ESTABLISHING CONTINENTAL SOVEREIGNTY IN AFRICA

Risk and Opportunity in Financial Integration: Lessons for Africa from a Legal Perspective

By

Edwin Ndeh Ngwafor

LL.B., University of Sheffield, 2007

LL.M., University College London (UCL), 2008

A THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

IN

THE COLLEGE OF SOCIAL SCIENCES

(School of Law)

THE UNIVERSITY OF GLASGOW

(Glasgow)

February, 2015

ABSTRACT

This thesis identifies and defines the new *African sovereignty*. It establishes a modern sovereignty in Africa hatched from the changing nature of sovereignty in which countries come together at various levels or grades of partial surrender of national sovereignty in order to work closer together for their mutual advantage and benefit. To this end, the narrative zooms in on the central issues within the realms of money matters whereby a new model of monetary sovereignty and monetary solutions is designed in an attempt to ease the recurring tensions and challenges of modern national sovereignty in the continent of Africa. As such, this discussion will offer a historical journey through the constitution of sovereignty, to the birth of the nation state and international public law. It develops the theory of the changing nature of sovereignty within the modern state and opens new lines of inquiry for Africa. In this regard, it draws from juxtaposing and mixing elements of regional and global financial integration as well as retaining national financial sovereignty features to form this new design which I dub *continental sovereignty*.

At its core, the thesis will deal with the legal aspects that stem from the co-mingling of legal systems of nation states and communities at the regional and global levels within the context of financial integration. The argument is that the rule of law remains sacrosanct in monetary management. Effective financial integration is the result of properly structured and managed legal frameworks with robust laws and institutions whether at a national, regional or global level. However, the thesis reveals that in order to avoid undermining the progress of Africa's financial integration project, any solution for Africa must be immersed within a broader global solution where development issues are addressed and resolved and Africa can form a more central part in all relevant international discussion fora.

The work will expound these issues by applying them within a regional and global context, with the state of affairs in Africa forming the nucleus. This application consequently presents the six key themes of the thesis which will be considered therein. They are: a.) *regional advantage*: which exploits the possibilities of deeper and further financial integration between smaller communal arrangements; b.) *regional risk and exposure*: the extent to which this deeper form of

financial integration can spiral out of control if effected too quickly and too ambitiously; c.) *global advantage*: which considers the merits of global financial integration and the influence exerted by financial laws on the global financial architecture; d.) *global risk and exposure*: which considers the challenges of global financial integration especially within the background of the Global Financial Crisis 2007-2008; e.) *African challenge*: which considers the extent to which this analysis impacts the African economic and financial integration agenda; and f.) *development challenge*: which examines the extent to which global development issues impact the African solution (*continental sovereignty*) and the need for any solution for the continent to be roped into a broader global solution within which Africa can form an important part.

Even though the thesis requests an optimistic undertone on the progress made so far, it unearths the African problem of multiple national sovereignty and multiple overlapping regional sovereignty constituted as the *‘spaghetti bowl’* dilemma. As such, the unique contribution to knowledge on financial integration in Africa can be echoed in these words: Africa‘s financial integration agenda has had little success in authenticating a systematic and dependable legal framework for monetary management. Efforts made have been incomplete, substandard, and not carefully followed through particularly reflected in the impuissant nature of the judicial enforcement mechanisms. Thus, the thesis argues that, any meaningful answer to the problems dogging the continent is *inter alia* deeply entrenched within a new form of cooperative monetary sovereignty. In other words, the thesis does not prescribe the creation of new laws; rather it advocates the effective enforcement of existing laws.

Table of Contents

LIST OF ABBREVIATIONS

ADB: African Development Bank
AEC: African Economic Community
AJICL: African Journal of International Comparative Law
AIG: American International Group
AMU: Arab Maghreb Union
AU: African Union
AUC: African Union Commission
BCCI: Bank of Credit and Commerce International
BCEA: Banque Centrale de Etas de L'Afrique de L'Ouest
BRICS: Brazil, Russia, India, China and South Africa
BRVM: Bourse Régionale des Valeurs Mobilières
CEEC: Committee for European Economic Cooperation
CEMAC: Economic and Monetary Community of Central Africa
CENSAD: Community of Sahel-Saharan States
CERDS: Charter of Economic Rights and Duties of States
CFSP: Common Foreign and Security Policy
CILSS: Permanent Interstate Committee on Drought Control in the Sahel
CISNA: Committee of Insurance, Securities and Non-Banking Financial Authorities
CMA: Common Monetary Area
COBAC: Commission Bancaire de L'Afrique Centrale
COMESA: Common Market for Eastern and Southern Africa
COSSE: Committee of SADC Stock Exchanges
COSUMAF: Commission de Surveillance du Marche Financier de L'Afrique Centrale
CREMPMF: Conseil Régional de l'Epargne Publique et de Marchés Financiers
DRC: Democratic Republic of Congo
DSX: Douala Stock Exchange
EAC: East African Community
EBA: European Banking Authority
EBRD: European Bank for Reconstruction and Development
EC: European Community

ECB: European Central Bank

ECCAS: Economic Community of Central African States

ECJ: European Court of Justice

ICJ: International Court of Justice

ECOWAS: Economic Community of West African States

ECSC: European Coal and Steel Community

EDC: European Defence Community

EEA: European Economic Area

EEC: European Economic Community

EFTS: Electronic Funds Transfer Systems

EIOPA: European Insurance and Occupational Pensions Authority

EPU: European Payments Union

ESA: European Supervisory Authorities

ESC: European Securities Committee

ESFS: European System of Financial Supervision

ESMA: European Securities and Markets Authority

ESRB: European Systemic Risk Board

ESRC: European Securities Regulators Committee

EU: European Union

EURATOM: European Atomic Energy Community

FAFT: Financial Action Task Force

FCA: Financial Conduct Authority

FDIC: Federal Deposit Insurance Corporation

FSA: Financial Services Authority

FSAP: Financial Sector Assessment Programs

FSB: Financial Stability Board

FSF: Financial Stability Forum

FTA: Free Trade Area

GATT: General Agreement on Tariffs and Trade

GFC: Global Financial Crisis

GTB: Guaranty Trust Bank plc

IFRS: International Financial Reporting Standards

IGAD: Inter-Governmental Authority for Development

IGADD: Intergovernmental Authority on Drought and Development

IMF: International Monetary Fund

IOC: Indian Ocean Commission

IOSCO: International Organization of Securities Commissions

ITO: International Trade Organisation

LCGFI: Large Complex Global Financial Institution

LPA: Lagos Plan of Action

LTCM: Long Term Capital Management

MDGs: Millennium Development Goals

MFN: Most-Favoured-Nation

MINT: Mexico, India, Nigeria, Turkey

MIP: Minimum Integration Program

NIEO: New International Economic Order

OAU: Organization of African Unity

OECD: Organization for Economic Cooperation and Development

OHADA: Organisation pour l'Harmonisation en Afrique du Droit des Affaires

PTA: Preferential Trade Agreement

REC: Regional Economic Community

RFI: Regional Financial Integration

ROSC: Reports on the Observance of Standards and Codes

RTGS: Real Time Gross Settlement

SACU: Southern African Customs Union

SADC: Southern African Development Community

SDGs: Sustainable Development Goals

SEC: Securities Exchange Commission

SICAV : Societe d'Investissement A Capital Variable

TARP: Troubled Assets Relief Programme

TEU: Treaty on European Union or Maastricht Treaty

TFEU: Treaty of the Functioning of the European Union

UNECA: United Nations Economic Commission for Africa

WAEMU: West African Economic and Monetary Union

WAMU: Washington Mutual

WAMZ: West African Monetary Zone

WTO: World Trade Organization

ACKNOWLEDGEMENTS

I begin by thanking God whose over-arching presence every step of the way ensured the successful conception to completion of this thesis.

I will never be able to convey the depth of gratitude I feel towards my parents Professor Ephraim Ngwafor and Mrs Gladys Ngwafor to whom I dedicate this work. You have been incredible mentors and confidants throughout my academic pursuits. To my sisters Jessica and Sharon and brother Randolph, I say thank you for your relentless support. You all made this journey worthwhile.

This thesis would not have been what it is without the critical and constructive comments of my supervisors Professors George A. Walker and Iain MacNeil. I thank you infinitely for your clarity, patience and belief in me. Working with you shaped my interest in this area of law and solidified my commitment to this project.

AUTHOR'S DECLARATION

I declare that except where explicit reference is made to the contribution of others, this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature:

Edwin Ndeh Ngwafor

CHAPTER 1: INTRODUCTION

1.1 Introduction

Regardless of the academic strata one belongs to, the definition of sovereignty will always invoke connotations pertaining to supreme power or authority over a territory.[1] In the political and legal sphere, sovereignty is defined as 'the supreme and independent control by states of their internal affairs, subject only to the recognized limitations imposed by international law'.[2] In fact, Max Huber notably stated in his award in the *Island of Palmas Case* that: '*Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State*'.[3]

Thus, the genius of sovereignty defines the nation state, national identity and the notion of independence which have no doubt shaped many initiatives through which states exercise their functions all over the world. It is on the strength of this ingenuity that an analysis on the changing nature of sovereignty within the African context to reflect the modern continent and modern public international law will be made. The thesis seeks to advance the argument that Africa's lasting problems discussed mainly in Chapter Two can be thwarted by surrendering parts of national sovereignty to form meaningful alliances and co-operation between countries. This creates the novel notion dubbed *African Sovereignty or Continental Sovereignty*.

On this backdrop, the historical evolution of national sovereignty will be revisited. This journey will travel from its establishment through its changing nature over the years. After all, history is more than the trail left by the past; it influences the present and can shape the future.

[1] This is no different with regards to the concept of monetary sovereignty which represents the employment of sovereign powers within the confines of money matters (See 1.2 below as the research problem delves more into this)

[2] See, for example Martin E A and Law J (eds.), *Oxford Dictionary of Law* (6th edition OUP, Oxford 2006).

[3] *Island of Palmas Case (Netherlands v USA)* (1928), 2 UNRIAA 829; Also see Lowe V: '*Sovereignty and International Economic Law*' in Shan W, Simons P, and Singh D (eds); *Redefining Sovereignty in International Economic Law* , Hart Publishing, Oxford 2008, p.77; for an analysis of the themes outlined by Huber which discuss the significance of sovereignty and define independence

1.2 African Sovereignty or Continental Sovereignty– A monetary model of deeper cooperation and alliance

There is no doubt that the European Union (EU) integration regime has inspired the African continent to replicate this success. Unfortunately, the African Regional Economic Communities (RECs) have so far failed to translate the adoption of this agenda to meaningful economic integration within them. In fact, achieving the most basic forms of economic integration has been challenging. In the thick of these challenges therefore, it is immature to think that given the status quo on the ground in Africa, adopting a new financial regulatory framework modeled from the EU example in the short and medium term would be successful. The ensuing subsections summarized from Iwa Salami's comments offer a more sensible approach to bolster financial integration among the RECs and ensure a robust regulatory mechanism.[4] These will be expanded further in subsequent Chapters Two and Three. The thesis will build on these by arguing that any continental solution requires the super-imposition of these proposals on a larger framework of alliance between African RECs in terms of monetary cooperation in order to facilitate broader global participation to enable the effective running of financial markets as the overarching solution to the many residual challenges Africa faces. This is the solution I dub *African Sovereignty* or *Continental Sovereignty*.

a.) *Embracing the concepts of Supra-nationality and Supremacy of Regional law*

Generally, African RECs are known to ignore the concept of supra-nationality with neither being able to show a strong supranational framework yet. This is unfortunate because achieving the African Union/ African Economic Community (AU/AEC) objectives without the RECs and their Member States embracing this concept will be an exercise in futility. African countries have the reputation of having little regard for REC provisions and usually implement them very slowly at their own time or ignore them altogether. As a consequence of the lack of according Treaty provisions and secondary instruments supreme status nationally, REC policies are not implemented at the national level. Roped in this challenge also is the weakness of the regional enforcement mechanisms as they are unable to ensure compliance of these REC provisions nationally. Unless this concept of supra-nationality is embraced unconditionally, it will be flawed to attempt any type of integration using the EU institutional architecture.

[4] Salami I; *Financial Regulation in Africa, An Assessment of Financial Integration Arrangements in African Emerging and Frontier Markets*; Ashgate Publishing Limited, Farnham Surrey 2012.

b.) *Strengthen Regional Financial Integration (RFI) communities*

The RECs are based mainly on an economic integration agenda for the Member States with objectives ranging from achieving a Free Trade Area (FTA), customs union, common market to the more ambitious arrangements of an economic and monetary union. Obvious failure to implement REC provisions domestically has hindered the achievement of these REC objectives. It is hard to envisage the creation of a common regional financial framework with a strong economic and monetary agenda when basic regional integration goals such as an FTA have been difficult to achieve. It makes sense for Member States to first consider trying to accomplish the most fundamental of these integration objectives, then strengthen and maintain them before striving to achieve deeper and more ambitious objectives such as financial integration. For instance, it is important to liberalize capital transactions between Member States then subsequently opening up their markets to the rest of the world eventually in order to be fully integrated into the global financial markets. It is imperative however that a robust regulatory regime be in place as without this, there would be cataclysmic consequences.

c.) *Reforming payment systems*

In accordance with the Committee on Payment and Settlement Systems, the public policy objectives of safety and efficiency in systemically important payment systems have resulted in 10 Core Principles for Systemically Important Payment Systems and four outlined responsibilities for central banks.[5]Here, Member States' compliance with Principal I is most relevant in relation to this thesis as it states that *'the system should have a well-founded legal basis under all relevant jurisdictions.'* In explaining this Principle, the committee stressed that the system should have an environment which is legally robust and effectively guarantees the protection of all participants through adequate enforcement of contract, payment, securities, banking, debtor/creditor relationships and insolvency laws.[6] Also relevant are Principles IV and V which state that: *'the system should provide prompt final settlement on the day of value, preferably during the day and at a minimum at the end of the day'* and *'a system in which multilateral netting takes place should, at a minimum, be capable of ensuring the timely completion of daily settlements in the event of an inability to settle by the participant with the*

[5] See 'Committee on Payment and Settlement Systems: *Core Principles for Systemically Important Payment Systems*' (Bank for International Settlements, January 2001) p.3. Available on http://www.bis.org/publ/cpss34e.pdf (accessed 25 September 2014)

[6] Ibid p.6

largest single settlement obligation' respectively.[7]These constitute the basic minimum expected of all Member States.

Although most African countries have a satisfactory payment system in cheque-clearing systems, there still remains a substantial amount of work to be done in this area as many of these systems have still not been modernized. For instance, just a few countries have introduced real time gross settlement (RTGS) systems and many still do not have electronic funds transfer systems (EFTS). Granted, cheque-clearing systems remain the most widely used medium in Africa and while for the most part they function effectively, sometimes settlement is awfully slow.[8]All African states must strive to establish a RTGS and promote the essential legal and judicial overhaul necessary to help enforce basic contract and bankruptcy laws which are fundamental to the operation of an efficient domestic payment system. Implementing the REC provisions is also vital and without embracing the supremacy of regional laws in Member States, implementing the harmonization provisions for the operation of the payment system would be inconceivable.

d.) *Indigenous needs should inform regional standards for African RECs*

The need for regional standards centering on the environment and culture and relevant to the disparate stages of development in financial systems in Africa has never been more pressing. Given this disparity, a pragmatic approach would see the adoption of regional standards and institutions for the different groups with similar stages of development. Another option would be to establish some sort of accession criteria which will only integrate those countries within the REC which have achieved a certain standard of financial development and gradually increase the numbers upon achievement of this level by the other Member States. A move towards a 'one-size-fits all' approach as required by international standards would only achieve negligible success if any at all.

For instance, in terms of capital market regulation within Economic Community of West African States (ECOWAS), harmonization of the capital market could still occur through cooperation by the stock exchanges in the REC that are at the same level of financial development in spite of the absence of a formal regional framework for capital markets regulation. Three such stock exchanges exist in ECOWAS; they are: The Nigerian Stock Exchange (in Lagos), the Ghanaian

[7]Salami (n.4), p.170

[8] In the DRC for example, it could take up to 30 days.

Stock Exchange (in Accra) and the West African Economic and Monetary Union's (WAEMU) Bourse Régionale des Valeurs Mobilières (BRVM) (in Abidjan). Here, a regional regulatory regime could seek to harmonize accounting standards by universally upgrading the domestic rules in the Member States to international standards or establishing a regional standard inspired by International Financial Reporting Standards (IFRS). Alternatively, adopting as inspiration the financial regulatory mechanism of a success story within the African context such as the South African model of a single regional regulatory and supervisory authority is a good idea.

e.) *National supervisory authorities co-ordination*

In the case of the EU, embracing supra-nationality has made this process much easier. Submission to EU regulatory institutions by Member States is common place and the hub-and-spoke nature of the new EU regulatory regime has solidified the familiarity between National Central Banks and the European Central Bank (ECB) as the former operate as branches of the latter. It is therefore reasonable to speculate that the national financial supervisors are working smoothly within the European System of Financial Supervision (ESFS). Surely, this framework will not operate smoothly without the consistent co-operation of the national supervisory authorities.

African RECs and their Member States must succumb to supra-nationality otherwise the relationship between national supervisors will be non-existent. It is imperative to submit to a regional financial regulator particularly in an industry as such where disparity between national practices is alarming, worsened by the differing stages of development of the African states' financial systems which would further complicate the job of any regional financial regulatory authority.

f.) *Strong national financial regulatory and supervisory regimes*

The importance of this point cannot be over-emphasized. The powers to enforce regulation by the national regulators and supervisors need to be strengthened. There is the dire need for the improvement of many aspects of financial regulation within African states such as strengthening accounting and disclosure standards for financial firms and strengthening corporate governance provisions. Importantly, the independence of the financial supervisors must be ensured as this remains a deep-seated problem, especially in the banking sectors. As earlier mentioned it will be badly erroneous to superimpose a strong regional financial regulatory and supervisory authority upon weak and unreliable national financial regulatory and supervisory authorities. If the regional regulatory framework is deemed strong enough generally, then, a fortiori, the national regulatory frameworks must be strong too.

g.) *<u>The development of a sound 'regulatory strategy'</u>*

Closely linked to the point above is the necessity to prioritize the needs for regulation and supervision over time in a design that Quintyn and Taylor call a regulatory strategy.[9]They use Alfred Chandler's argument that 'structure follows strategy' to justify the need for a strategy to ease the design of an appropriate supervisory structure relevant to an individual country's current and future needs.[10] They urge that this strategy should factor in capacity constraints and the central banks intricate role in the supervisory process. Therefore issues like the employment of trained and skilled staff and the need for institutional structures of regulation to be adapted to the changing nature of the financial industry are critical. Nevertheless responding to the capacity-constraint problem for example, if a particular sector is small, undeveloped, and showing little sign of growth (such as the capital markets sector in most states in Africa), it is sensible to use the scarce resources to first regulate other sectors that are more important for entire financial system stability. Over-all, this regulatory strategy should be built upon two decisions namely: the regulatory scope and the regulatory intensity.[11] The former refers to the point in time during which the development of a particular sector attains a level where it needs to be regulated and thereby brought into the supervision net. The latter on the other hand refers to that point once a sector has been identified as needing regulation and supervision, would require determination as to the type of regulatory and supervisory framework to be imposed. It is advisable for institutional structures of regulation to be designed in connection with a state's regulatory strategy.[12]

h.) *<u>Legal and judicial regimes must be strengthened</u>*

Drawing from above is the need to reform the legal and judicial systems in African states in order to enable financial laws operate without interruption. The time-consuming and usually inept manner in which basic laws such as contract, property rights, and bankruptcy laws are

---

[9] Quintyn M and Taylor M W; *Building Supervisory Structures in Sub-Saharan Africa – An Analytical Framework*; IMF Working Paper; Monetary and Capital Markets Department, 2007

[10] Ibid

[11] Ibid p.28

[12] ibid

enforced have done very little to foster financial sector development. These need to be improved in order to guarantee investor protection because foreign portfolio investors typically steer clear from investing in countries that pose significant amounts of risks to their investment. It is well known that part of their risk assessment considers the extent of unreliability in the legal systems of states where they consider investing.

i.) *Encourage economic growth*

As mentioned earlier in the chapter, the IMF reports Africa as the second fastest growing economic region in the world after Asia with strong economic growth rates averaging approximately 6 percent per annum since the early 2000's. In fact, McKinsey's examination of these growth trends reports greater access to international capital. This capital if managed efficiently will go a long way to advance the development of the financial sector in the continent. This is particularly true as recent studies show a correlation between economic growth and financial sector development.[13] Fostering economic growth in Member States will enable the advancement of the financial integration agenda within RECs especially considering the disparity in economic development amongst the African economies.

Reflections

Existing African community laws have established a unique legal system with their own law making institutions including mainly a Conference of Heads of State or Government, a Council of Ministers, and a Court of Justice. Currently as will be dissected in the next chapter, there are multiple regional blocs in Africa many of which have overlapping memberships; and as a result of this high rates of overlap, it is likely that some Member States with several memberships will eventually exit one or more of the RECs. The ensuing subsection identifies the case for a tidy and orderly creation of a model for economic and financial integration within Africa by virtue of the concept of *African sovereignty* which will be consistent with the Member States preparedness and acceptance of it.

The idea of effectiveness measures the degree to which the RECs are, and will be, able to attain their objectives laid out in their various treaties. From this, it makes sense to point that

---

[13] In their study of the relationship between stock markets, banks and economic growth, Levine and Zervos found that the magnitude of banking and stock market development are closely linked with current and future rates of economic growth most especially in developing countries.(See Levine R and Zervos S; *Stock Markets, Banks and Economic Growth*;(1998) 88 American Economic Review 536.

there could be differing degrees of achievement on these criteria; what is needed therefore is a process which views these criteria as ingredients along a continuum instead of a phase that is reached instantly. In this scenario, the more successful a community is, the more it would demonstrate elements of the criteria. This success can thus be rewarded with admission into a more advanced REC which enjoys superior and deeper levels of integration.

1.2.1 Conceptualizing 'African sovereignty' and relational issues of law

It is difficult to draw references to what the sources of law of the community will or should be throwing into doubt the relationship which exists with national laws. Certainly, the Treaty and protocols make up the essential sources of community law. Also, decisions of the Conference of Heads of State and regulations of the Council of Ministers are considered sources of law. Further, the judgments of the Community Courts should represent another source of community law. The general principles of law recognized by member states, including general principles of international law, could also be important sources of African community law.

