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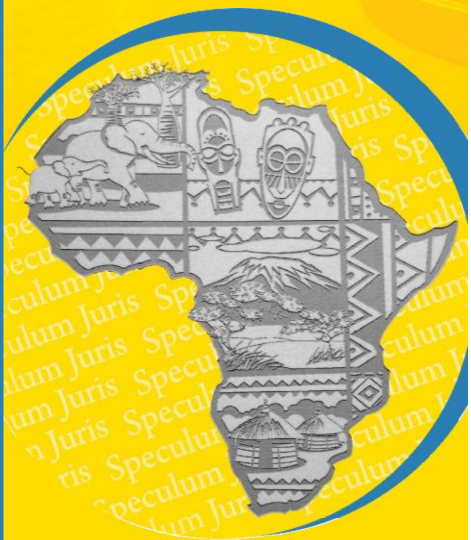

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Evaluating the Southern African Development Community's Role in Continental Integration: The Need for Deeper Legal Integration and Dispute Resolution

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Abstract

This paper explores the relationship between regional and continental integration in Africa, focusing on the Southern African Development Community (SADC) and its role in the African Continental Free Trade Area (AfCFTA). The argument, grounded in institutionalist theories of regional integration, is that legal integration is essential to regional cohesion and that the absence of robust legal mechanisms can undermine regional integration efforts. Through case studies such as the collapse of the SADC Tribunal and South Africa's unilateral trade agreement with the European Union (EU), this paper demonstrates how legal fragmentation disrupts regional integration. Comparisons with other regional blocs, including the East African Community (EAC), further highlight the importance of adherence to regional treaties. The analysis shows that legal integration, which involves harmonised laws and effective dispute resolution, is essential for enforcing agreements and ensuring member states' compliance. The paper also discusses how political dynamics, sovereignty issues, and the absence of

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judicial enforcement have negatively affected SADC's integration goals. For AfCFTA to succeed, the paper concludes that member states must commit to legal frameworks that prioritise collective regional interests over unilateral action(s).

Keywords: regional integration; legal integration; Southern African Development Community (SADC); African Continental Free Trade Area (AfCFTA); institutionalism; dispute settlement mechanisms; treaty compliance

1 INTRODUCTION

Regional integration in Africa has long been signalled as one of the solutions to the continent's economic and political challenges. It encompasses efforts to foster cross-border collaboration, improve trade relations, and drive economic growth. One of the key instruments for achieving this goal is the African Continental Free Trade Area (AfCFTA),[1] which aims to create a unified market for goods and services across the continent. Within this framework, the Southern African Development Community (SADC)[2] plays a critical role in advancing regional integration. However, for SADC to contribute meaningfully to the success of the AfCFTA, greater integration across its member states is crucial. This paper examines the intertwined nature of regional and legal integration and emphasises the importance of robust legal frameworks that ensure compliance with regional treaties. It highlights key case studies, such as the collapse of the SADC Tribunal, and South Africa's unilateral negotiated free trade agreement (FTA) with the European Union (EU) to the exclusion of other Southern African Customs Union (SACU)[3] member states.

These key studies illustrate how legal fragmentation can severely undermine regional goals. Through an analysis of these examples and comparisons with other regions, such as the East African Community (EAC),[4] I argue that without robust legal mechanisms, regional integration initiatives will falter — ultimately compromising Africa's larger integration objective under the AfCFTA.

The paper first illustrates the relationship between regional integration and legal integration from the theoretical approach of institutionalism in regional integration. The point of departure is that for regional integration to achieve its desired outcomes, adherence to legal integration must be part of its foundation. Thereafter, the paper explores the demise of the SADC Tribunal to illustrate the importance of legal integration for promoting robust regional integration. Next, the paper shows that disregard for regions in legal instruments that underpin collaboration was displayed earlier in more established and integrated examples of cooperation, such as the SACU. This was demonstrated by South Africa's disregard for the smaller SACU member

1 The AfCFTA is the world's largest free trade area, bringing together the 55 countries of the African Union (AU) and eight Regional Economic Communities (REC). The agreement, which entered into force on 30 May 2019, has been signed by 54 countries (excluding Eritrea) and ratified by 46 countries. https://au-afcfta.org/about/ (accessed 16-10-2024).

2 In 1992, heads of government of the region agreed to transform the Southern African Development Co-ordination Conference (SADCC) into SADC, with the focus on integration of economic development. The current SADC 16 member states are Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic of Tanzania, Zambia, and Zimbabwe. https://www.sadc.int/pages/history-and-treaty (accessed 16-10-2024).

3 Formed in 1910, the Southern African Customs Union (SACU) is the oldest functioning customs union. Members are Botswana, Eswatini, Lesotho, Namibia and South Africa. https://www.sacu.int/about-sacu (accessed 16-10-2024).

4 The East African Community (EAC), established in 2000, is a regional intergovernmental organisation of eight partner states, comprising the Republic of Burundi, Democratic Republic of Congo, Republic of Kenya, Republic of Rwanda, Federal Republic of Somalia, Republic of South Sudan, Republic of Uganda, and the United Republic of Tanzania, and with its headquarters in Arusha, Tanzania. https://www.eac.int/overview-of-eac (accessed 16-10-2024).

states when it unilaterally negotiated an FTA with its then-largest trading partner, the EU. In sharp contrast is the robust intervention of the Court of Justice of the EAC, when it ordered that Kenya's unilateral negotiations with the United States (US) were invalid.[5] This judgment endorses the application of the treaties and protocols that give rise to regional integration. The required commitment of member states to these instruments is beyond question.

The examples of the unilateral FTA negotiation between South Africa and the EU, as well as between Kenya and the US, were selected for the following reasons. In my view, both instances aptly demonstrate how regional commitments that establish customs unions in the case of SACU and EAC, and an FTA in the case of the EAC, can be potentially undermined when individual state parties negotiate bilateral agreements outside of their regional commitments. When evaluating the success of the AfCFTA, it is vital to note that the AfCFTA considers regional communities as its building blocks. Therefore, the experiences of these existing regional communities also speak to the success of the AfCFTA.

The paper demonstrates that without strong legal mechanisms, regional integration initiatives will weaken, ultimately compromising the AfCFTA's ability. For effective integration to occur, compliance and enforcement by judicial means must occur.

2 THE RELATIONSHIP BETWEEN REGIONAL INTEGRATION AND LEGAL INTEGRATION FROM AN INSTITUTIONAL FRAMEWORK PERSPECTIVE

Regional integration refers to the process by which neighbouring countries or states form a partnership to improve economic, political, social, or environmental cooperation.[6] The ultimate goals of regional integration can range from establishing a free trade area to creating a customs union, a single market, or even a complete political and economic union.[7] With the emphasis on economic activities, regional integration is often termed regional economic integration, which has been defined as:

> The co-ordination of economic activities, with the aim of enhancing the development of countries or regions. It involves elimination of tariffs and non-tariff barriers to the flow of goods, services and factors of production between a group of nations, or different parts of the same nation.[8]

The process of integration is implemented through the signing of treaties or agreements by member states, which set the parameters of their cooperation and establish the organs that will administer the collaboration. Examples in Africa include SADC, SACU, EAC and AfCFTA. Ideally, consistency in the application of the treaties and protocols lays the foundation for the full realisation of the integration project.[9]

Legal integration refers to the harmonisation and alignment of laws, regulations, and judicial mechanisms across different states in a region. It ensures that countries in a regional bloc adhere to common legal frameworks or standards. This may involve creating supranational institutions, such as courts or tribunals, and standardising legal processes across areas such as trade, human rights, competition, and governance.[10]

5 *Christopher Ayieko v Attorney General of the Republic of Kenya,* Reference No 5/2019 (15).

