided approach with the Namibia Stock Exchange changing its regulation and policies to shadow those of JSE to increase cross-border listing on its markets. This, therefore, calls into question the need for safeguards to ensure that dominant markets do not dictate policies to their benefit which would impact the spirit of integration and the ability to achieve the African Economic Community (AEC).

In Chapter 2 and 3, a discussion on the two regional exchanges was provided. The two exchanges, the BRVM and BVMAC, are made up of Francophone countries in the same region sharing a common colonial past. The failures and successes of these exchanges may shed light on the gains that integration hopes to achieve. Despite BRVM serving eight countries and six countries sharing the BVMAC, none of these exchanges have substantially attracted listings or experienced increased market activity. If the integration of BRVM and BVMAC were taken as examples, they would cast doubt on the potential of integration of stock markets to improve the state of Africa's financial markets. Are there other factors, apart from integration, that can be explored to make capital markets work for Africa? This is an area that requires further academic research. Integration, in itself, does not seem to be an 'alpha and omega' solution to the challenges of Africa's capital markets.

8.4 The Pursuit of Regionalism and Integration of Stock Markets

*'I dream of the realisation of the unity of Africa, whereby its leaders combine in their efforts to solve the problems of this continent.'*⁹

Africa's solution to its challenges post-independence was always unity and the thought that if Africans remained united, they could conquer just anything. Pan Africanism may have many varieties but all of them point towards unity. It is no surprise therefore that the AU pursues trade integration through the free trade zone, common markets, and capital market

⁹ Nelson Mandela.

integration. The concept of regionalism has evolved over the years, but the spirit of unity has remained static for Africa's pursuits.

In Chapter 4, the concept of regionalism has been reviewed. RECs, which are by-products of calls for unity, are the central playing fields for integration projects in Africa. Whereas there are eight recognised RECs by the AU, not all of them have integration projects. The Arab Maghreb Union and the Community of Sahel-Saharan States, for example, do not engage in stock market integration projects. This is attributed to political factors ranging from political instability to civil conflict. In addition, the discussion in Chapter 4 has shown that there are various levels of stock market development in these RECs and the integration projects are at different levels. There is no uniformity in the structure, type, and process of integration of stock markets in the RECs. This breeds uncertainty for how these will lead to the AEC if there is no clear and uniform structure of undertaking these projects. In addition, the creation of new regional groups such as in West Africa poses a challenge to the pursuit of integration through RECs.

Although the Abuja Treaty prescribed the establishment of national and regional exchanges and integration of capital markets, it is silent on the methodology for integration. There are various ways through which stock markets can be integrated including the Euronext Merger Model, cross-border trading, cross-listing, and a single regional exchange such as BRVM. The most advanced projects (AELP, and the East African Community Capital Markets Infrastructure Project) have focused on cross-border trading. Could this signal that this is the most ideal method? Maybe. However, that alone has not been the driving factor behind their success as, in addition to cross-border trading, regulatory changes have been crucial to the overall advancement of their pursuit.

In addition, the AELP is the only stock market integration project that is not under a regional grouping. This may foreshadow the future of stock market integration i.e., moving away from the RECs under the auspices of the AU into coalitions of the willing that are not overseen by a region. This could pose a challenge to the spirit of the Abuja Treaty in using the RECs as the building blocks of the AEC and as conduits of integration. Does this point to a need for the AU to rethink the entire premise of the AEC and how the AEC can be

achieved as well as the viability of using RECs to achieve the AEC? Certainly. This will require further research into structuring new integration projects within the spirit of the Abuja Treaty and how projects such as the AELP can be brought within the ambit and/or the spirit of the Abuja Treaty.

