



EMORY
LAW

Emory International Law Review

Volume 28 | Issue 1

2014

Rethinking and Theorizing Regional Integration in Southern Africa

Luwam G. Dirar

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

Luwam G. Dirar, *Rethinking and Theorizing Regional Integration in Southern Africa*, 28 Emory Int'l L. Rev. 123 (2014).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol28/iss1/5>

This Article is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

RETHINKING AND THEORIZING REGIONAL INTEGRATION IN SOUTHERN AFRICA

*Luwam G. Dirar**

Regional integration studies is characterized by, and normally understood as, a combination of inquiries from various disciplines. Conventionally, integration requires the amalgamation of political and economic policies. Yet, integration projects transcend political and economic cooperation and might even require harmonization of laws and principles. Scholars from legal, economic, and political sciences have studied and engaged in intra-disciplinary conceptualization of integration. Some of the theories that developed in relation to integration schemes in the developed North reflect socio-economic, political and historical factors of the North, casting doubt on the applicability, value, and consistency of those theories to integration schemes in southern Africa. Hence, this article is an attempt to conceptualize integration through a multidisciplinary analysis in order to proffer a broader conception of integration that encompasses local and regional emancipation movements in Africa in general, and in southern African countries in particular.

* Rudolf Schlesinger Comparative Law Fellow, 2012–2013, Cornell Law School; Visiting Researcher of Law, Institute for Global Law and Policy, Spring 2013, Harvard Law School; J.S.D. Candidate, Cornell Law School; LL.M., Cornell Law School; LL.B., Asmara University (*cum laude*). I am deeply grateful for the encouragement and comments of Chantal Thomas, Muna Ndulo, Robert Hockett, James Gathii, Erika De Wet, Ibrahim Gassama, Steve Kayizzi-Mugerwai, Kibrom Teweldebirhan, Fudzai Pamacheche, Memory Dube, Danny Bradlow, and Magnus Killander. My gratitude also goes to the Institute for Comparative and International Law in Africa, Pretoria University, Schlesinger Comparative Fellowship and Berger International Studies Program, Cornell Law School. Mistakes and errors are my own. This Article is a chapter in my J.S.D. dissertation at Cornell Law School, titled the European Union as an Exogenous Factor in Integration Schemes of southern African States.

| | |
|---|-----|
| INTRODUCTION | 125 |
| I. PAN-AFRICAN CONCEPTION OF INTEGRATION | 128 |
| A. <i>Founding Fathers: African Unity or African Solidarity</i> | 129 |
| II. CLASSICAL ECONOMIC THEORIES OF INTEGRATION | 133 |
| III. KANTIAN THEORY OF PERPETUAL PEACE AND AFRICAN REGIONAL INTEGRATION | 138 |
| A. <i>Mbeki and Hegel on Kant</i> | 140 |
| B. <i>Marketization and Peaceful Coexistence</i> | 144 |
| IV. LAW AND CONCEPTUALIZATION OF INTEGRATION | 145 |
| A. <i>Nature of Law</i> | 147 |
| B. <i>Function of Law</i> | 149 |
| C. <i>Politicization of Law</i> | 150 |
| D. <i>Consensus of Non-Enforcement</i> | 152 |
| E. <i>Integration Pessimism and Optimism</i> | 154 |
| V. CONCLUSIONS: TOWARDS A BROADER CONCEPTION OF INTEGRATION | 155 |
| A. <i>Romantic Idealism Vis-à-Vis Broader Conception of Integration</i> | 158 |
| 1. <i>Emancipation: Between Colonization and Racial Domination</i> | 160 |
| 2. <i>Integration-Disintegration and Emancipation</i> | 163 |
| CONCLUSION | 165 |

INTRODUCTION

Existing theories of regional integration are characterized by a lack of consensus. Theorists from different disciplines have attempted to theorize and conceptualize integration.¹ However, most theorists focus on their own disciplinary inquisition rather than on a comprehensive conceptual framework for understanding regional integration. The different approaches to understanding regional integration resulted in the current epistemological pluralism, which lacking epistemic synergy, led to the correlation between disciplinary inquiry and the nature and character of the integration scheme.

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

Similar to theorists in other disciplines, legal scholars also have a particular approach to analyzing integration. Legal scholars focus on understanding coherence, supremacy, and the direct effect of integration law, and assume the economic and political impacts of integration schemes are already known. Among legal scholars there is generally a positive appreciation for the effects of integration on development, even though economic theories show less than positive results. Many non-legal theorists assume that integration agreements can apply domestically despite the fact that domestic application of integration schemes requires a sophisticated discourse involving domestic constitutional norms and principles based on monist or dualist legal thought. Furthermore, the lack of horizontal and vertical coherence in regional integration law further complicates existing domestic application of regional commitments.

Although various disciplines approach integration differently, the existing integration schemes in Africa, and in southern Africa in particular, cannot be

¹ See, e.g., Stanley Hoffmann, *Significant Books of the Last 75 Years: Western Europe*, FOREIGN AFF., Sept./Oct. 1997, at 224, 226–27 (reviewing ERNEST B. HASS, *THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950–1957* (1958)) (explaining that Ernest B. Haas is considered one of the first international relations theorists of European integration schemes); see also C.A. Cooper & B.F. Massel, *A New Look at Customs Union Theory*, 75 ECON. J. 742, 742–47 (1965) (discussing economic aspects of regional integration through customs unions).

easily categorized as political or economic integration schemes, but rather as a combination of all approaches.² In addition, existing theories of integration, such as the linear integration model, developed in relation to integration schemes of the developed North took into account the particular historical, socio-economic, and political factors of that region.³ For this reason, there is doubt as to the applicability of these schemes in the integration of other developing countries.⁴ The question remains then, how to overcome the existing epistemological pluralism and develop a comprehensive understanding of regional integration in Africa. Hence, in order to proffer a broader, if not comprehensive, understanding of integration, this article proposes a multidisciplinary inquisition that investigates the concept of integration by using historically sensitive methodologies.

First, to conceptualize regional integration in Africa, and in southern Africa in particular, this article looks at the views of three prominent African leaders and founding fathers: Emperor Haile Selassie of Ethiopia,⁵ Julius Nyerere, first president of Tanzania,⁶ and Kwame Nkrumah, first president of Ghana.⁷ The

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

³ See JAMES THUO GATHII, *African Regional Trade Agreements as Flexible Legal Regimes*, in *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES 1* (2011) (comparing African integration schemes with their counterparts in Europe and North America).

⁴ *Id.*

⁵ See generally HAILE SELASSIE I, *THE AUTOBIOGRAPHY OF EMPEROR HAILE SELASSIE I: ‘MY LIFE AND ETHIOPIA’S PROGRESS’ 1892–1937* (Edward Ullendorff trans., 1976) (discussing Haile Selassie’s ascent to power); see also Reidulf Molvaer, *My Life and Ethiopia’s Progress Vol. II*, 3 NE. AFR. STUD. (n.s.) 149, 149–54 (1996) (reviewing and critiquing Haile Selassie’s autobiography); see also Gérard Chaliand, *The Horn of Africa’s Dilemma*, FOREIGN POL’Y, Spring 1978, at 116, 117 (discussing the causes of resistance to Haile Selassie and his overthrow from power, in particular that Haile Selassie, by focusing on modernization of military, international relations and education, failed to address the needs of eighty-five percent of the Ethiopian population who were in need of land and economic policy reforms).

⁶ Madaraka Nyerere, *A Short Biography of Julius Nyerere*, in *AFRICA’S LIBERATION: THE LEGACY OF NYERERE*, at xvi–xvii (Chambi Chachage & Annar Cassam eds., 2010). Julius Nyerere, who was also referred

views of Nkrumah and Nyerere will help conceptualize integration in Africa, given that they both represent two of the main blocks of negotiation for unity in post-colonial Africa.⁸ However, reference to Selassie as an African integration thinker might appear contentious. Selassie's persistent claim of how his Ethiopian kingdom is a continuation of Kingdom of Judah makes him more Zionist than Africanist. Nevertheless, discussions during the formative years of African unity show that Selassie's views are an intermediary between the views of Nkrumah and Nyerere. His persistent call for unity without regard to different approaches emphasized "unity" as solidarity, even more than "unity" as integration.⁹

Second, this Article challenges classical theories and justifications of regional integration and their applicability in the southern African context.¹⁰ Unlike the classical justification for integration in Europe, the main justification for integration in post-colonial Africa is emancipation from racial

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

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

⁸ *See* Mohabe Nyirabu, Feature, *Appraising Regional Integration in Southern Africa*, 13 AFR. SECURITY REV., no. 1, 2004, at 21, 21–22 (comparing Nkrumah's and Nyerere's integration models).

⁹ *See* Haile Selassie, Emperor of Ethiopia, Address at the 1963 African Summit (May 23, 1963), in U.N. ECON. COMM'N FOR AFR., *CELEBRATING SUCCESS: AFRICA'S VOICE OVER 50 YEARS 1963–2013*, at 2, (2013) [hereinafter Selassie Address].

¹⁰ By classical theories of integration, the author is referring to the economic and political justifications for integration.

domination and colonial rule.¹¹ With the end of apartheid rule and the independence of all African states, the common need for political emancipation has become less imperative.¹² The question then remains: Has integration ended with the end of apartheid? More specifically, has there been a transformation in how integration is understood, and is integration sought only for conventional justifications like the economic and political reasons given in case of the European Union?¹³ By asking these questions and others, this article is a critical attempt to move toward a multidisciplinary reconceptualization of integration in Africa, and in southern African countries in particular. In conclusion, this Article intends to bring both theoretical and conceptual synergy by re-conceptualizing “integration as emancipation” among southern African states.

I. PAN-AFRICAN CONCEPTION OF INTEGRATION

This Part of the Article analyzes the ideas of African political thinkers regarding regional integration in order to proffer answers for understanding integration in the continent. Understanding the views of Selassie, Nkrumah, and Nyerere (referred to in this Article as the “founding fathers”),¹⁴ leads to a sophisticated discourse of regional integration that allows one to assess the conceptual understanding of integration, or the lack thereof, by exploring the intent of the founding fathers. The dominant understanding among post-colonial African thinkers was that there was a shared enthusiasm for integration.¹⁵ All the states represented in the formative years of the

¹¹ See Selassie Address, *supra* note 9, at 1–2.

¹² In this part, the use of the phrase, “political emancipation” is limited to the independence of African states from colonization and the freedom of Africans from racial domination by colonial settlers. However, expansions of the emancipation project to new post-independence emancipation projects of Africa, for instance minority rights movements, is advocated and argued for in the last part of this Article.

¹³ The main justification for the origins of the EU in the 1950s is the creation of peaceful co-existence and economic development and prosperity among member states. See Robert Schuman, French Minister of Foreign Affairs, Declaration of 9 May 1950, in EUR. PARLIAMENT, 60TH ANNIVERSARY OF THE SCHUMAN DECLARATION 1950–2010: THE 9TH OF MAY SCHUMAN DECLARATION: HISTORICAL CONTEXT AND MAIN ACTORS 33 (2010).

¹⁴ The call for African Unity can be traced back to Marcus Garvey, Henry Sylvester-Williams, W.E.B Du Bois and other Pan-Africanist thinkers outside the African continent, and while Nkrumah was an active member of the Pan-Africanism movement in the 1940s, the same cannot be said with regard to Nyerere and Haile Selassie. See Afari-Gyan, *supra* note 7, at 1–2. Nevertheless, this Article will focus the discussion of Pan-Africanism on when it took continental dimension, specifically with the call for African unity by the heads of African states.

¹⁵ See, e.g., Gamal Abdel Nasser, President of the United Arab Republic, Address at the 1963 African Summit (May 23, 1963), in CELEBRATING SUCCESS: AFRICA’S VOICE OVER 50 YEARS 1963–2013, *supra* note 9, at 110 (analogizing between the birth and survival of an individual and unity of African continent); see also,

Organization of African Unity (“OAU”) supported African integration.¹⁶ In conclusion, this Part argues that African thinkers, in the formative years of African unity, did not have an agreed upon conception of regional integration; yet, they all believed that integration led and solidified the continental emancipation project.

A. *Founding Fathers: African Unity or African Solidarity*

The founding fathers acknowledged the existence of different approaches to integration and were divided on which approach to adopt. Nkrumah advocated for a federal approach, with vertical central authority and supranational authority over member states.¹⁷ On the other hand, Nyerere promoted a more gradual and intergovernmental confederal approach that enabled member states to retain most of their sovereign power.¹⁸ On the contrary, Selassie represented a centralist view that neither advocated for federalism or confederalism, but rather advocated for an agreement that showed that Africans stand united.¹⁹ For him the difference was one of

David Dacko, President of the Cent. Afr. Rep., Address at the 1963 African Summit (May 23, 1963), in *CELEBRATING SUCCESS: AFRICA’S VOICE OVER 50 YEARS 1963–2013*, *supra* note 9, at 16 (explaining that the existence of the Central African Republic would be in danger if it were to stand by itself); Sekou Toure, President of Guinea, Address at the 1963 African Summit (May 23, 1963), in *CELEBRATING SUCCESS: AFRICA’S VOICE OVER 50 YEARS 1963–2013*, *supra* note 9, at 42–43 (stating that African Unity was an effort to correct the arbitrary actions of colonist in the scramble for Africa). Partly because of those reasons and other similar justifications, all states represented were in agreement of the need for integration.