6 Sideri "Globalisation and Regional Integration" 1997 *EJDR* 62.

7 Balassa *The Theory of Economic Integration* (1969) 2.

8 UNECA Report Assessing Regional Integration in Africa. EAC Policy Research Report 2004.

9 Kawenda "Legal Integration as a Means to Regional Economic Integration" 2016 *Indonesian JIL* 194.

10 See generally Conant "The Politics of Legal Integration" 2007 *JCMS* 45–66.

The assessment of regional integration outcomes, however, varies depending on the theoretical approach applied. While David Ricardo's theory of comparative advantage has shaped much of global trade theory, it has not consistently produced the expected outcomes. In practice, countries — particularly in Africa — cannot always rely on the "invisible hand" of international or regional markets to direct their specialisation and trade patterns.[11] Similarly, the gravity model, which aims to predict the economic effects of regional integration by factoring in market size, geographic distance, and enabling policies such as integration instruments, has had limited explanatory power.[12] It does not fully account for the continued reliance of many African countries on exports to global markets over intra-regional trade.

Alternative theoretical frameworks offer different insights. Legal pluralism, for example, may be better suited to explain the coexistence and interaction of multiple legal systems across the continent and within various Regional Economic Communities (RECs).[13] When combined with the New Regionalism Approach (NRA), these frameworks provide tools for analysing the broader dynamics of regional integration. The NRA emphasises the role of diverse actors, processes, and context-specific factors in shaping integration outcomes.[14]

For this paper, the analysis adopts the theoretical framework of institutionalism in regional integration. This approach focuses on the role of institutions in shaping the development and effectiveness of regional organisations.[15] Using this framework, this paper compares the dispute settlement mechanisms and institutional structures of SADC and the EAC. This comparison is a basis for examining the integration processes in these RECs and their implications for regional integration in Africa.

Oppong supports this view and explains the importance of well-defined legal frameworks.[16] The paper, therefore, argues for well-defined legal frameworks that support legal integration. Furthermore, without alignment of laws, regulations, and judicial mechanisms across states within a regional bloc, member states are less aligned in sharing legal frameworks and standards.

The correlation between regional integration and legal integration is fundamental, as legal frameworks provide the foundation for the success of any regional integration effort. This cooperation can only be practical if it is underpinned by strong legal frameworks that ensure compliance with regional treaties and agreements, and if it provides mechanisms for resolving disputes and ensuring compliance with those treaties and agreements.[17]

The author holds that legal integration creates a predictable environment that fosters regional cooperation. When laws and policies are harmonised across a region, businesses, investors, and governments can operate with greater confidence. This legal certainty is critical for economic

11 See generally Ashabur "David Ricardo's Principle of Comparative Cost Advantage Inspires International Trade" 2023 *Global Business Issues eJournal* https://ssrn.com/abstract=4519038 (accessed 27-05-2025).

12 See generally Luigi "Review of the Gravity Model: Origins and Critical Analysis of its Theoretical Development" 2021 https://ssrn.com/abstract=3883507 (accessed 27-05-2025).

13 See generally Berman "Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative" 2020 *GWLaw* https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2773&context=faculty_publications (accessed 26-5-2025).

14 See generally Hettne and Söderbaum "The New Regionalism Approach" 1998 *Politeia* 6–21.

15 While no single main scholar dominates the field, Saurugger and Terpan are widely recognised for their work on regional integration and institutionalism. See generally Saurugger "Grand Theories of Integration: Neofunctionalism, Intergovernmentalism and Constructivism" 2023 *The Elgar Companion to the EU* 13–26.

16 Oppong *Legal Aspects of Economic Integration in Africa* (2015) 31.

17 See generally Oppong "Legal Harmonisation in African Regional Economic Communities: Progress, Inertia and Regress" in Döveling, Majamba, *et al. Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities* (2018).

integration, as it allows for smoother cross-border trade, investment, and cooperation.[18] For economic integration to function effectively, whether in the form of a free trade area, a customs union, or a common market, the author considers that legal frameworks must regulate the terms of trade. This ensures that all member states adhere to agreed-upon rules, and it prevents protectionist measures or unfair trade practices.

Riesenfeld, while surveying the legal frameworks for integration applicable in Europe and Latin America, highlighted the importance of the proper legal system for the steady progress of the integrative process.[19] He confirms that proper judicial control is an important, if not indispensable, ingredient of continual development. Oppong[20] and Fagbayibo[21] both support this position regarding integration efforts in Africa. Riesenfeld's examination of Europe and Latin America highlights the universal applicability of legal integration for regional success. This aligns with my view, as it underscores the role of law in providing a stable, predictable environment for cooperation. Oppong's support for Riesenfeld's position, contextualised in Africa, highlights the continent's unique challenges in securing regional integration. Oppong affirms that African regional blocs, such as SADC, cannot achieve their integration goals without addressing deficiencies in legal harmonisation and institutional oversight.[22] His work validates my view by illustrating how weak legal integration in Africa has hindered progress towards effective regional integration. Fagbayibo adds to this perspective by emphasising the role of legal systems in fostering accountability among member states in Africa. He argues that without strong legal integration, states are less likely to commit to or comply with regional agreements.[23] His insights support my claim that initiatives like the AfCFTA depend on robust legal frameworks to ensure implementation and prevent unilateral actions, as those witnessed in South Africa's trade negotiations with the EU in the late 1990s, as discussed in section 4 of this paper.

Arguably, one of the best-known examples of legal integration today is the EU.[24] In my view, the origin of the EU's success lies in the notion that regional integration must be underpinned by legal integration. Phelan[25] supports this view when quoting Davis. He affirms that the establishment of the primacy and direct effectiveness of the law of the European Communities over the law of the member states in the early 1960s is the most radical moment in the European integration project. The decisions of the Court of Justice of the EU in *Van Gend en Loos v Nederlandse Administratie der Belastingen*[26] and *Costa v ENEL*[27] laid the foundations for the contemporary EU's practical legal framework.

From the above discussion, a key element of legal integration is the establishment of regional courts or tribunals to handle disputes between states, businesses, or individuals. Effective

18 Erasmus "Is the SADC Trade Regime a Rules-based System?" 2011 *SADC LJ* 18.

19 Riesenfeld "Legal Systems of Regional Economic Integration" 1997 *Hastings ICLR* 569.

20 Oppong *Legal Aspects of Economic Integration in Africa* (2015) 31.

21 Fagbayibo "Exploring Legal Imperatives of Regional Integration in Africa" 2012 *CILSA* 64.

22 Oppong *Legal Aspects* 31.

23 Fagbayibo 2012 *CILSA* 64.

24 The EU has experienced its fair share of challenges in relation to integration challenges. Most notable was the United Kingdom's exit from the EU through a referendum in June 2016, in which 51.89 per cent voted to leave. More recent challenges included the Covid-19 pandemic, the migration crisis, and the populist and illiberal challenge to the EU's core values of democracy and the rule of law. See generally Juncus and Naurin "Core Internal and External Challenges to European Integration" https://ecpr.eu/Events/Event/SectionDetails/1284 (accessed 16-11-2024).