This thesis posits that much of the challenges facing integration are tied to the very concept of regionalism and the use of RECs. The push towards regional exchanges ignores the need to clarify the place of national exchanges. Post-colonial sentiments have led to an increased belief that the exchange is a symbol of statehood. Therefore, where integration threatens the existence of the national exchange, it has not achieved much. It is not surprising that the projects that have registered success are those that have maintained the sanctity of that exchange. Unlike general commentary, this thesis argues that Article 44(1)(d) of the Abuja Treaty is crafted in a way to allow the co-existence of both national and regional exchanges, hence preserving the national exchange. It is a matter of co-existence rather than replacement.

To add to the complex interplay between national and regional exchanges, Chapter 5 has discussed the new financial institution of the AU known as the Pan African Stock Exchange (PASE). Unlike other institutions of the AU created by the AU Act, PASE is as a result of a recommendation by the General Assembly of Heads of State. It is doubtful that a Treaty can be amended by a recommendation of a General Assembly and the legality of this recommendation has not been explored. There is no known academic literature on the PASE and hence it is one shrouded in mystery. This thesis makes an original contribution by casting much needed light on PASE. Without a Protocol in place for its establishment, suggestions on operationalising the PASE have been made. Central to the suggestions is the need for any Protocol to carefully situate PASE within the complex web of the relationships between national and proposed regional exchanges. A study of the report for its establishment shows that a recommendation for a virtual exchange whose listings and trading activities are regulated by home regulators was made and hence in Chapter 4, this thesis concluded that its structure substantially resembles the current AELP. Although the report proposed the use of RECs for this virtual exchange, it is difficult to see the

uniqueness of this concept or what it is meant to add to the pursuit of integration of stock markets in an already convoluted and complex field.

This thesis recommends that the ownership structure and legal status of PASE must be resolved at the outset. An exchange created under the auspices of the AU may have the AU as the legal owner. However, considering its operations and the dependence on other exchanges, having the AU as an owner is not advisable. State ownership of exchanges is discouraged and has been phased out over the years. The ownership structure must hence be carefully thought out. In Chapter 5, this thesis has identified competition law concerns that can arise during mergers of exchanges and in the formation of PASE. How competition regimes affect integration and mergers of stock exchanges is an area that requires further study.

Chapter 5 identified two further challenges relating to PASE: financing of the exchange and supervision of the same. It is important that an institution like PASE have clear and sustainable financing to support its activities. This thesis posits that any Protocol pertaining to PASE should provide for sources of financing which may include shareholder funds, annual payments by member states and fees charged on intermediaries. Secondly, PASE requires regulation and supervision and institutions should be identified, equipped, and empowered to legislate, monitor, and enforce the regulatory framework.

Chapter 2 introduced the nexus between colonialism and market development in Africa. One of the largest roadblocks to achieving integration of stock markets is the concept of state sovereignty. Regionalism and the activities thereunder require pooling of power at the region or transfer of certain powers to the region. This is an idea that African leaders passionately oppose due to their experiences with colonialism and their fixation with statehood. This thesis notes that as a result, integration has become a political matter. Without the requisite political will, integration is bound to fail. The defence of sovereignty is listed as one of the objectives of the AU which shows its importance in the African landscape. Yet this is not unique to Africa and is evident in the EU's journey towards an integrated market. To date, there is still a complex relationship between EU law and national law and although the concept of supremacy of EU law was developed to resolve any conflict of laws, it has not stopped disapproval by certain states. In addition,

the EU built compromises in its founding documents such as concepts of competence and differentiated integration to deal with some of these challenges. Managing the politics of integration is probably the most important aspect of pursuing integration and creating the complex concept of an AEC.

Integration projects require finances. The lack of financing vehicles has been identified as one of the impediments to integration. Even where the African Integration Fund was proposed, it is yet to be fully implemented. The increased dependence on donors to fund African integration projects is not sustainable. This thesis reviewed the financing mechanisms of the EU and ASEAN to draw attention to the importance of financing and show this can be achieved and implemented.