The Statute of African Court of Justice and Human Rights (ACJ)[14] solves, in part, this omission on sources of law as Article 31 of the statute lists various sources of law the court 'shall have regard to', but it is not clear on how the sources relate to each other, for instance in instances of conflict.[15] Ultimately, the ACJ will have to act to resolve internal conflict of laws problems within the community legal system.

In reality, there are several conditions for domestic legal systems to develop an appropriate relationship with the community legal system. These include *inter alia*: the need for an independent judiciary; respect for the rule of law; well developed judicial decisions, constitutional and international laws; and the political will to legislate. These conditions, which succeeded in Europe, are still absent in many African states. Nevertheless some progress can be seen for example with South Africa's judiciary which is reputed for its independence and quality of its judgments. Also, as recently as 2008, Ghana has democratically changed

[14] See Protocol on the Statute of the African Court of Justice and Human Rights, 01 July 2008 [Protocol on the African Court of Justice], and the Statute of the African Court of Justice and Human Rights [Statute of the African Court of Justice], which is annexed to the Protocol, (2009) 17 African Journal of International and Comparative Law.

[15] Protocol on the Statute of the African Court of Justice and Human Rights: see online: http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf ; p. 19

government five times since 1992. Other good examples of democratic, peaceful and stable countries are Botswana, Namibia and Tanzania.

The existence of community law as a legal system has legal and socio-economic benefits. For instance, national governments' interference with the external community is reduced due to the independence of the community's legal system. Furthermore, it helps to stabilize the level of economic integration by reducing risk and uncertainty which is usually associated with economic transactions intra-community. This is so because varied categories of economic activity within the community can be subject to the community legal framework which is independent of domestic legal systems. More so, from a social perspective, a sense of unity within the community could be fostered as community citizens all live under one legal system.

It is worth mentioning that, the integrity of the legal system at the community level and its status at the national level must be well defined and respected. Without a coordinated relationship between the community and national legal systems, the usefulness and success of the former will be undermined. These will be made easy by the surrender of state sovereignty to the community institutions. As one writer has noted:

"The depth of legislative coordination required to achieve these economic goals [the goals of a common market, including that of free movement of people, capital, and services] would appear to require the member states of a common market to cede large portions of sovereignty to an institutional structure capable of not only implementing such integration but also policing whether member states follow through with their obligations. Without a strong institutional structure, a common market could only be created by countries capable of achieving a political consensus on the content and implementation of each common commercial policy."[16]

States generally have their own legal systems and enact their own laws which directly bind their citizens. Therefore, they hardly ever surrender this sovereign power however it is only through a surrender of this sovereignty at the community level and the acknowledgment of that surrender at the national level that such an initiative can exist.

[16] Taylor C; *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?* (1996-1997) 17 Nw. J. Int'l L. & Bus 850 p.867

A demonstration of the surrender of state sovereignty is to permit the direct application and supremacy of laws established by community institutions. Decisions made should become part of the member state‘s legal system and have binding effect within it. Sovereignty may be surrendered partially or wholly. States could co-exist in a mere political association without the need to surrender sovereignty however this is not possible in the case of an economic community. For example, it is not possible to have a common market or economic union in which member states have not ceded sovereignty to some extent and also created a all - encompassing legal system. In this connection, it is worth mentioning that in Federations like Canada, Nigeria and the USA the laws made by the federal government are usually directly applicable in the constituent states.

The general silence in community law on the issue of member states‘ sovereignty should be differentiated from the ECOWAS Treaty which explicitly acknowledges in its preamble that ‘the integration of the Member States into a viable regional Community may demand the partial and gradual pooling of national sovereignties to the Community within the context of a collective political will.’[17] Nevertheless, this does not imply that the ECOWAS Treaty is more clear-cut on the issue of sovereignty and therefore implying that ECOWAS law is better positioned within a member state than any other community law which the state is a member. ECOWAS law is hardly raised in national courts and its presence within member states is trivial.[18] Successful integration necessarily eats into member states’ sovereignty, and in that sense a gradual surrender of sovereignty, even if not expressly provided in a treaty is inevitable.

As will be seen in the next chapter, some African States have already recognized the need to partially surrender sovereignty in order to advance economic development through regionally organized policies. For example, the EAC Treaty accords sovereignty to EAC institutions and organizations and promotes community laws above domestic national laws.[19]

[17] *Revised Treaty establishing the Economic Community of West African States*, 24 July 1993, (1996) 8 Afr. J. Int‘l & Comp. L. 187-227 [ECOWAS Treaty], preamble

[18] Searches of law databases and reports in Ghana and Nigeria did not yield any important cases in which ECOWAS law has been applied in national courts. Nonetheless, there is a chance that it is being applied in administrative and executive cases. With regards to Sierra Leone and Liberia however, I wondered that due to conflicts which have hindered regional integration in the sub-region, it is unlikely that given the political instability experienced over the past decades, any such cases would have gone to the national courts.

[19] *Treaty for the establishment of the East African Community*, 30 November 1999, 2144 U. N. T. S. I-37437, Art 8(4) [EAC Treaty]

Also, the Treaty establishing the Organisation for the Harmonization of Business Laws in Africa (OHADA Treaty)[20] provides another example of the readiness of African governments to partially surrender sovereignty in order to promote economic development. OHADA member States under this treaty have partially given up national sovereignty to create a single regional regime of Uniform Acts which has harmonized their business laws. These Uniform Acts are directly applicable and overriding in the member states, in spite of any conflict which may arise with other domestic laws.[21]

<u>Reflections</u>

It is evident from the above that a notable problem in African financial integration is what Oppong describes as *relational issues* of law in economic integration which are diverse in form.[22] He portrays these varied forms to include: "*the relations between the laws of a community (community law), its institutions and those of its member states; mechanisms for normative exchange or communication between a community and its member states and member states inter se; jurisdictional conflicts between a community and its member states; the allocation of competences between a community and its member states; individuals' access to community institutions; and the recognition and enforcement of member state and community normative acts.*"[23] Oppong further explains that community law involves treaty provisions, protocols, regulations and judicial decisions and the objectives, principles and undertakings of member states as laid out in the community treaties are of legal consequence. Although these can be discussed from multiple perspectives, focus in this thesis will rest on the legal and institutional structures and the interactions between different legal and judicial systems in reference to regional systems *vis-a-vis* national systems, and the implementation and enforcement of laws.

It is true that both national and community efforts to limit the cross-border movement of goods, services, people and capital are typically informed by socio-economic and political considerations; however I firmly assert that it is only through the medium of laws that controls

[20] *Treaty on the Harmonization of Business Law in Africa*, 1997, online: Organization for the Harmonization of Business Law in Africa http://www.ohada.com/traite.php (accessed 01 March 2014)

[21] Ibid Art 10

[22] Oppong R F; *Legal Aspects of Economic Integration in Africa*; Cambridge University Press, Cambridge, 2011 p.8

[23] Ibid

are realized and these issues become more relevant as states move through the various stages of integration. Whilst an FTA may endure without cogently managed relations between the community and national legal systems, a customs union, common market, economic and monetary union cannot function efficiently without considering these relational issues.[24] This is because as economic integration advances through the different stages, the interactions between legal systems deepen.

In spite of this complication, there is the presupposition that a high degree of legal integration and expectation of it and subsequently the existence of a high degree of legal integration is necessary but not a sufficient condition for the effectiveness of economic integration in Africa. In fact from a legal perspective an effective community should demonstrate: “the free flow of goods, services, person, capital and property, including judgments within the community consistent with the stage of economic integration it has reached; the existence and development of a significant body of community laws including judicial decisions to regulate the integration process; integration of community law into the laws of member states; the existence of a carefully structured legal framework for addressing and managing the multiple relationships (for example, community–state, interstate, inter-community, inter-institutional) created by economic integration; the existence of institutions adequately designed, mandated and resourced to ensure the application of community law; the existence of well-outlined procedures for monitoring and addressing breaches of community law; adherence to community law in member states; and the existence and development of constituencies with interest in the community and their full integration into the activities and operations of the community at both national and community levels.”[25]

Considering Africa’s under-development and economic marginalization, its governments should appreciate the need to set aside their national and personal interests to build a common framework through the Africa-wide integration project. The damage caused by World War II and the general threat of Communism, drove Europe to integrate. Similarly, the dire economic conditions in Africa should propel the leaders to work together. They should unite and grant supranational decision-making powers to the community to enable the pursuit of a common economic agenda. The obvious advantages of economic integration which are being enjoyed by other regions of the world should persuade African leaders to approach the economic

[24] The proposals in para.1.2 above provide a comprehensive approach to tackling these issues.

[25] Oppong p.10-11

integration initiative with enthusiasm even though success will not come without problems. Nevertheless, with the necessary legal and institutional structures, political will and conducive socio-economic climate, it can be achieved.

1.3 Sovereignty in Europe: A Historical Timeline

It must be said that it is indeed a tall order avoiding uncertainties of emphasis when summarising the aspects of a very large and multifaceted subject. It is therefore impossible to squeeze the subject into any single academic discourse such as law, philosophy, history or political science as none of these disciplines capture the various stages of its evolution in entirety. Nevertheless, the study conducted on this matter of sovereignty draws from referenced interdisciplinary authority to make any relevant assertions or declarations. All references to sovereignty refer to state sovereignty unless otherwise specified.

It was Sir Francis Hinsley who stated that 'men do not wield or submit to sovereignty. They wield and submit to authority or power.'[26] In classical history, the ancient empires of Egypt and Greece for example showcased the sort of far-reaching and somewhat superficial absolute authority of their rulers which tremendously widened the gap between these rulers and their communities. They were categorized with the gods and the law; Alexander the Great for instance, the son of Zeus, ruler of Egypt, Macedon, Asia and Greece, was considered a real god on earth. This era was can be deemed to be void of sovereignty as this notion as we see it can only arise when rule is more comprehensive and restricted (implying that it governs a society (the former) and is anchored to a society (the latter)).[27]

---

[26] Hinsley F H: *Sovereignty*; Alden Press, Oxford, 1966, p. 1- The term sovereignty depicts final and absolute authority in a political community illustrating the function of the concept (Hinsley p.1). Hinsley differentiates between the political society and political systems explaining that the latter are by no means the only institutions in the community which regulate social behaviour. Hinsley warns on the need to be weary of what he called the 'semantic problem' implying that terms and expressions of one era can sometimes be only given quasi definitions when translated into other languages. He provides examples from Aristotle's use of the words such as 'the state', 'the law' and the word 'empire' by Charles V of Spain or Kant's 'federalism' which would mean something different (Hinsley p.22-23). Admittedly, caution is necessary in defining sovereignty as words such as power, rule, empire, country, king, and government are synonymous to its use although less technical as the idea of sovereignty.

[27] Hinsley p.27-32- Hinsley argued that because these rulers made little or no progress in developing the stage of sovereignty which involves the state forms extending their power within the community and reintegrating with it, they had failed to create the environment for the development of this notion of sovereignty (p.32)

It was in the third century during the era of the Hellenistic monarchs that the first steps were taken to bridge the gap between the rulers and their communities as the rulers began to recognize fixed territories.[28] Even though further reintegration continued with the emergence of the Roman Empire following conquest, the emperor remained *above the law*[29] and it was here that the emperor's will became a source of law. The Roman jurist Ulpian articulated '*princeps legibus solutes est*'- and *'quod principi placuit legis habet vigorem'*[30]

Following this era, the word 'sovereign' in the medieval period meant God - whose commands were recognized by Christians as necessitating strict obedience. In this connection, the Pope who was God's representative here on earth led the Latin Christendom and his authority could not be rejected. Also, given that Catholic orthodoxy was based on the doctrines and teachings of the Christian religion, there was no room for anyone who questioned its legitimacy. During the medieval era of Latin Christendom, the church and state were inextricably connected and it was almost impossible to have any political discourse without mentioning religion because religion sanctified all authority - temporal and spiritual. Whilst the king was in part a religious authority, the Pope was also in part a political authority.

Putting this into perspective, the political theorist Dante declared "*therefore it is evident that the authority of the temporal Monarch descends upon him from the fountain of universal authority (God), without any intervening medium.*"[31] Dante nevertheless expanded on the difference between religious authority (represented by the pope) and secular authority (represented by the emperor)- the latter being the temporal Monarch because his power was the effect of nature although also derived from God whereas that of the Pope was not the effect of nature but the direct and personal revelation from God.[32]

---

[28] Hinsley provides a vivid historic account of these events. (Hinsley 1966 p.32-44); Also for a summarised timeline of events illustrating the development of sovereignty and how it is interconnected with the modern world (see Jackson 2007)

[29] referring to the codes, customs and constitution of the society- (Hinsley p.41)

[30] Translated as 'the sovereign is not bound by the laws' and 'what has pleased the prince has the force of law' respectively- (Hinsley p.42).

[31] Quoting from Dante Alighieri's *De Monarchia*; See Rolbiecki J: ***Dante's Views on the Sovereignty of the State***; The Catholic Historical Review; Vol. 9, No. 1 (April 1923); p.91-92

[32] (Rolbiecki, p. 92)

At this time, the notions of state, nation-state, and sovereign people, national and international borders were absent and only came at a later time. Medieval Christians considered themselves as collectively belonging to one unified Christian-world regardless of how practically disjointed and loose this unity was.[33]

The objective of achieving this unified Christian-world led to the Commonwealth of Christians in Europe known as *Res Publica Christiana*.[34] This has been described as 'dualist' and constituting a theological-political empire were the Pope had overarching and centralized authority whilst the emperor had authority in the regna to defend the faith against all threats both internal and external and protect clergy and churches.[35]

In post medieval times, sovereignty has portrayed a distinctive and novel composition of law, religion and politics which differentiates the modern world from previous eras. In my opinion no

---

[33] This unity never materialised historically. It is worth mentioning that two Christian Empires existed during the Middle Ages- in the West there was the Latin Christendom centred in Rome and in the East, the Greek Byzantine Empire centred in Constantinople (present day Istanbul). The Christian authorities in the latter rejected the Pope's supremacy. In the mid-fifteenth century, its territories and populations were engulfed into the Muslim empire following their conquering and destruction by the Ottoman Turks. This event significantly hindered the emergence of sovereign states in the Ottoman parts of Europe until the 19th and early20th centuries. (See Jackson R: *Sovereignty: The Evolution of an Idea*; Polity Press, Cambridge, 2007 p.25; [For more discussion on the age of conversion between the 4th and 14th centuries, and how the boundaries of Latin Christian civilisation were pushed see Jackson (Sovereignty); Fletcher R: *The Conversion of Europe*; Fontana, London, 1998; also see Bartlett R: *The Making of Europe*; Penguin Books, Harmondsworth, 1993]. The belief in this Christian unity although its realisation was sometimes hampered has been referred to as 'deep-seated and die-hard' (See Keen M: *The History of Medieval Europe*; Penguin Books, Harmondsworth, 1991, p.12)

Medieval Europe consisted of various islands of local political authority (called regna with a regnum (king)) which spread across the west of the Roman Empire and these were setup randomly following the collapse of the Roman Empire and the settling of different migrants (notably the barbarian tribes) such as the Saxons, Franks, and Huns and so on. (Bury J: *The Invasion of Europe by the Barbarians*: Norton, New York, 1967)

[34] Jackson states that *Res Publica Christiana* was the means through which religious and secular authorities justified their authority- it was the theological-political way in which they thought of themselves and how they visualised the world. (Jackson (p.34)); Truth be said, it was the only uniform institution that existed in Medieval Europe and was central in all political thinking and activity during that era (See G Mattingly: *Renaissance Diplomacy*; Dover Publications, New York, 1988, p.16). Meanwhile, the conversion of rulers and the people living in the territories they ruled meant outposts of the Christian church were established. The *regna* and *ecclesia* a kind of 'state' and church formed the two components of a single theocracy which administered the expanding area of Europe for a millennium.

[35] Jackson (p.27)

one has put more succinctly the necessity to understand the history of sovereignty than Harold Laski when he said:

"*Nothing is today more greatly needed than the clarity upon ancient notions. Sovereignty, liberty, authority, personality – these are the words of which we want alike the history and the definition; or rather, we want the history because its substance is in fact the definition*."[36]

Laski states that it is indubitable that a state is an offspring of a unique set of historic events, and although man has always been a community -building specie, it was not until the sixteenth century that the features which characterize a modern state began to manifest. In fact, the foundations of medieval organization were fundamentally different as they focused on unity through a groups system which frequently exceeded geographical boundaries.[37]

These groups system influenced by both the church and the emperor posed a problematic reconciliation task for the medieval thinker as separating the eternal from the temporal order was simply discouraging.[38]Changes were needed and the law had to be properly divided into Divine Law (or natural law) and Community Law.

In a nut-shell, it is clear that the classical and medieval eras were characterized by a complicated, longwinded, but still crucial change which witnessed power of command (authority) move from the divinity of the emperor to the supremacy of the Pope and to a theological-political phase where authority was somewhat shared. Now, it can be said that the move from medieval to modern involved the disbandment of *res publica christiana* and the conversion of the regna and ecclesia into what Machiavelli[39] referred to as the *stato*[40] and a national church respectively.[41]

---

[36] Laski H J: *The Foundations of Sovereignty and other Essays*; Harcourt, Brace and Co., New York, 1921, p.314

[37] Ibid (p.1) – in legal language, a state can be defined as 'a territory or territories over which there is a government claiming unlimited authority' (see Zimmern A E: *Nationality and Government, with other wartime essays*; Chatto and Windus, London, 1918, p.56). Zimmern's definition makes clear the indisputable fact that whatever the response of individuals, the claim to exercise unlimited authority is inherent to statehood. He also draws from Aristotle's thinking to elaborate the State's justification to claim this peculiar authority by explaining that experience shows that the state is mankind's only safeguard against anarchy, and that anarchy involves the eclipse of freedom. (Zimmern p.56-57)

[38] Laski (p.3)

[39] Machiavelli N: *The Prince*; ed. Bull G; Penguin books, 1961. In this controversial book, Machiavelli described what a prince needed to do to promote a thriving republic in conditions that granted him supreme authority within his

Some commentators have held that this world system of territorially mapped-out and organized sovereign states which humans happen to find themselves a part of over the past three to four centuries is a specific European innovation.[42] Deemed a globally accepted system of government, it has been eventually replicated in every populated area on earth.[43] Today, there

---

territory. Evidently, he was not to be bound by any authority be it natural or canon law that other members of Christendom were subject to. Instead, he would have to be willing and ready to be evil and to perform evil deeds, as it was sometimes necessary to advance the greater good in Machiavelli's eyes and thought which ultimately was the strength and fortitude of the state. This obligation was the ***raison d'état*** and remained incontestable.

The ***raison d'etre*** which included the morality and interest of the state was the main and only justification of statecraft (See Vincent J; *Realpolitik*, in Mayall J (ed), *The Community of States* ;George Allen & Unwin, London, 1982 p.73-85)

[40] refers to the nation state and system of states within modern Europe which has emerged today

[41] The rulers of early modern Europe came up with the idea to repudiate the all encompassing authority of the pope. Classical theories of sovereignty were fashioned to understand those expedient arrangements and practices in a comprehensive and systematic way. The mind-set used in escaping from papal authority was applied in the course of their rivalries and struggles which led to the formulation of international law. This will be expanded on in the subsequent subsection on the Reformation and Revolution.

[42] See Strandsbjerg J: *Territory, Globalization and International Relations*; Palgrave Macmillan, Basingstoke, 2010; for a discussion on modern cartography and how it influences the modern political space in terms of the relationship between territory and globalization with impact on political identity. An explanation is given as to why state territory is crucial in discussions surrounding global politics. (Also see White G: *Nation, State, And Territory: Origins, Evolutions and Relationships Volume 1*; Rowman & Littlefield Publishers; Lanham, 2004)

Although this territorially mapped-out design of sovereign states is considered a European innovation, it does not change the fact that other commentators have argued that central to the conception of International Law and Sovereignty is colonial confrontation between non-European and European societies. He states and I consider very logical that international law has always been brought to life by the 'civilising mission' because issues such as racial discrimination, cultural subordination and economic exploitation are intrinsically significant for the discipline. His approach draws on a history of sovereignty and international law which is different yet interesting as it considers the evolution from the 16th century to the League of Nations and eventually to the present day 'war on terror'.(See Anghie A: *Imperialism, Sovereignty and the Making of International Law*; CUP, 2004) .[Cf. G Lyons & M Mastanduno (ed.): *Beyond Westphalia: State Sovereignty and International Intervention*; John Hopkins University Press, Baltimore, 1995]

[43] See Jackson (p.144) and Bull H & Watson A: *The Expansion of International Society*; Clarendon Press, Oxford, 1984. Also see D'Entreves who said: "*The importance of the doctrine of sovereignty can hardly be overrated. It is a formidable tool in the hands of lawyers and politicians, and a decisive factor in the making of modern Europe.* (D'Entreves A P: *Natural Law*; Hutchinson, London, 1970, p.67)

are 193 sovereign states, each responsible for the territory under its jurisdiction, and the people who live there.[44]

Although sovereignty has proved to be remarkably long-lasting, it is neither fixed nor unchanging. Instead it has evolved and been reformulated into different designs over the course of history to match the demands of specific historical periods.[45] The next subsection explores the factors which accounted for the reformulation of sovereignty including the controversies and wars- both political and religious; the shift in scientific and political thinking during the sixteenth and seventeenth centuries which led to the eventual fine-tuning of this concept to what it is today.

1.3.1 The Renaissance, Reformation, Age of Enlightenment and Revolution

In the sixteenth century, the medieval ecclesiastical-political order began to collapse following the Renaissance and Reformation which occurred almost concurrently.[46]

i.) *The Renaissance*

The renaissance which initially began in Italy, involved the emergence of independent Italian city-states which established a regional state system. This system was copied across Europe as other rulers took lessons from the Italians including the political art of statecraft.[47] The subsequent reformation; also known as the Protestant Reformation involved the struggle by Protestants for religious freedoms and political authority against the status quo- Catholic orthodoxy.

ii.) *The Reformation*

---

[44] The United Nations' list of member states http://www.un.org/en/members/ (accessed 10 August 2014) - cf with The United States Department of State which recognizes 195 sovereign states, http://www.state.gov/s/inr/rls/4250.htm (accessed 10 August 2014). Earnestly, it is problematic to compile a definitive list with an exact number of all sovereign states as there are a number of countries whose sovereign status is disputed by others (such as Israel, China, Palestine) given that there is no binding definition for the criteria and requirements for statehood to be adhered to by all members of the community of nations.

[45] Philpott D: *Revolutions in Sovereignty*; Princeton University Press; Princeton, 2001

[46] See Jackson R: *Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape* in Jackson R, James A, Clapham C et al; *Sovereignty at the Millennium* (ed. Jackson R); Blackwell, Massachusetts, 1999 p.15

[47] See Machiavelli (supra n.39) on how political theorists began to influence novel ideas on statehood and statecraft.