¹⁶ The 1963 Conference of Heads of African States and Governments led to the creation of the Organization of African Unity (“OAU”). Thirty-two African states were represented at the conference and expressed their interest and support for African integration. Those countries were: Algeria, Burundi, Cameroon, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Ethiopia, Gabon, Ghana, Guinea (Conakry), Ivory Coast, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Tanganyika (Tanzania), Togo, Tunisia, Uganda, United Arab Republic (Egypt), and Republic of Upper Volta (Burkina Faso). Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39.

¹⁷ See Kwame Nkrumah, President of Ghana, Address at the 1963 African Summit (May 23, 1963), in *CELEBRATING SUCCESS: AFRICA’S VOICE OVER 50 YEARS 1963–2013*, *supra* note 9, at 37–39 [hereinafter Nkrumah Address].

¹⁸ See Julius K. Nyerere, Pres., Tanganyika, Address at the 1963 African Summit (May 23, 1963), in *CELEBRATING SUCCESS: AFRICA’S VOICE OVER 50 YEARS 1963–2013*, *supra* note 9, at 101 [hereinafter Nyerere Address].

¹⁹ Selassie Address, *supra* note 9, at 2–3 (emphasizing an agreement that unites Africa without actually focusing on one approach to integration). For some, African Unity was a Negro superiority project that sought to achieve and maintain African equality with Europe:

There has been, in the language of African unification, the implied assumption that even if a united Africa, materially on a level with a divided Europe, did not prove equality in technological capacities, it would at least have established African *superiority* in terms that can almost be described as ‘ethical.’ The (Nigerian) Action Group Policy Paper on a West African Union issued

semantics.²⁰ In his words, “no clear consensus exists on the ‘how’ and the ‘what’ of this union, it is to be, in form, federal, confederal or unitary? Is the sovereignty of individual states to be reduced, and if so, by how much, and in what areas?”²¹ Selassie noted that all integration approaches have a common central objective of unity—a unity that symbolizes strength and facilitates the independence of all African people.²² He noted that a united Africa would have more chances of transitioning from its colonial history to active participation in world affairs.²³ He envisioned Africa free from colonization and racial discrimination. In his words:

Africa’s victory, although proclaimed, is not yet total, and areas of resistance still remain. . . . Our liberty is meaningless unless all Africans are free. Our brothers in the Rhodesia, in Mozambique, in Angola, in South Africa cry out in anguish for our support and assistance.²⁴

For Selassie, the primary goal of integration was to secure independence for all Africans.²⁵ Although, he envisioned political union as the ultimate goal of unity, he noted the importance of social and economic cooperation to strengthen political unity.²⁶ In contrast, Nkrumah argued that political

in 1960 could thus view the creation of such a Union as a means by which Africans were to prove to the world that ‘Negro states, though the last to come, are the first to use their brains for the conquest of the forces that have kept men apart.’ Such Negro states were to have been almost the first multi-lingual sovereign states willingly to renounce their sovereignty for the unity of at least one group of peoples. To that extent they would have established superiority over a Europe which, in recent times, had had two enormously costly civil wars—a Europe which still remained in acute competition both within itself and in the advantages each little segment of Europe sought from the outside world.

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

²⁰ Selassie Address, *supra* note 9, at 2 (“[T]hrough all that has been said and written and done in these years, there runs a common theme. Unity is the accepted goal. We argue about techniques and tactics. But when semantics are stripped away, [t]here is little argument among us. We are determined to create a union of Africans.”).

²¹ *Id.* at 3.

²² *See id.* at 2.

²³ *Id.* at 1 (“Africa is today at mid-course, in transition from the Africa of yesterday to the Africa of [t]omorrow.”).

²⁴ *Id.* at 2.

²⁵ *Id.*

²⁶ *Id.* at 4.

integration was of vital and primal importance for Africa's development.²⁷ In his words, "African Unity is, above all, a political kingdom which can only be gained by political means. The social and economic development of Africa will come only within the political kingdom, not the other way round."²⁸ For Nkrumah, the justifications for Africa's integration were not limited to the liberation of African people, but also included its impact on attracting foreign investment and peaceful coexistence.²⁹ For Nkrumah, unity was not an option but a necessity based on cooperation in defense, foreign affairs, diplomacy, common citizenship, and African economic and monetary integration.³⁰ Nkrumah refuted Nyerere's confederal approach to integration, labeling it as balkanization that was susceptible to the promotion of neo-colonialist agendas.³¹ For Nkrumah, Nyerere's proposal for gradual integration ignored the interrelationship and mutuality of the problems facing African states.³² To the contrary, Nyerere argued that just as liberation of Africa is gradual, so is its unity.³³ For Nyerere, gradual integration secured free agreement and consensual unionization.³⁴

²⁷ Nkrumah Address, *supra* note 17, at 35.

²⁸ *Id.*

²⁹ *Id.* at 37 (describing the effect of the formation of OAU on peace in the continent). "The masses of the people of Africa are crying for unity. The people of Africa call for the breaking down of the boundaries that [kept] them apart. They demand an end to the border disputes between sister African states—disputes that arise out of artificial barriers that divided us. It was colonialism's purpose that left us with our border irredentism, that rejected our ethnic and cultural fusion." *Id.*; see also Ama Biney, *The Legacy of Kwame Nkrumah in Retrospect*, J. PAN AFR. STUD., Mar. 2008, at 129, 136 (discussing how Nkrumah thought that regional integration is a prerequisite for the elimination of neo-colonialism).

³⁰ See Nkrumah Address, *supra* note 17, at 38 ("Unite we must. Without necessarily sacrificing our sovereignties, big or small, we can here and now forge a political union based on Defense, Foreign Affairs and Diplomacy, and a Common Citizenship, an African Currency, an African Monetary Zone and an African Central Bank. We must unite in order to achieve the full liberation of our continent. We need a Common Defense System with an African High Command to ensure the stability and security of Africa.").

³¹ *Id.* at 39 ("It is this popular determination that must move us on to a Union of Independent African States. In delay lies danger to our well-being, to our very existence as free states. It has been suggested that our approach to unity should be gradual, that it should go piece-meal. This point of view conceives of Africa as a static entity with 'frozen' problems which can be eliminated one by one and when all have been cleared then we can come together and say: 'Now all is well. Let us unite.' This view takes no account of the impact of external pressures. Nor does it take cognisance of the danger that delay can deepen our isolations and exclusiveness; that it can enlarge our differences and set us drifting further and further apart into the net of neo-colonialism, so that our union will become nothing but a fading hope, and the great design of Africa's full redemption will be lost, perhaps, forever.").

³² *Id.* at 36–37.

³³ Nyerere Address, *supra* note 18, at 101.

³⁴ *Id.* ("We are therefore left with only one method of bringing about African unity. That method is the method of free agreement. That is why at the beginning of this speech I said our task is to discover how to bring about our freedom in unity and our unity in freedom.").

Examining the thoughts of the founding fathers demonstrates that their focus was on unity. However, the founding fathers were vague in their definition of unity. Ambiguity exists as to what unity actually is, or should be. For one, unity can be used interchangeably with integration, meaning the “process of making a whole.”³⁵ Second, unity can mean to act in concert against a common enemy.³⁶ There is no doubt that the founding fathers defined unity as acting together for liberation of all Africans; however, the question then remains whether they meant unity to also include integration.³⁷

The ambiguity of the use of “unity” as both solidarity and as integration reflects the lack of conceptual clarity in the formative years of the OAU. The OAU Charter consistently used words such as “unity,” “solidarity,” and “cooperation” interchangeably without actually defining them.³⁸ When the OAU was transformed to the African Union (AU), the ambiguity surrounding use of the word “unity” continued and the duality still exists today.³⁹

The dual meaning of the word “unity” is also manifest in sub-regional integration efforts on the continent.⁴⁰ Solidarity, and other concepts such as human rights, democracy, and rule of law, are principles of the Southern African Development Community (“SADC”) and its member states.⁴¹ These principles, with the aim of forging integration, theoretically guide the actions

³⁵ BLACK’S LAW DICTIONARY 880 (9th ed. 2011) (defining integration as “the process of making whole or combining into one”).

³⁶ *Id.* at 1676 (defining unity as “jointness of interest”).

³⁷ Nyerere Address, *supra* note 18. For Nyerere, all of the African states had a common stance, or solidarity, against colonization. *Id.* That is to say, to Nyerere, unity meant solidarity. Nevertheless, he also made it clear that unity also meant integration. *Id.* However, it is also evident that solidarity and integration were understood as mutually interdependent concepts among the founding fathers. *Id.*

³⁸ Charter of the Organization of African Unity art II, May 25, 1963, 479 U.N.T.S. 79. The OAU Charter in general, but particularly Article II, never uses the term “integration.” *See id.*

³⁹ Constitutive Act of the African Union art. 3, *adopted* July 11, 2000, OAU Doc. CAB/LEG/23.15 (“The objectives of the Union shall be to . . . achieve greater unity and solidarity between the African countries and the peoples of Africa . . . [and to] accelerate the political and socio-economic integration of the continent.”).

⁴⁰ *See generally, e.g.,* SADC Treaty, *supra* note 2. Historically SADC was formed to end political and economic domination by then-apartheid South Africa. *See SADC Profile*, AFR. UNION, www.au.int/en/recs/sadc (last visited Mar. 28, 2014). One of the reasons for the inclusion of Article 6(2) of the SADC Treaty was to end racial domination. *See* SADC Treaty, *supra* note 2, art. 6(2) (“SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, or disability.”).

⁴¹ *See* SADC Treaty, *supra* note 2, art. 4 (“SADC and its Member States shall act in accordance with the following principles: a) sovereign equality of all Member States; b) solidarity, peace and security; c) human rights, democracy, and the rule of law; d) equity, balance and mutual benefit; e) peaceful settlement of disputes.”).

of SADC Member States.⁴² However, the SADC Treaty provides neither a mechanism, nor guidance, on how to interpret the principles of the organization. Hypothetically speaking, all the principles enumerated under Article 4 of SADC Treaty are equal and carry the same weight. There is little doubt that the drafters of the SADC Treaty did not envisage the possibility of contradiction between the different principles. Nevertheless, the way SADC states have reacted to Zimbabwe's refusal to abide by the SADC Tribunal's decisions reflects the fact that SADC Member States prioritize solidarity over other principles of the organization.⁴³ Unlike the interpretation of solidarity in the 1960s, which then meant emancipation of all Africans,⁴⁴ the behavior of the SADC member states demonstrates an alternative interpretation of solidarity to mean standing together in support of the actions of member state governments, even if doing so violates the emancipation project.

II. CLASSICAL ECONOMIC THEORIES OF INTEGRATION

Along the same lines as the Washington Consensus, the neo-liberal economic theory of development argues that trade liberalization leads to economic growth.⁴⁵ It promotes regional economic integration as a plan B to

⁴² SADC Treaty, *supra* note 2, art. 6(1) ("Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.").

⁴³ See, e.g., Solomon T. Eboerah, *Human Rights Developments in Sub-Regional Courts in Africa During 2008*, 9 AFR. HUM. RTS. L.J. 312, 334–35 (2009) (discussing SADC Tribunal's decision on Zimbabwe as an example of human rights prevailing over oppression, although Zimbabwe failed to abide by the Tribunal's decisions); see also Amos Saurombe, *An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States in the Light of the Suspension of the SADC Tribunal*, 23 S.H. AFR. MER. L.J. 392, 392–406 (2011) (discussing suspension of SADC Tribunal).

⁴⁴ See generally Saurombe, *supra* note 43.

⁴⁵ Oluwbenga A. Onafowora & Oluwole Owoye, *Can Trade Liberalization Stimulate Economic Growth in Africa?*, 26 WORLD DEV. 497, 501–05 (1998) (arguing that trade liberalization directly correlates with economic growth and exploring the relationship between growth, trade policies, and investment in twelve sub-Saharan African countries). See also Michael J. Trebilcock, *Critiquing the Critics of Economic Globalization* 11–12 (Jan. 20, 2005) (unpublished manuscript), available at <http://iilj.org/courses/documents/HC2005.Trebilcock.EconGlobal.pdf>, for an analysis of how open economies tend to grow larger and faster than closed economies. Trebilcock argues that global inequalities are more a failure of domestic policies rather than a failure of globalization. *Id.* He argues that income inequalities at the country level today are much higher than global inequalities and, therefore, it is really the failure of domestic government policies that do not mandate redistribution of wealth between the haves and have-nots. *Id.*; accord MARIAN L. TUPY, CATO INST., POLICY ANALYSIS NO. 557, *TRADE LIBERALIZATION AND POVERTY REDUCTION IN SUB-SAHARAN AFRICA* 4–5 (2005). But see Frank Ackerman & Kevin P. Gallagher, *The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models: A Critical Assessment*, 37 INT'L J. POL. ECON. 50, 50–51 (2008)

unilateral tariff reduction.⁴⁶ This theory based on the assumption that unilateral tariff reduction increases competition, argues a causal link between liberalization and trade creation.⁴⁷ Since states are not willing to unilaterally reduce or eliminate tariffs, the classical approach then encourages states to prefer the discriminatory elimination of tariffs.⁴⁸ At the multilateral level, the World Trade Organization (“WTO”) is case in point where states engage to eliminate tariffs and non-tariff barriers discriminatorily to non-member states.⁴⁹ At the regional level, several states have formed regional and sub-regional integration schemes that discriminate against foreign products.⁵⁰

Contrary to unilateral tariff reduction, Jacob Viner, an economist, advances a theory on customs union that argues that discriminatory tariff reduction can have a trade creation and/or diversion effect.⁵¹ For Viner, ambiguities in the welfare impact of customs unions are related to the capacity and limitations of

(discussing how mainstream economic models are flawed and unable to accurately predict the impact of trade liberalization).