8.5 The Challenges posed by RECs in integrating Africa's stock markets

*'If you are to cure a chicken, you do so while it is still kicking.'*¹⁰

Much as RECs are the conduits of integration, they too pose great challenges which must be resolved if stock market integration is to work for Africa. This was the focus of Chapter 6 of the thesis. The ability of member states to belong to as many RECs as they wish poses unique challenges. Multiple memberships are a policy maker's nightmare. With each African country belonging to at least one REC, the outcome is overlapping mandates, conflicting loyalties, and wastage of resources. This thesis has shown the extent of this complex problem. To resolve this, it is suggested that RECs and membership to RECs be rationalised. The thesis has explored different ways that this could be done but ultimately has recommended that membership should be based on geographical location. The creation of the two regional exchanges in Africa is on geographical lines and may offer some light into the success of this model.

The very concept of RECs leads to another concern of regional law. States involved in integration in RECs are faced with multiple legal orders. How is

¹⁰ African Proverb.

this conflict of laws likely to be resolved? Suggestions have been made for two possible resolutions. One is derived from international law and is the principle of '*pacta sunt servanda*' which requires states to perform their treaty commitments in good faith and hence comply with treaty law. Where treaties entrench principles of direct applicability and direct effect, this would resolve the conflict. An alternative is an equivalent of the 'supremacy of EU law' concept whose jurisprudence has evolved through the European Court of Justice (ECJ). This does not mean that the latter is a magic wand that has resolved the challenges faced by the interplay between national and EU law. The evidence is to the contrary i.e., there are various judgments coming out of national courts in the EU that do not respect or even directly oppose the supremacy of EU law. However, the consistent application of this concept by the ECJ has enabled it to take root and there are structures in place to deal with oppositions. This thesis contributes to resolving the potential conflicts between regional law and national law by advocating for use of the concept of supremacy of regional law and entrenching it in the different treaties setting up RECs.

This thesis has drawn attention to the lack of an adequate enforcement mechanism for treaty obligations relating to the integration of the financial services sector including stock markets. By discussing the lack of a dedicated judicial system at the AU level to adjudicate and monitor implementation of the Abuja Treaty, this thesis spotlights the need to operationalise the Protocol on the Statute of the African Court of Justice and Human Rights ('Merger Protocol') and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ('the Malabo Protocol'). This requires 15 member states to ratify both Protocols so that the African Court of Justice and Human Rights can have jurisdiction on all disputes on the AU treaties and extend to RECs.

Even where regional courts are established in RECs, this thesis has shown the complexities that these courts face in the search for legitimacy as well as the impunity of states in defying court orders and openly attacking the judiciary for decisions deemed not in favour of individual states. Independence of the judiciary in the regional courts is difficult to achieve due to the nature of the appointment of judges and funding of the courts. This thesis makes an

original contribution to the body of knowledge on integration in Africa by drawing attention to the need for establishment of independent, impartial, and well-functioning domestic and regional courts in making integration work for Africa. In addition, it has drawn attention to the need for states to respect the autonomy and independence of the courts and the judicial officers.

Lastly, the importance of non-judicial institutional mechanisms for monitoring and implementing stock market integration cannot be overstated. Africa is not short of institutions. In fact, there are more institutions than necessary. However, the saying that too many cooks spoil the broth is true. With a magnitude of institutions all dealing with different aspects of integration, there has been very little dedication to capital markets integration. The AEC, which is the end game of integration, does not have a separate legal personality and no institutions are specifically dedicated to it. It must hence depend on the AU's structures as well as those of RECs. With the AU placing little focus on stock market integration, the monitoring of these projects has fallen short. Regions are left to monitor their projects, but they too have multiple agencies for the same outcome. The multiplicity of agencies just like multiple memberships to RECs poses challenges and requires balancing of powers and building consensus. Navigating the treaty-based institutions is a daunting task. This thesis argues that the institutions need to be streamlined and roles must be adequately set out precisely. The use of the African Regional Integration Index (ARII) is encouraged.