The reformation has been said to be sparked by the publication of *The Ninety-Five Theses* by the German theologian Dr Martin Luther in 1517.[48]His theories challenged the doctrines of Catholicism and the *res publica christiana* which subsequently stirred the disentanglement of the state's authority from that of the Pope's. A good example was when King Henry VIII defied the Pope's authority by separating from both his wife Catherine of Aragon and also from the *res publica christiana* in the same stroke. This defiance was advanced when the Act of Supremacy (1534) was passed which eradicated papal authority and lifted the King to Supreme Head of the Church of England.[49] This time in history was plagued with wars which created an insatiable desire by monarchs to consolidate power in their hands within a stronger central authority at the expense of the ecclesia; and with this, the modern nation state began to emerge.[50]

Meanwhile, the principle of sovereignty was first systematically expressed as a crucial basis for the exercise of state power by Jean Bodin in his writings – *Les Six Livres de la Republique* (1576) – a political treatise which carried out a study on the French monarchial state as a political entity which was free standing and self-absorbed.

Bodin wrote what is considered a rejection of the political order in medieval times:

"*It is most expedient for the preservation of the state that the rights of sovereignty should never be granted out to a subject, still less to a foreigner, for to do so is to provide a stepping-stone where the grantee himself becomes the sovereign*."[51]

---

[48] Online at: http://www.britannica.com/EBchecked/topic/415676/Ninety-five-Theses (accessed 12 August 2014)

[49] See Davies N: *Europe: A History*; Pimlico, London, 1970, p.490

[50] The reformation led to a series of religious wars across Europe including the French wars of religion between the French Catholics and Huguenots (French Protestants) between 1562 and1598 and the *Thirty Years' War* (1618-1648) between Protestant and Catholic states involving almost all European countries.

[51] Bodin J*: Six books of the Commonwealth*; (Tooley M J trans.), Blackwell, Oxford; no confirmed date- (See Jackson n.46 p.16)

It is believed that Bodin was likely influenced by Francois Grimaudet his less famous contemporary who in 1560 gave an important speech in which he state publicly that 'the welfare of the state demanded the subjection of the ecclesiastical to the civil power, in whose hands all the functions of society were legally invested.' –See Grimaudet F; *Remonstrances aux Etat's d'Angers* (1560) - initially delivered in French as a speech to the Provincial Assembly of Angers on 14 October 1560. (see Zimmermann C D: *The concept of monetary sovereignty revisited*; EJIL, 08/2013, Vol. 24, Issue 3; p.726-727)

Drawing on this rejection, most scholars hold that the event that eventually settled the bloody religious wars; serving as the most accurate historical reference to symbolize the transformation of the European political order from medieval to modern were a series of peace treaties signed in the seventeenth century precisely in 1648 called the *Peace of Westphalia.*[52]

It was a vital turning point in the emergence of sovereignty as Westphalia ensured a platform where more authority was surrendered to the emerging European states by the *res publica christiana*. Christian unity as international justification was superseded by international diversity originating from a secular society of sovereign nation states. In fact as Jackson summarized, 'what had been a political-theological *universitas* became an international *societas* of sovereign states. That is what Westphalia stands for.'[53] At long last sovereignty began to clarify the confusion around the issue of authority which existed during the medieval era. This juncture in history is considered the birth of Public International Law.

Although major attempts to restore the order of a unified hierarchical authority continued in the latter parts of the seventeenth century as with the case of French King Louis XIV who fought for a universal monarch, and before the twentieth century with Napoleon's attempt for continental hegemony, fierce resistance has always prevailed over such attempts.[54]

iii.) *<u>The Age of Enlightenment</u>*

This was the period of intellectual and scientific liberation in the years following Westphalia (between 1650 and 1775). The Oxford dictionary defines it as "*A European intellectual movement of the late 17th and 18th centuries emphasizing reason and individualism rather than*

---

[52] Cf. Hinsley's view which considers the Concert of Europe in the 1820s as the historical manifestation of this transformation. See Hinsley F: '*The Concept of Sovereignty and the Relations between States'*, in Stankiewicz W J, ed., *In Defense of Sovereignty*; OUP, New York, 1969, p.285

[53] (Jackson supra n.46 p.17)- It is worth mentioning that there was the intention to have a balance of power between states to prevent any on from consolidating power and establishing a hegemony which would cause an unfortunate return to the era of empires. See Watson A: *The Evolution of International Society*, Routledge, London, 1992, ch.17 (where Watson talks about Europe being arranged upon an anti-hegemonic principle); and See Kissinger H; *Diplomacy*, Simon & Schuster, New York, 1994, p.20

[54] Britain has always assumed the role of defending the balance of power by providing added military options especially in post-revolutionary Napoleonic France with the United States also playing similar roles in World War II against Nazi Germany. Evidently, both Britain and the US have assumed the role to defend the anti-hegemonic principle and even when their powers were greatest, in the classical sense of political meaning they are still not considered hegemons. (Jackson, n.46 p.19)

tradition."[55] Its objective was to reform society using reason whilst advancing knowledge through scientific methods, and challenging ideas rooted in faith and tradition. It revolutionized human thinking by encouraging scientific thought, skepticism, and intellectual debate. These debates were argued on a platform of clearly defined principles where correct logic was used to arrive at conclusions through evidence and with the revision of these principles conducted in the event of convincing evidence put forward.[56] Several monarchs used these ideas to govern their people and till this day, the ideas of this era continue to influence academia, culture, politics and governments of many countries all over the world.

Part of this novel way of human thinking enabled the idea of sovereignty to achieve both legal and moral recognition in describing the meaning and power of a state; and the extent to which independent states, that enjoy sovereignty over a given territory can pursue their interests without destroying each other or the international system which they all form a part.[57] Central to this system was the role of the citizen in shaping the outlook of sovereignty and the state. In fact Benjamin Franklin stated:

---

[55] Oxford Dictionary: http://www.oxforddictionaries.com/definition/english/enlightenment (accessed 12 August 2014). It was heavily influenced by seventeenth-century philosophers such as Adam Smith, Francis Bacon, Rene Descartes, John Locke, Thomas Hobbes, Voltaire, Isaac Newton, Immanuel Kant, Montesquieu, Rousseau, David Hume, Denis Diderot and others.

[56] The quest for a new legitimacy in governance was offered an answer by a new scientific philosophy. This new philosophy centred on the belief that all things were bound by universal laws and truths, including social behaviour and relationships, giving rise to the concept of *natural law*; which was the idea that human law was obtained from reason. Even though the Romans had previously developed natural law, it became extremely popular during the enlightenment era and was considered the highest form of law. (Greer T& Lewis G; *A brief history of the Western World; Harcourt Brace College Publishers*; New York, 1997; p.120 and p.448). In fact, enlightenment thinkers further developed other concepts such as natural rights which included life, liberty and property. Reason being chosen as the basis of law and rights, seemed unusual because such laws and rights were considered natural whereas reason was human and unnatural. However the scientific thinkers concluded that should humans act against nature's physical laws like gravity, they will suffer consequences; in the same way should humans act against the natural law of reason, they will also suffer consequences. Natural laws ensure the protection of universal human rights endowed by nature. (White G E: *Nation, State and Territory*; Rowman & Littlefield Publishers, Lanham, 2004 p.147)

[57] Bodin's definition of sovereignty was strengthened by Thomas Hobbes in his book *Levitian*: available online at: http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html (accessed 12 August 2014) where his theory of absolute and indivisible sovereignty argues for a 'social contract' whereby a ruler's sovereignty is contracted out to him by the people he rules in return their guarantee of physical safety. Hobbes concludes that if and when the ruler fails in his duty, the people can reclaim their ability to protect themselves, including by forming a new contract with a new ruler. Also see Jean-Jacques Rousseau theory of popular sovereignty which moots that government is created and sustained by its people's consent through elected representatives.

"*In free governments, the rulers are the servants and the people their superiors and sovereigns*"[58]

Hence when people acquired this novel way of thinking which transformed social identity, political and intellectual attitude and energized the quest for a new legitimacy in governance, when their demands were not reflected in political action, they resorted to fierce protests which eventually resulted in the seventeenth and eighteenth century upheavals and historic revolutionary movements which changed the world for ever.

iv.) *The Age of Revolution*

The period following the age of enlightenment from 1775-1850 was characterized by momentous revolutionary movements across Europe and America.[59] This period gave birth to constitutional states and republics; this blend of democracy, a constitution, and civil rights, gave a unique meaning to sovereignty which reflects in the definition of a nation state and national identity today, as opposed to absolutist monarchies. This period weakened the European imperialists most notably the British Empire who lost control of many colonies in the Western hemisphere of which they had under control for centuries.

In fact their most notable defeat came during the American Revolution when the United States Declaration of Independence was adopted by Congress on the 4th July 1776 which confirmed that thirteen American colonies no longer considered themselves as part of the British Empire.

Thomas Jefferson one of the American founding fathers and eventual third President was the principal author of the Declaration of Independence and oversaw one of the most memorable sentences in the English language with probably the most popular statement on human rights:

---

[58] Franklin B (ed. Ketchum R):*The Political Thought of Benjamin Franklin*; Hackett Publishing, Indianapolis 2003, p. 398.

[59] Examples will include the American Revolution (For historical analysis see Wood G: *The Radicalism of the American Revolution*; A.A Knopf, New York, 1992; also Merrill J: *The Founding of a Nation: a History of the American Revolution 1763-1776*; Hackett Publishing, Indianapolis, 2004); and the French Revolution (For historical analysis see Furet F: *Interpreting the French Revolution*; Editions Gallimard, Paris, 1978; also see Frey L & Frey M: *The French Revolution*; Greenwood Press, Westport, 2004). Other revolutions occurred in Latin America and Greece which allowed independence from Spain and Portugal; and the Turks respectively.

"*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness*"[60]

Evidently this period of warfare revolutionized the concept of sovereignty. It made meaningful the relevance of human institutions which rest at the core of every society and enabled an arrangement that recognizes the fundamental importance of these core human values which ought to be protected and upheld.[61] For instance, in justifying the need for a constitutional separation of powers[62], James Madison said: "In order to lay a due foundation for that separate and distinct exercise of the different powers of government…it is evident that each department should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others…The interests of the man must be connected with the constitutional rights of the place."[63]

Following this age of revolution, the notion of sovereignty has continued to stay central in the world political system as it serves as custodian of those sacred values necessary for the service of humankind.

1.3.2 The Changing Nature of Sovereignty within the Modern State

Evidently human nature became the source of order in modern times and the reigning authority was humankind's inner voice, conscience, passion and desire. Nobility was no longer

---

[60] This sentence has been said to contain '*the most potent and consequential words in American history*' (See Ellis J: *American Creation*; A.A Knopf, New York, 2007, p.55-56)

[61] Jackson lists the most fundamental of these core values of sovereignty to include inter alia: 'international order amongst states, membership and participation in the society of states, co-existence of political systems, legal equality of states, political freedom of states, and pluralism or diversity of ways of life of different groups of people around the world.' He explains that this is why sovereignty is valued and so jealously possessed by political leaders and their people all over the world, because it guarantees an arrangement which safeguards these values. (Jackson n.46 p.32)

[62] This political doctrine found its origins in Montesquieu's *The Spirit of the Laws* (translated *De L'Esprit des Loix*); [Charles Louis de Secondat, Baron de Montesquieu, The Complete Works of M de Montesquieu (London: Evans T, 1777, 4 Volumes, Vol. 1 available online at: http://oll.libertyfund.org/titles/837 (accessed 01 September 2014)]where he made a case for a constitutional government with three separate branches and defined abilities to check the powers of the other branches in a system of checks and balances.

[63] Madison J; The Federalist, No. 51, reprinted in Hutchins, *Great Books of the Western World*, 43, p.162-5

synonymous to the reigning elites by birth but to those of heart and mind; those of genuine intellect and sensibility.[64]

As the notion of sovereignty continues to evolve within this new international society of sovereign states, it is helpful to take stock of a summary of its historical characteristics. Generally, we have seen from the timeline that sovereignty has been regarded as absolute, exclusive, perpetual and indivisible. *Absolute* in the sense that sovereign power could legislate without consent and was neither restricted by a constitution, preceding laws or custom, and no areas of law or policy were beyond its control. *Exclusive* implying that within its jurisdiction, the decisions made by a sovereign power could not easily be contradicted by another authority. *Perpetual* in the sense that, sovereign power could not be temporarily delegated to a superior power and no one was to have the ability to enforce a time limit on the governing power demonstrating superiority over it. *Indivisible* in the sense that the sovereign remains the final authority and does not share power with any other; thereby eliminating any chance of dispute resolution between multiple sovereign powers.[65]

These factors which have historically defined sovereignty over the passage of time now provide a clearer understanding of the complication that arises in achieving a balance between sovereignty retention while simultaneously surrendering parts of it in a cooperative arrangement for mutual advantage and the greater good.

The capacities of sovereignty to be regenerated, reinvented and restated will now be considered in terms of a narrative on the continuity or change in conceptions of sovereignty in recent years. This represents the shift in the previous competing legal and political concepts of sovereignty to the presence of almost two-hundred sovereign states on the UN stage. The rise of global

[64] Pickett T: *Invention nations: Justifications of the authority in the modern world*; Greenwood Press, Westport, 1996, p.1. Pickett examines the main justifications (liberalism, nationalism, and socialism) for authority in the modern world today which he considers are the root causes of the increase in conflict and violence in modern times.

[65] Loughlin attests to the fact that the concept of sovereignty is misunderstood today as he draws from an account on this matter by De Benoist A, '*What is Sovereignty?*' (1999) 116 Telos 99; which sets-out that much of the literature on sovereignty is wrong in assuming that " (a) sovereignty is not linked to the concept of the State, (b) it existed in the ancient and medieval world, (c) it is inherent in any notion of political authority, (d) it is not absolute, and (e) it can be delegated, distributed, and shared" (see Loughlin M: *Why Sovereignty?*; in Rawlings R, Leyland P, Young A: *Sovereignty and the Law: Domestic, European and International Perspectives*; OUP, Oxford 2013.

industry and spread of law through supranational or transnational adjudicative and regulatory frameworks and networks[66] will form central discussion points in this thesis.

In this regard, these discussions will reveal the effect of sovereignty on the substance of international law. According to Christopher Greenwood, “for some, the concept of sovereignty (or, more accurately, concepts, for there is more than one) is a standard around which to rally—‘the sovereignty of Parliament’, ‘the sovereign nation’, ‘loyalty to the sovereign’. For others it has become something outmoded, an obstacle to reform, whether in the form of democratization at home or greater international cooperation abroad. For the international judge, however, sovereignty is neither totem nor torment but an inescapable fact of life; part of the landscape within which judgments have to be made.”[67]

From a legal perspective, sovereignty will normally refer to the constitutional allocation of power and authority within a State’s legal system; for instance, in the United Kingdom (UK) there is ‘sovereignty of Parliament’ implying that parliament always has the final word in making law with no rival law-making authority acknowledged by the UK Constitution. This must however be distinguished from other jurisdictions which have written constitutions that limit the powers of their law makers such as in the United States where power is separated by the US constitution between three separate branches of government to prevent abuse of power.[68]

Christopher Greenwood has identified certain global developments in the last fifty years which have shaped the nature of power and authority between national and international borders.[69] My emphasis lays on these because with over two hundred independent countries, it is difficult to see how a peaceful international world order could work without the proper coordination of these developments.[70]

---

[66] Rawlings R: *Introduction: Sovereignty in Question;* (in Rawlings, Leyland and Young; supra n.65)

[67] Greenwood C: *Sovereignty a View from the International Bench*; (in Rawlings, Leyland and Young; supra n.65)

[68] In the US these three branches are created in the Constitution. The Legislative power is created in Article 1, section 1 and comprised of the House of Representatives and Senate; The Executive power is created in Article 2, section 1 and is composed of the President, Vice-President, and the Departments and thirdly; The Judicial power is created in Article and composes the federal courts and the Supreme Court. See Constitution of the United States: available online at: http://www.senate.gov/civics/constitution_item/constitution.htm#a3 (accessed 12 August 2014)

[69] Greenwood (n.67)

[70] Firstly, international law tends to impose obligations on States regarding their behaviour within their own territories especially with regards to human rights. The International Covenant on Civil and Political Rights, the European

What flows from these developments are the challenges the modern state faces and the eventual result as shall be seen is the formation of various arrangements of cooperative and complex sovereignty by these modern states in a bid to coordinate a peaceful international order.[71]

The challenges which endure are indicative of the two key issues which summarize the research problem below. First is the issue of sovereignty and addressing the tensions arising from modern sovereignty; second, monetary sovereignty and the tensions and challenges of modern monetary sovereignty. From sovereignty and changing sovereignty, the concepts of global and regional integration are hatched and form the most part of the thesis.

1.4 Research Problem

I sought to bring to the fore these abovementioned developments because their relevance is important in establishing an agreement between nations to facilitate the building of strong institutions, and achieving favourable development goals as well. Concerning agreements between nations, as the world evidently grows smaller, it is easy to assume that human beings immediately recognize their similarities because we all seek the same things; happiness and fulfilment for self and family.

Yet somehow, even with the spread of globalization at a dizzying pace and smoothing of modernity, people still remain apprehensive and hold on to those things they consider dear and intrinsic to their identities; things like their race, their tribe, their religion and how they conduct

---

Convention on Human Rights, the Convention against Torture and the UN Convention on the Rights of the Child, 1989 have brought a significant revolution in international law. There is little doubt that following the horrors of genocide, torture and other abuses during the mid to latter parts of the last century, prohibition by international law is beneficial and necessary. This nevertheless results in tension between international law and the national concept of sovereignty mainly because the resulting conflicts particularly concerning human rights are brought before national courts.

Secondly, in the same way international law has encroached on issues known to be domestic matters, a growing number of States have also sought to apply their laws to activities occurring outside their borders. For example, many States have legislated to make terrorist activities, financial crime, cross-border frauds, or antitrust activities illegal even though they occur outside their borders. (See Greenwood n.46)

[71] For a discourse on the struggle to construct a global political authority see Grand E & Pauly L (eds): *Complex Sovereignty*; University of Toronto Press, Toronto, 2005

their financial and monetary affairs. Over the centuries, this apprehension has led to conflict, total wars- and following World War II, people began to pause and reflect on the importance of coming together to harmonize mutual objectives and forge a unified global agenda for the benefit of all. What better sector precipitates the inclination towards the pursuit of happiness than the banking and finance sector which showcases the money markets; the need for free trade and the encouragement of a befitting environment for economic and financial activity? Indeed the appropriate management of this sector is in my opinion central to the resolution of many world problems today.

Stemming from this and central to this thesis is the challenge which African states face in handling the proliferation of international financial institutions and regulations at the expense of state sovereignty. The infringement of global financial institutions such as the World Bank, International Monetary Fund (IMF), and World Trade Organisation (WTO) on state sovereignty for instance has given international lawyers food for thought because states the world over continue to deliberate on ceding control over economic and financial policies in order to achieve global financial efficiency.

In this regard, particular attention will be paid to monetary sovereignty with stress on financial integration at the regional stage firstly and then subsequently at the global stage. My emphasis will be on the global and regional models of modern monetary sovereignty and monetary solutions in resolving the tensions and challenges of modern national monetary sovereignty.

Traditionally, monetary sovereignty refers to states' sovereign powers to create money through the issuance of currency, determining the appropriate amount of current and capital account convertibility, conducting monetary and exchange rate policies, and the organization of financial regulation and supervision. The tensions arising out of monetary sovereignty in the modern state center on the degree to which a given state, should preserve or lose its respective sovereign powers in the confines of money under the impact of various economic and legal constraints within a monetary union at a regional level, or within the international community as a whole. Perhaps importantly, what makes matters more complicated, is the fact that individual African states' competences in monetary and financial matters is now increasingly redundant because of the prevalence of factual constraints brought about by the growing integration of financial markets globally.[72]

In no other continent has the subject of state independence following Huber's definition above been more recent, relevant and stirred more complex emotional debate and controversy as the continent of Africa. After all, it was only in the mid- 1950's that the process of de-colonization began in Africa following its loss of sovereignty to colonialism. Today, there are fifty- five sovereign states in Africa which all benefit from unique national sovereignty and national identity.[73]

I will identify *continental sovereignty* in Africa and the nature of continental integration specifically in money matters with a coherent legal structure shaped by evolving contemporary regional and global constraints that arise.[74] The thesis will stress on the construction of a monetary model as pre-requisite to solving most of Africa's problems.

---

[72] Zimmerman (n.51) p.2

[73]There are 54 member states in the African Union (AU). See AU website, available online at: http://www.au.int/en/member_states/countryprofiles (accessed 12 August 2014).The only African state absent is Morocco.

[74]At a time of increasing globalization and financial markets integration, the fostering of monetary and financial stability, are key values of contemporary monetary sovereignty.

Zimmerman exposes the difference in approach between some central banks as they strive to maintain these values and also the differences from global financial institutions. For example in terms of monetary stability, some states adopt inflation ceilings while others set inflation targets as a preferred approach. This inflation target could be a 'point inflation target', referring to a specific percentage increase of consumer prices, as evidenced by the Bank of England's inflation target of 2%, or the more common 'target inflation range' used in other countries like Canada and Sweden. (Zimmermann: *The concept of monetary sovereignty revisited*; p.13-15- Zimmermann draws this analysis from a study of central bank objectives conducted by a former general counsel of the IMF: Gianviti F; '*The Objectives of Central Banks*' in Giovanoli M and Devos D (eds): *International Monetary and Financial Law: The Global Crisis*, OUP, Oxford, 2010). For an elaborate definition and thorough discussion of monetary stability as a key central bank objective, see Lastra R M: *Legal Foundations of International Monetary Stability* OUP, Oxford 2006, p.34–9.