25 Phelan "The Troika: The Interlocking Roles of *Commission v Luxembourg and Belgium, Van Gend en Loos* and *Costa v ENEL* in the Creation of the European Legal Order" 2015 *Eur LJ* 119.

26 ECJ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

27 ECJ Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585.

dispute-resolution mechanisms help ensure that regional agreements and treaties are enforced, thereby building trust and cooperation among member states.[28] This is important to provide redress, especially where domestic mechanisms have collapsed.

3 THE SADC TRIBUNAL

The Southern African Development Community Tribunal was established under the Treaty of the Southern African Development Community (SADC) in 1992,[29] but only became operational on 22 November 2005.

The SADC Tribunal was a regional Court designed to resolve disputes related to the Treaty of the Southern African Development Community and to ensure adherence to the rule of law in member states. Adjudicated disputes could involve member states, individuals, and corporations on issues related to the SADC Treaty.[30] However, operations were effectively suspended in 2010 by a decision of SADC heads of state.[31] In August 2012, the Summit[32] resolved that "a new Protocol on the Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between the Member States".[33] This new draft Protocol on the SADC Tribunal was adopted in August 2014.[34] However, it was signed by only nine of the fifteen SADC member states and has yet to be ratified by any of them.[35] As a result, the "new" SADC Tribunal remains largely inactive today. A Resolution of the SADC Summit established the SADC Administrative Tribunal (SADCAT) in August 2015.[36] However, the SADCAT only has jurisdiction to hear and determine labour disputes

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28 Ruhangisa "The Role of African Regional Courts in Developing International Law" 2020 *Tuma LR* 2.

29 The Southern African Development Community Tribunal was established under the Treaty of the Southern African Development Community (SADC), established under Art 9(g), as read with Art 16 of the SADC Treaty in 1992. https://ijrcenter.org/regional-communities/southern-african-development-community-tribunal/ (accessed 16-10-2024).

30 The SADC Tribunal had broad jurisdiction. The provisions governing the Tribunal's personal jurisdiction are outlined in Arts 15, 17, 18, and 19 of the 2000 Protocol. According to these Arts, the Tribunal has jurisdiction over disputes between: (i) Member States (Art 15 (1)); (ii) natural or legal persons and Member States (Art 15 (1)); (iii) Member States and SADC (Art 17); (iv) natural or legal persons and SADC (Art 18); and (v) SADC employees and SADC (Art 19). It is important to note that the SADC Tribunal was never fully independent, as the Summit is considered the supreme policymaker of SADC and has the power to give direction to the institutions, which includes the Tribunal itself (Art 10 of the SADC Treaty).

31 These decisions were taken at the Summit of 16–17 Aug 2010, held in Windhoek. The relevant part of the Summit decision reads as follows: "A Study shall be Undertaken and Completed within Six Months of the Summit Meeting of August 2010". See also Erasmus 2011 *SADC* 17–34 29; "Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal" http://www.sadc.int/index/browse/page/790 (accessed 16-10-2024).

32 The Summit, composed of heads of state and government and established by Art 9 of the Treaty, is SADC's principal organ tasked with the overall responsibility of policy direction and control of SADC functions. Under Art 32(5) of the Protocol, the Summit is the ultimate body to decide on the course of action to be taken in cases where a member disregards a Tribunal ruling. For the Summit to reach a binding decision, the decision must be reached by consensus. See also Nyathi "Supreme in Letter, Supreme in Spirit, Supreme in Deed: An Exposition of the SADC Summit's Overarching Powers in the SADC Regional Integration Project" 2017 *Spec J* 168.

33 Paragraph 24 Communiqué of the 32nd SADC Summit held in Maputo, Mozambique, Aug 2012.

34 34th SADC Summit held in Victoria Falls, Zimbabwe. The 2014 Tribunal Protocol effectively limits the SADC Tribunal's jurisdiction to receiving and adjudicating disputes between member states only.

35 "Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal" http://www.sadc.int/index/browse/page/790 (accessed 16-10-2024).

36 Resolution of the SADC Summit, August 2015 meeting held in Gaborone, Botswana, pursuant to Arts 9(2) and 10(6) of the SADC Treaty; Asmelash "Southern African Development Community Tribunal (SADC)" MPILux

between the SADC Secretariat or any of its institutions, as an employer, and an employee.[37] For this reason, the author argues that SADC is without a dedicated institution to ensure compliance with the provisions of the SADC Treaty and its protocols. The SADC's integration efforts are therefore negatively affected, as the legal frameworks that ought to regulate relations between member states are inactive.

The key reasons for the Tribunal's demise and current position are closely linked to land reform and to political tensions between member states, particularly over sovereignty issues and the Tribunal's rulings against Zimbabwe.[38] The SADC Tribunal's suspension was triggered mainly by its rulings against the government of Zimbabwe over its land reform programme, which began in the early 2000s. This was in the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*.[39] The SADC Tribunal ruled that Zimbabwe's land reforms, which involved the seizure of white-owned farms without compensation, were illegal under the SADC Treaty.[40] The Tribunal found that Zimbabwe had violated human rights and the rule of law by expropriating land without proper compensation and without legal recourse for the affected farmers.[41]

Zimbabwe refused to comply with the Tribunal's rulings and asserted that the Court had no jurisdiction over its internal affairs. President Robert Mugabe and his government rejected the Tribunal's authority, claiming that the land reform was a matter of national sovereignty and should not be subject to external legal decisions. Zimbabwe argued that the Tribunal's rulings infringed national sovereignty.[42] Mugabe's government mounted an intense diplomatic campaign in SADC to discredit the Tribunal and portrayed it as an institution that undermined the independence of member states.[43] Zimbabwe's actions clearly affirmed its unwillingness to comply with the provisions of the SADC Treaty or to adhere to the decisions of a dispute settlement mechanism.[44]

As of 2024, the SADC Tribunal remains inactive. There have been periodic calls from civil society groups and legal experts for the revival or reform of the SADC Tribunal. Most recently, there were calls by the courts in both South Africa[45] and Tanzania.[46] However, these efforts continue to face resistance from SADC governments that are cautious about ceding power to a regional Court.

37 https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/2496_Southern_African_Development_Community_Tribunal__SADC__EiPro_Sample_Entry.pdf (accessed 22-05-2025).

38 Nathan "The Disbanding of the SADC Tribunal: A Cautionary Tale" 2013 *Hum Rights Q* 871 https://repository.up.ac.za/bitstream/handle/2263/42461/Nathan_Disbanding_2013.pdf?sequence=1 (accessed 16-10-2024).

39 *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28-11-2008).

40 *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2008), SADCT 2/2007 (prior to this judgment, in late 2007 the Tribunal issued an interim ruling in favour of the farmers – affirming its jurisdiction in the matter).

41 *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28-11-2008) 41.

42 Further action was thereafter taken in respect of Zimbabwe's non-compliance in *Louis Karel Fick v Republic of Zimbabwe* (SADC (T) 01/2010) [2010] SADCT 8, wherein the SADC Tribunal once again ruled that Zimbabwe had failed to comply with its previous orders, and that it would report such failure to the Summit.

43 Ndlovu "*Campbell v Republic of Zimbabwe*: A Moment of Truth for the SADC Tribunal" 2011 *SADC LJ* 1.

44 It is important to note that the SADC Tribunal was never totally independent, as the Summit is considered the supreme policymaker of SADC and has the powers to give direction to the institutions, which include the Tribunal itself (Art 10 of the SADC Treaty).