8.6 In Defence of Regulatory Harmonisation

*'There are no shortcuts to the top of the palm tree.'*¹¹

In simple terms, no amount of structural integration will work without regulatory changes. Having identified all the challenges faced in the integration of the markets in Chapter 5 and 6, Chapter 7 explored an alternative. This thesis advances the notion that regulatory harmonisation may just hold the key to making capital markets work for Africa. Unlike the convoluted nature of structural integration in RECs which is sometimes sprinkled with some regulatory directives, regulatory harmonisation as a

¹¹ African proverb from Cameroon.

solution requires RECs to focus on harmonising securities regulation with a focus on the regulations that advance investor protection, and which ensure that markets are transparent, fair, and efficient.

In Chapter 7, the thesis interrogates the why, how, and what of regulatory harmonisation. The shift to regulatory harmonisation suggested by this thesis is based on the successes of regulatory harmonisation in Africa under the OHADA model and in the EU securities market. As a net exporter of capital which also ends up on the stock market, Africa must pay special attention to creating regulatory frameworks that facilitate FDI and cross-border trading and settlement. In addition, liquidity is linked to the rule of law, and the price discovery mechanism is highly sensitive to regulatory quality.¹²

Harmonising regulation is a theme that runs throughout the treaties setting up RECs as well as Article 44(2) of the Abuja Treaty. As a result, the alternative of regulatory harmonisation offered by this thesis respects the spirit of and commitments to the treaties. To achieve regulatory harmonisation, this thesis posits that regions must agree on a blueprint guided by the spirit of the Abuja Treaty. The blueprint should set out areas of harmonisation, the method of harmonisation, and schedules for achieving the same. Although Chapter 7 makes substantial reference to the EU's harmonisation drive, this thesis warns against the dangers of copying and pasting foreign concepts without domesticating them or making them suitable to an African setting. It points out the EU scenarios or concepts that would not work for Africa (such as a concept similar to the European Securities Markets Authority) and those which would, such as differentiated integration and the use of a blueprint.

The thesis identifies priority areas for regulatory harmonisation which are areas that already exist in different African states although the practice may be different. The idea is that to work, harmonisation must initially focus on areas in which consensus is likely to be achieved before tackling more complex areas like taxation and centralisation of supervision and infrastructure. Areas suggested for harmonisation include trading rules,

¹² Bruce Hearn and Jenifer Piesse, 'A Reassessment of Stock Market Integration in SADC: The Determinants of Liquidity and Price Discovery in Namibia' (2013) 23(2) *Applied Financial Economics* 123.

clearing, payments and settlement procedures, listing particulars and regulations governing disclosure of information, market abuse regulation (market manipulation and insider dealing), and accounting standards for listed entities. Since RECs are already existent, they would be useful for advancing regulatory harmonisation if the challenges pointed out concerning RECs are resolved.

8.7 Looking to the Future and Areas for further scrutiny

This thesis is broadly situated within the Abuja Treaty framework and the calls therein for the integration of capital markets in Africa. However, fundamental questions remain as to whether the Abuja Treaty got it right in choosing integration. Are state-led individual initiatives for the growth of capital markets more viable than regional-based initiatives? Should attention shift back to national changes to regulation without the need to harmonise regionally? Will integration be the one solution that finally fixes the challenges facing African capital markets generally? What are the negative impacts of integration on African capital markets? All these are questions that require further scrutiny. Concepts such as contagion and migration of liquidity in integrated markets need to be further explored.