⁴⁶ MARTIN RICHARDSON, UNIV. OF OTAGO, ECONOMICS DISCUSSION PAPERS NO. 0102, UNILATERAL LIBERALISATION IN A MULTILATERAL WORLD 2 (2001). The defining factor in unilateral tariff reduction is its lack of reciprocal tariff-reduction requirements. *Id.* Unilateral tariff reduction can have other conditions attached to it. *Id.* For example, tariff reduction can be tied to loan forgiveness. *Id.*

⁴⁷ ANTHONY P. THIRLWALL, AFR. DEV. BANK, ECON. RESEARCH PAPERS NO. 63, TRADE, TRADE LIBERALISATION AND ECONOMIC GROWTH: THEORY AND EVIDENCE 14 (2000). The trade creation effect of a particular tariff elimination policy is determined by its impact on trade costs. If country *A* has no tariffs at all on exporting product *Z* and produces *Z* at a cost of *X*. Country *B* produces product *Z* at a cost of *X* but charges export tariff of *T*. The cost of *Z* in the global market is cost of production plus profit (*P*). Both states have a fixed profit of *P*. The cost of product *Z* will be *X+P* in country *A* and *X+P* in country *B*. The cost of importing product *Z* from country *A* is just *X+P* while that of country *B* is *X+P+T*. Assuming all other variables are static importers from country *C* will rationally import product *Z* from country *A*. Therefore, unilateral tariff elimination by country *A* on product *Z* has led to more trade for country *A* than country *B*.

⁴⁸ See Richard E. Baldwin & Anthony J. Venables, *Regional Economic Integration*, in 3 HANDBOOK OF INTERNATIONAL ECONOMICS 1597, 1598 (G. Grossman & K. Rogoff eds., 1995) (2003) (discussing how Europe and North America have managed to liberalize their regional trade substantially more than the global trade liberalization project).

⁴⁹ *Principles of the Trading System*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited May 2, 2014).

⁵⁰ Cf. *List of all RTAs*, WTO, <http://rtais.wto.org/UI/PublicAllRTAList.aspx> (last visited Mar. 20, 2014). Since 1995, more than 300 regional integration schemes have been brought to the attention of the WTO. *Id.*

⁵¹ C.A. Cooper & B.F. Massell, *A New Look at Customs Union Theory*, 75 ECON. J. 742, 742 (1965) (discussing how Viner’s theory of customs unions explains the trade creation and diversion effect of a preferential trade arrangement). For Viner, trade diversion, which negatively affects welfare of the home state, is a shift from a “high-cost domestic” producer to a “low-cost foreign producer,” which could alternatively be called outsourcing of production. *Id.* On the other hand, trade creation by insourcing foreign production increases welfare of the home state at the disadvantage of the foreign state. *Id.*; see also JACOB VINER, THE CUSTOMS UNION ISSUE (1950); Jagdish Bhagwati & Arvind Panagariya, *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, 86 AMER. ECON. REV. 82, 82 (1996).

members to define their own external trade policy.⁵² The net static effect of regional integration is positive if the formation of the integration scheme has a net trade creation effect.⁵³ However, static welfare analysis assumes that the respective Member States of the integration scheme are complementary.⁵⁴ Applying Viner's theory on regional integration schemes to Africa, and SADC in particular, has led to ambiguous results, partly because of low intra-regional trade.⁵⁵

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

Table 2.2.1-Intra-REC Import (Im.) and Exports (Ex.) (2003–2007) in US (\$) millions.⁵⁶

Conventionally, trade integration is measured by the level of intra-regional trade among member states.⁵⁷ Using transaction data as the sole measure of integration and its impact is deeply flawed. For one, the relationship between intraregional trade and growth is contestable. Trade integration is associated with four freedoms: (1) goods, (2) services, (3) capital, and (4) people.⁵⁸ Depending on the degree of integration, the freedoms guaranteed in the integration schemes can extend from trade liberalization that guarantees free movement of goods to trade liberalization that guarantees free movement of

⁵² See generally VINER, *supra* note 51.

⁵³ Baldwin & Venables, *supra* note 48, at 1605 (discussing how James Meade, a British economist, building on Viner's theory, argued that if all external trade barriers are fixed and unchanging, static markets, regional integration agreement has a positive correlation to welfare of member states).

⁵⁴ Jozef M. Van Brabant, *Economic Integration Among Developing Countries Toward a New Paradigm*, in ECONOMIC COOPERATION AND REGIONAL INTEGRATION IN AFRICA 31, 33 (Naceur Bourenane ed., 1996) (discussing the reasons for low intraregional trade in African integration schemes, one of which is the lack of complementarities to modes of production in the continent).

⁵⁵ See, e.g., DAVID EVANS ET AL., SADC: THE COST OF NON-INTEGRATION 4–5, (1999); see also ECON. COMM'N FOR AFR., ECA POLICY RESEARCH REPORT, ASSESSING REGIONAL INTEGRATION IN AFRICA I, at 16 (2004) [hereinafter UNECA I] (estimating that the net gain from integration in the SADC will result in a one percent increase in GDP, while other economists have predicted either no effect, or a negative effect, of integration).

⁵⁶ ECON. COMM'N FOR AFR., ECA POLICY RESEARCH REPORT, ASSESSING REGIONAL INTEGRATION IN AFRICA IV, at 77, 82 (2010) [hereinafter UNECA IV]. The information in the chart was extracted from two different tables. See *id.*

⁵⁷ UNECA I, *supra* note 55, at 277.

⁵⁸ *Background*, EUR. FREE TRADE ASS'N, <http://www.efta.int/eea/eu-programmes/application-finances/background> (last visited Mar. 28, 2014).

people. Goods transactions are the easiest to quantify among the four freedoms. Nevertheless, existing data on the flow of goods in African integration schemes does not encompass transaction of goods performed under the rubric of the informal sector. For instance, the informal sector constitutes twenty to ninety percent of the national economy of the west African states.⁵⁹ This critique of lack of comprehensiveness of existent transaction or trade flow data in Africa is a clear example of what Shanta Devarajan, the World Bank's chief economist for Africa, calls it "a statistical tragedy."⁶⁰ Furthermore, it is a logical expectation for intra-regional imports and exports to be of equal value. An analysis of existing intraregional transactions, as specified in Table 2.2.1, shows that intraregional imports do not match intraregional exports. For instance, according to available data of the year from 2007, intraregional exports among SADC states were \$11,678 million in value, while intraregional imports amounted to \$12,802 million.⁶¹ Therefore, according to existing data, the SADC as a region has a deficit. Statistically, it is possible for the SADC, or any other regional integration scheme, to show trade deficit or surplus with other trading partners, as shown in Table 2.2.2. However, no adequate explanation, other than the continent's "statistical tragedy" has been extended to explain the data in intraregional trade deficit of SADC.

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

Table 2.2.2-REC's average exports and imports (2000–2007) to select trading partners in US (\$) ⁶²

Viner's theory was further developed by other economists, the latest being Baldwin whom extended classical theory of customs union to markets with imperfect competitions.⁶³ Baldwin's framework of welfare analysis looks at allocation, accumulation, and location effects of regional integration schemes

⁵⁹ UNECA IV, *supra* note 56, at 143.

⁶⁰ See Nico Colombant, *New Research Confronts Africa's 'Statistical Tragedy,'* VOICE OF AM. (Dec. 5, 2011), <http://www.voanews.com/content/new-research-confronts-africas-statistical-tragedy-135134213/159278.html>.

⁶¹ UNECA IV, *supra* note 56, at 77, 82.

⁶² *Id.* at 77, 80–83.

⁶³ See Baldwin & Venables, *supra* note 48, at 1601–02.

in imperfect markets.⁶⁴ First, the allocation effect argues that formation of regional integration increases resource allocation.⁶⁵ This argument centers around the inverted relationship between protectionism and its impact on efficiency.⁶⁶ Moreover, regional integration has a variety effect and gives consumers choice of product quality and price.⁶⁷ Second, the accumulation effect argues that formation of regional integration schemes has a positive effect on economic growth as it increases both factor and knowledge accumulation.⁶⁸ Third, the location effect argues that market size affects investor's decisions of whether to invest.⁶⁹ Hence, investors are prone to invest in bigger markets formed under integration schemes than to invest in single state with smaller market size.

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

Table 2.2.3. Foreign Direct Investment (FDI) flows 2004-2006 to SADC Member States in US (\$) millions.⁷⁰

⁶⁴ *Id.* Baldwin categorizes the trade effects of formation of integration schemes and analyzes it under both perfect and imperfect competition. The formation of regional integration has the output, variety and scale effects. *Id.*

⁶⁵ U.N. Conference on Trade & Dev., *Economic Development in Africa: Strengthening Regional Economic Integration for Africa's Development*, at 5, UNCTAD/ALDC/AFRICA/2009, U.N. Sales No. E.09.II.D.7 (2009) [hereinafter UNCTAD 2009].

⁶⁶ *Id.* at 7 (discussing how import substitution policies of several African countries resulted to protection of inefficient industries).

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* (discussing relationship between investment flows and regional integration).

⁶⁹ *Id.*

⁷⁰ U.N. Conference on Trade & Dev., *World Investment Report: Transnational Corporations, Extractive Industries and Development*, at 252, U.N. Sales No. E.09.II.D.7 (2007) [hereinafter UNCTAD 2007].

When looking at FDI flows in the SADC region, one might wonder if regional integration has had an impact in FDI inflow to Member States. As shown in Table 2.2.3, Angola is the highest recipient of FDI inflow among all SADC Member States.⁷¹ Malawi, on the other hand, is the lowest recipient of FDI inflow in the year 2006.⁷² Malawi is more representative of the entire continent of Africa, which has not been a major recipient of foreign direct investment (FDI).⁷³ For instance, in the years 1999 through 2000, Africa's share of FDI inflow was 0.8 percent, putting the continent at the bottom of the list.⁷⁴ Only six years later in 2006, Africa's FDI inflow tripled and reached 2.7 percent of global FDI inflow.⁷⁵ This surge in FDI inflow is not a result of deep integration in the continent but rather of the quest for oil and other natural resources.⁷⁶ In addition to Angola, which is the major oil exporter in the region, other mineral-producing countries among southern African states (e.g., Mauritius, Lesotho, Swaziland, Tanzania and Zambia) received larger inflows of FDI.⁷⁷ Therefore, the liberal claim of the relationship between regional integration and FDI inflow, at least as it pertains to Sub-Saharan Africa, lacks empirical foundation. However, the success of African integration cannot be measured only by low intraregional trade or FDI inflow, but rather must also be based on what the founding fathers imagined could be achieved through integration.

III. KANTIAN THEORY OF PERPETUAL PEACE AND AFRICAN REGIONAL INTEGRATION

Earlier peace theorists predominantly focused on the importance of maintaining homogeneous religious values for peaceful coexistence of the international system.⁷⁸ Without instilling less tolerance to different religions,

⁷¹ *Id.*

⁷² *Id.*

⁷³ Chantal Dupasquier & Patrick N. Osakwe, *Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities* 6 (Econ. Comm'n for Afr., Afr. Trade Ctr., Working Paper No. 21, 2005) (discussing recent trends in Foreign Direct Investment).

⁷⁴ *Id.*

⁷⁵ UNCTAD 2007, *supra* note 70, at xvii.

⁷⁶ *Id.*

⁷⁷ *Id.* at 74 & n.5 (discussing FDI inflow increase to specific countries with extractive resources).

⁷⁸ IMMANUEL KANT, PERPETUAL PEACE 4–6 (M. Campbell Smith trans., 3rd ed., 1917) (1795) (noting that “for the barbarian, war is the rule; peace the exception. His gods, like those of Greece, are war-like gods; his spirit, at death, flees to some Valhalla. For him life is one long battle; his arms go with him even to the grave. Food and the means of existence he seeks through plunder and violence” and suggesting that what brought about the formation of states is a conscious necessity of forming a united front in the battlefield). This institution, the state, changed character of warfare into a systematic war of one nation against another nation

peaceful coexistence meant that a particular society or societies had to practice the same religion.⁷⁹ In a way, religion has a dual impact of peace and war.⁸⁰ Today, with the development of modern society, characterized by rationalization, the world has become what Max Weber called “disenchanted”⁸¹ and theorists have focused on integration as a means to end future wars.⁸²

Immanuel Kant’s analysis of the covenant of peace, *foedus pacificum*,⁸³ is one of the earliest works that dealt with the correlation between integration and peace without instilling religion into the dynamic of peaceful coexistence.⁸⁴ For Kant, formation of a federation of states is one of three definitive articles for perpetual peace.⁸⁵ He reasoned that peace treaties might end current wars

but was not able to transform ancient world, of perpetual warfare, to perpetual peace. See generally Chadwick F. Alger, *Religion as a Peace Tool*, 1 GLOBAL REV. ETHNOPOLITICS 94, 94 (2002) (analyzing religion as a peacemaking tool).

⁷⁹ See Charles J. Halperin, *The Ideology of Silence: Prejudice and Pragmatism on the Medieval Religious Frontier*, 26 COMP. STUD. IN SOC’Y & HIST. 442, 442 (1984) (explaining how religious animosity was the central cause and basis for crusade and jihad and war among Christians and Muslims).

⁸⁰ See JONATHAN FOX, THE MULTIPLE IMPACTS OF RELIGION ON INTERNATIONAL RELATIONS: PERCEPTIONS AND REALITY 7 (2006), available at http://www.ifri.org/files/politique_etrangere/4_2006_Fox.pdf.