In terms of interest rates for instance, the Federal Reserve (USA) and the European Central Bank differed in their responses to the Global Financial Crisis (GFC). While the former reacted with a series of interest rate cuts directed at saving employment, the latter kept interest rates unchanged for much longer in a bid not to jeopardize domestic price stability. These issues will be discussed more thoroughly in Chapters two and three when addressing the difficulties which persist in harmonizing global economic and financial problems. Unfortunately, the example of central banks' lack of harmonization regarding interest rates policies in pursuit of different monetary policy objectives

The difficulty in Africa which has ensued is that of multiple national sovereign with multiple overlapping regional communities. This problem labeled the spaghetti bowl is the starting point of the African problem. It is part of a broader problem in which a large number of sovereign countries (with sovereign autonomy) still suffer unique problems and are unable to use this quintessentially sovereign authority to solve the pertinent problems within their territories especially with regards to poverty, war and disease. More often than not, assistance and coordination is normally sought from outside the borders. This necessitates a new solution and in line with the African proverb *'one hand cannot tie a broom'* it will be argued that what is needed to resolve this difficulty is a partial surrender and cooperation of sovereignty particular cooperative monetary sovereignty (financial cooperation). This cooperation will entail varied layers of regional and global financial integration arrangements which involve different forms of cooperative and complex sharing of monetary sovereignty for the mutual advantage of countries.[75]

The new model of sovereignty which comprises a mixture of regional and global financial integration as well as retaining national financial sovereignty within the novel arrangement is what I characterize '*continental sovereignty' or* the new *'African sovereignty'*. This defines the modern case of monetary sovereignty in Africa which explains the shift from conventional monetary sovereignty to the nature of a modern monetary sovereignty in Africa in which all countries come together and engage in various levels or grades of partial surrender of monetary

---

is replicated by the same issues which concern other economic problems across different countries especially concerning regulation and supervision.

[75]In expansion, like sovereignty, the concept of monetary sovereignty has evolved significantly with the passage of time and will undoubtedly continue to change as economic and political circumstances shift. Having said this, it is of utmost importance to maintain the link between modern monetary sovereignty and domestic sovereignty as part of this novel cooperative monetary sovereignty. The conceptual continuity can be preserved by a framing element which some describe as the '*principle of subsidiarity'*. (See Zimmerman: *The concept of monetary sovereignty revisited*; p.19-20). This refers to a state's renunciation of its exercise of sovereign powers money and financial matters only to the extent necessary for the effective promotion of the core values of modern monetary sovereignty. As further elaborated by Besson: '[a]s a concept of power distribution the principle of subsidiarity implies a test of efficiency in power allocation. In each case, the sovereign authority will be that authority which can realize the objective in the most efficient way' [Besson S: '*Sovereignty in Conflict*' (2004) 8(15) European Integration online Papers; available online at: http://eiop.or.at/eiop/pdf/2004-015.pdf (accessed 20 August 2014)]. This will ensure that the regulatory decisions that are normally part of the exercise of monetary sovereignty are not taken further away than required from those to whom those in power are ultimately responsible. (Zimmermann, p.20)

sovereignty so they can work closer together for their mutual advantage and benefit especially in tackling common problems such as poverty, war and disease.

Against this background, in constructing this new model for the African continent, the thesis will seek to address the following six issues:

A. *Regional advantage*: Reviewing the extent to which integration goes much further. In fact communal and national laws have provided benefits for the mutual resolution of regional economic and financial tensions. This subsequently provides the arguments for a regional financial mechanism to successfully approach and resolve these challenges in order to facilitate and foster economic and financial activity amongst member states and ensure the effectiveness of the regional financial integration agenda.

B. *Regional risk and exposure:* Analysing the extent to which certain principles and policies adopted within and without some member states have jeopardised the application of regional laws, thereby hindering the integration agenda. The European Union case study provides relevant talking points for African regional systems to consider when forging ahead attempts at an integration agenda (rather than a mere copy-and-paste solution), especially with regards to the potential problems which arise when integrating too far and too quickly.

C. *Global advantage*: Examining the extent to which the benefits of global financial integration have historically minimised the tensions of economic and financial problems and how, if at all existing international laws have successfully approached or resolved subsequent challenges which have ensued as economic and financial circumstances evolve over time. Thereby making a strong case for the need of countries to harmonize towards a global financial architecture.

D. *Global risk and exposure*: Investigating the extent to which the challenges brought about by global financial integration have plagued its primary objectives and prompted legal systems globally to make far-ranging adjustments and decisions which have forever changed the perceptions of global financial integration. Here, the Global Financial Crisis 2007-2008 takes centre stage in the discussion.

E. *African Challenge*: Discussing the extent to which the African monetary integration agenda has faced its challenges. Bringing together key lessons from regional and global perspectives, the discussion addresses the effectiveness and/or ineffectiveness of Africa‘s monetary integration process.

F. *Development Challenge*: Examining the extent to which global development issues impact the African solution (*continental sovereignty*) and the need for any solution for the continent to be roped into a broader global solution within which Africa can form an important part.

Although there has been some work done on the legal aspects of Africa's integration agenda, it still appears scanty in comparison to the plethora of monographs, treatises and resources devoted to other continents particularly Europe.[76] This thesis is a distinct attempt to fill a vacuum in the discourse on the efforts for a new *African Sovereignty*. A financial integration story which cuts across the continent in its entirety establishing the requirement for *Continental Sovereignty* as defined above. It provides a fresh perspective on the realistic nature of the objectives the African integration agenda has set for the continent.

Undeniably, other communities outside Africa such as the EU have confronted challenges and tensions brought about by regional and/or global integration and have approached them through varied means. These experiences provide useful historical and comparative sources for this thesis. Nevertheless, this neither makes this work non-original or less relevant nor duplicative. Instead the expected academic contributions on Africa‘s integration agenda especially with reference to the novel idea of *continental sovereignty* are to: draw attention to the changing

[76] Salami (n.7): *Financial Regulation in Africa: An assessment of Financial Integration Arrangements in African Emerging and Frontier Markets*; provides in my opinion the most comprehensive analysis of economic and financial integration efforts within the African context. It insightfully illustrates the lingering challenges of these efforts especially concerning financial integration and reform. The book (in addition to other contributions (articles) by Salami provide a good basis for my ensuing arguments and recommendations in Chapters six and seven below. Another book by Oppong R F; *Legal Aspects of Economic Integration in Africa*; (supra n.22) also provides a genuinely informative resource for discussions on economic integration processes from a legal standpoint.

Unfortunately, contributions made on the importance and relevance of financial integration and the legal aspects in leading African Journals are few and far between. See for example, the African Journal of International and Comparative Law, Journal of African Law, Monitoring Regional Integration in Southern Africa Yearbook (which is the only African journal devoted entirely to economic integration, although focused mainly on Southern Africa arrangements). Recently, the African Integration Review published by the AU Commission was also added.

nature of monetary sovereignty within Africa; critically examining current attempts to forge ahead an African monetary integration agenda through regional integration arrangements (as part of a broader global integration framework) and their effectiveness; and investigate the extent to which the progress of Africa's monetary integration agenda may be stalled or boosted by attention to development issues. As such, my research aim is not to prescribe new financial laws, but rather to advance a discourse that exploits other relevant lines of inquiry and push boundaries in order to foster change and transformation.

1.5 Methodology

The thesis methodology entails a combination of detailed historical, descriptive and investigative considerations of the governing and legal institutions that shape and influence selected REC's and regional financial systems in Africa as well as European and Global banking and financial systems. In other words, the thesis is heavily reliant on secondary and tertiary sources. The core global financial institutions focused on are the offspring of the Bretton Woods system of monetary management established in the mid-20th Century- they are the World Bank and the International Monetary Fund (IMF); some attention is also paid to the World Trade Organisation (WTO).

Furthermore, an explanatory, qualitative and comparative technique is used on the governing laws of the EU banking and finance programme, the regional financial arrangements in Africa, and the jurisprudence of national and regional courts to obtain a deeper understanding of their operation and efficiency. Here, reliance is focused on primary sources.

Also, as the regional communities in Africa are analysed, it is seen that they do not vary considerably in their structures. In fact the problems the countries are bedevilled with appear strikingly similar which evidently implies a common solution is meaningful. Little wonder Mistry observed, 'it appears as if the drafting of all these arrangements across Africa was done from the same template'.[77] Truth is, they all share the common goal to create an all-encompassing economic and financial space for trade among member states through eliminating tariff and non-tariff barriers. This has resulted in the birth of the AEC, which forms a pivotal part of the AU, as it attempts to merge all regional communities within the continent. Chapter Two will elaborate on its competence as the umbrella structure under whose canopy the other regional communities

[77] Mistry P: *Africa's Record of Regional Co-operation and Integration*: (2000) 99 African Affairs 553 at p.564-565.

aim to achieve the African economic integration agenda. My choice of the African regional communities is pertinent because I aimed to geographically cover all parts of Africa from North to South, East to West.

This global journey ultimately exposes the limitations on the scope of the thesis and in the same stroke the methodology as well. Firstly, at the global level, because of the voluminous amount of material on the Global Financial Crisis (GFC) with contributions ranging from economists, politicians, journalists, lawyers amongst others from all continents, the focus remains predominantly on the legal aspects within the confines of selected developed world countries such as the USA and UK in terms of an international response and Germany and France for regional responses. Secondly, due to the lack of a reliable system of law reporting in most African countries, there is occasional reliance on 'unreported' material obtained from the internet.[78]

The thesis draws on academic commentary and offers most invaluable insights for African policymakers. However, the African experience is the centre of this thesis; and although many of the relevant principles discussed within the confines of the continent-wide integration agenda are drawn from their adoption in Europe, as Chapters Three will reveal, caution is needed when relying on insights from Europe. I say so because these chapters disclose unique differences between the European and African stories in terms of their historical circumstances, their socio-economic-political contexts and the degree of their respective stages of development. Indeed, while the European model is far advanced, the African model is still undergoing formation. As a consequence, even though the European insights are helpful in dealing with community-state relationships, they are less helpful in terms of handling the distinctive African phenomena of fragmented autonomous regional arrangements operating simultaneously with the ultimate goal of eventual economic and financial integration.

1.6 Structure of Thesis

Chapter Two paints the picture of the ambitious state of affairs towards the African financial integration agenda while assessing its readiness to embark on deeper and further integration. The chapter develops the argument that effective financial integration is the product of a correctly structured and managed legal framework harbouring the smooth synchronization of

[78] For example, some ECOWAS judgements are available online at: http://www.ecowascourt.org/cases.html

relationships between states, communities, legal systems and institutions. A qualitative analysis will be devoted to the legal and institutional limitations which plague the future of financial integration in the continent. This concerns the effectiveness of community institutions with focus on the judicial institutions of the regional arrangements. Among the issues discussed are: the multiple overlapping regional communities labeled the *'spaghetti bowl'* dilemma; and the jurisdictional co-operation between community and domestic courts.

Although the chapter laments the incomplete story recounted of the different levels of Africa's successes, it will however admit that the African agenda is still at the formation stage and its development is fundamentally contingent on the advanced development of the core constituent regional arrangement models already in existence such as the South African Development Community (SADC), the East African Community (EAC) and the Economic Community of West African States (ECOWAS). In this connection and continuing on from Chapter One, the constitutive treaties and the jurisprudence of their respective laws and courts at the national and regional stages will inform the argument for the adoption of a mixed model of cooperation between member states for a new qualified monetary sovereignty to realize the effective running of financial markets as a solution to the African problem. This requires the surrender of more sovereignty in the areas of economic, fiscal and monetary policies to community institutions to achieve economic and financial coordination within RECs. These RECs form the building blocks for achieving *continental sovereignty*. This chapter provides a barometer for measuring the extent to which African national legal systems are integrated. This is necessary to aid the monetary integration process and financial transactions which take place within them.

Chapter Three further considers the discussion on the relevance of transferring more sovereignty to community institutions by virtue of even deeper integrated financial markets between nations within specific regions. The precious balance between national sovereignty and the ever-growing need to relinquish parts of this national sovereignty 'voluntarily' will be considered especially in terms of the *regional market and local control conflict*. Brought to the fore will be an analysis of the advantages and disadvantages of regional financial integration as the chapter zooms in on the EU Banking and Finance programme as case study. An examination will be conducted on the aspects that make this region considered to be the most advanced regional arrangement in the world. Here, particular attention is paid to issues such as its single or internal European Market and the Economic and Monetary Union (EMU) which form the core of the EU economic and financial architecture; the nature of its legal system, supremacy of EU law, and the harmonization of national laws through the doctrine of *mutual recognition*.

Drawing from this, a comparative analysis will be devoted to the legal and institutional limitations which plague the future of financial integration in the African continent with examples from the EU. This touches the effectiveness of African community institutions and the need to strengthen and empower these in order to achieve organic development in the short and medium term before embarking on any attempts to imitate EU institutions in the much longer term.

It must be cautioned however that the manner in which the EU handled the GFC, coupled with the ravaging nature of the sovereign debt crisis it faced, confirms the imperfection and incompleteness of the European financial integration process both in terms of its content and geographical coverage. The Greece case study will be discussed and key insights will be derived from this experience which will inform the efforts made for Africa-wide integration.

Chapter Four inserts the changing nature of sovereignty within a global context by drawing from the historical efforts of financial integration efforts at the global level. The chapter centers on the objectives, successes and failures of the Bretton Woods System which aimed at regulating and controlling international financial markets. This analysis confirms the source of inspiration for regional integration arrangements around the world. The chapter illustrates how states began committing to international financial institutions and regulations at the expense of state sovereignty. In using the examples of global financial institutions such as the World Bank, International Monetary Fund (IMF), and World Trade Organisation (WTO) the chapter promotes the argument that in order to achieve global financial efficiency, states need to cede control over parts of domestic economic and financial policies. Here it will be asserted that as regional integration and eventual *continental sovereignty* is necessary to assist Africa in meeting its indigenous challenges within the continent, it is also crucial for Africa to increase and consolidate its influence on the global stage by subscribing to global integration.

Chapter Five addresses the likely risks and exposures of global integration by examining the complex nature of the global financial design. This will inform decision makers in Africa on the consequences of any ill-advised agendas for global influence. The chapter discusses in depth the impact of the recent Global Financial Crisis and the catastrophic ramifications it left behind especially in terms of the redefinition of what is commonly understood as *systemic risk* and *financial stability*. The efforts made to respond to this crisis and restore a befitting global financial regulation structure to absorb the shock of this or any future crisis will be thoroughly evaluated. It argues that, free markets are of intricate value to society but without a watchful eye, could spin out of control especially considering the uncertainty of human intuition which presents its own challenges.

From an African perspective, the impact of the Global Financial Crisis on the African continent will also be investigated. It will be showed that the crisis effect suffered in the developed and emerging financial markets were quite different from those suffered in Africa. Whilst the developed financial systems were first hit by a systemic banking crisis, Africa sustained milder hits on economic growth and activity following the global recession. The argument is made for the strengthening of existing regulatory and supervisory institutions in Africa to ensure a robust financial system in the continent. The *African sovereignty* proposition will provide the necessary support and protection to the African financial system and improve preparedness for a future Global Financial Crisis while simultaneously enabling the African financial system to fit properly into the global financial framework. This will consequently provide a favourable ecosystem for the drivers of economic growth to flourish. The chapter nevertheless concludes by urging any solution in the continent to factor in development issues in order to mitigate the human impact of a crisis.

Chapter Six reflects on the residual difficulties the continent faces and considers a solution embedded in the larger global community. In a nutshell, the Chapter advocates that *African sovereignty* must consider development law and globalization and ought to be superimposed on a larger framework of strategic and sustainable global programmes. In doing so, the chapter identifies efforts towards these sustainable global programmes which can assist Africa in circumventing its challenges within the diverse continent while remaining plugged into the bigger framework of global economic markets in general and global financial markets in particular. Issues of relevance will be *poverty and debt reduction, governance and capacity building, energy use and climate control, peace and security*. Also, the development of these programmes instigated by world leaders will be discussed although frustration is felt with regards to the repetitive nature of the recommendations and responses backed by little action.

Chapter Seven closes the thesis by establishing the threads of thought and providing the conclusion.

CHAPTER 2: AFRICA- TOWARDS MONETARY INTEGRATION

2.1 Introduction

Considering that the future economic growth in Africa will be propelled by its increasing ties to the global economy, sustainable mechanisms need to be continually introduced to help absorb the more complex, more integrated global environment today than did emerging markets of a quarter century ago. [1]

The core lessons to be learnt with reference to the African continent will form the nucleus of this thesis. Whether Africa will and/or can go as far as the European Integration agenda is a contentious matter this chapter will consider.

It is true that African financial markets remain vulnerable to the domino-effects of a GFC, nonetheless, in so far as channeling capital from those who can supply it to those who need it remains a benefit of integrated financial markets and systems, the robustness of the entire international financial architecture is necessary and inextricably bound to enabling strong financial markets to flourish in the continent. Regional and domestic financial markets will in turn play central roles in mobilizing savings towards investment in households, businesses and government, in order to support sustained growth and development and manage investments for posterity.

The continent's rapid recovery following the GFC is a key indicator of the dawn of a new era on the continent. Net inflows from foreign direct and foreign portfolio investment have been on the rise and this trend has led Africa to be labeled a 'second generation emerging market' also known as 'frontier markets'[2] by foreign portfolio investors.

---

[1] Then, institutional investors accessed emerging economies largely through equity markets and, in some cases, foreign currency debt issues. Today, these investments are only part of the picture. Investors are now immersed in a wide range of financial activities, including domestic bond and foreign exchange market instruments. Put simply, financial technology is now more complex than ever before. See Nellor D; *The Rise of Africa's Frontier Markets*; Finance and Development, A quarterly magazine of the IMF; September 2008, Volume 45, Number 3

[2] According to Standard & Poor's--which took over the emerging market financial indices from the International Finance Corporation (IFC) in 2000, "frontier markets" are countries with capital markets that are smaller and less liquid than those in the more advanced emerging markets. For more on this, see Nellor (n.1) available online at: *http://www.imf.org/external/pubs/ft/fandd/2008/09/nellor.htm* (accessed 10 April 2014)

Given this turn of events and as the continent strives to attain its full potential, the topic of financial integration most especially at the regional levels remains crucial in facilitating the efforts to assist African financial markets acquire their full potential in order to enhance their attractiveness for investors. These efforts will no doubt have to include effective regional and domestic infrastructure to enable successful implementation otherwise African financial markets will stay small, unsophisticated and underdeveloped with the inability to attract considerable portfolio inflows as indicated by many African states. In this light, it will be argued that a combination of regional and domestic law reforms are needed to enable the economic integration agenda (one unable to achieve maximum results without the other).[3]

As the integration exercise advances, it is sensible to pause and take stock of the reality on the continent. This chapter assesses the current stage of regional financial integration in Africa by evaluating the legal and institutional limitations which plague the future of financial integration and regulation in the continent. These limitations labelled the *'Africa problem'* bring to the fore the intricate relevance that laws and institutions have in constructing regional financial integration agendas. This signifies that it will be flawed to engage solely in a socio-economic and/or political approach to the analysis of RFI without appreciating the legal aspects. The chapter further advances the argument that a monetary model formed with these laws and institutions at the center is a pre-condition to solving Africa's residual challenges.

For the purposes of this research, reference to Africa is frequent although the scope remains mainly Sub-Saharan Africa with periodic reference to North Africa should the need arise. The reason for this is twofold; firstly the region is frequently studied as a unit in most academic and policy settings, mainly as a result of the commonality in the region in terms of culture and racial heritage. Secondly, the issues and shortcomings pertaining to development are relatively similar.

The first part of this chapter will define what the *Africa problem* is. This definition places into context the '*Spaghetti bowl*' dilemma by focusing on a discussion of the main Regional Economic Communities (REC) within Africa, their development, and how they work and operate.

[3] Salami I; *Financial Regulation in Africa, An Assessment of Financial Integration Arrangements in African Emerging and Frontier Markets*; p.203

The second part will consider post-colonial progress of financial integration from the African perspective with particular attention on cross border access and regulation. The critique will introduce the African Union project and then delve deeper into the *African problem* and bring out reasons attributed for the project's sluggish progress. Here the adequacy of the current treaties and enforcement mechanisms in place will be analyzed and recommendations put forth.

This leads to the third part which will make the case for further and deeper integration which can go a long way to thwart the *Africa problem* and the constraints on national sovereignty, by solving many of the problems faced by investors on the ground. Isolated success stories in managing and negotiating this Africa problem within the continent will be highlighted. This appreciation subsequently forms a basis for an emerging notion of sovereignty. The re-conceptualization of sovereignty here will bring to light the new form of economic and monetary cooperation for Africa *-African or continental sovereignty*. This will involve a model of cooperation and alliance between member states aimed at the effective running of financial markets as a solution to the *Africa problem*. This part will assess the suitability of the current institutional structure for specific regional blocs. This will help to further explain the new form of *continental sovereignty*.

The chapter concludes in part four which puts into perspective the realistic long term prospects of financial integration and regulation in Africa acknowledging the overwhelming amount of work which still needs to be done. It nevertheless urges for a complete as opposed to an incomplete story of Africa's prospects to be told. Even though the thesis illustrates explicitly the prodigious nature of challenges the continent faces and the daunting task of reform, the overall conclusion still requests an optimistic undertone of the glass being half full and not half empty with progress being made slowly but surely. The old oxymoron *festina lente* has not been more fitting: *make haste slowly*.

Part One

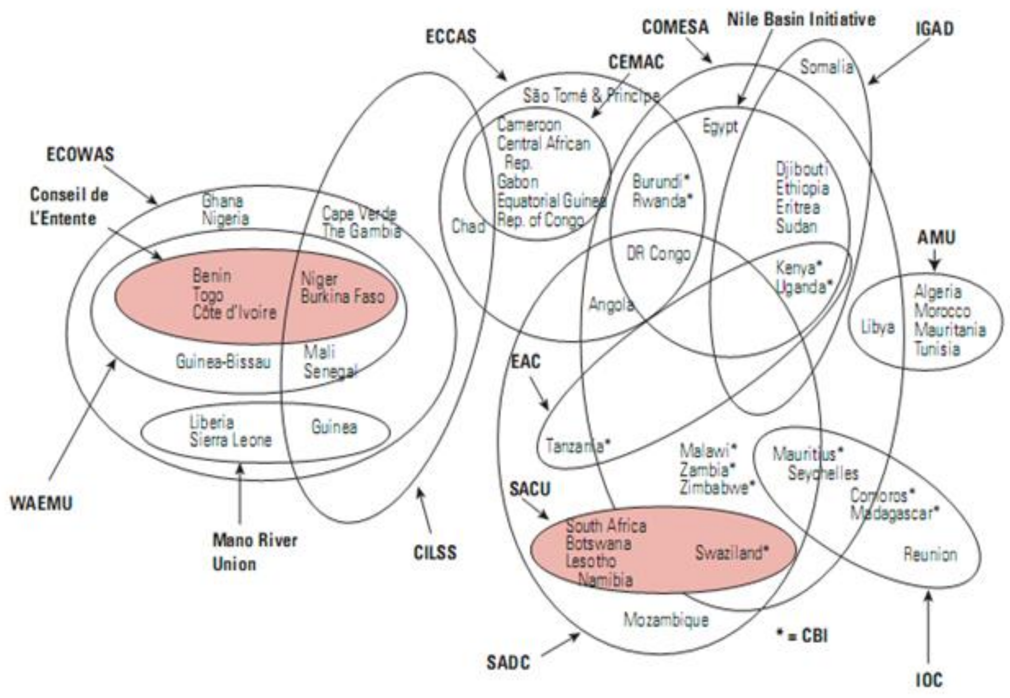
2.2 The Spaghetti Bowl

The illustration below clearly captures a plethora of RECs which coexist in Africa. As memberships overlap, a *'spaghetti bowl'* analogy is constituted. This multi-membership derived from the proliferation of RECs makes it administratively difficult to manage the integration process as their differing Rules of Origin, tariffs and customs procedures cause delays, confusion and increase the cost of trade. Therein lays the starting point of the *Africa problem*. As it will be seen, these RECs have struggled to fulfill the primary objectives of their arrangements.