Throughout the thesis, there have been references to the complex interplay between the AU, AECs, and the RECs. How does this web of relationships affect integration and how can it be reconciled? Africa is home to a legion of convoluted bodies fighting for power and recognition in integration. How these relationships impact and will impact attempts at regulatory harmonisation needs to be investigated. There is no doubt that 'well judged legal intervention can reinforce the development of a market.'¹³ This thesis has focused on the legal and regulatory matters. However, law alone will not be the sole contributor to making capital markets work for Africa. In the thesis, discussions on the conflicts in the Arab Maghreb Union and how these have affected the region have been provided. Separating the politics from the economics is short-sighted. The reality is that integration is a political matter and the politics impacts capital markets more than any other challenge. Academic research needs to venture into the nexus between politics and

¹³ Elis Ferran, *Building an EU Securities Market* (Cambridge University Press 2004) 26.

capital markets growth as well as the impact of economic policymaking on the growth of stock markets in Africa. These are the real challenges that must be resolved in the quest to make capital markets work for Africa.

It would be remiss to complete this discussion without pointing out the recent technology advancements and their impact on securities markets. The pursuit of integration is in response to the challenges facing capital markets in Africa. But could new technological developments hold the key to resolving some of these challenges? An example is the impact of distributed ledger technology ('DLT') and how it impacts financial market infrastructures.¹⁴ In 2016, the World Economic Forum made an ambitious look at how blockchain would reshape the entire financial services sector.¹⁵ It predicted that DLT would drive efficiency and simplicity and establish new infrastructure. Since then, developments in the use of DLT in securities markets have only increased. The EU is already studying the impact of DLT on the harmonisation of securities post-trading and on the wider conversation of financial integration.

DLT has the ability to impact issuance of securities, payments, and settlements as well as regulatory reporting. It can also make monitoring and surveillance of markets more efficient and minimise fraud in transactions. Worldwide, more developed exchanges are embracing DLT in aspects of their operations. For example, the Australian Stock Exchange used DLT for clearing and settlement of securities whereas NASDAQ launched LINQ, to allow issuance of private securities. Is this a development that African stock markets could benefit from or is this too advanced for the often smaller and underdeveloped markets? It is certainly early stage and the literature is scarce but it is definitely an area that will impact conversations on finding long-term solutions to the problems facing capital markets in Africa.

The African Central Bank, one of the institutions of the AU is expected to administer the African Monetary Union (AMU). It has its origins in the Abuja Treaty's calls for an African Central Bank and single African currency. This

¹⁴ See for example, Alexandros Seretakos, 'Blockchain, Securities Markets and Central Banking' (UCL Faculty of Laws, London, 19 June 2017).

¹⁵ World Economic Forum, 'The Future of Financial Infrastructure: An Ambitious Look at How Blockchain can Reshape Financial Services' (August 2016) https://www3.weforum.org/docs/WEF_The_future_of_financial_infrastructure.pdf accessed 9 November 2021.

has been reinforced by the presence of two currency unions in Africa: the CFA Franc in Central Africa and the CFA Franc in West Africa. These try to achieve the successes of the Eurozone in the EU. The difference though is that the monetary unions would be created in each of the existing RECs and with the African Central Bank being the sole issuer of the single African currency. Like other integration initiatives, this has faced resistance and disapproval and the timelines for its accomplishment have been extended. It would be interesting to study how the pursuit of monetary unions may affect Africa's capital markets and any quests for integration. Could it further regional integration initiatives? Is it a feasible pursuit? How does the presence of a monetary union and a single currency contribute to making capital markets work for Africa? This discussion would benefit from existing literature on the Eurozone and its impact on EU integration.

In conclusion, stock market integration projects are here to stay and are hence fertile ground for academic research. This area of research is rich in questions and can give birth to multiple academic explorations. This thesis is considered to be the first comprehensive research into stock market integration projects in Africa but should certainly not be the last. In laying the foundation for interrogation of the concept of integrating stock markets in Africa, the expectation is that this will be of interest of all players in this arena. This includes financiers (who must monitor progress and question methodology), policymakers (who should carefully review the current methods being adopted and consider alternatives), stock market participants (who must demand more from policymakers to enable capital markets to work for Africa), and political leaders (who must renew their commitment to the spirit of the treaties and turn rhetoric into action.) The door has been swung wide for further interrogation and discussion on integration and making capital markets work for Africa.

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