45 *The Law Society of South Africa v President of the Republic of South Africa* 2019 3 SA 30 (CC). The South African Constitutional Court, *inter alia*, ruled that the suspension of the SADC Tribunal and South Africa's signing of the 2014 Tribunal Protocol were "unconstitutional, unlawful and irrational". See also Nyathi and Phooko "The Revival of the SADC Tribunal by South African Courts: A Contextual Analysis of the Decision of the Constitutional Court of South Africa" 2019 *De Jure* 424.

46 *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania*, Case No. 23 of 2014. See also Phooko "Has the SADC Tribunal been Salvaged by the South African Constitutional Court and the Tanzanian High Court?" 2020 *Spec J* 174.

The effective suspension of the SADC Tribunal left a significant gap in regional accountability mechanisms and, therefore, in legal integration in SADC. With the rise of the AfCFTA, new regional dispute-resolution mechanisms will emerge. Still, their ability to remedy the lacuna left by the defunct SADC Tribunal is questioned — as illustrated by the examples listed below. The AfCFTA provides for the establishment of a dispute settlement mechanism for trade-related issues between state parties only.[47] As a result, private parties, including individuals and corporations, cannot directly access the system. The AfCFTA dispute settlement rules and procedures include, among others, compulsory consultations before a formal panel that can be established, as well as a surveillance system to monitor the implementation of rulings issued by the panel or appellate body. These rules and procedures, akin to those of the World Trade Organisation Dispute Settlement Understanding, have not been featured in any African REC arrangement.[48] In addition, the rulings of the dispute settlement body (DSB) must be made by consensus.[49] This raises the question: if an aggrieved party has a right to participate in the consideration and adoption process, what happens if an aggrieved party to a dispute votes against the adoption of the Panel's reports? The discussion of the SADC Tribunal above has shown that the requirement that decisions of a judicial body be adopted by consensus is flawed. To prevent the non-adoption of reports, the Protocol provides for "reverse consensus".[50] An aggrieved state party, therefore, cannot unilaterally prevent the DSB from adopting a report, unless there is consensus not to adopt the report.

In light of these conditionalities imposed on the AfCFTA DSB, it cannot be concluded that the AfCFTA dispute settlement process could fulfil the relevance of the SADC Tribunal in economic matters. However, this is not discussed further. Nonetheless, the negative impact of deficient legal integration is evident in the suspension of the SADC Tribunal in 2010. Still, it can also be observed much earlier, as illustrated by the South African government's unilateral negotiation of an FTA with the EU in the late 1990s — as discussed in section 4 below.

Comparing SADC's approach to legal integration with that of the EU highlights significant differences, particularly concerning the principle of supremacy and the direct applicability of regional law. In the EU, the principle of supremacy ensures that European law prevails over conflicting national laws, as established in landmark cases such as *Costa v ENEL*. This legal framework fosters deeper integration by compelling member states to comply with EU obligations uniformly, thereby creating a predictable legal environment essential to regional cohesion.

In contrast, SADC has struggled to establish a similar legal hierarchy. A notable example is Zimbabwe's stance during the SADC Tribunal dispute, in which it argued that its domestic laws were supreme within its jurisdiction, thereby directly challenging the Tribunal's authority, as discussed above. This assertion undermined the Tribunal's effectiveness and, by extension, the supremacy of SADC community law. The eventual suspension of the Tribunal, following resistance from Zimbabwe and a lack of political will among member states, exemplifies the fragility of legal integration in SADC. Without the enforceability of regional laws, member states have often acted unilaterally, leading to inconsistencies and a weakened sense of regional solidarity.

47 Bore "Dispute Settlement Mechanisms in African Regional Economic Communities: Lessons and New Development" 2020 *AJLS* 246.

48 *Ibid* 244.

49 Article 5(6) stipulates that where the rules and procedures of this Protocol provide for the DSB to make a decision, it has to do so by means of consensus.

50 Article 19(4) prescribes that Panel reports shall be considered, adopted and signed at a meeting of the DSB, unless the DSB decides by consensus not to adopt the report.

The EU's experience offers critical lessons for SADC. First, establishing the supremacy of regional law is pivotal for meaningful integration, as it ensures that member states adhere to agreed-upon rules and prevents unilateralism. Second, strong and independent judicial institutions are necessary to uphold regional law, resolve disputes, and maintain trust among member states. SADC must prioritise legal integration by creating mechanisms that ensure the binding nature of its laws and foster a political culture that values adherence to regional commitments. Without these reforms, SADC's contribution to broader initiatives such as the AfCFTA will remain limited.

4 THE TRADE, DEVELOPMENT AND COOPERATION AGREEMENT (TDCA) BETWEEN SOUTH AFRICA AND THE EUROPEAN UNION

The consequences of a political culture that does not fully adhere to regional commitments are illustrated by the South African government's decision to negotiate a bilateral trade agreement with the EU, known as the TDCA, which was a pivotal step in South Africa's post-apartheid economic strategy. Signed in Pretoria in October 1999,[51] the TDCA was designed to enhance economic cooperation, promote trade, and support South Africa's integration into the global economy after years of isolation under apartheid. [52]

This agreement was negotiated at a time when South Africa sought to rebuild its economy, foster development, and solidify its democratic gains.[53] The EU, as South Africa's then-largest trading partner, was a crucial actor in this process.[54] Through the TDCA, South Africa aimed to secure improved access to European markets, diversify its exports, and attract foreign investment, while also benefiting from development assistance and cooperation across various sectors.[55] At the time of the negotiations, South Africa was both a member of SACU, with whom it shared a customs union, and SADC.

The South African government's unilateral negotiation of the TDCA faced significant criticism, not only from SADC but also from SACU member states — as discussed below in sections 4.1 and 4.2. Critics argued that the agreement could undermine regional trade relations in southern Africa by diverting attention from regional integration efforts in favour of a stronger alignment with Europe. Both regional bodies raised concerns about the potential impact of the agreement on regional trade dynamics, economic cohesion, and their broader integration objectives. Despite these concerns, the South African government pressed ahead and viewed the TDCA as a strategic opportunity to strengthen its economic standing in the global marketplace.

51 Signed on 11 Oct 1999 in Pretoria, the TDCA entered fully into force on 1 May 2004. Some provisions fell within EU competence and therefore did not require ratification by the EU member states. In contrast, other provisions, such as geographic indications, are not considered exclusive EU competence and therefore require ratification by all EU member states. The TDCA was thus provisionally implemented on 1 Jan 2000 and fully implemented on 1 May 2004, following ratification by all the EU member states.

52 Lee "The European Union – South Africa Free Trade Agreement: In whose Interest?" 2002 *JCAS* 81–106 81. The EU–SA (South Africa) Trade, Co-operation and Development negotiations commenced on 30 Jun 1995 and ended in Mar 1999.

53 Bilal and Laporte "How did David Prepare to Talk to Goliath? South Africa's Experience of Trade Negotiations with the EU" 2004 *ECDPM Discussion Paper No. 53* 7.

54 *Ibid* 8.

55 "Trade, Development and Cooperation Agreement (TDCA) with South Africa" https://eur-lex.europa.eu/EN/legal-content/summary/trade-development-and-cooperation-agreement-tdca-with-south-africa.html (accessed 16-10-2024).