⁸¹ Max Weber, *Science as a Vocation*, Speech at Munich University (1918), in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 155 (H.H. Gerth & C. Wright Mills eds., 2005) (“The fate of our times is characterized by rationalization and intellectualization and, above all, by the ‘disenchantment of the world.’”). Max Weber’s choice of word of disenchanted rather than secularization is an interesting choice. Disenchantment is the privatization of religious beliefs rather than full abandonment of once faith. See *id.*

⁸² Note that the arguments above are not meant to imply that “religion” has lost its relevance as a peace or war tool. Rather, the argument is that the world has become more “disenchanted.”

⁸³ *Foedus pacificum* is made of two Latin terminologies. *Foedus* means “league” or “treaty.” See BLACK’S LAW DICTIONARY 716 (9th ed., 2009). *Pacificum* means “peaceful.”

⁸⁴ See Patrick Riley, *The Abbé De St. Pierre and Voltaire on Perpetual Peace in Europe*, 137 WORLD AFF. 186, 186 (1975) (discussing how the Project for Perpetual Peace (Abbe’ de St. Pierre’s Project) is considered a comprehensive plan for perpetual peace in Europe, through the creation of federation of states, or through regional integration). Even though the Abbe de St. Pierre’s Project is more comprehensive than earlier projects of the Perpetual Peace Project, it nonetheless contains internal limitations both in terms of geographic and religious specificity.

⁸⁵ There are three definitive articles of perpetual peace. KANT, *supra* note 78, at 121–23. First, “[t]he civil constitution of each states shall be republican.” *Id.* at 120. Second, “the law of nations shall be founded on a federation of states.” *Id.* at 128. Third, “the rights of men, as citizens of the world, shall be limited to the conditions of universal hospitality.” *Id.* at 137. One should note that, for Kant, the three definitive articles for perpetual peace are interrelated and are not alternatives but rather it takes a combination of all three to achieve perpetual peace. So by singling out the second article in this Subpart, it might seem to the reader that the other two articles are not of great relevance. To the contrary, the author of this Article believes that the three definitive articles should be looked at together. The reason why this Article focuses only on the second article of Kantian Perpetual Peace is its direct justification for formation of regional integration agreements. While Kant’s first article “Constitutional Republic State” will bring peace and harmony at the domestic level, it also diminishes the possibility of state-to-state wars. That is to say, in a republic, which has participation of the

but not future wars.⁸⁶ Hence, Kant proposed a “federation of states” rather than a “nation of states” governed by an international treaty as a measure to halt future wars.⁸⁷ This Part attempts to analyze, the value and consistency of Kantian theory of perpetual peace as a justification for African integration schemes.

A. Mbeki and Hegel on Kant

Unlike Hegel, who dealt with Kantian theory of perpetual peace theoretically and directly, Moeletsi Mbeki dealt with the question of peaceful coexistence practically and without any theoretical claim to Kant’s theory of perpetual peace. Mbeki argues that perpetual peace could not be a justification for Africa’s choice to integrate.⁸⁸ Mbeki substantiates his argument on recurrence of state-to-state wars, and concludes that since most wars in Africa are ethnic-based civil wars, regional integration has no correlation on the peaceful existence of states.⁸⁹ Although Mbeki does not explicitly define the

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

⁸⁶ *Id.* at 134 (“Hence there must be an alliance of a particular kind which we many call a covenant of peace (*foedus pacificum*), which would differ from a treaty of peace (*pactum pacis*) in this respect, that the latter merely puts an end to one war, while the former would seek to put an end to war forever.”).

⁸⁷ *Id.* at 129. Kant makes a clear distinction between “federation of states” and “state of nations.” The former guarantees equality of states while the later envisages a powerful state with command authority over other member states. In his words: “This would give rise to a federation of nations which, however, would not have to be a State of nations. That would involve a contradiction. For the term ‘state’ implies the relation of one who rules to those who obey . . .” *Id.* Put simply, federation of states in this Section is defined as the act where a group of “nation states” or “states” come together and form a central governing unit. On the other hand, “nation” state is defined when “nations”—homogenous peoples—decide to form a self-governing unit.

⁸⁸ MOELETSI MBEKI, ARCHITECTS OF POVERTY: WHY AFRICAN CAPITALISM NEEDS CHANGING 133–34 (2009).

⁸⁹ *Id.*; J. Ndumbe Anyu, *The International Court of Justice and Border-Conflict Resolution in Africa: The Bakassi Peninsula Conflict*, 18 MEDITERRANEAN Q. 39 (2007). In Africa there have been around 103 ethnic conflicts; which can be attributed to three major categories of the causalities. *Id.* For Anyu, some conflicts are old-fashioned land disputes, some are the result of discovery and access to natural resources, and others are a result of the Berlin conference and its impact on imposing artificially designed territorial boundaries among and between African people.

term “war,” he adopts a dual typology of war as either intrastate or interstate wars based on its participants. However, it is not clear how he came to conclude that in the past fifty years there were only two state-to-state wars.⁹⁰ In state-to-state war, if war is measured by hostile armed conflict, Mbeki’s headcount of interstate wars in Africa is flawed. If Mbeki’s distinction between what constitutes and does not constitute war is based on, for instance, “loss of life,” then he did not make that distinction clear in his work. This confusion leads one to ask what war is. Alternatively, what is the Kantian conception of war?

For Kant, peace is an exception to the normal “state of nature,” which is war.⁹¹ The Kantian conception of the “state of nature” emanates from a pessimist attitude of human nature that Kant uses to appraise states.⁹² Kant qualifies his argument and explains that “state of nature” does not mean open warfare, but rather “a constant threatening that an outbreak may occur.”⁹³ The distinction is that while warfare and its consequences are expected outcomes of open hostilities, an unceasing threat of war is an unpredictable situation that puts everyone on alert and causes them to view their neighbors as possible enemies. Hence, Kant has a broader conception of war that included not only “open hostility” but also any threat of war. Moreover, Kant believed a state is a

⁹⁰ MBEKI, *supra* note 88. For Mbeki, these wars are: (1) the war between Tanzania and Uganda in 1970; and (2) the war between Eritrea and Ethiopia between 1998 and 2000. *Id.* See also Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 CONFLICT MGMT. & PEACE SCI. 123 (2000), for a different definition of interstate war formulated by the Correlates of War Project. According to Sarkees, interstate war is a combat involving armed forces on both sides and fatalities of more than 1000. *Id.* Although, Mbeki does not specifically define war, if Mbeki has adopted this definition, it would be correct to conclude that in the past fifty years of post-independence Africa, there have only been two state-to-state wars. However, since he did not specify or clarify his definition of war it is difficult to understand how he came to his conclusion. Moreover, to critique Kantian theory of perpetual peace, one needs to understand Kant’s conception of war. And Kant’s goal was to eliminate all possibilities of war, irrespective of fatalities headcount. In addition, if one adopted *Black’s Law Dictionary’s* definition of war and not just active hostilities, war is much broader and encompasses all sorts of conflicts that might arise out of different situations. See BLACK’S LAW DICTIONARY 1720 (9th ed., 2009) (defining “war” as “hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state”). Hence, one might conclude that Mbeki’s head count of the resurgence of state-to-state wars in Africa is erroneous as he has missed, for instance, the border conflict between Nigeria and Cameroon.

⁹¹ KANT, *supra* note 78, at 117–18 (“A state of peace among men who live side by side is not the natural state (*status naturalis*), which is rather to be described as a state of war . . .”).

⁹² *Id.* at 128 (“Nations, as states, may be judged like individuals who, living in the natural state of society—that is to say, uncontrolled by external law—injure one another through their very proximity.”).

⁹³ *Id.* at 117–18.

voluntary association established by men that serves as a peace institution to avert the “natural state of nature,” which is war.⁹⁴

However, the historical factors that led to the formation of modern day African states present a stronger theoretical challenge for Kant’s theory of perpetual peace. The impact of colonial imposition of territorial boundaries on Africa’s people negates voluntary association, which according to Kant, is central for the elimination of the natural “state of nature.”⁹⁵ Kant’s conceptualization of perpetual peace does not require the existence of nation states, but rather, centers around “voluntary association,” be it among men or states.⁹⁶ For Kant, it is the “voluntary association” that is the means to eliminate the “state of nature.”⁹⁷ The crucial question, then is how universal is Kant’s conceptions of “state of nature” and “voluntary association” and their correlation to the formation of states in the African context?

In the contemporary African context, the “state of nature” that led to statehood is colonization and racial domination by colonial powers. In Africa, the distinction also needs to be made between formal statehood and the idea of nation states. However, the analysis of theorists including Kant, relies on the idea of “voluntary” or “free” association and formation of states, which was the case in Europe but not necessarily in Africa.⁹⁸ Hence, a deconstruction of the Kantian theory of perpetual peace reveals dual conceptual incompatibilities barring its application in African integration schemes.

Another theoretical criticism of Kant is Georg W.F. Hegel’s work on *Philosophy of Right*.⁹⁹ Hegel explains that the idea of perpetual peace through federation of states is contingent on the private sovereign will, which for Hegel, supersedes any international treaty.¹⁰⁰ Understanding Hegel’s criticism

⁹⁴ Kant subscribes to the Hobbesian conception of statehood. *Id.* at 118 (quoting THOMAS HOBBS, LEVIATHAN II, ch. XVIII) (“A commonwealth is said to be instituted, when a multitude of men do agree, and covenant, every one, with every one, that to whatsoever man, or assembly of men, shall be given by the major part, the right to present the person of them all, that is to say, to be their representative; every one, as well he that voted for it, as he that voted against it, shall authorize all the actions and judgments, of that man, or assembly of men, in the same manner, as if they were his own, to the end, to live peaceably amongst themselves, and be protected against other men.” (emphasis removed)).

⁹⁵ See generally Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT’L L. 1113 (1995).

⁹⁶ KANT, *supra* note 78, at 109.

⁹⁷ *Id.* at 118–19.

⁹⁸ Mutua, *supra* note 95, at 1115.

⁹⁹ G.W.F. HEGEL, PHILOSOPHY OF RIGHT 264 (S.W. Dyde trans., 2001).

¹⁰⁰ *Id.* (“Kant’s idea was that eternal peace should be secured by an alliance of states. This alliance should settle every dispute, make impossible the resort to arms for a decision, and be recognized by every state. This

at a pragmatic level requires inquisition of the 1964 Cairo declaration of African states on peaceful coexistence.¹⁰¹ In theory African states pledged to recognize colonial boundaries, but in reality, the ambiguity, incoherence, and multiplicity of colonial treaties and/or the discovery of mineral resources has led to several border conflicts in Africa.¹⁰² One of the first border conflicts occurred during the very early stages of African independence between Ghana and Upper Volta, leading to dissolution of a customs union between the two states.¹⁰³ Several other border conflicts in Africa have made their way to the International Court of Justice and the Permanent Court of Arbitration.¹⁰⁴ Moreover, two recent conflicts, one between Cameroon and Nigeria and one between Eritrea and Ethiopia, were among states that had common regional integration membership.¹⁰⁵ In conclusion, irrespective of formal commitments to honor colonial boundaries, in the African context, Kantian theory of perpetual peace is subject to “sovereign will” of states.

idea assumes that states are in accord, an agreement which, strengthened though it might be by moral, religious, and other considerations, nevertheless always rested on the private sovereign will, and was therefore liable to be disturbed by the element of contingency.”)

¹⁰¹ Border Disputes Among States, AGH/Res. 16(1), Assembly of Heads of State and Government, Org. of Afr. Unity, 1st Sess., July 17–21, 1964 (solidifying colonial boundaries as the basis of territorial boundary formation of post-independence African states). The relevant provision of the Cairo Declaration states: “[A]ll member states pledge themselves to respect the borders existing on their achievement of national independence.” *Id.*

¹⁰² See Patricia Berko Wild, *The Organization of African Unity and the Algerian-Moroccan Border Conflict: A Study of New Machinery for Peacekeeping and for the Peaceful Settlement of Disputes among African States*, 20 INT’L ORG. 18 (1966) (explaining the origins of the border conflict between Algeria and Morocco, the author shows that the causes for the dispute were a combination of colonial history, socioeconomic and political factors).

¹⁰³ Lincoln P. Bloomfield & Allen Moulton, *Cascon Case GUV: Ghana-Upper Volta 1964–66*, MASS. INST. TECH., http://web.mit.edu/cascon/cases/case_guv.html (last visited Mar. 6, 2014) (giving a brief description of the dispute between Ghana and Upper Volta); see also Border Disputes Among States, AGH/Res. 19(1), Assembly of Heads of State and Government, Org. of Afr. Unity, 1st Sess., July 17–21, 1964. OAU Member States heard grievances of Upper Volta and Ghana and recommended that both states solve their problems amicably. *Id.*

¹⁰⁴ JOHN W. DONALDSON, PERCEPTIONS OF LEGAL AND GEOGRAPHIC CLARITY: DEFINING INTERNATIONAL LAND BOUNDARIES IN AFRICA, in *ESSAYS IN AFRICAN LAND LAW* 14–23 (Robert Home ed., 2011). In discussing international land disputes that have been adjudicated through adjudication and arbitration, Donaldson rightfully notes that the International Court of Justice (“ICJ”) has adjudicated eight land boundary disputes in the past fifty years. *Id.* at 6. Out of these cases, only five were between African states: Burkina Faso/Mali from 1983 to 1986, Libya/Chad from 1990 to 1994, Cameroon/Nigeria from 1994 to 2002, Botswana/Namibia from 1996 to 1999, and Benin/Niger from 2002 to 2005. *Id.* Moreover, three international land boundary disputes involving at least one African state were arbitrated. *Id.* These are Egypt/Israel in 1988, Eritrea/Ethiopia from 2002 to 2008, and the Abyei arbitration in 2009. *Id.*

¹⁰⁵ Both Eritrea and Ethiopia are members of the Common Market for Eastern and Southern Africa (“COMESA”), Inter Governmental Authority for Development (“IGAD”) and had several bilateral trade agreements among themselves. *Id.* (citation omitted).