The effect of the *spaghetti bowl* has been described as follows: "The fashioning of the emerging *'spaghetti bowl'* of regional trade agreements among African countries, while perhaps being done with good intentions, in practice is not having demonstrable salutary effects. Many Chinese and Indian investors—not to mention African and other foreign investors—find them at best, ineffective, or at worst, confusing, and not conducive to attracting international commerce."[4]

[4] Broadman H: *Africa's Silk Road, China and India's New Economic Frontier*; The World Bank, Washington, USA, 2007; p.18; available online at: http://siteresources.worldbank.org/AFRICAEXT/Resources/Africa_Silk_Road.pdf (accessed 10 April 2014)

2.2.1 Figure A: The Spaghetti Bowl of African RECs[5]



Source: World Bank staff.

Note: AMU: Arab Maghreb Union[6]; CBI: Cross Border Initiative; CEMAC: Economic and Monetary Community of Central Africa[7]; CILSS: Permanent Interstate Committee on Drought Control in the Sahel[8]; COMESA: Common Market for Eastern and Southern Africa[9]; EAC: East African Cooperation[10]; ECCAS: Economic Community of Central African States[11]; ECOWAS: Economic Community of Western African States[12]; IGAD: Inter-Governmental Authority on Development[13]; IOC: Indian Ocean Commission[14]; SACU: Southern African Customs Union[15]; SADC: Southern African Development Community[16]; WAEMU: West African Economic and Monetary Union.[17]

---

[5] Ibid; Figure 9; p.18 (source: the World Bank)

[6] http://www.maghrebarabe.org/en/ (accessed 10 April 2014)

[7] http://www.cemac.int/ (accessed 10 April 2014)

[8] http://www.cilss.bf/ (accessed 10 April 2014)

[9] http://www.comesa.int/ (accessed 10 April 2014)

[10] http://www.eac.int/ (accessed 10 April 2014)

[11] http://www.ceeac-eccas.org/ (accessed 10 April 2014)

[12] http://www.ecowas.int/ (accessed 10 April 2014)

[13] http://igad.int/ (accessed 10 April 2014)

[14] http://politics.ioconline.org/home.html (accessed 10 April 2014)

[15] http://www.sacu.int/ (accessed 10 April 2014)

[16] http://www.sadc.int/ (accessed 10 April 2014)

[17]http://www.uemoa.int/Pages/Home.aspx (accessed 10 April 2014)

Instantly, one can recognize how easily efforts to foster integration can be duplicated and how complex the exercise becomes when trying to work out what obligations states involved in the RECs have towards each other and third states. Here, the definition of the third state becomes somewhat messy and ambiguous for the purposes of operating a common external tariff by a member state to another state where it is also involved in a customs union arrangement. Salami provides a very neat example using the case of Kenya which belongs to a customs union arrangement with the EAC, SADC and COMESA. How would it then relate with Burundi for instance as a third state for the purpose of operating the customs union in COMESA when it is also in a customs union arrangement with Burundi under EAC? Again, Cameroon being a member of ECCAS which has the paramount aim of establishing a common market and subsequently a customs union is already a member of CEMAC which already has a customs union. How would it relate with Sao Tome and Principe its fellow custom union member under ECCAS as a third state when trying to implement the common external tariff as a member of CEMAC?[18]

To untangle this complex web and solve the problem of duplicity of efforts, I am in accord with Salami's recommendation for a Pan-African Regional Coordination Structure to be established with the objective to ensure that memberships to RECs are effectively coordinated to avoid jeopardizing the ultimate AU agenda.[19]This structure should be independent and free from any influences- political or otherwise to enable it function at its maximum capacity.

2.2.1.1 The African RECs

Drawing from the above, the existing integration arrangements in Africa are an attempt to facilitate the continent-wide integration project through a gradual process of coordination, harmonization and progressive integration of activities of existing and future RECs in Africa. It is worth mentioning that there are only eight RECs recognized by the African Union. They are: the ECOWAS, SADC, EAC, COMESA, ECCAS, AMU, CEN-SAD, and IGAD.[20] These will now be evaluated below:

[18] n 8; p.19

[19] Ibid; p.20

[20] Available online at: http://www.au.int/en/organs/recs (assessed 10 April 2014)

i.) *The Economic Community of West African States (ECOWAS)*

The pursuit of economic integration in West Africa restarted in 1972 when it became apparent that the countries were being marginalized more and more on the international stage.[21] The Nigerian and Togolese Heads of state authorized their government officials to design the framework for such an integration arrangement. It was this framework that eventually hatched the idea of the West African Clearing House (WACH) in 1975. The WACH was the first attempt to boost intra-regional trade between states in the West African region. Yet, it failed to achieve its goals mainly due to the non-recognition and application of its policies at domestic levels in Member States. This led to the creation of ECOWAS. ECOWAS was the first attempt to create a formal regional bloc, covering the entire West African region. The Treaty of ECOWAS was signed in Lagos on 28th May 1975 by Benin, Burkina Faso, Cote d'Ivoire, Gambia, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

Although the ECOWAS Treaty did not necessarily state one of its objectives as achieving a common market, its goals nonetheless formed parts of a common market. The 1993 revised treaty however stated that achieving a common market was one of the goals of ECOWAS.[22] Without much success in achieving trade liberalization, the Anglophone states of ECOWAS (Gambia, Ghana, Liberia, Nigeria, and Sierra Leone) decided to embark on the creation of a monetary union, the second in the sub-region. This was initially scheduled for 2003 but has been postponed four times to now be achieved in 2020.[23] The second monetary zone (the West African Monetary Zone (WAMZ)) was created in 2000 and is made of five countries within the ECOWAS that plan to introduce a common currency called '*the Eco*' by 2020. There is no doubt that this objective will be met with challenges as the free trade area which was scheduled to be achieved by 1985 was only attained thirty years later in 2010.

In terms of the governance structure[24], ECOWAS comprises three arms of governance, the Executive, the Legislature and the Judiciary. The Chairman of the Authority of Heads of State and Government sits at the helm of the organization structure is. The Chairman is the current Head of State and Government appointed by other Heads of State and Government to oversee the affairs for a period of one year. The Minister in charge of ECOWAS affairs in

---

[21] Okeke C; *The Theory and Practice of International Law in Nigeria* (Fourth Dimension Enugu Nigeria 1986) 172.

[22] ECOWAS Treaty 1993 Art 3(d)

[23] ECOWAS Vision 2020; available online at: http://www.ecowas.int/wp-content/uploads/2015/01/ECOWAS-VISION-2020.pdf (accessed 01 July 2014)

[24] Available online at: http://ecoslate.github.io/about-ecowas/governance-structure/index.htm (accessed 01 July 2014)

the country of the Chairman of the Authority automatically becomes the Chairman of Council of Ministers; similarly, that country presides over all other ECOWAS statutory meetings for the year (ministerial and senior level, such as the Technical Committees).

At the top of the Executive arm of the Community is the President of ECOWAS Commission appointed by the Authority for a non-renewable period of four years. He is assisted by a Vice President and 13 Commissioners.

The legislative arm of the Community is the Community Parliament headed by the Speaker of the Parliament. The administrative functions of the Parliament are directed by the Secretary General of the Parliament. Pending elections by direct universal suffrage in future, parliamentarians are seconded by national Parliaments to the Community Parliament for a period of four years. The judicial arm of the Community is the Community Court of Justice, headed by the President. They are all supported by the Supreme Courts of their respective Member States to fill the country positions. The Court ensures the interpretation and application of Community laws, protocols and conventions. The administrative functions of the Court are handled by the Court Registrar who is assisted by other professionals.

ii.) *The Southern African Development Community (SADC)*

SADC is made up of 15 Member States which are Angola, Democratic Republic of Congo (DRC), Lesotho, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. They are at different stages of development but remain largely underdeveloped. SADC was created in 1980 as the Southern African Development Coordination Conference (SADCC). The objective at the time was to achieve integrated economic development and to strengthen economic and political independence against apartheid. It became apparent that the organization needed a stronger legal position to attain its aim of economic integration. This would require an agreement, charter or treaty to replace the SADCC Memorandum of Understanding.

This led to the signing of a declaration by the Head of States and Governments and the Treaty of Windhoek in 1992 established SADC. Its objectives included: the achievement of economic development and growth; alleviation of poverty; and the enhancement of the standard of living of the Southern African people through regional integration.[25] The objectives are to be achieved by developing policies directed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of the

[25] SADC Treaty Art 5(1)(a)

peoples in the region generally among Member States[26]- simply put, attaining a common market. Nevertheless, intra-regional trade is still sluggish due to structural problems caused by non-tariff barriers. Commitment to fully liberalize intra-regional trade is the pre-requisite to achieve the deeper integration plans to eventual monetary union.

Regarding the governance structure and decision-making procedures[27], the organization has eight principal institutions and organs charged to execute its mandate. They are: The Summit of Heads of State or Government; Summit Troika of the Organ; Tribunal; Council of Ministers; Sectoral and Ministerial Committees; Standing Committee of Senior Officials, Secretariat; National Committees; and Parliamentary Forum.

The SADC Summit is responsible for the overall policy direction and control of functions of the community, ultimately making it the policy-making institution of SADC. It is made up of all SADC Heads of States or Government and is managed on a Troika system that comprises of the current SADC Summit Chairperson, the incoming Chairperson (the Deputy Chairperson at the time), and the immediate previous Chairperson. The Troika System vests authority in this group to take quick decisions on behalf of SADC that are ordinarily taken at policy meetings scheduled at regular intervals, as well as providing policy direction to SADC Institutions in between regular SADC Summits. This system has been effective since it was established by the Summit at its annual meeting in Maputo, Mozambique, in August 1999. Other member States may be co-opted into the Troika as and when necessary. The Troika system operates at the level of the Summit, the Organ on Politics, Defence and Security, the Council of Ministers and the Standing Committee of Senior Officials. The Summit usually meets once a year around August/September in a member State at which a new Chairperson and Deputy are elected.

The SADC Tribunal ensures adherence to, and proper interpretation of the provisions of, the SADC Treaty and subsidiary instruments, and adjudicates upon disputes referred to it. It was established by the Protocol on the Tribunal, which was signed in Windhoek, Namibia during the 2000 Ordinary Summit, and was officially established on 18 August, 2005 in Gaborone, Botswana. The inauguration of the tribunal and the swearing in of members took place on 18 November, 2005 in Windhoek, Namibia where it is based. It consists of appointed judges from Member States.

[26] SADC Treaty Art 5(2)(d)

[27] Available online at: http://www.sadc.int/about-sadc/sadc-institutions/ (accessed 01 July 2014)

After several judgments ruling against the Zimbabwean government, the Tribunal was *de facto* suspended at the 2010 SADC Summit. On 17 August 2012 in Maputo, Mozambique, the SADC Summit addressed the issue of the suspended SADC Tribunal. The SADC Summit resolved that a new Tribunal should be negotiated and that its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States.

The Council of Ministers oversees the functioning and development of SADC and ensures that policies are properly implemented. The Council consists of Ministers from each Member State, usually from the Ministries of Foreign Affairs, Economic Planning, or Finance. It meets twice a year in January or February and immediately prior to the Summit in August or September.

The Secretariat is the principal executive institution of SADC, responsible for strategic planning, co-ordination and management of SADC programmes. It is also responsible for the implementation of decisions of SADC policy and institutions such as the Summit, the Troikas and Council of Ministers. It is headed by an Executive Secretary and has its headquarters in Gaborone, Botswana.

iii.) *The East African Economic Community (EAC)*

The EAC is made up of six Member States. They are: Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. Over the last century, these states have been involved in one form of economic cooperation or the other. For example, Kenya and Uganda were once involved in a customs union as far back as 1917.[28] There was also an East African Community between 1967 and 1977 and an East African Cooperation between 1993 and 2000. Following the collapse of the previous East African Community in 1977 due to political reasons, the Member States negotiated a Mediation Agreement for the Division of Assets and Liabilities in 1984. It stated that Member States were to consider areas for future cooperation and to make concrete arrangements for such cooperation.

Subsequent meetings of the Heads of State of the original three states (Kenya, Tanzania and Uganda) led to the signing of the Agreement for the establishment of the Permanent Tripartite Commission for the East African Co-operation on 30 November 1993. This was later upgraded to a treaty when the need to strengthen regional cooperation arose. The

[28] Salami (n.3 p.28)

Treaty for the creation of the EAC was signed on 30 November 1999 and entered into force on 7 July 2000.[29]

The objectives of the EAC are to develop policies and programmes, aimed at deepening political, economic, social and cultural cooperation among Member States with the aim of strengthening and regulating the industrial, commercial, infrastructural, cultural, social, political, and other relations of the Member States in order to achieve speedy development and sustained expansion of economic activities among all Member States.[30] Following these goals, it aims to achieve a customs union, common market, monetary union and ultimately a political federation amongst other things.

The EAC is making good progress with the achievement of its goals, both a customs union (2005) and a common market (2010) have been established and the Monetary Union Protocol (signed 30 November 2013) has been implemented within set timeframes.[31]

With regards to the governing structure[32], the main Organs of the EAC are the Summit, the Council of Ministers, the Coordinating Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.

The Summit comprising of Heads of Government of Partner States gives strategic direction towards the realization of the goal and objectives of the Community. The Council of Ministers (or simply, the Council) is the central decision-making and governing Organ of the EAC. Its membership constitutes Ministers or Cabinet Secretaries from the Member States with responsibility for regional co-operation. Every year, the Council meets twice, one meeting of which is held immediately preceding a meeting of the Summit. The Council meetings assist in maintaining a link between the political decisions taken at the Summits and the day-to-day functioning of the Community. Regulations, directives and decisions taken or given by the Council are binding to the Member States and to all other Organs and Institutions of the Community other than the Summit, the Court and the Assembly. The Council, each year, elects a Chairperson by rotation to serve a one-year term to the office of Chairperson of the Council of Ministers.

[29] Ibid p.29

[30] EAC Treaty Art 5(1)

[31] Available online at: http://www.eac.int/about/overview (accessed 01 July 2014)

[32] Available online at: http://www.eac.int/about/organs (accessed 01 July 2014)

The East African Court of Justice (or simply, the Court) is the principal judicial Organ of the Community and ensures adherence to the law in the interpretation and application of compliance with the EAC Treaty. It was established under Article 9 of the EAC Treaty for the Establishment of the East African Community. Its temporary seat is Arusha, Tanzania until the Summit determines its permanent seat. The Court established its Sub-registries in the Member States, which are located in the premises of the National Courts. The Court is currently composed of ten judges, appointed by the Summit from among sitting judges of any Member State court of judicature or from jurists of recognised competence, and the Registrar who is appointed by the Council of Ministers. The Court has two divisions: an Appellate division and a First Instance division.[33]

The East African Legislative Assembly (EALA) is the Legislative Organ of the Community and has a cardinal function to further EAC objectives, through its Legislative, Representative and Oversight mandate. It was established under Article 9 of the EAC Treaty. The Assembly has a membership comprising of 45 elected Members (nine from each Member State), and 7 ex-officio Members consisting of the Minister or Cabinet Secretary responsible for EAC Affairs from each Partner State, the Secretary-General and the Counsel to the Community totalling 52 Members.

The Secretariat is the executive Organ of the Community. As the guardian of the Treaty, it ensures that regulations and directives adopted by the Council are properly implemented. In service of the Community, the Secretariat comprises the Secretary-General, 4 Deputy Secretaries-General, the Counsel to the Community and hundreds of EAC staff members who carry out the day-to-day work of the EAC as mandated by the Council. The Secretary-General is the principal executive and accounting officer of the Community, the head of the Secretariat and the Secretary of the Summit; he/she is appointed by the Summit for a fixed five-year, non-renewable term. The Deputy Secretaries-General are appointed by the Summit on recommendations of the Council and on a rotational basis. They deputise the Secretary-General and each serves a three-year term, renewable once. The Counsel to the Community is the principal legal adviser to the Community.

iv.) *The Economic Community of Eastern and central African States (COMESA)*

In 1965, the United Nations Economic Commission for Africa (UNECA) organised a meeting of the newly independent states of Eastern and southern Africa in 1965 to consider proposals for establishing regional economic integration arrangements among them. The

[33] Available online at: http://eacj.org/ (accessed 01 July 2014)

meeting proposed the creation of an Economic Community of Eastern and Central African states which would benefit from a larger market size and promote social and economic cooperation among the Member States. A treaty for the creation of a preferential Trade Agreement (PTA) among the Member States was concluded in December 1981 and came into force on 30 September 1982. The treaty outlined plans to transform the PTA into a common market within 10 years. This led to the treaty establishing the COMESA signed on 5 November 1993, and it came into force on 8 December 1994.[34]

COMESA comprises 19 countries which include: Burundi, Comoros, DRC, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe. Its main objective is to create a fully integrated and unified region which has free movement of goods, services, capital and persons among Member States: the idea is to establish a regional economic community.[35] COMESA achieved a FTA, among nine Member States including Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe in 2000 which was the deadline for the achievement of an FTA among all member States. Rwanda and Burundi joined the FTA in 2004 and the Comoros and Libya joined in 2006. The customs union was due to be achieved in 2004 launched later in June 2009. The delay was as a result of Member States' failure to implement the free movement of goods policies. In spite of this, COMESA agreed in 2008 to expand the FTA to include two other RECs including the EAC and SADC.[36]

In terms of decision-making power[37], the COMESA Authority, composes of Heads of States or Government and is COMESA's supreme policy-making organ. The Authority is headed by a Chairman elected for an agreed period. The Authority is tasked with the general policy direction and controlling the overall performance of the executive functions of COMESA. It meets once a year at Summits which are held in different member States. Whilst the hosting country assumes the chairmanship of the Authority for the year, an Extraordinary Summit can be held at the request of any member of the Authority; so long as one-third of the members of the Authority support such a request. The Authority meetings are held in closed sessions and usually decisions are taken by consensus. The session leaders have to issue a communiqué, recording any decisions made. These directives and decisions taken by the

[34] Salami, (n.3 p.30)

[35] COMESA Treaty Art 4

[36] Ibid

[37] Available online at: http://www.comesa.int/the-comesa-authority/ (accessed 01 July 2014)

Authority are binding on all member States and the other organs to which they are addressed.

The COMESA Court of Justice decisions have precedence over any decisions of national courts. The Court of Justice may receive cases not only from member States, but also from natural and legal persons, against the Council to determine the legality of any act towards the directive's, regulation or decision made. The Persons are also permitted under the Treaty to sue a member State in the COMESA Court; the legality under the Treaty of any act, directive regulation, or decision of such member State.

v.) *The Economic Community of Central African States (ECCAS)*

The *Union Douanière et Économique de l'Afrique Centrale* (UDEAC) known as the Customs and Economic Union of Central Africa was established by the Brazzaville Treaty in 1996 to create a customs union between its members. The Member States included: Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea and Gabon. In 1981 the UDEAC leaders agreed to form a wider economic community of Central African states which gave rise to the Economic Community of Central African States (ECCAS). This was established on the 18 October 1983 by the UDEAC members and Burundi, Rwanda, former DRC, Sao Tome and Principe. Angola became a member in 1999. The ultimate aim of ECCAS is to achieve a customs union.[38]

ECCAS was functional in the mid 80's but became subdued for several years due to financial difficulties (non-payment of membership fees) and conflicts in the region and focus was diverted to achieving peace and security within the region. The war in the DRC was particularly divisive, as Rwanda and Angola fought on opposing sides. In fact in February 1999, Member States established the Council for Peace and Security in Central Africa (COPAX) with the aim of promoting, maintaining and consolidating peace and security in Central Africa. It entered into force in January 2004.[39] Achieving peace in this region has been difficult because conflicts persist notably recently in the Central African Republic.

The governance structure[40] comprises the Conference of Heads of State and Government; Council of Ministers; Secretariat General (one secretary-general elected for four years and three assistant secretaries-general); Court of Justice; and Consultative Commission.

[38] ECCAS Treaty Art 6(2)(c)

[39] Salami, (n.3 p.31)

[40] Available online at: http://www.ceeac-eccas.org/index.php/fr/a-propos-de-la-ceeac/organes-de-la-ceeac (accessed 01 July 2014)

The Conference of Heads of State and Government is the supreme organ and is made of the Heads of State of Member States. The Conference defines the political and socio-economic harmonisation agenda for the organisation. It seats once a year and the presidency rotates annually by alphabetic order of the Member States. The Council of Ministers constitutes Ministers or Cabinet Secretaries from the Member States with responsibility for economic development. Every year, the Council meets twice and the meetings assist in maintaining consistency between the political decisions taken at the Conference and the day-to-day functioning of the Community. The Council also proposes recommendations for the Conference to consider.

While the Secretariat is the executive organ to ensure the promotion of the organisations' objectives, the Court of Justice is still not operational.

vi.) *The Arab Maghreb Union (AMU)*

The AMU comprises of five Member States which are: Algeria, Libya, Mauritania, Morocco, and Tunisia. It is a sub-regional bloc of countries in North Africa. Algeria, Libya, Morocco and Tunisia came together through the first conference of Maghreb Economic Ministers in Tunis in 1964 to establish the Conseil Permanent Consultatif du Maghreb (CPCM). It was set up to coordinate and harmonize the development plans of the four countries, and to coordinate intra-regional trade between them and relations with the EU. As these plans failed to materialize, in June 1988 the states set up the Maghreb High Commission and other specialized commissions. This eventually gave rise to the establishment of the AMU signed in Marrakech on 17 February 1989 by all Member States. The primary objectives of the AMU Treaty included working '…towards the progressive realization of the free movement of persons, services, goods and capital'.[41] Again, although the treaty does not specifically state that a common market is part of its goals, the above all form parts of a common market. Similarly like the case of ECCAS, conflicts[42] in the area have hindered progress on the union's joint goals and practically made it currently inactive. Furthermore, the overall instability following the Arab Spring crisis which sprung in 2010 cannot be overemphasized. Nevertheless, attempts have been made to revive it especially as growing efforts for peace and security in the region have ignited a fresh need for cooperation.