4 1 Criticism from SADC

When the TDCA was adopted, SADC members were wary that it could disrupt regional integration efforts. The EU was a significant global trading bloc, and by negotiating a bilateral agreement with South Africa, there was concern that the agreement would create a regional imbalance. Some SADC members were wary that South Africa, the region's largest and most developed economy, would benefit disproportionately from enhanced trade relations with the EU, leaving smaller SADC economies at a disadvantage.[56]

The TDCA undermined SADC's plans for a regional free trade area by diverting South Africa's focus from intra-regional trade to the EU. Since SADC's goals were focused on fostering regional economic integration, including through the SADC Protocol on Trade, the unilateral agreement with the EU can be seen as prioritising external over regional commitments. Moreover, SADC member states appreciated that the TDCA would result in trade diversion, with goods from the EU replacing intra-SADC trade, further weakening economic ties in the region.[57]

Despite these challenges, the TDCA was not entirely disruptive in the long term. Over time, SADC members sought to mitigate its effects by negotiating collectively with external partners. This shift culminated in the Economic Partnership Agreement (EPA) between the EU and the SADC Economic Partnership Agreement group (SADC EPA), which included South Africa and five other SADC member states.[58] The EPA addressed the TDCA-related disparities by providing a framework for regional engagement with the EU. [59]

4 2 Criticism from the SACU

The SACU, the oldest customs union in the world, with five members — South Africa, Botswana, Lesotho, Namibia, and Eswatini (formerly Swaziland) — raised similar concerns, but with a sharper focus on customs and trade policy alignment. As a customs union, the SACU applies a common external tariff[60] and member states share customs revenue generated under the common external tariff.[61] Criticisms included that South Africa's decision to negotiate the agreement with the EU unilaterally could undermine SACU's unity and collective bargaining power.[62] The excluded SACU member states claimed that in trade negotiations, SACU countries ought to act together because they share a common external tariff, and that, by negotiating independently, South Africa disregarded this arrangement.[63] This claim has strong similarities to the case before the Court of Justice of the EAC, discussed below.

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56 See generally Qhobela *TDCA and SADC EPA: Facilitation of Market Growth and Integration or Decline within SACU?: A Critical Analysis* (LLM thesis, UCT, 2014) https://open.uct.ac.za/server/api/core/bitstreams/d2d0f953-52e0-465e-ab6a-c84fbce28b6e/content (accessed 14-10-2024).

57 See generally Bertelsman-Scott and Draper *The TDCA: Impacts, Lessons and Perspectives for EU–South and Southern African Relations* 2005 https://www.saiia.org.za/wp-content/uploads/2013/06/7-Trade-Report-No.-7_reduced.pdf (accessed 14-10-2024).

58 See generally Czermińska "Trade Relations between the European Union and South Africa – Causes and Effects of the Transition from TDCA to EPA" 2018. *Proceedings of the 18th International Joint Conference Central and Eastern Europe in the Changing Business Environment.*

59 See generally Qhobela LLM thesis.

60 Meaning that all member states apply the same tariffs on goods imported from outside the Union.

61 Goodison "Marginalisation or Integration? Implications for South Africa's Customs Union Partners of the South Africa–European Union Trade Deal" 1999 *The Institute for Global Dialogue (IGD), Occasional Paper.*

62 Kiala *The Politics of Trade in the Southern African Customs Union (SACU): Prospect of the SACU China Free Trade Agreement* (Masters thesis, University of Pretoria, 2009) 73 https://repository.up.ac.za/bitstream/handle/2263/30593/dissertation.pdf?sequence=1 (accessed 15-10-2024).

63 Goodison 1999 *Occasional Paper.*

As demonstrated above, the TDCA offered preferential access to EU products in South Africa and, by allowing lower tariffs on EU imports, threatened to reduce the revenue pool from which SACU members benefited. As EU imports entered South Africa at reduced or zero tariffs, the revenue that SACU would normally collect on these imports would decline, disproportionately affecting the smaller SACU members that relied on customs revenues to promote fiscal stability. Consequently, the excluded member states — Botswana, Lesotho, Namibia, and Eswatini — believed that the establishment of a free trade area would negatively affect the customs revenue-sharing pool of the SACU members and their national budgets.[64]

SACU members feared that the preferential terms offered to the EU would negatively affect their economies by increasing competition from European goods, potentially undermining local industries that were less competitive than those in South Africa. They were also concerned that South Africa's independent trade agreement with the EU would weaken SACU's collective bargaining power in negotiating future trade agreements as a bloc.[65]

Following the conclusion of the TDCA, there were calls for reforms within SACU to make decision-making more inclusive and transparent. The excluded SACU members sought a greater role in trade negotiations affecting the entire customs union and mechanisms to prevent any one member from acting independently in ways that could harm the group's economic interests. In response to these concerns, South Africa eventually agreed to renegotiate the SACU Agreement. The resultant 2002 SACU Agreement introduced new provisions to ensure greater equality among member states in decision-making, particularly in external trade negotiations.[66] The new agreement aimed to address the imbalance by establishing more equal participation in decision-making, including negotiating trade agreements as a bloc.[67]

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64 Lee 2002 *JCAS* 92.

65 This can indeed also be seen by the subsequent economic partnership agreements entered into with the EU following the end of the Lomé and Cotonou Agreements.

66 Article 31 of the 2002 SACU Agreement requires the SACU member states to negotiate trade agreements with third parties as a collective https://www.sacu.int/uploads/documents/11ed59ad0efe7652a9f7ea25c3438 15919ed023c.pdf (accessed 15-10-2024).

67 Article 31 2002 SACU Agreement
"Trade Relations with Third Parties
1. Member States may maintain preferential trade and other related arrangements existing at the time of entry into force of this Agreement.
2. Member States shall establish a common negotiating mechanism in accordance with the terms of reference to be determined by the Council in accordance with paragraphs 2 and 7 of Article 8 for the purpose of undertaking negotiations with third parties.
3. No Member State shall negotiate and enter into new preferential trade agreements with third parties or amend existing agreements without the consent of other Member States.
4. When goods imported by a Member State from outside the Common Customs Area under a preferential agreement are exported to another Member State, the normal import duty applicable to such goods when imported into the rest of the Common Customs Area will be charged. Any difference between the normal duty and the duty originally charged on these goods shall be paid into the Common Revenue Pool."
To date, the concluded trade negotiations with third parties that have upheld Art 31 of the SACU Agreement, 2002, are:
(i) the Preferential Trade Agreement (PTA) with the Southern Common Market (MERCOSUR), consisting of Argentina, Brazil, Venezuela, Uruguay and Paraguay, and which came into force on 1 Apr 2016;
(ii) the Free Trade Area (FTA) with the European Free Trade Association (EFTA) consisting of Norway, Switzerland, Iceland and Liechtenstein, which came into force on 1 May 2008;
(iii) the Trade, Investment, and Development Cooperative Agreement (TIDCA) with the United States of America, signed and implemented in Jul 2008;
(iv) the Economic Partnership Agreement (EPA) between the European Union (EU) and the Southern African Development Community EPA Group, which came into force on 10 Oct 2016; and
(v) the Economic Partnership Agreement (EPA) between SACU member states and Mozambique and the UK, which was signed in Oct 2019 and entered into force in Jan 2021.