B. *Marketization and Peaceful Coexistence*

Hegel's criticisms of Kant did not stop theorist Norman Angell from following Kant's liberal international approach and theorizing on the relationship between marketization and peaceful coexistence. Angell's theory of interdependence, also called the theory of vulnerability, argues that interdependence increases the vulnerability of states, which leads states to cooperate for peaceful coexistence.¹⁰⁶ Building on the interdependence theory, classical functionalist theorists explained that peaceful coexistence is actually a "spillover" effect of economic interdependence.¹⁰⁷ Central to both schools of thought is assessing the empirical impact of interdependence on peaceful coexistence. This assessment may require answering the following questions: What is interdependence? How do you measure it? Is it through trade transaction? What about modes and factors of production?

In analyzing trade relations among African states and their impact on peaceful coexistence, one can adopt two modules. One is the parallel module, which argues that peace and trade can coexist separately. Thus, even if two states are in war and official trade ties are broken, informal underground cross border trade can continue. For example, the border conflict between Eritrea and Ethiopia closed all formal trade and diplomatic ties between the two countries;¹⁰⁸ however, an informal trade sector among homogenous ethnic

¹⁰⁶ Cornelia Novari, *The Great Illusion Revisited: The International Theory of Norman Angell*, 15 REV. INT'L STUD. 341, 342 (1989) (analyzing Norman Angell's theory of interdependence, alternatively called a vulnerability theory). For Angell interdependence theory explains why states experience mutual harm, when things in one country that pose potential harm, whether economic, social or political, end up affecting things in another country. *Id.*

¹⁰⁷ See IAN BACHE ET AL., POLITICS IN THE EUROPEAN UNION 5 (3d ed. 2011)

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

Id.

¹⁰⁸ Partial Award: Economic Loss Throughout Ethiopia: Ethiopia's Claim 7 (Eri. V. Eth.) para. 15, 18 (Eri. Eth. Claims Comm'n 2005). Eritrea and Ethiopia had five bilateral agreements relating to trade and commercial practices between the two countries. *Id.* Yet, both countries went to war. *Id.* para. 16. The Ethiopian government claimed for compensation based on the argument that the relationship between trade and peace is parallel. *Id.* para. 18. The position of the Eritrean government cannot be categorized as falling to either modules but was more rather a theoretically weak defense based on factual rather than legal argument.

groups continued, irrespective of war.¹⁰⁹ The second module is the sequencing module, which is consistent with the functionalist theory, and argues that trade follows peace and helps sustain peace by creating interdependence.¹¹⁰ At the core of the impact of trade on peaceful coexistence is the idea of complementarity of goods and factors of production among trading states. Then again, one needs to substantiate the idea of “economic interdependence” through empirical evidence, and investigate if it makes states vulnerable among each other. Here, as discussed in the previous Part and in Table 2.2.1, the low level of intraregional trade among African states accurately indicates the low level of economic interdependence among African states. Furthermore, the concept of “spill over” as theorized by functionalist-theorists contradicts trajectory of African integration schemes, which started with political integration instead of economic integration. To clarify, integration in the European context started as an economic interdependence project that had a spillover effect on politics, but in Africa, politics are at the core of integration projects. Therefore, it seems that in theorizing the impact of regional integration schemes in Africa, one needs to move beyond the conventional understanding and challenge existing theories.

IV. LAW AND CONCEPTUALIZATION OF INTEGRATION

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

While previous integration studies from an economic perspective sought to study a dynamic economic integration, for peace theorists there was an underlying emphasis on creating predictable peaceful coexistence either through a federation of states or through economic interdependence. Both disciplines acknowledged that integration is a process that requires an incremental course of change. Similar to peace studies and contrary to dynamic

Id. The Commission subscribed to the sequencing module and stated: “[T]here is a broad consensus that bilateral treaties, especially those of a political or economic nature, are at the very least suspended by the outbreak of a war.” *Id.*

¹⁰⁹ UNECA IV, *supra* note 56, at 153–64 (noting that Ethiopian customs authorities impounded around 40,000 kilograms of the cereal grain *teff* that was supposed to be smuggled to Eritrea).

¹¹⁰ See Dale C. Copeland, *Economic Interdependence and War: A Theory of Trade Expectations*, INT’L SEC., Spring 1996, at 5.

or incremental course of change, legal scholars emphasize predictability as a positive feature of legal systems.¹¹¹ The idea of “predictability,” despite making law chthonic and reluctant to change, foresees or eliminates unintended consequences and thereby creates certainty among contracting states. However, predictability of law may mean rigidity, but one should note that law has internal flexibility mechanisms. For instance, variable geometry in regional integration agreements is a flexibility mechanism attempting to accommodate diverging preferences of member states of an integration scheme.¹¹² Hence, through its flexibility mechanisms, law provides a course of change, albeit a predictable change.

Moreover, the idea of neutrality and immutability of law leads to what Mohammed Bedjaoui coined as “legal paganism.”¹¹³ Legal paganism is an intra-disciplinary inquisition of law with a fictional understanding. In other words, law is a freestanding, autonomous enterprise with no attachment to political, economic, and historical realities of the society.¹¹⁴ It is beyond doubt that law does not exist in vacuum and in integration studies; law is a variable that is shaped by economic, historical and political contexts that exist in a particular integration scheme. This Part offers a landscape of law as a variable of integration studies. After giving a landscape of the nature and function of law, this Part will challenge and expose the limitations of the intra-disciplinary inquisition of law in integration studies of southern African countries.

¹¹¹ Anna Gardella & Luca G. Radicati di Brozolo, *Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction*, 51 AM. J. COMP. L. 611, 612–13 (2003) (discussing features of a civil law system as predictability and neutrality of law).

¹¹² GATHII, *supra* note 4, at 609 (“In the African context, variable geometry refers to rules, principles, and policies adopted in trade integration treaties that give member states, particularly the poorest members: (i) policy flexibility and autonomy to pursue at slower paces time-tabled trade commitments and harmonization objectives; (ii) mechanisms to minimize distributional losses by creating opportunities such as compensation for losses arising from implementation of region-wide liberalization commitments and policies aimed at the equitable distribution of the institutions and organizations of regional integration to avoid concentration in any one member; and (iii) preferences in industrial allocation among members in an RTA and preferences in the allocation of credit and investments from regional banks.”).

¹¹³ MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 98–101 (UNESCO trans., 1979).

¹¹⁴ *Id.* at 100 (“[B]y detaching law in this way from the reality it governs and imprisoning it in legal formalism, lawyers end by mummifying law and worshipping it for its own sake.”).

A. *Nature of Law*

Most, if not all, regional integration agreements are treaties.¹¹⁵ Within a broad range, it is possible to divide treaties into conventions and contracts. The distinction is that, in contracts, states enter into agreements to further their own interests, while in covenants, states manifest normative commitments.¹¹⁶ The WTO, took a rationalist approach to treaty obligations in the *Japan-Taxes Alcoholic Beverages* case and reasoned that WTO agreements are contractual agreements driven by the self-interests of contracting parties.¹¹⁷ Even though WTO agreements do not regulate formation of regional integration schemes, the trade section of an integration scheme is subject to WTO regulations.¹¹⁸ Moreover, all southern African integration schemes have a trade component, so southern African states use the flexibility of Article XXIV to surpass anti-discrimination principles of WTO.¹¹⁹ By deduction, one might conclude that southern African integration schemes are contractual agreements driven by self-interest.¹²⁰ This analysis, however, misses the other side of the narrative.

¹¹⁵ Sources of International Law are enumerated under Article 38(1) of the Statute of the International Court of Justice, which is an integral part of the U.N. Charter. *See* Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 38, para. 1(a), 59 Stat. 1055, T.S. 993, 3 Bevans 1179. Article 38 (1) states:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id.

¹¹⁶ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, in *LEGALIZATION AND WORLD POLITICS* 37, 40 (Judith L. Goldstein et al. eds., 2001).

¹¹⁷ Appellate Body Report, *Japan Taxes on Alcoholic Beverages*, Sec. 32, WT/DS8/AB/R (Oct. 4, 1996) (“The *WTO Agreement* is a treaty—the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.”).

¹¹⁸ *See* Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs*, 79 N.D. L. REV. 879 (2003) (discussing the historical and jurisprudential background of Article XXIV of GATT, which excepts WTO Member States from the non-discrimination principle of the global trade regime); *see generally* WTO, ANALYTICAL INDEX: SUPPLEMENT COVERING NEW DEVELOPMENTS IN WTO LAW AND PRACTICE: OCT. 2011–AUG. 2013 (2013) [hereinafter *WTO ANALYTICAL INDEX*].

¹¹⁹ *Id.*

¹²⁰ Note that under WTO, SADC was notified as an integration scheme formed under Article XXIV of GATT.

Southern African integration agreements have as many normative prescriptions as self-interest-driven contractual relations.¹²¹ This composition makes it hard for international legal scholars to follow a binary distinction between covenants and contracts in categorizing regional integration agreements.¹²²

International legal experts are less concerned with the distinction between the contract/convention and more concerned with the distinction between “law making” and “non-law making” treaties. “Law-making” treaties are treaties whose purpose does not cease with performance of its obligations.¹²³ Human rights conventions fall to the category of “law-making” treaties. To the contrary, a “non-law making” treaty ceases to exist when the obligation of the treaty is met. For instance, the 1953 London Debt Agreement between the United States and Germany ended once all the obligations it created ended when the United States cancelled German’s debt in accordance with the treaty obligations.¹²⁴ Irrespective of the distinction, all treaties, whether “law-making” or “non-lawmaking,” have the effect of law between parties.¹²⁵ Nevertheless, the distinction is relevant for legal scholars because “law-making” treaties have the effect of establishing general law as enumerated in Article 38 of the International Court of Justice (“ICJ”).¹²⁶ International law scholars such as Ian Brownlie and J.L. Briery concur that “law-making” treaties are treaties with larger membership and conclude with the assent of contracting parties of their law-making effect.¹²⁷ In the southern African context, for instance Article 4 of the SADC treaty, provides principles of the

¹²¹ See Dunia Zongwe, *Gender Equality and Harmful Practices in the SADC Gender Protocol: The Challenges of Cultural Transformation*, 12 CURRENT 99 (2008) (discussing how the SADC Gender Protocol deals with issues of discrimination and harmful practices against women in southern Africa).

¹²² See Abbott & Snidal, *supra* note 116, at 40 (discussing how in international legal studies, unlike in international relations, there is no binary distinction between interest- and norm-based treaties).

¹²³ IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12 (5th ed., 1998) (“Such treaties create legal obligations the observance of which does not dissolve the treaty obligation.”).

¹²⁴ See Agreement on German External Debts, Feb. 27, 1953, 333 U.N.T.S. 3; Timothy W. Guinnane, *Financial Vergangenheitsbewältigung: The 1953 London Debt Agreement* (Yale Univ. Econ. Growth Ctr. Discussion Paper No. 880, 2004), available at http://www.econ.yale.edu/growth_pdf/cdp880.pdf (last visited Feb. 14, 2013).

¹²⁵ J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 57 (6th ed., 1963). All treaties are law and the Latin maxim, *modus et conventio vincunt legem*, has application in international law as much as in domestic law. *Id.*

¹²⁶ Statute of the International Court of Justice, *opened for signature* June 26, 1945, art. 38, para. 1(a), 59 Stat. 1055, T.S. 993, 3 Bevans 1179. The wording of the article is clear that a treaty should be rule establishing.

¹²⁷ See BROWNLIE, *supra* note 121, at 12; BRIERLY, *supra* note 125, at 58.

organization that have a law-making effect.¹²⁸ On the other hand, the SADC Trade protocol, specifically with the formation of free trade agreements ceases to have effect when southern African states have established a customs union among them.¹²⁹

B. *Function of Law*

If the nature of law in integration studies is a treaty-based agreement, which has both normative and interest based contractual provisions, then what is the function of law? Edward Jenks, an international legal scholar, rightfully noted that at a domestic level, the idea of “law” implies “compulsion” and “order.”¹³⁰ The former, “compulsion,” denotes the correlation between law and chastisement, where disobeying of “law” leads to punishment of the lawbreaker.¹³¹ The latter, “order,” implies methodical harmony, which is inseparable and parcel of “compulsion” through the notion of “rights.”¹³² For Jenks, continuity in the association of law with “compulsion” and “order” is central in determining its regulatory function.¹³³ Alternatively, continuity of law through its regulatory function helps one predict the future.¹³⁴

To explain the relationship between international relations and international law, legal scholars such as, Kenneth Abbott and Duncan Snidal, argued that states choose to govern their relations through legal arrangements to solve coordination problems.¹³⁵ Abbott and Snidal’s analysis centered on two forms of legalization: soft legalization and hard legalization.¹³⁶ Their analysis explains how different states with different coordination needs choose one over the other. Since the nature of law in integration agreements is hard law, this Article will focus on hard legalization in its discussion of the topic. Hard

¹²⁸ See SADC Treaty, *supra* note 2, art. 4(c) (stating that SADC states must act in accordance with human rights).