---

[41] AMU Treaty Art 2

[42] Member States have for many years belonged to two enemy camps- with Algeria and Morocco in one camp against Libya and Tunisia in another. See Martinez L: *'Algeria, The Arab Maghreb Union and Regional Integration*'; Euromesco Paper, October 2006; Available online at: http://www.euromesco.net/euromesco/images/59_eng.pdf (accessed 01 July 2014)

vii.) *The Community of Sahel-Saharan States (CEN-SAD)*

There are twenty-eight Member states of CEN-SAD. These are: Benin, Burkina Faso, Central African Republic, Chad, Comoros, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Equatorial Guinea, Gambia, Ghana, Guinea, Guinea Bissau, Kenya, Liberia, Libya, Mali, Morocco, Niger, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, Sudan, Togo and Tunisia. The Treaty establishing CEN-SAD was signed in Tripoli on 4 February 1998. It became a REC in July 2000 and it is the biggest REC in Africa by virtue of number of countries, population and surface area. Following the inactivity of AMU, CEN-SAD has become the main player in the North African region.

The goals of CEN-SAD include establishing an economic union, which would involve establishing a common market with the free movement of persons, capital, goods and services.[43] The progress of CEN-SAD like the case of AMU has been hindered by political conflicts in Member States. The focus to achieve economic benefits from the REC has been delayed by the pursuit for solutions to the political conflicts in Darfur and Somalia.[44]

More pressing is the complication brought about by the *spaghetti bowl* dilemma. Achieving a customs union for all twenty-eight Member States will be problematic considering that they all are actively involved in other RECs with intersecting customs union goals.

With regards to the governing structure[45], at the helm of the organisation is the Conference of leaders and Heads of State. They meet once a year. The Executive Council prepares the programmes and action plans and ensures the implementation of the decisions arrived at the Conference of Heads of State. The Secretariat ensures the day-today running of the organisation and the functioning of the different institutions in the organisation.

viii.) *The Intergovernmental Authority for Development (IGAD)*

The Intergovernmental Authority on Drought and Development (IGADD) was first established to advance a platform to redress recurring and severe droughts and other natural disasters between 1974 and 1984 which had caused widespread famine and economic hardship in the Eastern African region.[46] There were six countries in the horn of Africa which included

---

[43] CEN-SAD Treaty Art 1

[44] Brunel C: *'Maghreb Regional Integration'*, Ch. 3, p.7, available online at: https://piie.com/publications/chapters_preview/4266/03iie4266.pdf (accessed 01 July 2014)

[45] Available online at: http://www.censad.org/index.php/la-cen-sad/organes.html (accessed 01 July 2014)

[46] Salami, (n.3 p.34)

Djibouti, Ethiopia, Kenya, Somalia, Sudan, and Uganda that came together to launch the IGADD.

Eritrea joined the IGADD upon its independence in 1993 and in March 1996, the IGADD changed into the Intergovernmental Authority on Development (IGAD). The objectives were broadened to include: harmonizing policies with regards to trade and customs; promoting the free movement of goods, services and people within the region; creating an enabling environment for foreign, cross border and domestic trade and investment. The IGAD's aim also included promoting and realizing the objectives of the COMESA and EAC since the bulk of its members belong to these communities.[47]

In terms of the organization structure of IGAD[48], the organisation is comprised of four hierarchical POLICY organs: first, the Assembly of Heads of State and Government which is the supreme policy making organ of the Authority. It determines the objectives, guidelines and programmes for IGAD and meets once a year. A Chairman is elected from among the member states in rotation; second, the Council of Ministers which is composed of the Ministers of Foreign Affairs and one other Focal Minister designated by each member state. The Council formulates policy, approves the work programme and annual budget of the Secretariat during its biannual sessions; third, the Committee of Ambassadors which is comprised of IGAD member states' Ambassadors or Plenipotentiaries accredited to the country of IGAD Headquarters. It convenes as often as the need arises to advise and guide the Executive Secretary; fourth is the Secretariat which is headed by an Executive Secretary appointed by the Assembly of Heads of State and Government for a term of four years renewable once. The Secretariat assists member states in formulating regional projects in the priority areas, facilitates the coordination and harmonisation of development policies, mobilises resources to implement regional projects and programmes approved by the Council and reinforces national infrastructures necessary for implementing regional projects and policies.

Again like the cases of AMU and CEN-SAD, persistent political conflicts in the area have dented efforts for economic cooperation and diverted focus to achieving peace and security.

[47] Available online at: http://igad.int/index.php?option=com_content&view=article&id=93&Itemid=124&limitstart=1 (accessed 01 July 2014)

[48] See online at: http://igad.int/index.php?option=com_content&view=article&id=93&Itemid=124&limitstart=2 (accessed 01 July 2014)

Having considered the above, the chapter will now reexamine the development of the differing types of financial integration systems within Africa from the post-colonial period till present, taking into account the motivations for RFI.

2.2.2 The Evolution of Economic Integration in Africa

On the back of the *African problem* laid out above, it is sensible to reflect on the development of the concept of regional economic integration in Africa to better understand why the project has morphed into this multifarious web.

Economic integration arrangements institute the removal of domestic trade barriers typically between countries within the same geographic region. These integration arrangements are usually free trade areas or customs unions. As evidenced previously, these regional arrangements have not been without criticisms. Firstly, possible trade diversion could occur as trade could be diverted from a cheaper source in a non-Free Trade Area country to a more expensive source in a Free Trade Area member who still enjoys a price advantage because of tariff protection. On another side of the same argument, there is the possible reduction in the terms of trade of Member States where FTA leads to trade diversion from a low-cost third country to a higher cost intra-FTA source. For instance countries like South Africa and Nigeria enjoy competitive advantage by virtue of the fact that there is typically an influx of investors and human resources because they provide more conducive business environments by virtue of the size of their economies. This could be further complicated by perceived or real gains and losses among the members that may lead to disputes and a sense of loss of national sovereignty.[49] Furthermore, the fiscal stability of member states could be affected in the short run as regional economic integration can lead to reduction in government revenue mainly because a huge part of government revenue in Africa is generated from trade tariffs and taxes. Small wonder the 1990's witnessed countries that made the swiftest advances toward trade liberalization suffer significant reductions in revenue from trade taxes.[50]

In spite all this, Salami draws from empirical evidence and suggests that trade liberalization through regional agreements nonetheless enhances development but advices that any

[49] Maruping M; *Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination*; Africa in the World Economy - The National, Regional and International Challenges Fondad, The Hague, December 2005; Available online at http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf (Accessed 10 April 2014), pp.131

[50] Salami (n.3 p.4)

adverse fiscal consequences should be diluted by proper sequencing and the introduction of adequate policies in Member States. These preconditions for sound regional economic integration must be present domestically such as strong commitment in implementing the agreed arrangements and fair mechanisms to arbitrate disputes[51]; ensuring a sound macroeconomic environment, stringent measures to ensure the coordination of the revenue and spending aspects of the budget including raising domestic indirect and direct taxes, strengthening tax administration and collection and improving the effectiveness of public spending. [52]

From a broader perspective, the underpinning pillars for regional integration in Africa originate in the continent's geography, geology and demography. This development can be described as follows:

i) *Geography*: With its vast land area nearly 30 million square kilometers, in fact its sheer land area dwarfs that of the combined major economies of the world, including that of the USA, Western Europe, Japan, China, India and the Gulf Cooperation Council (GCC) countries, which average 27.8 million square kilometers. The sheer geographical scale of the continent is only matched by its economic prospects. Most of the discussion on regional integration has focused on the free movement of goods and services. There are nevertheless 17 landlocked countries with no access to sea. The possibility of integrating all these countries into one common market is a very attractive economic prospect.

ii) *Geology*: Africa is endowed with mineral and natural resources with near-global monopolies of platinum, chromium and diamond; a high proportion of the world's gold, cobalt and manganese; and extensive reserves of bauxite, coal, uranium, copper and nickel. It is also home to timber deposits and has an enormous agricultural potential.

iii) *Demography*: In addition to its abundant supply of land, the continent is blessed with abundant labour supply that is not only youthful, but growing. With a population of slightly over one billion people in the 54 countries, it accounts for about 14.8 percent of the World's human population. Comparatively, Africa's population is larger than the combined population of the USA, Japan, Western Europe and the GCC countries. In economic theory, land and labour are considered as two major factors for the production process. As such with a

[51] Maruping (n.49 p.131)

[52] Salami (n.3 p.4)

combined endowment of labour and land, everything being equal it is justified for the continent to attain sustainable growth.

Given the similarities of the problems faced continentally, regional integration is seen as a rational response to the difficulties like the smallness of many national markets, landlocked countries, high unemployment rates despite the population size and unevenly distributed resources which have in most curses served as a curse rather than a gift.[53]

Consequently, there has been much support from African governments for regional integration. Indeed since independence they have embraced regional integration as an important component of their development strategies. The different types of integration agreements which states have used to foster their development agenda will now be explained below.

2.2.2.1 Merits of Financial Integration in Africa

Financial integration is deeply rooted within the constructs of the simplest forms of trade integration methods. These can be distinguished as preferential trade agreements, free trade agreements and custom unions from which it has been argued other higher forms of economic integration agreements have cropped up including a common market and a monetary union, which require more commitment from Member States. Basically, RFI harmonizes the financial policies of Member States within a particular regional bloc. In essence, it begins with the liberalization of capital accounts and can subsequently deepen with banking and capital markets integration (normally harmonizing the banking and capital market laws) with the objective of establishing a single market in the financial services sector. The rationales for this include[54]:

i) *Pooling scarce savings together*: the continent has suffered high levels of poverty exacerbated by weak banking regimes with poor laws and regulation. This has resulted in inefficient credit systems; coupled with the underdevelopment of capital markets, extremely limited sources of savings and investment exist. Cross-border banking and financial activity would help pool resources from all member states in the arrangement. These resources could then be used to fund credible domestic and regional projects.

[53] For years, natural resources have played a negative role in many of Africa's bloodiest wars, from Sierra Leone and Liberia to Angola and the Democratic Republic of the Congo (DRC).

[54] Balassa B; *The Theory of Economic Integration*; Greenwood Press Westport, Connecticut 1961;p.2

ii) *Developing the national financial systems and national financial regulation mechanisms*: drawing from the previous point, cross border banking and financial activity will no doubt bolster the advancement of national systems because the Member States that render more advanced banking and finance services and functioning capital markets can easily transfer the skills to other Member States that lack these advanced services. Also the risk of contagion will propel the Member States with more efficient financial regulatory authorities to take a lead in ensuring top-notch regulation and supervision to avoid systemic risk spreading across the region. This will ensure financial stability.

iii) *Harmonizing regional laws*: in the same connection, a harmonized regional system for regulation and supervision would enable all Member States adhere to stipulated regional standards.

iv) *Encourages competition and innovation in the banking and finance sector*: opening regional markets would likely result in increased competition and consequently innovation which would encourage a better lending and credit system. This system would thereby promote cheaper and more competitive services across the region.

v) *Risk diversification*: closely linked to the above point, an efficient credit system provides an array of investment opportunities. Investors will be able to have multiple options of combining investment portfolios and as such the ability to diversify risk. This is advantageous as it promotes investment and resources can be channeled to other projects.

Balassa defines a preferential trade agreement (PTA) and free trade areas (FTA) as the former being an agreement to reduce customs duties (mainly tariffs) on trade among members relative to those on trade with non-members and the latter referring to an area where tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against non-members. Further, while a customs union is where tariffs (and quantitative restrictions) between the participating countries are abolished and the participating countries share a common external tariff against non-members, a common market is a higher form of integration where trade restrictions as well as restrictions of factor movements are abolished.[55] This definition is elaborated further by Tsoukalis as an economic area within which there is free movement of goods, services, persons and capital.[56] A monetary union has been defined as the high degree of

[55] Ibid

[56] Tsoukalis L; *The New European Economy Revisited*; OUP 1997, p.12-13

coordination of monetary, macroeconomic and budget policies.[57] Reinforcing the argument for supra-nationalism, an economic and monetary union can be differentiated from total economic integration in that the latter is 'the unification of monetary and fiscal policies requiring the setting up of a supra-national authority whose decision are binding on for member states.'[58]

It is worth noting that an African Development Bank (ADB) report set forth a 5 stage criteria for attaining financial integration within RECs.[59]These stages are illustrated in Table 1 below.

[57] Molle W; *The Economics of European Integration: Theory, Practice, Policy*; Aldershot, Dartmouth 1994;p.11
[58] Balassa (n.54)
[59] *Financial Sector Integration in Three Regions in Africa* (African Development Bank, Tunis, 2010), p. 36-37; Table 2.1;available online at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/AfDB%20Regional%20Financial%20Integration%20REPORT_EN.pdf (accessed 10 April 2014)

2.2.2.2 Table 1: Regional Financial Integration: A Generic Roadmap

Stage of RFI	**Domestic measures**	**Regional measures**
Preconditions	*Macroeconomic stability* *Bank soundness*	
Stage I: Preparatory Member countries begin to take steps to modernize their financial systems by implementing parts of international financial standards and initiating exchange of information among themselves	Improve national payments systems (RTGS) to reduce payment delays and transfer costs Strengthen bank supervision and regulatory framework ('partial' compliance with BCPs) Improve accounting standards (IFRS) Improve core elements of legal system (land and corporate registries, property rights, contract enforcement)	Agreement to establish FTA Regional secretariat to advance and implement regional agenda Exchange of information and regular meetings between monetary and financial authorities Regional committees to delineate areas and modalities of the integration process Bilateral and regional agreements to offer technical assistance to 'less developed' members to upgrade their financial systems
Stage II: Harmonization Member countries to modernize their financial system. Steps should be taken to harmonize and link regional financial policies, institutions, and rules and regulations	Expand payments systems to include electronic fund transfers, security deposit systems, and payment switches Devise cost-effective systems for small transfers Further strengthen bank supervision and regulation by 'large' compliance with BCPs, IAIS, & IAS Remove intraregional exchange controls Liberalize foreign capital inflows Strengthen stock exchange (if it exists) rules and regulations, and implement supervision ((IOSCO) principles Substantially complete the modernization of the financial systems, making them market-based; Central bank autonomy and reinforced supervisory authority Remove barriers to entry of regional and foreign banks to	Fully effective FTA Agreement on relevant convergence criteria (voluntary compliance) Establishment of (advisory) surveillance and monitoring mechanism Regular meetings between country regulators and supervisors Harmonization of policies regarding inward capital flows Liking national payments systems (REPSS< TARGET) Establish private financial sector consultative bodies (association of bankers, accountants, stock exchanges, etc.) Establish regional physical infrastructure development bodies

	improve competition Develop national credit information systems.	
Stage III: Cooperation Members make substantial cooperative moves towards harmonizing and linking their financial sector policies. They also strengthen and make more operative the regional surveillance and monitoring mechanism	Gradually liberalize exchange controls vis-à-vis the rest of the world Implement regionally agreed comprehensive convergence criteria Coordination of monetary and exchange rate policies	Agreement to establish customs union Regional FDI regime Establishment of comprehensive convergence criteria (mandatory) and its monitoring with MDBs/IFIs support Full harmonization of regulatory, supervisory, and accounting standards Single bank licensing, cross-border participation of regulators and supervisors in bank supervision Development of a centralized credit information system Development of region-wide securities market infrastructure and regulations
Stage IV: Integration Members move to unify their institutions, rules and regulations, as well as financial products.	Adapt/modify domestic legislative and regulatory requirements and institutional set-up to conform to the requirements of this stage of RFI.	Fully effective customs union Unified stock exchange Adoption of broad legal system (e.g. OHADA treaty by WAEMU countries) Partial pooling of reserves Regional bond market
Stage V: Unification In this stage members yield sovereignty in monetary policy to a regional authority	Exchange local currency for a regional currency Reserves in common currency	Regional central bank Regional common currency

The ADB report touted financial integration as a process ending with monetary union and not just one leading up to it. The roadmap outlined above involves a number of detailed measures to be implemented at various stages of the integration process.

The need to integrate African economies has been widely endorsed however the nature and scope of this integration remain contested. This breakdown fuels the argument which underpins this chapter as to whether there is now the need for a new mixed African model of integration; suggesting that countries be grouped in accordance to their current integration commitments. This will be such that as part of the enlargement process, those at the basic levels within preferential and free trade areas will be gathered in the same arrangement. Following successful implementation and accomplishment of certain criteria they then ascend to the customs union block, thereafter into a common market and subsequently the monetary union arrangement with a political union the last phase. This undoubtedly lends credence to the truth that an effective framework for overall regional financial integration can only be derived upon the success of simpler forms of economic integration such as free trade areas and customs unions. This will now be put into context in the ensuing paragraphs as the African Union project is unfolded.

Part Two

2.2.3 The Organization of African Unity (OAU) to African Union (AU)

The post-independence period of the 1960's brought about protectionist economic policies adopted by the newly independent states across the continent as opposed to any form of state cooperation beyond the colonially imposed boundaries. This was due to the melancholy which prevailed following the exploitative nature of colonialism they had suffered and that any form of state cooperation could bear similar effects. This approach was very unpopular with respect to the international markets and states became increasingly overlooked thereby ushering in regional economic integration as a more thoughtful system moving forward.

Consequently, the OAU was the first attempt hatched in 1964 as an all-encompassing framework for an African-wide integration system. Its objective was to promote economic development through economic cooperation among the economies of the African states.[60]To achieve this, it sought coordination and harmonization in the context of economic and political cooperation.[61] It is worth noting that eventually other sub-regional groupings were formed typically among countries that shared the same colonial history on one hand and among countries within the same geographical region on the other. There are fourteen sub-regional economic groupings which have existed concomitantly with the OAU although as

---

[60] Art 2(1)(2); Charter of the Organisation of African Unity (1963) 479 UNTS 39 (OAU Charter)- Salami I: *Legal and Institutional Challenges of Economic Integration in Africa*; EJL, Vol. 17, No.5, September 201, p.668

[61] Art (2)(2)(b); OAU Charter

abovementioned only eight have been recognized by the AU.[62] A unique fact prevalent is that majority of the African states are members of more than one regional or sub-regional bloc. As it will be seen, the various regional blocs and indeed the individual countries that comprise their membership were and still are at differing stages of development and implementation of their regional arrangements. This continues to pose significant difficulty for the smooth functioning of an African-wide integration system.

2.2.3.1 The AU and AEC Treaty

The United Nations Economic Commission for Africa (UNECA) which became the driving force of regional integration and the OAU in its entirety struggled to meet the aforementioned objectives and as a result the Lagos Plan of Action (LPA) was adopted in 1980 by the OAU. The LPA led the way for the treaty establishing the African Economic Community (AEC). The AEC Treaty[63] came into force in May 1994 and following its ratification, the OAU operated on the basis of the OAU Charter and the AEC Treaty. The LPA aimed to create separate but confluent and overarching integration regimes in three blocs via three sub-regions which were West Africa, Eastern and South Africa and Central Africa.

Further, Article 6(2) of the AEC Treaty affirms the main purpose of the AEC is to realize an African Central Bank and single currency by 2028 in six different stages. Placing this into perspective, this continental integration process is an ambitious plan that seeks to do in thirty-four years what Europe accomplished in forty-one years. Other aims of the AEC as outlined in Article 4(1) provide that the AEC is to promote social and cultural development including African economic integration with the view of realizing economic development.

Firstly, within the first five years, Stage I will aim at strengthening existing RECs and where necessary will create new ones.

Secondly, within eight years, Stage II will focus on the stabilization of tariff and other barriers to regional trade and the strengthening of sectoral integration, particularly in the field of trade, agriculture, finance, transport and communication, industry and energy, as well as coordination and harmonization of the activities of the RECs.

---

[62] Available online at: http://www.au.int/en/organs/recs (assessed 01 September 2014). It is worth noting that although the WAEMU is not recognized as an REC under the AU, it remains an important regional arrangement in Africa because all its members belong to other RECs which have been recognized by the AU.

[63] Available online at: http://www.wipo.int/edocs/lexdocs/treaties/en/aec/trt_aec.pdf (assessed 10 April 2014)

Thirdly, within ten years, Stage III will seek to establish an FTA and a Customs Union at the level of each REC.

Fourthly, in two years, Stage IV will subsequently coordinate and harmonize tariff and non-tariff systems among RECs, with a view to establishing a Continental Customs Union.

Fifthly, within four years, Stage V will establish an African Common Market and the adoption of common policies.

Finally in the last five years Stage VI will integrate all sectors, establish an African Central Bank and a single African currency, set up of an African Economic and Monetary Union including creating and electing the first Pan-African Parliament. The justifications for the need of a monetary union intersect with those for an RFI arrangement. These include:

a) the furtherance of price stability by controlling inflation where the mandate of the union establishes price stability as a pivot of monetary policy;

b) also, curbing inflation and stabilizing exchange rates stimulates economic activity thereby promoting growth and facilitating foreign investment as a result of the macroeconomic stability;

c) again, currency convertibility will enable smooth unrestricted trade within and without the region. This solves pertinent problems caused by transaction costs and delays from using foreign currencies like the dollar and euro in intra-regional trade given that business transactions are normally carried out in foreign currency;

d) further, closer cooperation and trade will enhance the region’s influence in the global economy.

The establishment of an African-wide monetary union with a Central Bank is overly ambitious by every measure considering that a monetary union typifies the deepest form of RFI. The legitimacy of the ambition to accomplish this project within the prescribed deadline can be questioned however as African states have so far found it difficult to realize the more basic forms of integration.

Remarkably, a transformation occurred in 2001 with the advent of the new Constitutive Act--the OAU was now changed to the African Union (AU).[64]

The AU was formed in order to accelerate the process of economic and political integration across the continent concurrently with the achievement of the already existing economic development goals of the OAU. Suffice to say therefore that the AU was set up to pursue the aims of both the OAU Charter and the AEC Treaty. This will ultimately unify the OAU and the AEC into one institution. Generally, the AU objectives are more wide-ranging than those of the OAU however Article 33 (2) of the AU Act states:

"*The provisions of this Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community*".