The tensions in SADC and SACU resulting from South Africa's unilateral negotiations with the EU were perceived as self-serving, suggesting that the country was leveraging its economic position without fully considering the broader regional implications. There were also concerns that South Africa's TDCA could set a precedent for other SADC and SACU members to pursue their own bilateral agreements, further fragmenting regional economic cohesion.[68]

The unilateral nature of South Africa's actions in negotiating the free trade agreement with the EU demonstrated the complexities of regional economic integration. It highlighted the intricate dynamics between regional integration and bilateral trade agreements. These complexities are further exacerbated when the economies of member states are highly unequal. The discussion above also highlights the need for strong legal mechanisms to ensure that member states adhere to their regional commitments and do not act in ways that harm the region as a whole.

Like the impact on SADC, the TDCA's effect was not entirely disruptive in the long term. The SACU treaty was amended to prevent a similar situation from occurring in the future, which appeased the parties.[69] Member states were also later party to the SADC EPA, which addressed the disparities caused by the TDCA.[70]

5 THE LAUNCH OF BILATERAL FREE TRADE NEGOTIATIONS BETWEEN KENYA AND THE UNITED STATES

Similar to South Africa's unilateral negotiations of a TDCA with the EU, was Kenya's negotiation of a free trade area with one of its larger trading partners, the US. The US and Kenya announced their intentions to negotiate a free trade area on 6 February 2020.[71] Kenya's decision was fuelled by the need to facilitate the continued duty and quota-free access of Kenyan goods into the US after the termination of the African Growth and Opportunities Act.[72] Here too,[73] these bilateral negotiations commenced without the involvement of the EAC, a customs union and common market, of which Kenya had been a party since 2000.[74]

68 See generally Bertelsman-Scott and Draper *The TDCA: Impacts, Lessons and Perspectives*.

69 See generally Kirk and Stern "The New Southern African Customs Union Agreement" 2003 *Africa Region Working Paper Series 57*.

70 Bertelsmann-Scott "SACU – One Hundred Not Out: What Future for the Customs Union?" 2010 *SAIIA Occasional Paper Development Through Trade Programme* 9.

71 Naumann "The U.S.-Kenya Free Trade Area (FTA): Insights into the Bilateral Trade Relationship and Early Progress on Setting Terms for an FTA" 2020 *tralac* https://www.tralac.org/publications/article/14663-the-united-states-kenya-free-trade-area-fta-insights-into-the-bilateral-trade-relationship-and-early-progress-on-setting-terms-for-an-fta.html (accessed 14-10-2024).

72 AGOA provides eligible sub-Saharan African countries with duty-free access to the US market for over 1 800 products, in addition to the more than 5,000 products that are eligible for duty-free access under the Generalised System of Preferences program. https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa (accessed 7-8-2024).

73 Similar to the discussion under section 3, where South Africa unilaterally negotiated a free trade area with the European Union without including the Southern African Customs Union (SACU) parties.

74 The East African Community (EAC) is a regional intergovernmental organisation of eight partner states: The Republic of Burundi, the Democratic Republic of the Congo, the Republic of Kenya, the Republic of Rwanda, the Federal Republic of Somalia, the Republic of South Sudan, the Republic of Uganda, and the United Republic of Tanzania, and with its headquarters in Arusha, Tanzania. Kenya has been a partner state since 2000.

Prior to these negotiations, there had been much discourse over the last few years about whether Kenya could unilaterally negotiate an FTA with a third country outside the EAC and, if so, what the requirements of entering such negotiations are.[75]

In contrast to the unilateral negotiations between South Africa and the EU in the late 1990s, the Court of Justice of the EAC (CJEAC) intervened in the case of *Christopher Ayieko v Attorney General of the Republic of Kenya.*[76] Unlike SADC, which does not have an operational Tribunal,[77] the discussion below shows that the CJEAC's decision confirms that adherence to the EAC Treaty and respect for the jurisdiction of regional courts are critical to ensuring that member states comply with their regional obligations. This demonstrates how robust legal frameworks ensure that regional commitments are respected, a necessity for effective integration.

In March 2020, the first and second applicants, Ayieko and Osiemo, filed a reference to the CJEAC against the Attorney General of the Republic of Kenya as first respondent and the Secretary-General of the EAC as second respondent.[78] The primary issue was whether negotiations between Kenya and the US were undertaken without complying with procedural rules, namely by failing to send the proposed agreements to the Secretary-General of the Community, in violation of community law.[79] The secondary issue was whether the Secretary-General of the EAC had failed to fulfil his obligations under community law by not carrying out his mandate.[80]

The applicant's argument was primarily based on procedural rules and on the objectives of EAC community law, which were breached by failing to include the other EAC partner states in the negotiations. While the first respondent held that there was no obligation to notify or inform partner states about non-concluded agreements, it is the sovereign right of a state to conclude or amend a trade agreement with a foreign country on its own.[81]

In the judgment of the Court delivered on 2 December 2022, the Court first clarified what constitutes a proposed agreement under Article 37(4) of the Customs Union Protocol, as this would determine whether an obligation to notify other partner states was present. Thereafter, the Court examined the violations of community law.

In determining the issue, the CJEAC examined Article 37 of the EAC Customs Union Protocol and Article 37 of the Common Markets Protocol, which each provide in sub-section 4(a) that:

> A Partner State may separately conclude or amend a trade agreement with a foreign country provided that the terms of such an agreement or amendments are not in conflict with the provisions of this Protocol.[82]

75 Khandwalla "The East African Court of Justice Delivers a Landmark Judgement on Kenya's Bilateral Negotiation with the United States without Involving EAC Partner States" 2023 *tralac* https://www.tralac.org/blog/article/15989-the-east-african-court-of-justice-delivers-a-landmark-judgement-on-kenya-s-bilateral-negotiation-with-the-united-states-without-involving-eac-partner-states.html (accessed 15-01-2026)

76 *Christopher Ayieko v Attorney General of the Republic of Kenya,* Reference No 5/2019.

77 Phooko 2020 *Spec J* 175.

78 Reference No 5/2019 (13).

79 Reference No 5/2019 (15).

80 Reference No 5/2019 (16).

81 Reference No 5/2019 (19).

82 Protocol on the Establishment of The East African Customs Union. Article 37 Trade Arrangements with Countries and Organisations Outside the Customs Union.

Article 37(4)(b) provides that:

> Where a Partner State intends to conclude or amend an agreement, as specified in paragraph 4(a) of this Article, with a foreign country the Partner State shall send its proposed agreement or amendment by registered mail to the Secretary General, who shall communicate the proposed agreement by registered mail to the other Partner States within a period of thirty days, for their consideration.

The Court concluded that Kenya's trade agreement and arrangements with the US did indeed trigger the obligation under Article 37(4). The CJEAC specified that the ordinary meaning of the provision would require that, where the partner state has a plan to conclude a trade agreement with a foreign country, it shall suggest the possible agreement to the other partner states for consideration.[83]

The CJEAC further stated that the statement released on 6 February 2020 by the Kenyan Cabinet Secretary of the Ministry of Industrialisation announced their intention to negotiate an FTA with the US. The CJEAC declared that the next course of action, as per Article 37 of the Protocol, would be that once the intent has been ascertained, the partner state should transmit a proposed agreement to the other partner states within 30 days. The CJEAC noted that the Customs Union Protocol specifies a proposed agreement and not a completed one.