¹²⁹ See Protocol on Trade in the Southern African Development Community, arts. 3–11, Aug. 1, 1996, http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf.

¹³⁰ Edward Jenks, *The Function of Law in Society*, 5 J. COMP. LEGIS. & INT’L L. 169, 170 (1923).

¹³¹ *Id.* (“Still, it is the general doctrine of jurists that there can be no true law (even in their sense) without a ‘sanction’—some penalty or adhibition which makes the breaking of a law an unpleasant thing for the breaker.”).

¹³² See *id.* at 169–72.

¹³³ See *id.*

¹³⁴ *Id.* at 176 (“We do not, in fact, lawyers or laymen, think or speak of isolated commands or expedients as ‘laws.’ We regard it as one of the tests of a ‘law,’ that it enables us to predict, with varying degrees of certainty, the sequence of future events.”).

¹³⁵ See Abbott & Snidal, *supra* note 116, at 37.

¹³⁶ *Id.*

legalization, which Abbott and Sindal measure through “obligation,” “precision,” and “delegation,” increases the credibility of commitments.¹³⁷ Alternatively, law imposes consequences for violations of international law designed to solve coordination problems. Similar to Jenks’s analysis of function of law at the domestic level, one might argue that, for Abbott and Sindal, the function of law in a legalized state-to-state coordination is nothing but regulatory.

Using Abbott and Sindal’s framework of analysis, in the context of, for instance the SADC treaty, reveals that southern African integration schemes have a legalized framework of cooperation with clear and precise obligations, backed by a dispute-resolution tribunal. In practice however, high-level of legalization does not guarantee compliance with integration obligations.¹³⁸ Then the question will be: how could law have a regulatory function if there is non-compliance?¹³⁹ Alternatively, has the function of law changed in African integration schemes?

C. Politicization of Law

Theoretically, at the regional level, community law is an apparatus used to further *raison d’être* of integration.¹⁴⁰ Treaty negotiation can be political, but lawyers either hope or believe that application of law is apolitical. The notion

¹³⁷ *Id.* at 37–38.

¹³⁸ *See generally* Gerhard Erasmus, *Is the SADC Trade Regime a Rules-Based System?*, 1 SADC L. J. 17 (2011). Rules-based trade is defined as:

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

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

¹³⁹ *See id.*

¹⁴⁰ *See, e.g.*, David M. Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* (Univ. Wis. Law Sch., Law & the New Dev. State Working Paper, 2010). Classical developmentalists used law to ensure state intervention, while neo-liberalists used law as to prevent state intervention in markets. *Id.* at 8.

of neutrality of law argues that the socio-economic and political situations of member states, with the exception of interstate war, do not hamper the legality or binding nature of a treaty agreement. Nevertheless, socio-economic and political factors play a huge role in the implementation of treaty obligations.

The “enforcement” or “implementation” of a treaty obligation is a logical expectation of the regulatory function of law. The question this Subpart attempts to answer is, if there is low or no enforcement of a treaty obligation, then has the function of law been changed or altered through practice? Alternatively, does the non-enforcement of a treaty obligation amount to amendment through practice?¹⁴¹ The issue of treaties over time, or the impact of subsequent practice on altering a treaty obligation has and is an issue that has not been resolved. The Vienna Convention on Law of Treaties (“VCLT”) mandates use of both “textual” and “state practice” as equivalent means of treaty interpretation.¹⁴² Given the difficulty of defining what amounts to “state practice,” international dispute resolution mechanisms have adopted different modes of interpretation, irrespective of the wording of Article 31 of VCLT.¹⁴³ Of greater importance for southern African integration schemes are the practices of WTO dispute resolution institutions. The International Law Commission (“ILC”) rightfully noted that WTO has put emphasis on text-

¹⁴¹ A classical example of amendment of treaty obligation through practice is Article 27(3) of U.N. Charter. See U.N. Charter art. 27, para. 3 (“Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.”). Although now, there seems to be a consensus on interpretation of Article 27(3) of the U.N. Charter, historically legal scholars extensively debated its interpretation, specifically on the issue of amendment through practice. See, e.g., Constantin A. Stavropoulos, *The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27, Paragraph 3, of the Charter of the United Nations*, 61.3 Am. J. Int’l L. 737, 746 (1967). The issue was that textual interpretation of Article 27(3) does not permit permanent members of Security Council to abstain. *Id.* Alternatively, the argument posed was textual reading of Article 27(3) required permanent members of Security Council to provide a positive vote. *Id.* However, in practice, permanent members of Security Council do abstain. For instance in Security Council Resolution 221/1966 both France and the then Soviet Union abstained. S.C. Res. 221, U.N. Doc. S/RES/221 (April 9, 1966). The question is then, what happens when permanent member of Security Council abstains? Through subsequent practice, Article 27(3) was reinterpreted and understood to mean that abstention by a permanent member of Security Council does not amount to vetoing Security Council resolution. See, e.g., Stavropoulos, *supra*; see also U.N. Charter art. 27, para. 3.

¹⁴² Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

¹⁴³ Treaties Over Time, U.N. Int’l L. Comm. [ILC], Rep. on its 63d Sess., Apr. 26–Aug. 12, 2011, Ch. XI, U.N. Doc. A/66/10 (2011) (identifying three approaches of treaty interpretation by international dispute resolution institutions: (1) take all approaches of interpretation as enumerated under Article 31 of VCLT; (2) text oriented interpretation; and (3) purpose-oriented interpretation.).

oriented interpretation, thereby giving a certain degree of certainty of law over time.¹⁴⁴

In the southern African context, specifically speaking in the SADC, the practice is a collection of politicization of law by southern African governments and purposive interpretation by the SADC Tribunal.¹⁴⁵ In other words, actions and decision of the Tribunal are subject to politics of southern African governments.¹⁴⁶ Hence, enforcement of community law in a politicized integration project is a combination of legal reasoning and coercion. At the community level, legal reasoning is a function of both community and domestic courts, while coercion is that of executive branches of member states. The argument here is that community law is a political tool for governments of southern African countries to use. Here, one should make a distinction between community courts, which resort to progressive legal analysis, and the reluctance by political authorities to enforce community decisions. A classical question to ask will be, is law considered politics at a community level?¹⁴⁷ Alternatively, does the “politicization of community law” mean same as “law as politics”? Even though, the distinction between both phrases might not be visible, for the purposes of this Article the “politicization of function of law” in the southern African context means enforcement of community law as a highly politicized project of southern African governments.

D. Consensus of Non-Enforcement

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

¹⁴⁴ *Id.* at 281. The ILC substantiates its characterization of WTO practice on treaty interpretation by refereeing to Appellate Body Reports on Brazil-Aircraft Case. *Id.* at 281 n.651.

¹⁴⁵ *Id.* (noting a purpose-oriented interpretation by regional human rights courts). The SADC Tribunal, even though not specifically a human rights court, adopted purposive interpretation with regard to specific human rights provisions of the SADC Treaty. *Campbell v. Zimbabwe* Case No. 03/2009 SADC (T) 2009.

¹⁴⁶ See Franny Rabkin, *SADC Tribunal A Political Hot Potato*, BDLIVE (Aug. 6, 2012), <http://www.businessday.co.za/Articles/Content.aspx?id=146693>.

¹⁴⁷ See Mark V. Tushnet, *Critical Legal Theory*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 80, 80 (Martin P. Golding & William A. Edmundson eds., 2005). For critical legal studies scholars (CRITS), law is politics because: (1) legal reasoning is not different from political arguments; (2) disputes within law were resolved in the same way as disputes within politics; and (3) disputes do not disappear with rendition of authoritative decisions. *Id.* If law is politics at the community level, one will have to engage in a hair split analysis of those three elements. However, this author's focus is not on analyzing law as politics but rather on explaining that enforcement of law is highly politicized.

“lack of political will” or “lack of resources.”¹⁴⁸ The most notable, alternative rationalization of disassociation of law from practice is James Gathii’s analysis of flexibility in African integration schemes.¹⁴⁹ Disassociation of law from practice in integration schemes might be a “crisis of law;” however, it is a manifestation of “consensus of non-enforcement” among southern African countries with treaty obligations. Choice of phraseology, “consensus of non-enforcement” over Gathii’s “flexibility,” is broad and includes formal and informal flexibilities of integration schemes.¹⁵⁰ For Gathii, African regional integration treaties are flexible by design and practice.¹⁵¹ However, “consensus of non-enforcement,” acknowledging formal flexibilities is limited to informal disassociation of law from practice. Hence, in the southern African context, it focuses on the lack of enforcement of integration commitments and the mutual failure of member states to bring disputes against themselves to regional courts. In short, consensus of non-enforcement is a practice of southern African integration schemes to subterfuge treaty obligations through political relations.

One could argue that consensus of non-enforcement is not different from the political rhetoric or lack of “political will” critique of African integration schemes. For the lack of “political will” argument to make sense one needs to answer the following question: why do African governments expend time, energy, and resources on treaty negotiations if there is no will in the first

¹⁴⁸ Percy S. Mistry, *Africa’s Record of Regional Co-operation and Integration*, 99 AFR. AFF. 553, 554 (2000) (discussing Africa’s integration initiative more as a rhetoric or instinct rather than an intellectually grounded rational choice).

¹⁴⁹ See GATHII *supra* note 4, at 576.

¹⁵⁰ *Id.* at 573. Gathii enumerates six defining characteristics of flexibility in African integration schemes:

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

Id.

¹⁵¹ See *id.* For Gathii, African regional integration agreements show that flexibility is entrenched in the design and practice of constituting treaty. *Id.*

place? Furthermore, as a credulous argument, “lack of political will” makes African integration initiatives oblique, tautological, and exigent get-together functions of state officials. On the other hand, “consensus of non-enforcement” maintains the positive connotation of African integration initiatives.

“Consensus of non-enforcement” is an adventitious outcome of both internal and external politics of southern African countries. As such, uncertainty is a central attribute of “consensus of non-enforcement,” both in terms of outcomes of disputes and in terms of the life span of extant consensus. Shifts in internal and external political relations can easily influence paradigms of integration schemes. Furthermore, the probability of punctilious enforcement of regional treaty obligations is historically non-existent among southern African states. Internal politics, such as Botswana’s problems with the Sun people, affects the way Botswana will react to human rights violations in southern African region.¹⁵² Hypothetically, Botswana might issue formal statements condemning human rights violations of another southern African state, but for it to take legal action in the SADC Tribunal means that it is ignoring its vulnerability to similar action by other states. Therefore, internal politics among southern African countries plays a vital role in creating a consensus of non-enforcement in the region and a move from meticulous enforcement of treaty obligations. Similarly, external politics or political relations among southern African countries, rooted in deep history of resistance against colonial and racial domination created a sense of solidarity among them. In conclusion, a combination of both internal and external politics led to secession from formalistic treaty relations in southern African integration initiatives.

E. Integration Pessimism and Optimism

It is important for legal scholars engaged in the intra-disciplinary inquisition of integration schemes that their success rests on the legal architecture of the particular integration agreement and Member States compliance with it. Without regard to the socioeconomic and political impacts of integration initiatives, then integration scholars will generally be pessimist or optimist of regional integration, based on Member States’ compliance or

¹⁵² See, e.g., K. Bojosi, INT’L LABOR ORG. [ILO], BOTSWANA: CONSTITUTIONAL, LEGISLATIVE AND ADMINISTRATIVE PROVISIONS CONCERNING INDIGENOUS PEOPLES 6 (2009), available at http://www.chr.up.ac.za/chr_old/indigenous/country_reports/Country_reports_Botswana.pdf.

non-compliance with the laws governing the integration agenda.¹⁵³ One of the problems with this narrow approach to integration studies and measure of regional integration is that legal scholars are only focused on understanding the status of community law at the domestic level of Member States and its coherence with the laws and other international obligations of said states.¹⁵⁴ Furthermore, legal scholars are also engaged in understanding the governance structure and organizational architecture of integration projects, which further reinforces the emphasis on treaty compliance or lack thereof as measure of the success of integration projects.¹⁵⁵ To clarify, the author is not arguing that understanding the coherence, supremacy, direct-effect, and organizational structure of integration schemes is irrelevant. Instead, the author wants to emphasize that understanding regional integration in the African context is a much more sophisticated discourse while intra-disciplinary evaluation of integration is rather limiting.¹⁵⁶ In conclusion, it is time to rethink the idea of law as a freestanding enterprise in integration studies.

V. CONCLUSIONS: TOWARDS A BROADER CONCEPTION OF INTEGRATION

The above sections show four approaches (namely historical, economic, political, and legal), which are a representation of the intra-disciplinary inquisition of integration without epistemic synergy. The question then remains: how should the different approaches relate to offer a broader, if not comprehensive, conception of integration? The central argument of this Part is

¹⁵³ See GATHII, *supra* note 4, at 575; see also Adebayo Adedeji, *Creating the Conditions for Integration*, AFR. RECOVERY (Sept. 1, 2002), <http://www.globalpolicy.org/home/162-general/27778.html>. See generally Mistry, *supra* note 148 (analyzing African integration schemes as overly ambitious and implying the extant disassociation between commitments and practice and thereby non compliance with treaty obligations). In his interview, Adedeji alludes to the existent of third group of integration scholars. Adedeji, *supra*. The third tier of scholars are neither pessimist nor optimist of integration schemes but rather are indifferent. *Id.* Furthermore, Adedeji notes that those who are indifferent are those who have come to realize the realities of African economies. *Id.* In his words, “All the regional economic arrangements throughout the developing world did not fully achieve their objectives. But the European Community did. Of course, if you look at the period of the 1950s, 1960s, and 1970s, the European economies were moving fast, expanding. Therefore, the environment for regional integration was there. That is what has been absent in Africa. We don’t have an enabling environment for integration, because we have stagnant, declining economies.” *Id.*

¹⁵⁴ See, e.g., Iwa Salami, *Legal Considerations for Devising a Governance Structure for the African Union*, 16 AFR. J. INT’L & COMP. L. 262, 272–73 (2008) (discussing the status of supremacy and how it relates to success of African integration initiatives).