It is worth mentioning that the majority of the RECs abovementioned aim to create a customs union and a common market through the elimination of obstacles to enable the free movement of goods and services, labour and capital. Needless to say that none of them can showcase an efficient common market; not even COMESA, which is known as a common market. The same situation exists with the other African RECs like SADC, WAEMU and CEMAC that have a monetary union.[65]

2.2.3.2 Accelerating Economic Integration in Africa

After the AEC Treaty, the integration process has remained slow despite many good attempts to accelerate the process of economic integration in the continent. Firstly The Sirte Declaration of 1999 tried to shorten the AEC Treaty time-frames and then the Accra Declaration of 2007 called for a Union government of Africa to speed up political and economic integration. In 2009 the Minimum Integration Program (MIP) was established as agreed by Member States, the RECs and the African Union Commission (AUC) to enhance the cooperation amongst RECs as a continental framework to achieve economic integration in the continent. MIP is of capital importance as it promotes the idea that allows RECs progress at differing rates in an organized manner while simultaneously carrying out the activities laid out in MIP. This builds consensus around the activities and projects to be executed to accelerate the regional and continental integration process. Also MIP infuses greater visibility into the implementation of both the regional and continental agenda and

---

[64] The Constitutive Act of the African Union (11 July 2000) [African Union Act); Available online at: http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf (Accessed 10 April 2014)

[65] WAEMU and CEMAC are not recognized as RECs in the AU/AEC agenda.

clarifies the relationships, restoring synergy between stakeholders in terms of policy coordination and harmonization.[66]

One of the areas of priority which was to be achieved by the RECs in the first phase of MIP included free movement of people, goods, services and capital by progressive elimination of tariff barriers in all the RECs; elimination of non-tariff barriers in the RECs; signing of partnership agreements between RECs; facilitation of customs procedures and creation of customs unions in each REC with a common external tariff; total free movement of people in the regions and partial free movements between the regions; free movement of goods in the regions; progressive free movement of services and capital in the regions; establishing a regional and continental framework to attract visitors.[67]

The MIP did admit that although the RECs function in specific environments with projects and programmes suited to their circumstances, it is vital for their actions to be coherent with their role as the building blocks of the AEC. The coordination and harmonization of these activities around jointly negotiated priority programmes will accelerate the continent's integration. Therefore, actualizing the MIP will depend on the resolve of each stakeholder to play their role and to give solid expression to its share of the programme.[68]

Unfortunately, most RECs are still far behind establishing a customs union by 2017 as per the time frame of the AEC Treaty and the main bottlenecks hindering MIP are identical to those existent before it was created. These are non-implementation of regional policies and provisions at national levels; absence of supranational coordination and leadership at the AU level; conflict of interest issues that arise from the countries' multi-membership of REC's.[69]

Suffice to say however that behind every dark cloud hides a silver lining as evidence of cooperation amongst RECs has been recorded following the COMESA-SADC-EAC Tripartite Summit on the 20 October 2008. This marked a significant high-point as for the first time in AU history, key building blocks of the AEC met to plan how to deepen cooperation between

---

[66] AU; *Minimum Integration Programme 2009-2012*; May 2009; available online at: http://www.africa-union.org/root/ua/Annonces/2010/EA/MIP/MIP%20Small%20Doc%20English%20Version%20for%20Web.pdf (accessed 11 April 2014)

[67] Ibid

[68] Ibid

[69] Salami (n.3 p.17)

themselves within the AEC Treaty framework.[70] The second Tripartite Summit dated 12 June 2011 provided evidence which solidified the commitment by these three RECs and their member states to foster integration.[71] They indicated strong willpower to see an integrated Africa by adopting a road map for establishing the Tripartite FTA and adopting negotiating principles, processes and institutional frameworks. It can only be hoped that these efforts will come to fruition.

Clearly, there is little doubt as to the many advantages that regional economic integration can bring to Africa. Nevertheless, the outlined plan for continent-wide-integration appears to be far more advanced and ambitious than the Member State's readiness for it. Any revisions, modifications or additions should be therefore be practicable.

More so, this thesis concedes that the characteristic weaknesses in the legal structures across most RECs serve as the main hindrance to achieving their goals at the regional level and also attaining the overall AU objectives. As Africa's role in the global sphere increases, these legal impediments become more apparent and there is the urgent need now more than ever for them to be addressed.

2.3 The Status and Implementation of Regional Law in REC Member States

Generally, most RECs would usually have primary law which typically constitutes treaty provisions establishing the REC and also secondary law which is composed of all other legal instruments adopted by the institutions of the organization.

Most REC treaties fall short in providing for the status and applicability of REC secondary law or legal instruments in Member States even though most REC treaties have a general provision for adherence to their treaty obligation. For instance in the case of ECOWAS, the status of the 1975 Treaty was stated in Article 3:

[70] Final Communique of the 1st Joint COMESA-EAC-SADC Tripartite Summit: *Towards a Single Market* ;Kampala, Uganda, 20 October 2008. Available online at: http://www.comesa-eac-sadc-tripartite.org/sites/default/files/documents/Final%20Communique%20%20The%20Tripartite%20Summit%202008.pdf (Accessed 13 April 2014).

[71] Final Communique of the 2nd COMESA-EAC-SADC Tripartite Summit held on 12 June, 2011 in Johannesburg, South Africa. Available online at: http://www.comesa-eac-sadc-tripartite.org/sites/default/files/documents/Communique%20of%20the%202nd%20Tripartite%20Summit%20-%20English%20-%2012.06.2011.pdf (Accessed 13 April 2014).

'The Member States shall make every effort to plan and direct their policies with a view to creating favourable conditions for the achievement of the aims of the Community; in particular, each Member State shall take all steps to secure the enactment of such legislation as is necessary to give effect to this Treaty.'

With respect to the secondary instruments, two main types of legal instruments originated from two institutions of the community. Firstly were the 'Decisions' and 'Directions' of the Authority of Heads of State and secondly were the 'Decisions' and 'Directions' of the Council of Ministers. The Authority of Heads of State is the highest institution of the community and their 'Decisions' and 'Directions' were binding on all institutions of the community.[72] The 'Decisions' and 'Directions' of the Council of Ministers, on the other hand, were binding on all subordinate institutions of the community.[73] No mention of the effect of these legal provisions on Member States is made and in fact, the failure to specify the binding effect was a significant weakness of the 1975 Treaty even though the revised 1993 ECOWAS Treaty sought to solve this problem. The 1993 Treaty clearly stipulates that the 'Decisions' of the authority shall be binding on the Member States and the institutions of the community.[74] However, it did not specify particularly the legal effect of 'Decisions' in Member States.

It is worth pointing out the similarity that exists between the other RECs in Africa with regards to the status of both the primary and secondary law. In SADC for example, the treaty provides, imprecisely, for the effect of SADC treaty provisions as Article 6(1) states:

'Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.'

Furthermore, Article 6(4)–(5) stipulates that:

'Member states shall take all steps necessary to ensure the uniform application of this Treaty. Member States shall take all necessary steps to accord this Treaty the force of national law.'

---

[72] Article 5(3); ECOWAS Treaty 1975

[73] Ibid, Article 6(3)

[74] Article 9(4) and 12(3); ECOWAS Treaty 1993

There is neither mention of secondary law nor any provision to address the application of such law at the national level.

Another interesting position is that of the revised EAC Treaty 2007. Article 8(4) states:

‘Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.’

This does not consider or acknowledge the fact that there might be national provisions that are entirely different from the treaty and it fails to state which would prevail. This is the same scenario with Article 8(5), which stipulates:

‘In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones.’

This is problematic because it could now be interpreted that since the national provisions are dissimilar and totally contradictory to the regional framework, there would be no need to ensure their compliance with the EAC Treaty. This interpretation is likely given that there clearly would be no need to pass the ‘necessary legal instruments to confer precedence of Community organs, institutions and laws’ since the national law in question is different to the treaty provision.

Also, Article 16 whose title is ‘Effects of Regulations, Directives, Decisions and Recommendations of the Council’ states:

‘Subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly within their jurisdictions, and on those to whom they may under this Treaty be addressed.’

This article somehow mentions secondary law of the treaty but does not define their status. These provisions are quite peculiar because other than the treaty, this is the first mention of regulations, directives and decisions of the council. Ideally, these instruments which should have different binding effects ought to be defined. Unfortunately their status has not been defined as opposed to the provisions of the EC Treaty, which it sought to emulate.

The case of ECCAS is also remarkable. Article 5(2) spells out the status that should be accorded the treaty nationally. It states:

‘Each Member State shall take all steps under its constitutional procedures to secure the enactment and publication of such legislation as is necessary to give effect to this Treaty.’

Also, Article 11(1)–(3) states that:

“The Conference shall act by decisions and directives. Decisions shall be binding on the Member States and institutions of the Community, except for the Court of Justice. They shall become enforceable automatically in Member States Thirty (30) days after the date of their publication in the official journal of the Community. Directives shall be binding on the institutions concerned, except for the Court of Justice. They shall come into force upon notification and shall be published in the official journal of the Community.”

While Article 15(1)–(3) stipulates that:

‘The Council shall act by regulations. Regulations shall be binding on the Member States and institutions concerned, except for the Court of Justice. They shall be enforceable automatically in Member States thirty (30) days after the date of their publication in the official journal of the Community. They shall become effective for the institutions concerned immediately upon notification.’

These articles outline decisions, directives and regulations as the secondary instruments of ECCAS and have sought to make provision for their effect at the national level. They go on to indicate that Decisions and Regulations take effect in Member States 30 days after the date following publication in the official community journal. Be that as it may, it does not factor in the possibility that the legal systems within Member states could be dissimilar and as such could have implications on the effect of international law domestically.

Thus far, it would seem the REC Treaty provisions of the COMESA Treaty are the most detailed. Articles 2 and 10 differentiate between the status of the treaty provisions on one hand and secondary legislation of the council in Member States on the other. Article 2 states:

'Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular . . . to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.'

Article 10(1)–(5) defines the status of COMESA secondary legislation within Member States—something which the other REC treaties conspicuously neglect. It states:

"The Council may, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. A regulation shall be binding on all the Member States in its entirety. A directive shall be binding upon each Member State to which it is addressed as to the result to be achieved but not as to the means of achieving it. A decision shall be binding upon those to whom it is addressed. A recommendation and an opinion shall have no binding force."

However there remain several impediments to the realization of the customs union and common market objectives in spite of these detailed provisions, on the status of the COMESA treaty and secondary legislation in Member States. For instance non-tariff barriers affect the free movement of goods thereby hindering trade among Member States.[75] Nevertheless, the efficacy of regional enforcement structures in addition to the supreme status of the treaty and its legal instruments being accorded in Member States would ultimately determine the application of these provisions. In short, the general vagueness of most of the REC Treaty provisions confirm that those who drafted the treaties as well as the ratifying states made little or no preparation for compliance within Member States. Little wonder hardly any of these RECs have fully achieved their objectives.

RECs such as ECOWAS and EAC which make provision for legal instruments to have binding effect in Member States but omit to specify how they would be implemented leave the execution of these laws in the hands of national parliaments. Again, the failure of most Member States to accord supreme status to REC provisions over national law allow these REC legal instruments to be ignored in most Member States. It remains true that the REC treaties ought to have articulated clearly the status of REC legal instruments to avert confusion. That notwithstanding, even in cases such as COMESA where the treaty clearly stipulates the status, because Member States fail to accord a supreme status to REC

[75] Mayda A and Steinberg C; *Do South–South Trade Agreements Increase Trade? Commodity-Level Evidence from COMESA*, IMF Working Paper 07/40 (IMF, 2007); available online at http://www.imf.org/external/pubs/ft/wp/2007/wp0740.pdf (accessed 20 September 2014)

provisions at the national level, the articulation of the status of these legal instruments in the REC Treaty is therefore expendable. History shows that regardless of the types of legal systems which African states operate, they typically do not have a reputation of complying with regional treaties and legal instruments. This is a reputation that has to change for things to move in a forward direction especially knowing now that the articulation of the status of REC treaties and the legal instruments must go hand-in-hand with specifications on how they would be implemented in Member States.

2.3.1 The Credibility of Regional Enforcement Systems

In Africa, the REC treaties have normally made provisions for the creation of community Courts of Justice and tribunals, but the reality is that the provisions have fallen short of granting these regional enforcement mechanisms the authority to hear cases referred to them by national courts. For example, the 1975 ECOWAS Treaty provided for the establishment of a tribunal to resolve disputes between Member States and to ensure the legal and just interpretation of the treaty.[76] In the event of an unsuccessful resolution of disputes between Member States, the tribunal's decisions would be final.[77] The treaty did not provide for initial referral of disputes to the tribunal and this omission clearly resulted in the failure of the tribunal to foster community law and enable its possible supreme status. No wonder upon revision of the treaty in 1993, the tribunal had fallen short of establishing a body of jurisprudence.

Unlike the 1975 Treaty, the revised 1993 treaty accentuated the legal aspects of ECOWAS with the most notable change being the provisions for the establishment of a 'Community Court of Justice.'[78] In addition to the abovementioned functions of the tribunal, Article 15(4) further made provisions for the court's judgments to be binding on Member States, institutions of ECOWAS, individuals and corporate bodies. A protocol in defining its competence stipulated that it could hear disputes between Member States; and between Member States and community institutions on the interpretation and application of the treaty.[79]

In spite of this, due to the lack of a platform to enable the development of the supreme status of the ECOWAS Treaty, the revised treaty has been unable to guarantee the implementation of ECOWAS provisions in and by Member States. Still no provision for the referral of cases

[76] Article 11(1), ECOWAS Treaty 1975

[77] Article 56, ECOWAS Treaty 1975

[78] Article 6(1)e, ECOWAS Treaty 1993

[79] ECOWAS Protocol A/P1/7/91 on the Community Court of Justice Art 9(2)

by national courts to the community court was made for the interpretation of treaty provisions. Consequently, the community court could not exert the kind of influence to ensure the establishment of supremacy of African Community law. The case that vividly exposes this shortcoming is *Olajide Afolabi v Federal Republic of Nigeria*[80], where the plaintiff sought redress from the ECOWAS Court against Nigeria for closing the Benin border. This act had resulted in his business suffering a loss. Clearly this was a violation of the free movement provisions under the treaty however Nigeria argued that the ECOWAS court did not have jurisdiction to hear the case. The ECOWAS court folded under this argument and dismissed the case.[81]

In this case, the Applicant contended that the Court had jurisdiction to hear the substantive case on the grounds of the peculiar nature of the suit wherein the Applicant instituted proceedings against his State. Every provision of the Community law must be placed in its context and applied or interpreted in the light of the provisions of Community law as a whole and in the light of all those considerations. The Court stated that the answer to the question submitted must be that the first paragraph of Article 9(3) of the Protocol which states that: *"a Member State may, on behalf of its nationals, institute proceedings against another Member State or Institution of the Community, relating to the interpretation, application, of the provisions of the Treaty, after attempts to settle the dispute amicably have failed"*; is to be applied as meaning that this Court is competent to hear disputes instituted by a Member State on behalf of its nationals against another Member State or institution of the Community and not otherwise, as was the case. By the examination of the said Protocol, the Court held that the Applicant cannot bring proceedings other than as provided in Article 9(3) of the Protocol. This view proved the point that the Applicant in this case could not bring the proceedings against his Country or Member State which by law is saddled with the responsibility of instituting proceedings on his behalf. The Court stated that the issue before it was that of competence to adjudicate on the proceedings instituted by the Applicant against the Respondent and not on *locus standi per se*, which the Applicant contended.[82]

This position was similarly taken in *Frank Ukor v Richard Lalaye*[83]. Here an action was brought against Benin by one of its citizens for the seizure of his truckload of goods. He

[80] ECW/CCJ/APP/01/03 (2003)

[81] It is worth mentioning that as there was no legal obligation for a Nigerian court to refer the case for preliminary ruling, the case was not referred to the ECOWAS court by a national court, instead the plaintiff exercised his right under the Community Court Protocol (A/P1/7/91, art 10(d)) to bring an action directly.

[82] For the case summary see: http://dev.ihrda.org/doc/ecw.ccj.jud.01.04/view/ (accessed 01 July 2014)

[83] ECW/CCJ/APP/01/04 (2004)

argued that this was in violation of the free movement provisions of the ECOWAS treaty. As in the previous case, Benin also argued that the court had no jurisdiction and the court yielded and dismissed the case.[84]

Here, the issue of jurisdiction of the Court considered Article 88 which provides as follows:

"*1. Where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may by reasoned order, after hearing the parties and without taking further step in the proceedings gives a decision.*
2. The Court may at any time of its own motion consider whether there exist any absolute bar to proceeding with a case or declare, after hearing the parties, that the action has become devoid of purpose and that there is no need to adjudicate on it; it shall give its decision in accordance with Article 87(4) and (5) of these Rules."

*C*oncerning the question of lack of jurisdiction, the Court considered the jurisprudence on jurisdiction which are deplete in the decisions of the Court, nationally and internationally as to when they may be said to lack it. On that basis, the cardinal principle of law on jurisdiction which never changes is that jurisdiction or lack of it is fundamental to the proceedings. It is trite law that jurisdiction means simply the power of a Court to entertain an action. On this note, this Court declined to act outside its mandate as specified in Protocol A/P1/7/9.[85]

As expected, the ECOWAS Court of Justice is therefore unable to also play a central role in developing the common market goals of ECOWAS.

This situation is similar among the enforcement mechanisms in other African RECs. Despite the fact that most of the treaties make provisions for the establishment of a court or a tribunal to ensure the interpretation of the treaty and dispute resolution between Member States arising from the treaty, it was only the COMESA, EAC and WAEMU treaties that allowed for national courts to refer cases to the regional enforcement body.

Others such as SADC, ECCAS and AMU like the ECOWAS Treaty had 'skeletal' outlines. In the SADC Treaty for instance, Article 16(1) states:

---

[84] For the case summary see: http://dev.ihrda.org/doc/ecw.ccj.jud.01.05/view/)accessed 01 July 2014)

[85] Protocol A/P.l/7/91 on the Community Court of Justice: available online at: http://www.courtecowas.org/site2012/pdf_files/protocol.pdf (accessed 01 July 2014)

'The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it.'

Article 16(4) provides that: *'The Tribunal shall give advisory opinions on such matters as the Summit or the Council may refer to it,'* while Article 16(5) states: *'The decisions of the Tribunal shall be final and binding.'*

Further, Article 32 stipulates that: *'Any dispute arising from the interpretation or application of this Treaty, which cannot be settled amicably, shall be referred to the Tribunal.'*

This is markedly similar to ECOWAS and even though the treaty goes on to provide for decisions of the tribunal to be final and binding and that disputes that cannot be resolved amicably shall be referred to the tribunal; it neither explicitly makes reference to Member States nor require Member State courts to refer cases for clarification to the tribunal. Evidently, the SADC tribunal could not develop community law nor foster the realization of common market goals.

The COMESA Treaty which has already been touted as the most comprehensive treaty of all the African REC treaties considered provides for an appropriate enforcement mechanism[86]alas, due to existing hindrances to the free movement of goods such as non-tariff barriers, trade is still obstructed between Member States. Yet Member States fail to seek judicial intervention in dealings between themselves. As a result, the supremacy of community law has not been realized within COMESA nor has the community court been influential in facilitating the fulfillment of common market goals despite all its exhaustive provisions.

In ECCAS's case, the treaty provision is sketchy regarding enforcement mechanism. Article 16(2) makes provision for the establishment of a Court of Justice that *'. . . shall ensure that the law is observed in the interpretation and application of this Treaty and shall decide disputes submitted to it under this Treaty.'* Article 16(3)(b) states that: *'The Court shall decide on actions brought by a Member State or the Conference on the grounds of lack of competence, misuse of powers or infringement of an essential procedural requirement of this*

[86] Article 19 outlines that the COMESA Court of Justice shall ensure the adherence to law in the interpretation and application of this treaty. Article 30(1)–(2) on national courts and preliminary rulings states that the highest court in the Member States should refer cases for preliminary rulings to the community court where the matter relates to the interpretation of the treaty.

Treaty,' while Article 16(3)(c) stipulates that the Court shall *'. . . give preliminary rulings on: the interpretation of this Treaty; the validity of the decisions, directives and regulations formulated by Community institutions.'* Article 17 also states that *'The decisions of the Court of Justice shall be binding on Member States and institutions of the Community.'*

Interestingly, regardless of the meagerness of the ECCAS Treaty, it somehow provides power for the community court to grant preliminary rulings—which have been central to the development of the supreme status of regional law. It unfortunately does not specify under what circumstances cases will be brought to the court and by whom. It remains unclear whether as with the EC and COMESA Treaties, it is the highest courts of the Member States or whether it is simply the institutions of ECCAS.

The subsequent necessity would be the impact of this provision on the achievement of the common market objective. Sadly, the ECCAS Court has no records of facilitating the realization of ECCAS goals because the achievement of peace and security within the region became a priority due to the prevalence of regional conflicts.[87] In this light, a provision on the court's power to grant preliminary rulings was made redundant as without peace and stability within and without Member States, the common market agenda was dead-on-arrival anyway. This peace and stability initiative has been recently tested following the coup d'état in March 2013 which ousted the President of the Central African Republic-a member state of ECCAS.

The AMU Treaty and the enforcement mechanism provision are quite scanty. Article 13 which designs the enforcement mechanism in the form of a judicial authority comprised of two judges from each Member State, appointed for a period of six years. Their judgments shall be enforceable and final with regards to their rulings on disputes concerning the interpretation and application of the treaty and agreements concluded within the union. There is no provision for preliminary rulings and the development of supremacy of regional law given that the judicial authority as the case with ECCAS, sought to achieve security and stability first due to the conflicts within the region, which for many years inhibited any attempts of establishing a common market.[88]

---

[87] African Union, *Regional Economic Communities: History and Background of Economic Community of Central African States*, available online at http://www.africa-union.org/root/au/recs/eccas.htm (accessed 20 September 2014)

[88] The effect of the 'Arab Spring" which began in Tunisia in December 2010 and spread throughout the Arab World cannot be over-emphasized as a revolutionary wave of protests consumed the status quo. Suffice to say

2.3.2 Recommendations

The examples above show that despite the efforts made by the African RECs to adopt a coherent regional integration model in both their treaty texts and long term common market objectives, they have fallen short more often than not. This triggers the necessity for vital reforms at both the domestic and regional levels to salvage the situation. Some proposals for reform will now be discussed below:

a.) *<u>Clarity of definition of REC Legal Instruments in Member States</u>*

But for the COMESA and WAEMU treaties, the other REC treaties considered above have shown that the draftsmen failed to neither provide clarity on the definition of the instruments that constitute secondary law nor provide explicitly for their effects in member states. Reforming the treaties by bridging these gaps will maximize the weight accorded these secondary law instruments in the national courts as well as before the regional enforcement mechanism.

b.) *<u>The concept of Supra-nationalism</u>*

The lack of subscription to the concept of supra-nationalism in Africa has dented the regional integration project. The African experience is characterized by weakness in leadership at the regional levels and ineptitude of the regional institutions to carry out their duties worsened by Member states blatant disregard of their obligations under the REC Treaties. This issue can only be resolved by strengthening RECs in Member States by expressly embedding regional laws in domestic laws. This will no doubt bolster the supranational framework.

c.) *<u>REC goals</u>*

A significant number of African RECs have obscure aims especially in relation to articulating their common market objectives. Omitting to mention integral parts of a common market or indeed stating that the project seeks to achieve a common market without specifying its component parts makes assessing the REC’s progress problematic and questions its integrity. The objectives of the RECs must be clearly articulated and defined to eliminate any ambiguity.