The CJEAC was explicit when it confirmed that:

> By omitting to engage the other Partner States … the 1st Respondent's actions potentially serve to jeopardize coordination of the Partner States economic policies though the institutions of the Community. The Respondent's actions and inactions undermine those aspects of the aspirations of the Community stipulated in Articles 37 of the Customs Union Protocol and the Common Market Protocol as well. They also undermine the precedence of the Community organs, institutions and law on implementation of the Treaty, contrary to Article 8 of the Treaty.[84]

The second respondent, the Secretary-General of the EAC, alluded that it had indeed taken prompt action, as a letter was sent to Kenya to enquire about negotiations. However, the Court held that:

> Given the gravity of this matter, one would have expected to see more initiative on the part of the [2nd] Respondent to have it resolved. The [2nd] Respondent should have sought to have his letter replied to or in the alternative, should have invoked his mandate under Article 71 and 29 of the Treaty to conduct an independent investigation about the matter.[85]

In particular, the intent to negotiate violated Kenya's commitment to the fundamental principles of the Community, specifically the principles of the rule of law, transparency and cooperation for mutual benefit as guaranteed under Articles 6(d) and (f) and 7(2) of the EAC Treaty and Article 37 of the Customs Union Protocol (and Article 37 of the Common Market Protocol). The proposed FTA was declared illegal, null and void.[86]

This judgment of the CJEAC is considered to confirm that legal integration extends beyond economics and trade; it also addresses the need for political and institutional alignment. The *Ayieko* case demonstrates the importance of legal compliance. It clearly shows how, when legal mechanisms are correctly used, the pitfalls of unilateralism can be avoided. This decision is in stark contrast to the South Africa–EU FTA that was discussed earlier.

83 Khandwalla 2023 *tralac*.

84 Reference No 5/2019 (65).

85 Reference No 5/2019 (101).

86 Reference No 5/2019 (108).

Had the SACU member states had the opportunity to approach a judicial body to ensure the integrity of the customs union, the negotiations may have followed a different trajectory. A legal framework can establish common governance standards which are essential to the long-term stability of any regional bloc. Likewise, the fact that the SADC Tribunal is not operational actively endorses unilateral negotiations by SADC member states that may be detrimental to the integrational project. As for the AfCFTA, for it to be successful, legal integration is necessary. The provision of effective dispute resolution mechanisms is therefore imperative.

6 REGIONAL COHESION THROUGH ALL THE DIFFERENT SCALES OF INTEGRATION

The progression of regional integration in Africa can be seen in the interconnected structures of the SACU, SADC, other RECs such as the EAC and, ultimately, at a continental level, the AfCFTA.[87] These frameworks represent different scales of economic collaboration, moving from localised cooperation within SACU to broader regional integration through SADC and the other REC and, ultimately, to the continent-wide ambitions of AfCFTA. Each stage reflects Africa's commitment to enhancing trade and economic development, with SACU, SADC, and REC laying the groundwork for the larger vision embodied by AfCFTA.[88]

SACU has been a crucial building block for economic cohesion in southern Africa, laying the foundation for collective trade policies and shared customs revenues among its five member states. SADC, which incorporates SACU and other member countries, expanded the scope of cooperation to include a broader range of economic, political, and social objectives.[89] Finally, AfCFTA, launched in 2017, aims to integrate all African economies into a single market, creating the largest free trade area in the world by number of countries.[90] Together, these structures represent Africa's evolving strategy to harness regional strengths for broader economic growth and global competitiveness.

The formation of a customs union is part of SADC's broader economic integration agenda. SADC's economic integration process follows a step-by-step approach outlined in its Regional Indicative Strategic Development Plan (RISDP).[91] The steps toward integration include: an FTA, customs union, followed by a common market and ultimately a monetary union. However, the process of moving towards deeper regional economic integration, with the ultimate goal of establishing a customs union and eventually a common market, has been slower than initially planned, and there are significant challenges in its implementation.[92] For this discussion, only the FTA and customs union are explored.

In 2008, SADC launched an FTA to eliminate tariffs on goods traded between member states. This FTA allows for duty-free access to most goods originating in the region, facilitating intra-regional trade. Most SADC members are now part of the FTA, with some exceptions owing to economic and political concerns.[93] The next stage in SADC's economic integration agenda is the formation of a customs union, which was initially planned for 2010. A customs union requires

87 AUC *2019 African Regional Integration Report: Towards an Integrated and Prosperous and Peaceful Africa* (2019) xiii https://au.int/sites/default/files/documents/38176-doc-african_integration_report-eng_final.pdf (accessed 26-05-2025).

88 *Ibid* 125.

89 Mathis 2005 "The Southern African Customs Union (SACU) Regional Cooperation Framework on Competition Policy and Unfair Trade Practices" *A report prepared for UNCTAD* 39.

90 AUC *2019 Integration Report* 126.

91 Erasmus 2011 *SADC LJ* 17–34 21.

92 See generally "Status of Integration in the Southern African Development Community" SADC Secretariat, https://www.sadc.int/sites/default/files/2021-08/Status_of_Integration_in_the_SADC_Region_Report.pdf (accessed 26-05-2025).

that SADC countries adopt a common external tariff on imports from non-member countries, in addition to the FTA among members. However, this goal has been delayed because of several technical, political, and economic challenges.[93] The requirement for harmonised customs procedures and tax systems is particularly complex, given the region's economic diversity.[94]

Nonetheless, despite the above-mentioned challenges and the global economic slowdown and macroeconomic challenges, intra-African trade has shown resilience in 2023, as reported by the 2025 Afrixembank African Trade Report.[95] Intra-African trade accounted for 14.9 per cent of total African trade, up from 13.6 per cent in 2022. The total value of intra-African trade rose to USD192.2 billion, reflecting a 3.2 per cent annual increase, though lower than the 10.9 per cent growth recorded in 2022.[96] Southern Africa led both in absolute trade volumes and in regional contribution, accounting for 41.1 per cent of intra-African trade. South Africa alone represented 20.4 per cent, reflecting its diversified economy.[97] This improvement is attributed to ongoing efforts to deepen regional integration, particularly through the AfCFTA, which has led to the adoption of legally binding tariff schedules, rules of origin, and customs documentation.[98] While aggregate figures are encouraging, the report highlights regional disparities and the need for continued policy harmonisation and trade facilitation to fully realise the benefits of intra-African trade.

In addition to the economic diversity of the region, many SADC member states are also part of other RECs, such as the SACU, the EAC, and the Common Market for Eastern and Southern Africa (COMESA).[99] These overlapping memberships create challenges in harmonising trade policies and tariff structures, as different RECs have different external tariff regimes. The author submits that one of the most significant challenges lies in the need for member states to relinquish some control over their trade and fiscal policies, which is an essential requirement for establishing a customs union. The need for harmonised external tariffs and coordinated economic policies can be seen as a limitation on national policy autonomy and state sovereignty. This is clearly demonstrated by South Africa's decision to unilaterally engage in the TDCA negotiations with the EU, excluding its SACU state parties — as discussed above.

In addition, since some SADC countries are part of SACU, which already has a common external tariff, reconciling SACU's existing customs union with SADC's broader customs union agenda poses additional complications.[100] There would need to be alignment or integration of these two arrangements, which is a politically and economically complex issue, as indicated above. While the formation of a customs union remains an aspirational goal within SADC, progress has been slow, and the timelines initially set have not been met.[101] Discussions on establishing a customs union continue, but owing to the challenges mentioned, there has been no clear consensus on when or how it will be achieved in SADC.