¹⁵⁵ See Alemayehu Geda & Haile Kebret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA*, 17 J. AFR. ECON. 357, 367, 380 (2007) (discussing lack of implementation as one of the failures of African integration projects).

¹⁵⁶ See *id.* at 382. The understanding here is that law is only one variable of an integration project.

that conceptualizing “integration as emancipation”¹⁵⁷ can bring convergence both conceptually and substantively to the existent epistemological pluralism.

During the formative years of the OAU, the debate on emancipation was limited to colonialism, neocolonialism, and racial domination.¹⁵⁸ The founding fathers failed to deal with other forms of oppression that existed in the continent, irrespective of the eminent need for struggle from colonial oppression.¹⁵⁹ For instance, both Nyerere and Nkrumah, who were socialist in their political alienation, reiterated a society based on egalitarianism, equality and unity.¹⁶⁰ However, both ran into a contradiction several times during the implementation of their policies and resorted to coercion.¹⁶¹ Similarly, Selassie

¹⁵⁷ How do you define emancipation? Is it freedom? Is it self-determination? Alternatively, is it both? During the 1960s, self-determination movements of African people were part of the continental emancipation project. Emancipation simultaneously, with self-determination, meant removal of restraints imposed by former colonists over colonized peoples and territories. Those restraints were political; they limited African political establishments from participating equally with European states. Second, the constraints were also social; colonists imposed a social racial hierarchical structure that excluded Africans from participating equally with European races. Furthermore, laws imposed on African territories and peoples without any legitimate democratic procedure legalized those social and political restraints. With the advent of decolonization, restraint for anti-imperialist movements comes from former colonial masters. While for other human rights movements, restraints on freedom might come from national governments, foreign governments and society as a whole. Hence, for the purposes of this Article, emancipation is defined in accordance with Black’s Law Dictionary definition but with some modification. *Black’s Law Dictionary* defines “emancipate” as: “[t]o set free from legal, social, or political restraint.” BLACK’S LAW DICTIONARY 598 (9th ed., 2009). Hence, for the purpose of this Article, emancipation is the removal of restraints on human freedom irrespective of its local or global origins, whether it is economic, social, legal or political.

¹⁵⁸ Although the founding fathers acknowledged the importance of freedom for development in Africa, their emphasis was on decolonization and movement against racial (white) domination. See Nkrumah Address, *supra* note 17, at 35; Nyerere Address, *supra* note 18, at 100; Selassie Address, *supra* note 9, at 2.

¹⁵⁹ See Thenjiwe Major & Thalia M. Mulvihill, *Julius Nyerere (1922–1999), An African Philosopher, Re-visions Teacher Education to Escape Colonialism*, 3 J. MARXISM & INTERDISC. INQUIRY 15, 16 (2009).

¹⁶⁰ *Id.* (discussing how Nyerere thought that the economic system and ideologies introduced by colonists into African society were based on capitalist ideologies that encouraged individualism in contrary to African communal way of life).

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

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

¹⁶¹ See Leander Schneider, *Freedom and Unfreedom in Rural Development: Julius Nyerere, Ujamaa Vijijini, and Villagization*, 38 CAN. J. AFR. STUD. 344, 369–71 (2004) (giving several examples of Nyerere

maintained a feudal land ownership system to the dismay of peasants in Ethiopia.¹⁶² Hence, it is fair to conclude that the continental emancipation project excluded issues of minority groups, such as women and peasants, and also excluded other forms of oppression, such as issues of Ethiopia's annexation of Eritrea, among others.¹⁶³ Similarly, classical theories of integration seem to lack the capacity to fully explicate African integration schemes, either due to a lack of adequate empirical data in the African context or due to the fact that they were developed in relation to integration schemes of developed north. Moreover, substantively speaking, emancipatory movements in the past sixty years of the continent's independence have taken all forms and shapes ranging from gay and lesbian rights, women's rights, and human rights movements. Hence, the conceptualization of integration as emancipation allows one to look at human rights movements not as a spillover of economic integration, but rather as a central theme of the integration project of Member States.¹⁶⁴ By including emancipation as an end of integration projects, it allows

resorting to coercion and his endorsement of coercion to enforce Ujamaa; *see also* Randi Rønning Balsvik, *Student Protest—University and State in Africa 1960–1995*, 2 F. FOR DEV. STUD. 301 (1998) (noting student protests against coercive government actions in Africa).

¹⁶² See Alden Whitman, *Haile Selassie of Ethiopia Dies at 83*, N.Y. TIMES, Aug. 28, 1975, at A1, for information on the circumstances that led to the end of Haile Selassie's rule in Ethiopia.

¹⁶³ By focusing on forms of oppression that emanate from colonists, the 1960s emancipation project of the continent did nothing but white wash forms of oppression that existed in the society. *See, e.g.*, Francis K Makoa, *Gender and Politics: A Note on Gender Inequality in Lesotho*, 12 J. SOC. DEV. AFR. 5 (1997) ("Basotho women led by Lesotho's 70-member Federation of Female Lawyers, are waging a vigorous campaign against sex and other forms of discrimination based on gender. This campaign is directed, in particular, at the country's laws, customs, traditions and social norms that govern the relationship between men and women. They are calling for radical legal and social reforms that will end gender inequality and thus ensure their full participation in and contribution to the process of development."); *see also* Ngianga-Bakwin Kandala et al., *Spatial Distribution of Female Genital Mutilation in Nigeria*, 81 AM. SOC'Y J. TROPICAL MED. HYGIENE 784, 784 (2009) (discussing how the practice of mutilating female genitalia can be justified culturally and socially justified); *see also* MJ Maluleke, *Culture, Tradition, Custom, Law and Gender Inequality*, 15 POTCHEFSTROOM ELECTRONIC L. J. 1 (2012) (analyzing harmful customary practices and calling for a cultural revival to bring about gender equality and development.); *Information by Country*, INT'L GAY & LESBIAN HUM. RTS. COMM'N, <http://www.iglhr.org/cgi-bin/iowa/region/8.html> (last visited Sept. 4, 2012) (arguing that the majority of African states criminalize consensual homosexual practices). Advocates and sympathizers of the movement for equality and decriminalization of homosexual activity face all forms of persecution. *See id.* While movements against racial domination and anti-colonization were recognized as emancipation projects; women's rights movements and other human rights movements were considered as national equality movements. The distinction being, as a continental project, emancipation was a priority for African governments. On the other hand, equality movements were left to the domestic political policies of Member States.

¹⁶⁴ *See* Andrés Malamud, Eur. Univ. Inst., *Spillover in European and South American Integration. An Assessment*, Delivered at Meeting of the Latin American Studies Association (Sept. 6–8, 2001), *available at* <http://lasa.international.pitt.edu/Lasa2001/MalamudAndres.pdf> (arguing that neo-functionalists like Ernst Haas view regional integration is not a passionate commitment but rather a process of voluntary unification of states

one to envisage a development project as freedom in all its senses.¹⁶⁵ In conclusion, this Part is an attempt to create a synergistic effect of integration studies by re-conceptualizing regional integration in Africa as process of forming a whole for emancipation of all.

A. *Romantic Idealism Vis-à-Vis Broader Conception of Integration*

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

through utilitarian and pragmatic decisions of political actors). Spillover is “a given action, related to a specific goal, creates a situation in which the original goal can be assured only by taking further actions, which in turn create a further condition and a need for more, and so forth.” *Id.* (quoting LEON LINDBERG, *THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION* 9 (1963)). Simplistically put, the formation of the European Economic Community, which had narrow economic objectives, had a spillover to the development of human rights institutions at the EU level. *See id.*

¹⁶⁵ *See generally* AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999). Mainstream economists, such as Milton Friedman, used freedom language to argue for neoliberal conception of development. With emphasis on negative freedom, mainstream economists advocated for wellbeing of individuals through GDP increase, giving consumers choice of product and price and free market. On the contrary, for Amartya Sen, positive freedom is the means and end of development. *Id.* Sen’s emphasis on positive freedom moves welfare analysis from markets and commodities dynamics to a much more sophisticated measure of wellbeing based on a person’s functioning and opportunities. *Id.* Although, Sen did not make a list of what he considers to be basic freedoms or capabilities, Martha Nussbaum took Sen’s analysis a step further by listing capabilities. Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 *FEMINIST ECON.* 33, 41–42 (2003). For Nussbaum, acknowledging Sen’s capabilities approach and its link with human rights, rightfully noted that capabilities language has more precision and helps critical scholars overcome debates, for instance, it helps one move beyond the rights and duties discourse. *Id.* For her, central capabilities deal with: (1) life, (2) bodily health, (3) bodily integrity, (4) senses, imagination and thought, (5) emotions, (6) practical reason, (7) affiliation, (8) other species, (9) play, and (10) control over one’s environment. *Id.* The central capabilities list for Nussbaum is open-ended to encompass different cultures, societies and capabilities. *Id.* The author’s use of the term “freedom” in this Part is in line with Sen and Nussbaum’s conception of positive freedom. However, at this point the author prefers to leave listing capabilities or freedoms to specific social contract that exists between governments and people of a particular state.

| Justifications of Regional Integration Projects among SADC states | | | | |
|---|---------------|-----------|--------------------|-------------------|
| | Apartheid Era | | Post Apartheid Era | |
| | 1960 -1980 | 1980-1993 | 1994-2005 | 2006 till present |
| Emancipation | + | + | – | – |
| Peaceful Co-existence | – | – | + | + |
| Economic Development | + | + | + | + |
| Law | – | – | – | – |

Table 2.6.2.1: + means has relevance, - means no or little relevance.

An alternative explanation for choices and prominence of disciplinary understanding of regional integration is mirrored through episodes of integration studies and its corresponding relationship with objectives of integration project in the continent, as shown in table 2.6.2. In the formative years of voluntary association of African states, referred to as the first episode, a cursory exploration of objectives of regional or sub-regional integration schemes reveals that the central objective of integration in most, if not all, African integration schemes was emancipation. With a limited understanding of emancipation for southern African integration schemes, specifically speaking the SADC, emancipation as a central objective of integration extends up to the early 1990s, the time of formal end of racial domination in South Africa.¹⁶⁶ Concurrent to the emancipation project of colonized people, the underdeveloped SADC Member States gained independence and sought economic development and/or economic independence from the then apartheid South Africa.¹⁶⁷ Hence, emancipation had a dual objective of leading to

¹⁶⁶ *Regional Indicative Strategic Development Plan (RISDP)*, SADC, <http://www.sadc.int/index.php?cID=201> (last visited Mar. 3, 2014) (stating that the ultimate goal of SADC's current Regional Indicative Strategic Development Plan (RISDP) is to deepen integration in the region with a view to eliminate poverty and attain other economic and non-economic goals). The Front Line States, formed by Angola, Botswana, Mozambique, Tanzania and Zambia, initialed and promoted regional integration among southern African states. *Frontline States*, S. AFR. HIST. ONLINE, <http://www.sahistory.org.za/organisations/frontline-states> (last visited Mar. 25, 2014). Established in 1975, the initiative aimed at political liberation of all southern African states, and coordinated efforts to support national liberation movements, anti-colonialism, and anti-apartheid movements. See *Regional Indicative Strategic Development Plan (RISDP)*, *supra*.

¹⁶⁷ Christine Ega Mbakile-Moloi, *Copycat Theory: Testing for Fiscal Policies Harmonization in the Southern African Coordinating Community (SADC) and Sub-Saharan Africa (SAA)* (Jan. 5, 2007) (Ph.D. dissertation, Georgia State University), available at http://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1021&context=econ_diss. "Most of the countries of Southern Africa ultimately achieved political independence, but against a background of mass poverty, economic backwardness . . . [and the] threat of powerful and hostile white minority ruled neighbors . . . [Thus], the leaders saw the promotion of economic

political and economic interdependence, while fighting against apartheid South Africa and economic underdevelopment. In the second episode, the post-Apartheid era, the emphasis on emancipation both as political and economic agenda ended and shifted to rhetoric of Eurocentric justifications of regional integration. Therefore, existent integration schemes among many Southern African countries adopted such conceptions of trade liberalization as landmark of integration achievements.

1. *Emancipation: Between Colonization and Racial Domination*

If an ideal integration scheme is a legally binding voluntary association of states, for emancipation of all, the effluence in defining “emancipation” is central to re-conceptualizing integration. The continental emancipation project, as shown in Table 2.6.2.3, sought both emancipation of the African citizenry from racial domination and that of the African state from colonization. This dual movement for emancipation though related is different and concentric. Emancipation of state may end with decolonization.¹⁶⁸ Emancipation for “individual,” even in its narrowest sense, emancipation from racial domination, did not end with the end of colonization.¹⁶⁹ A plausible presentation of individual emancipatory movements in Africa includes emancipation from oppressive societal norms and oppression by African states.¹⁷⁰ During

and social development through cooperation and integration as the next logical step after political independence.” *Id.*

¹⁶⁸ See BEDJAOUÏ, *supra* note 113, at 82 (explaining that decolonization as a “logical reversal of what preceded it, [and] implies, in theory, a fundamental policy of eliminating inegalitarian links” and discussing how decolonization can be a mirage of formal political independence, in era of neocolonialism and imperialism); see also Michael Adas, *Contested Hegemony: The Great War and the Afro-Asian Assault on the Civilizing Mission Ideology*, 15 *WORLD HIST.* 31, 62–63 (2004) (discussing decolonization as contestation of European civilizing mission).

¹⁶⁹ See Onyeonoro S. Kamanu, *Secession and the Right of Self-Determination: An O.A.U. Dilemma*, 12 *J. MODERN AFR. STUD.* 355, 355–66 (1974) (discussing Africa’s support for self-determination from colonial Europe but denial of the same request in the postcolonial setting). Kamanu criticizes the concept of “pigmentational self-determination” of Ali Mazrui, as inconclusive. *Id.* at 356–57. For instance, the Southern Sudanese liberation movement from Sudan was considered illegal, even despite the different pigmentation of Northern and Southern Sudanese. *Id.* at 357. Kamanu contends that African nationalists’ opposition to European rule was not because Europeans are not Africans, but rather because it was oppressive; therefore, it is hypocritical to turn a blind eye when oppression is internal. *Id.* at 358.

¹⁷⁰ See *Campbell v. Zimbabwe*, Case No. 2/2007 (SADC(T) 2007). One may interpret the *Campbell* case as a case of oppression by the state of Zimbabwe. In that case, Mr. Campbell and other white citizens of Zimbabwe sought emancipation from racial domination by a majority black-ruled state. Indeed, Mr. Campbell sought justice from oppressive behavior of the state. One could also argue that since Zimbabwe’s policy of discrimination against white minorities was not only supported but also fully endorsed by several members of Zimbabwean society, discrimination against Mr. Campbell and other white minorities was actually a societal form of oppression. Indeed, the question is where do you draw the line and say this is the act of the society and

decolonization, oppression was not rooted out, even though political oppression from colonists ended.¹⁷¹ For instance, the existence of intra-state ethnic conflicts in Africa illustrate and manifest racial domination, whereby an ethnic group framed as an interest group guards its economic and political interests. This obscures the need for emancipation from fear of future social, economic or political domination.¹⁷²

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

2.6.2.2. List of Major Cases against Republic of Zimbabwe in SADC Tribunal

General Practice in regional courts of the African continent show an importune for emancipation by African citizenry. For instance, the *Campbell*

not the state? It seems both questions merge if the state advocates or tolerates racial domination in any form or way. On the other hand, when a state sanctions discrimination against any class of society for instance women but a society practices discriminatory practices, it becomes easier to make a binary division between societal and state forms of oppression. For an example of societal forms of oppression against women in Yoruba communities, see Adeyinka Abideen Aderinto, *Subordinated by Culture: Constraints of Women in a Rural Yoruba Community, Nigeria*, 10 NORDIC J. AFR. STUD. 176, 183 (2001).

¹⁷¹ See Alexander Naty, *Memories of the Kunama of Eritrea Towards Italian Colonialism*, 56 AFRICA: RIVISTA TRIMESTRALE DI STUDI E DOCUMENTAZIONE DELL'ISTITUTO ITALIANO PER L'AFRICA E L'ORIENTE 573, 573–75 (2001) (explaining criticizing a paradigm of colonist and resistance movements in post-colonial studies). Naty explains that a particular ethnic group's attitude towards colonizers is based on their previous status as either "dominators" or "dominated" in a particular society. *Id.* at 574. Therefore, Naty criticizes simplistic understanding of why the Kunama did not oppose colonization and contributed minimally to Eritrea's independence movement, explaining it as the result of their pre-colonial oppression by the highlanders of Eritrea and Ethiopia. *See id.* at 589–89. However, with the end of colonial domination in Eritrea, Kunama, labeled "collaborators" and other negative connotations, lost respect and equal treatment by the highlanders and hence follows their given status or lack therefore in post-independence Eritrea. *See id.* at 588.

¹⁷² See Ibrahim Elbadawi & Nicholas Sambanis, *Why Are There So Many Civil Wars in Africa: Understanding and Preventing Violent Conflict*, 9 J. AFR. ECON. 244 (2000) (arguing that the cause of Africa's civil war is poverty and not ethno-linguistic fragmentation of the continent); see also David A. Lake & Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflict*, 21 INT'L SEC. 41, 41 (1996) (arguing that ethnic conflict is not a mere result of ethnic differences, but rather a collective fear of what the future holds for that particular ethnic group).

case was the first of such supplications that the SADC Tribunal entertained.¹⁷³ As shown in Table 2, it is clear that the existent lack of respect for equality and for human rights in Zimbabwe has led to four major cases against the Republic.¹⁷⁴ All of these cases except one dealt with Articles 4 and 6 of the SADC Treaty.¹⁷⁵ Individual claims for justice can be brought to the SADC tribunal, especially where no domestic forum was available for applicants, such as in the *Campbell* case.¹⁷⁶ The *Campbell* case differs from the *Gondo* case, in which applicants successfully litigated against violence inflicted upon them by agents of Republic of Zimbabwe in domestic courts.¹⁷⁷ From these cases, one can construct a view that the SADC Tribunal in southern African states assumed the role of a final adjudicator, not just for issues of racial discrimination as in *Campbell*, but also for issues of implementation of domestic court decisions, as in *Gondo*. Furthermore, one can deduce from the jurisprudence of both cases that the SADC tribunal, if faced with other human rights issues, would have adopted progressive interpretation of member obligations in favor of victims of human rights violations. Regardless of whether southern African states intended to create a regional adjudication forum that functions as the supreme court of the region, those who could not access justice at the domestic level sought it in a regional forum. Similarly, other individual claimants of justice would have knocked at the Tribunal for injustices committed by Member States had it not been for the Tribunal's dissolution.

¹⁷³ In 2007, the SADC Tribunal dealt with two cases. The first, which is not relevant for this article's central argument, is of African citizenry petitioning for emancipation from oppressive states and was a case against the SADC Secretariat by its former employee. *Mtingwi v. SADC Secretariat*, Case No. SADC(T): 1/2007 (SADC, May 27, 2008). The second case involves a minority group of white Zimbabweans bringing a case against the Republic of Zimbabwe against a land reform in the republic that led to a constitutional amendment and barred minority groups from accessing the local courts to seek redress and/or challenge constitutionality of such land reforms. *Campbell v. Zimbabwe*, Case No. 2/2007 (SADC(T) 2007). To the dismay of the Zimbabwean government, the Tribunal found in favor of the applicants, however, enforcement of the decision is yet to come. *Id.*

¹⁷⁴ In this part, when the author refers to "major cases" brought before the SADC Tribunal, the emphasis on "major" is meant to convey to the reader that the accounting of cases in this Article does not include interlocutory appeals.

¹⁷⁵ Article 4 is the human rights principle while Article 6 deals with non-discrimination. SADC Treaty, *supra* note 2, arts. 4, 6.

¹⁷⁶ *Campbell v. Zimbabwe*, Case No. 2/2007 (SADC(T) 2007).

¹⁷⁷ *Gondo v. Zimbabwe*, Case No. 5/2008 (SADC(T) 2008) (discussing how residents of Zimbabwe use SADC to request enforcement of a domestic court decision that Zimbabwe refused to enforce).

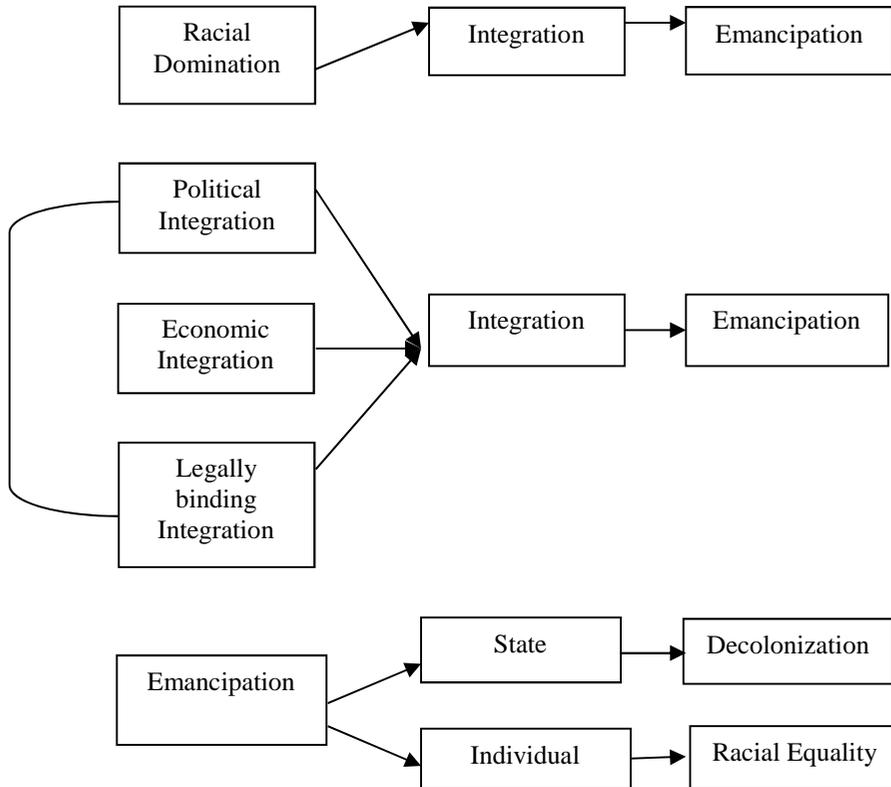


Figure 2.6.2.3: Casual Diagrams of the Interrelationship Between Integration and Emancipation

2. *Integration-Disintegration and Emancipation*

In the 1960s, integration as emancipation entailed a trajectory between a state of colonialism and a state of decolonization. While the former state of colonialism was oppressive, the expectation of decolonization was freedom and liberation of the oppressed people. Logically, if integration is emancipation, then disintegration means oppression. As Nkrumah stated, “African states must unite” in order to end colonial oppression or else it will be

subject to colonization.¹⁷⁸ In the early 1960s, the importance of African unity in its decolonization movement was clearly uncontested as the movement sought to oppose global power dominance through its unity.¹⁷⁹ In early years of Africa's independence, integration and emancipation, broadly speaking, were directly linked. Even so, does this mean there ought to be a link between integration and emancipation in contemporary Africa? Alternatively, if there is regional disintegration, does it indicate a move towards a state of colonization and/or oppression?

Mohammed Bedjaoui, an Algerian jurist and diplomat, explains the distinction between colonization and decolonization. He categorizes colonization as legalization of domination, exploitation, and non-egalitarian relations, which ended, at least in theory, with advent of decolonization.¹⁸⁰ On the other hand, "Decolonization," at least in its contemporary formation, includes not only independence movements from European colonizers, but also all forms of "oppression and resistance" paradigms that exist within and among societies and states in contemporary Africa. These "oppression and resistance" paradigms can help one move beyond traditional colonialism and include struggles for social protection in a liberalized market economy, minority rights movements and several others. Understanding these paradigms can help one move beyond traditional colonialism and discourse. Hence, the emancipation project of 1960s needs to carry on with it a new mandate that encompasses the broader conception of emancipation. If emancipation encompasses different forms of "oppression and resistance" paradigms of southern African states, what is the role of the ongoing integration initiatives for global economic order?

The role of integration initiatives in bringing about just economic order for a world characterized by inequalities partly comes from the power of unity as negotiating blocks in multilateral negotiations. Theoretically speaking, the 1970s movement for a more just economic order has created a better economic order. However, negotiations for a more just world, specifically speaking the third-world states' role in setting agenda for cotton negotiations in Doha

¹⁷⁸ Kwame Nkrumah, Speech at Casablanca Conference, Jan. 7, 1961, *reprinted in* 2 SELECTED SPEECHES KWAME NKUMAH 1, 2 (Samuel Obeng ed. 1997).

¹⁷⁹ *See id.* at 1.

¹⁸⁰ BEDJAOUI, *supra* note 113, at 82 ("Colonization, as a social, economic and political fact, expressed itself in legal relations which were those of domination and exploitation . . . Decolonization, the logical reversal of what preceded it, implies, in theory, a fundamental policy of eliminating inegalitarian links").

round,¹⁸¹ show that the struggle for party of participation is consequently pursued by African states. Nevertheless, issues of just global economic governance can also be raised in relation to Europe-Africa trade relations and possible claims of the European role in disintegrating Africa. Therefore, if ongoing Economic Partnership Agreements (“EPA”) negotiations are a disintegrating factor for southern African integration initiatives, then oppression will result both in terms of global governance and individual emancipation projects. Although EPA negotiations and possible disintegration might have been countered by the tripartite negotiations, theoretically, disintegration should mean oppression. In reality, however, this author understands that regional disintegration is oppression, only in the sense that it does not give citizens an adequate forum to plea their grievances against their home state. This lack of forum or regional guarantor of emancipation can also happen when community institutions tolerate or favor oppressive behavior of states over the rights of oppressed citizens. Consequently, any disintegration that might result because of EPA’s disrupts the continental emancipation project, in the sense that it freezes the role of community institutions as guarantors of emancipation for the individual.

CONCLUSION

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

¹⁸¹ See generally *The Cotton Initiative*, WTO (Dec. 1, 2004), http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd20_cotton_e.htm.