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93 "Status of Integration" SADC Secretariat Report 83.

94 *Ibid* 24.

95 See generally Afrixembank "Transforming Africa's Trade" African Trade Report 2024 https://media.afreximbank.com/afrexim/African-Trade-Report_2024.pdf (accessed 26-05-2025).

96 *Ibid* 13.

97 *Ibid* 67.

98 *Ibid* 71.

99 The history of COMESA began in December 1994, when it was formed to replace the former Preferential Trade Area (PTA) that had existed since 1981. Member states are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe https://www.comesa.int/ (accessed 14-10-2024).

100 "Status of Integration" SADC Secretariat Report 10.

101 *Ibid* 24.

The author believes the future role of the SACU is likely to evolve as the region grapples with new economic challenges and opportunities, including deeper regional integration and the expansion of intra-African trade. Recent developments aimed at addressing regional disparities and enhancing harmonisation and trade facilitation, which are critical for realising the benefits of intra-African trade, include several strategic initiatives. Among them are SADC's Regional Indicative Strategic Development Plan (RISDP 2020–2030)[102] and Vision 2050,[103] both of which aim to deepen regional integration and promote sustainable development in southern Africa. These strategies explicitly reference alignment with the AfCFTA, highlighting the potential to expand intra-SADC trade and support cross-regional FTA initiatives. However, the RISDP also acknowledges that progress towards establishing a SADC Customs Union has been limited. In parallel, SACU outlines its vision in the Strategic Plan 2022–2027,[104] which is structured around six strategic pillars. Notably, Pillar 3 focuses on the implementation of and benefit from opportunities presented by the AfCFTA. Most recently, SADC has taken steps to develop a Coordination Plan[105] aimed at maximising the benefits of the AfCFTA while avoiding duplication with regional programmes such as the AfCFTA.

SACU is already a well-established customs union with a common external tariff, which could serve as a foundation for more extensive integration efforts in the region, such as those under SADC and those proposed under the AfCFTA, as discussed above. It is suggested that since the SACU is the oldest customs union in the world, its institutional framework and policies could guide SADC and, ultimately, the AfCFTA, in creating a broader regional customs union.

Having highlighted the relationship between SACU and SADC, and the alignment of these regional communities with the AfCFTA, the fundamental correlation between regional integration and legal integration is once again brought to the fore, as legal frameworks provide the foundation for the success of any regional integration effort. The need for adherence to the frameworks and for effective dispute-resolution mechanisms to ensure that regional agreements are enforced is once again illustrated by South Africa's decision to negotiate the TDCA unilaterally with the EU.

From the author's perspective, it is preferable to retain regional dispute resolution mechanisms, such as the EACJ, alongside the AfCFTA Dispute Settlement Mechanism (DSM)[106] and the African Court on Human and Peoples' Rights (AfCHPR).[107] This position is based on several non-exhaustive considerations. First, RECs often pursue broader and deeper integration goals than, for example, those of the AfCFTA. For instance, the EAC aims to establish both a common market and a customs union,[108] which are objectives that extend beyond the AfCFTA's primary

102 SADC's Regional Indicative Strategic Development Plan (RISDP 2020–2030) https://www.sadc.int/pillars/regional-indicative-strategic-development-plan-2020-2030 (accessed 26-05-2025).

103 SADC Vision 2050 https://www.sadc.int/sites/default/files/2021-08/SADC_Vision_2050.pdf (accessed 26-05-2025) in particular mentions integration into the broader AfCFTA area.

104 Strategic Plan for the Southern African Customs Union (SACU) 2022–2027 https://www.sacu.int/uploads/documents/a5b6a3a7b6db1de61e1fb20caeb6dc16ed17d5a5.pdf (accessed 15-01-2026).

105 The plan is supported by funding from the German Development Cooperation (through the GIZ CESARE programme) and the European Union (through the EU Technical Assistance Facility (TE-TAF) which stands for Team Europe Technical Assistance Facility EU, Germany, France and Sweden) and is implemented by GIZ, Expertise France and FIIAPP) to support the AfCFTA and Continental Economic Integration.

106 See generally Milej "The Dispute Settlement Mechanism under the African Continental Free Trade Area as a Preserve of Elites – A Missed Opportunity for Regional Integration in Africa" 2023 Proceedings of the National University of Lesotho - World Trade Organization (NUL-WTO) Research Chairs' 2nd Annual Conference "The Political Economy of Regional Integration and International Trade in Africa" 5–6 Oct 2023 https://ssrn.com/abstract=4644827 (accessed 27-05-2025).

107 AFCHPR https://www.african-court.org/wpafc/ (accessed 27-05-2025).

108 Objectives of the EAC https://www.eac.int/customs/objectives (accessed 27-05-2025).

focus on trade liberalisation.[109] Second, regional mechanisms tend to provide broader access to justice. The EACJ permits applications from individuals and non-governmental organisations (NGOs), whereas the AfCFTA DSM is limited to state-to-state disputes.[110] Although the AfCHPR allows individual and NGO access, this is contingent on state declarations under Article 34(6) of the Court's Protocol.[111] A significant number of states have either failed to make these declarations or have since withdrawn them.

However, the coexistence of multiple dispute resolution bodies introduces the risk of overlapping jurisdictions. This can lead to forum shopping, where states or non-state actors select a forum based on perceived advantage, potentially undermining legal coherence.[112] In addition, divergent interpretations by the AfCHPR, EACJ, or AfCFTA panels may result in contradictory rulings, thereby weakening the authority and predictability of continental legal norms. [113]

To address these challenges, the author proposes that treaty bodies consider developing protocols to clarify the relationships among regional and continental mechanisms. These protocols should address issues such as rules of precedence, referral procedures, and subject-matter distinctions. Furthermore, efforts to promote harmonisation and mutual recognition between judicial bodies would support more coherent jurisprudence. Establishing clear jurisdictional rules and coordination mechanisms would allow the benefits of broader and deeper access to be more fully realised.

7 CONCLUSION

The paper explored the complex relationship between regional and legal integration in southern Africa, particularly in the context of SACU and SADC and their roles within the broader AfCFTA framework. Legal integration is not merely a supplementary feature but rather a cornerstone for ensuring that regional integration is sustainable and effective. As illustrated, the failure of the SADC Tribunal and South Africa's unilateral trade agreement with the EU are poignant examples of how political dynamics and sovereignty issues can disrupt regional cohesion. It is strongly urged that, for AfCFTA to succeed and for SADC to play a meaningful role in its implementation, member states must commit to a harmonised legal framework governing trade, dispute resolution, and treaty adherence. As Africa progresses towards deeper economic integration, the lessons from SADC's experience underline the need for legal mechanisms that transcend national interests — for the greater regional good.

109 See aims and objectives of the AfCFTA https://au.int/en/african-continental-free-trade-area (accessed 27-05-2025).

110 See generally Milej "The Dispute Settlement Mechanism" 2023.

111 Currently, there are only six member *states* that have deposited the *Declaration under Article 34*(*6*) *of* the African Court Protocol https://www.african-court.org/wpafc/declarations/ (accessed 27-05-2025).

112 Akinkugbe "What the African Continental Free Trade Agreement Protocol on Dispute Settlement Says about the Culture of African States to Dispute Resolution" 2019 *AfronomicsLaw* https://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution (accessed 27-05-2025).

113 *Ibid*.