---

the impact on peace and stability in this region would drastically affect any integration project. Additionally the prevalence of distractions like Boko Haram only delay any progress made in terms of peace and stability.

d.) *Regional Enforcement Framework*

Noticeably thus far, the foremost limitation of the legal systems of the African REC treaties is the weakness of their regional enforcement mechanisms which exude little or no authority. In spite of the fact that the duty to ensure that REC treaties are executed by Member States rests with them, the status quo confirms they lack the power to ensure compliance on the ground. Fair to say even with the EAC, COMESA and WAEMU Treaties which allow this provision, the regional enforcement institutions have been too defunct to make any remarkable difference.

Again, the REC enforcement institutions have not developed concepts such as direct applicability and effect which render the influence of the treaties in Member States and to community citizens abstract. All these don't help in the institutions' reputation in fostering the goals of RECs and the overall common market goals.

In order to reform the treaty provisions, it makes sense to ensure a common policy towards regional enforcement mechanisms requiring all RECs to have standard Courts of Justice or tribunals as the accepted enforcement mechanisms. The powers accorded the institutions to ensure compliance must be real and the repercussions for failure to comply properly spelled out. This will include adopting a common policy towards according all REC enforcement institutions the power of preliminary ruling so national courts can refer cases to be heard. Where regional courts appear to develop jurisprudence such as in ECOWAS and SADC, even though the bulk of cases heard are human rights cases, it will be ideal to encourage these institutions to take the lead and play a more active role in enforcing common market provisions thereby improving the chances for the achievement of common market goals.

e.) *Efficient Legal and Judicial Systems in Member States*

It is important to empower independent national legal and judicial systems. They should be seen to comprehensively enforce basic laws such as contract laws and property rights in a timely and fair manner. This is critical because the national legal systems are the media through which regional treaty provisions and policies will be applied and should they not operate up-to-snuff, it will jeopardize the overall implementation of Treaties by Member States.

For instance it is sensible to advance the argument that the existence of robust legal and institutional infrastructure in Member States should precede accession into a regional integration arrangement considering the fact that the legal and judicial systems in most

African countries have been plagued by a long history of poor enforcement of basic contract laws and property rights.[89]

f.) *Law of African Integration*

In addition to reforming domestic legal systems, the need to recognize African Integration Law within the core curriculum of legal education remains paramount. Unfortunately as this has not been recognized as a distinct area of law, the legal professionals such as lawyers and judges who will represent in and preside over these cases respectively could flounder as a result of incompetence. This is likely because the lawyers and judges will emerge from these communities where there have been no efforts made to enhance their expertise in this area of law. It is imperative that African Integration law going forward be developed and incorporated into the syllabus for formal legal training for future legal professionals. Essentially, to ensure professionals are kept abreast with international developments in this area, well-resourced information on integration law needs to be made available in libraries and learning centers. This information must be updated regularly and made accessible by appropriate communication technology.[90]

---

[89] Doing Business, *Measuring Business Regulation: Explore Economies*, available online at http://www.doingbusiness.org/rankings (accessed 25 September 2014). A World Bank survey conducted on 183 countries to assess the ease of doing business in these countries, ranked Sub-Saharan African countries as the lowest and the most difficult places to do business. Part of the parameters used for the study included the effectiveness of the judiciary in enforcing contracts and protecting investors.

[90] Concurrently, the fundamental differences which exist between the legal systems of African countries within a given REC need to be addressed urgently as this has an impact on the overall legal framework of the REC and eventually the AU project as well. Placing this in context, Sub-Saharan Africa is largely made up of English – speaking (Anglophones), French-speaking (Francophones) and Portuguese- speaking (Lusophones), while the Northern parts of Africa are predominantly Arab- speaking (Arabophones). This differences stem directly from their colonial history as the Francophone countries function firmly on the Roman concepts of the French system (*Code Civil*), whilst the Anglophones have backgrounds in the common law system operating on case law. These differences make it problematic to achieve a harmonized legal system in a regional context because of the split in similarities along the lines of colonial heritage. The impact of this is much more pronounced within large RECs that have memberships involving people from different colonial backgrounds like ECOWAS and those that cut across a few sub-regions in Africa such as COMESA. For example, within the ECOWAS the English speaking countries like Nigeria, Gambia and Ghana will have similar legal systems that follow English law whilst the French-speaking countries like Cote D'Ivoire, Togo and Senegal within the same REC follow the French legal system. In fact in Cameroon, because of their colonial ties to both the French and British, both legal traditions co-exist in a bi-jural arrangement within the state. On a positive note however, this has not been known to inhibit regional integration as is evidenced by the EU which comprises different peoples of different legal heritage. This confirms that it is possible to achieve economic integration without full harmonization of legal systems. Also, England and Scotland have managed to co-exist whilst operating different legal systems and whilst procedural issues here have been overcome, within the African integration context experience points to the fact that these

g.) *Supremacy of REC Law*

No matter how effective the national and regional legal and judicial systems are, coupled with well-trained law professionals, all this will be immaterial if there is no domestic law which accords regional law a supreme status. Member States should acknowledge the supreme status of community law through national provisions in the form of constitutions, or Acts of their legislature which explicitly award regional laws supremacy over domestic laws. Sadly, this is absent in African states where state constitutions have often been suspended following military coups which frequently interrupt state governance. In fact even where stable civilian government exists, national courts still fail to recognize regional law as supreme as no explicit supreme status is accorded African integration law. This consequently affects the overall achievement of REC goals as it would be complex to implement regional policies into Member States thus jeopardizing the entire regional integration project.[91]

Reflections

The types of regional financial structures operating in the African financial markets will be examined in the following part and consideration will be made as to the suitability of these kinds of structures. It will be seen that the main reason why African countries face challenges in applying international standards is because these standards do not typically factor in the peculiarities of African financial systems which for decades have been shaped largely by historical, political and economic factors among other things. These can hardly now be compelled into a 'one-size-fits-all' approach to regulation which international standards promote.

Should these internationally acceptable regional standards be adopted, the question about what these standards should be and how they will be established would still arise. As previously discussed, the AU and AEC aim to achieve monetary integration for the entire continent by 2028 by firstly achieving financial harmonization among the regional blocks, and then across the whole continent.

---

issues are more difficult to resolve than even the substantive issues. Nevertheless, the OHADA Treaty discussed earlier is a success story in progress especially with regards to direct applicability in member states.

[91] It is important to stress the need for the recognition of the supremacy of regional law by all the arms of government (legislative, executive and judiciary) including all levels of government in Member States to ensure consistency. Recognition by the legislative arm would ensure that no laws conflicting with REC laws are enacted.

In spite of all the shortcomings which plague the African integration project, these have still not prevented the RECs from pursing the adoption of a modern financial regulatory mechanism- at least on paper.

Part Three

2.4 The Progress of RECs in Africa

It is evident that the main weakness of economic integration in Africa is the failure of Member States to implement REC policies domestically. Firstly, most member states belong to more than one REC with overlapping policies and secondly, the judicial enforcement regimes are weak.

Nevertheless, the efforts made by the COMESA-SADC-EAC Tripartite arrangement provide a breath of fresh air as there is evidence of progress with respect to the Tripartite Free Trade Area (Tripartite FTA) and the Tripartite FTA institutional framework. The summit which took place on 20 October 2008 was a landmark event because it was the first time since the formation of the AU that key regional blocs of the AEC agreed to commence plans on deepening cooperation between themselves. The focus in my opinion should dwell more on ensuring the goals at the level of the individual RECs be fulfilled and the obstacles overcome in order to realize a truly integrated COMESA-SADC-EAC to serve as an example and model for the continent at large. As Salami points out, the focus of any plan such as the Minimum Integration Program (MIP) should not be to accelerate the process of economic integration, but to develop approaches that strengthen the efficacy of the RECs. For example she argues that the plan for an African Integration Fund to assist lesser developed economies within RECs is misplaced. In this case, the proposal encourages the focus on first getting Members States to appreciate the benefits of economic integration to the development process in Africa by raising awareness especially in the private sector. Secondly and more importantly, the AU should strive to persuade Member States' domestic implementation of regional policies. Once these foundations are rock-solid, then plans like the Fund can become relevant.[92]

2.4.1 The institutional structure of monetary union agendas in Africa

Further instances of progress can be seen in respect of the various monetary union agendas albeit at differing rates. Knowing that the emphasis of this thesis is regional financial integration and considering that the deepest form of financial integration is monetary

[92] Ibid

integration, the thesis will now examine the regional financial regulatory structures among the African RECs with a monetary union agenda. These are: WAEMU, CEMAC and SADC.

i.) *WAEMU*

The WAEMU which consists of the francophone countries in ECOWAS provides the best example of a monetary union agenda in Africa. The banking regulatory framework here is provided for by the West African Monetary Union ((WAMU) Treaty formally WAEMU Treaty), the BCEAO (Banque Centrale de Etas de L'Afrique de L'Ouest) Statute and the WAMU Banking Commission Convention. The treaty made provisions for a common banking code for the WAMU countries[93]promulgating into the WAMU Banking Law. Following this banking regulation, the Central Bank (BCEAO) and the Banking Commission jointly share the banking supervisory functions[94] whilst the ministers of finance of the various Member States maintain the residual functions.[95]

Regarding a regional mechanism for capital markets regulation, all existing financial markets within WAEMU have been merged into a single market and operate under a single regulator. The regional capital market is based in Abidjan, Ivory Coast. The adoption of an official regional regulator and stock exchange type capital market integration is advantageous because it enables Member States use only one single rulebook for listing, trading, clearing and settlement. The single market for both bond and stock trading BRVM (Bourse Regionale des Valeurs Mobilieres) and the fund management SICAV (Societe d'Investissement A Capital Variable) are supervised by a regional securities commission

[93] Article 22 WAMU Treaty

[94] The following articles stipulate the banking supervision functions of the BCEAO Statute: Art 23 grants assistance to WAMU banks, Art 24 requests information such as those regarding the financial affairs of banks; Art 25 requests banks to report any cases of payment problems; Art 27 ensures that harmonized banking laws are applied by domestic banks; and Art 28 proposes the need to constitute reserve requirements deposits with itself, including observing ratios within various components of their resources and monitoring ceilings for the amount of some of their uses of resources. Similarly, the banking supervisory functions of the WAMU Banking Commission can be found in the WAMU Banking Commission Convention and its annex. Art 1(1) outlines that the function of the WAMU Banking Commission is oversight of the organization and supervision of banks and financial institutions; Art 1(2) states that the Banking Commission would be governed by the terms of the Annex to the Treaty; Art 12 is on the approval of banks and financial institution; Arts 13–21 are on supervision of banks and financial institution; Art 22 is on administrative measures; Art 23 is on disciplinary measures; Arts 13, 14 and 21 are on joint supervisory functions with the BCEAO. (See Salami I; *Financial Regulation in African frontier markets: can the EU approach work?*; Law and Financial Markets Review Vol.5, Num 5, September 2011, p. 380)

[95] For example Art 31 and Art 12 of the WAMU Banking Convention and the WAMU Banking Law respectively require authorisation from Member States ministries of finance for the licensing and closure of banks.

The BRVM is the only wholly integrated regional capital market in Africa serving eight states in one region. In fact, it is the only model of a single market consisting of eight countries in one region operating in the world. This rarity coupled with the fact that there exists a common regulatory mechanism for all market players has led many to acknowledge the advanced nature of financial integration in WAEMU.

However the growth and development of the capital market in the region remains lethargic. For instance only 38 companies as at 2010 were listed on the exchange compared to 360 listed on the Johannesburg Stock Exchange (JSE). Its total market capitalization was $7.1bn as opposed to $1,012bn for the JSE.[96] Factors already mentioned such as poor legal systems to ensure basic contract laws, secured transaction laws, insolvency laws and property rights coupled with general political instability do little to guarantee protection for institutional investors thereby alienating them from the region. In combination with other socio-economic problems, these legal issues need to be tackled head-on predominantly at the national levels to increase participation by investors on the regional stock exchange.

ii.) *CEMAC*

Other than the WAEMU, another regional arrangement with a monetary union worth discussing is the CEMAC zone. There are similarities with WAEMU in that the banking laws here have also been harmonized. Following the establishment of the regional banking commission, La Commission Bancaire de L'Afrique Centrale (COBAC) in 1990, a Convention was signed in 1992 establishing the harmonization of banking laws across CEMAC. Other than the responsibility for the harmonization of regulations and supervision of the regional banking system, COBAC also ensures compliance by credit institutions including issuing sanctions for any offences.

Also, capital markets integration within CEMAC adopts the framework of a single regulator for the regional stock exchange. The Central African Stock Exchange BVMAC (Bourse des Valeurs Mobilieres d'Afrique Centrale), was established in 2003 and is situated in Libreville, Gabon. The Central African Financial Market Monitoring Commission COSUMAF (Commission de Surveillance du Marche Financier de L'Afrique Centrale) was created as the regional regulator of the capital market. Despite that, the creation of another stock exchange in Douala, Cameroon (Douala Stock Exchange (DSX)) at the same time has blighted the

---

[96] World Development Indicators 2012, available online at http://databank.worldbank.org/data/views/reports/tableview.aspx?isshared=true&ispopular=series&pid=3 (accessed 01 September 2014)

creation of the BVMAC. This coexistence poses a problem as it results in duplicity in the regulation and supervision of both exchanges. Besides, the region accounts for very few large companies and investors at the moment and there is a very low record of trading on DSX (with only 3 listed companies and a market capitalization of approximately $200million[97]) and hardly any on BVMAC. There is no question as to the underdeveloped nature of the capital markets in the region.

The reasons which account for this inactivity in the stock exchanges can be attributed firstly to the poor comprehension of the financial markets in the region, and most especially poor comprehension of the stock exchanges. Nationals do not understand how these will help them and affect their livelihoods directly. Secondly, many business operators still remain skeptical about enlisting their companies because control of these stock exchanges still remains predominantly with the state. People just do not trust the state in monitoring their shares. As a result, certain measures need to be put in place to address this situation. Firstly, there is need for the state to run public sensitization campaigns and educate the public about the importance and benefits of the stock exchange. Radio and television programs, town hall meetings and the introduction of courses on the Stock Exchange in the national curriculum will go a long way to enable the populace develop an understanding of this institution and the transactions and activities therein. The Nigerian Stock Exchange is excelling partly because of sensitization and public awareness. Furthermore, the state needs to partner with the private sector to manage the affairs of the Stock Exchange. This will reduce the fears haboured by the population about investing in the Stock Exchange.

iii.) *SADC*

Within SADC, there exists a Common Monetary Area (CMA) which is a monetary area comprising of three states (South Africa, Lesotho and Swaziland) and each Member State is given the responsibility of controlling its own financial institutions.[98] Unlike the WAEMU and CEMAC experiences, there is no harmonized banking regulatory system within the CMA and as such the central banks of each CMA country have a unique department within them responsible for bank supervision.

With regards to capital markets regulation in SADC, the Committee of SADC Stock Exchanges (COSSE) which was set-up in January 2011 is the main institution pushing through capital markets harmonization in the region. The draft SADC Finance and

---

[97] Available online at: http://www.douala-stock-exchange.com/indiceref_us.php (accessed 01 September 2014)

[98] Preamble of the CMA – Multilateral Agreement

Investment Protocol, which was signed to foster the aims of the SADC Treaty, provides the realms under which COSSE operates.[99] The primary objective of COSSE is to ensure the advancement and harmonization of capital markets in the SADC region. Other objectives include: to improve the operational, regulatory and technical requirement underpinnings and capabilities of SADC exchanges; to make the securities markets of SADC exchanges more attractive to both regional and international investors; to increase market liquidity and enhance trading in various securities and financial instruments; to promote the development of efficient, fair and transparent securities markets within the SADC region; and to encourage the development of a harmonized securities market environment within the SADC region.[100]

In spite of these objectives, the overall pace of progress remains sluggish because most of the other SADC Member States have small capital markets and are still trying to catch up with the advanced nature of the South African capital market regime. South Africa is the hub of the region and COSSE's vision to accomplish an integrated real-time network of the region's national exchanges in tandem with South Africa's by 2006 was never achieved. To date, there still is no regional capital markets regulatory mechanism in operation within SADC.

2.4.2 Continental Sovereignty: The case for deeper and further integration in Africa

In spite of the challenges discussed above, the thesis now advances the argument that the problems (abovementioned) faced by investors in the various RECs can be thwarted by deeper and further integration. A case is made to show that the complexities caused by the *spaghetti bowl* and inadequate legal institutions are being negotiated and managed

[99] Art 21 stipulates that Member States have to work towards harmonizing macroeconomic policies in specific areas of co-operation including investment and finance.

[100] Available online at: http://www.sadc.int/themes/economic-development/finance/capital-markets/ (accessed 25 September 2014) - Since 2007 COSSE has worked to harmonize the listing standards for SADC Member States with stock exchanges which meet the JSE listing standards. This is good practice as slowly but surely it encourages others to meet these standards thereby enabling them ascend into the more advanced arrangement. It is worth noting that presently, COSSE oversees securities exchanges in South Africa, Botswana, Malawi, Mauritius, Mozambique, Namibia, Swaziland, Tanzania, Zambia, and Zimbabwe. It also works closely with the Committee of Insurance, Securities and Non-Banking Financial Authorities (CISNA), which forms part of SADC's Trade, Industry, Finance and Investment Directorate. Also, in 2012, COSSE also launched a new website available at: http://www.cossesadc.org/ (accessed 25 September 2014) to improve visibility and access to data about Southern African stock exchanges. This is part of the Committee's focus on using technology to improve linkages between capital markets in the region.

successfully in some of the regions. This success story is hatched from the alliance between African RECs in terms of monetary cooperation to realize the effective running of financial markets as a solution to the African problem. This reveals the new concept of *African sovereignty* or *continental sovereignty*.

Following the instability and lack of confidence that engulfed the global financial markets since 2007, Africa emerged as an alternative for investors and policymakers alike as they continued to seek other investment opportunities and risk diversification options away from developed markets. This was smoothly facilitated by the revelation that Africa had muscled its way into a regional player following strong economic growth rates reported by the IMF averaging approximately 6 percent annually since the early 2000's making it the second fastest growing economic region in the world after Asia.[101] The quickening of Africa's economic pulse has thereby infused the continent with a new commercial vibrancy. In fact McKinsey examined this acceleration in Africa's growth trends and reported that the continent is gaining greater access to international capital as total foreign capital flows rose from $15 billion in 2000 to a peak of $87 billion in 2007.[102] The McKinsey report illustrates that the rate of return on foreign investment in Africa is higher than in any other developing region. Information of this sort confirms that growth trends in Africa are not synchronized with those in developed markets thereby creating an attractive platform for investors seeking high returns on investments elsewhere.

Furthermore, as future economic growth in Africa is propelled by its increasing ties to the global economy, sustainable mechanisms need to be continually introduced to help absorb the more complex, more integrated global environment today than did emerging markets of a quarter century ago. Then, institutional investors accessed emerging economies largely through equity markets and, in some cases, foreign currency debt issues. Today, these investments are only part of the picture. Investors are now immersed in a wide range of financial activities, including domestic bond and foreign exchange market instruments. Put simply, financial technology is now more complex than ever before. [103]

[101] International Monetary Fund (IMF), "*Regional Economic Outlook--Sub-Saharan Africa, Recovery and New Risk*" (IMF World Economic and Financial Surveys, April 2011), p.27—Nonetheless, many still want to see this growth trickle down to the poorest in society.

[102]Roxburgh C, Dorr N, Leke A et al: *McKinsey Global Institute-Lions on the move: The progress and potential of African economies*; June 2010. Available online at http://www.mckinsey.com/insights/africa/lions_on_the_move (accessed 15 April 2014)

[103] See Nellor D; *The Rise of Africa's Frontier Markets*; Finance and Development, A quarterly magazine of the IMF; September 2008, Volume 45, Number 3

It is worth remembering that Africa is a very fragmented continent with poor countries many of which are landlocked. However when these countries are grouped together, the arrangement becomes very interesting. For example, a country like Togo (in ECOWAS) is a small country with a GDP of approximately $7billion and a population of approximately 6.8 million people, in the grand scheme of things, this is not particularly attractive for investors. However when grouped with the likes of Nigeria and Ghana, it becomes a very interesting proposition with access to over 300 million people in the ECOWAS region alone.[104] It was this proposition that attracted investors to set up Ecobank Transnational (Ecobank) in Lomé, Togo in 1985 at a time when the banking industry in West Africa was dominated by foreign and state-owned banks. Today, Ecobank is a leading pan-African banking conglomerate with banking operations in 36 countries and its activities have facilitated economic, financial integration across the African continent.[105]

More so, in the case of stock exchanges for example, the increase of these throughout the continent in the last couple of decades have also contributed to the growth trend and boosted Africa’s international clout. The number of stock exchanges rose from a dozen in the early 1990s to over twenty-three today, including two regional stock exchanges. About two-thirds of African countries are now served by a local or regional stock exchange in a continent that was once devoid of stock exchanges. Between 2007 and 2009, $10billion of equity capital was raised on local African stock exchanges. Prior to the global financial crisis, African countries began to play an active role in the international financial markets and were able raise capital there. In January 2007, a Nigerian commercial bank, Guaranty Trust Bank plc (“GTB”), was able to raise $350million through a five year euro-bond issue and demand for this was high. This was the first time any Nigerian institution, private or public, had approached the international capital markets since the early1990s. In July 2007, GTB listed global depositary receipts on the London Stock Exchange in its first global offering. The offering raised $750m and was the first offering by a Nigerian bank. In September 2007, Ghana was the first African country to raise $750m in its first sovereign bond issue. The bond, which is for a term of 10 years with a coupon rate of 8.5% per annum, was the first in sub-Saharan Africa and at the time of closure was more than four times oversubscribed. In October 2008, Seychelles raised a $230million three-year bond; and in December 2007,

[104] The same is true for the EAC which is a community of five states with a combined population of almost 150million people, here again, they might not have much of an impact singly, but as a group, they exert significant clout.

[105] Available online at: http://www.ecobank.com/group/aboutus.aspx (accessed 01 July 2014)

Gabon successfully raised $1billion through a 10-year euro-bond issue on the international market.

In terms of a specific legal mechanism for regulating relations between different Member States within different RECs in the continent, there is a glimmer of hope with the *Organisation pour l'Harmonization en Afrique du Droit des Affaires* (OHADA) which is a treaty harmonizing business laws for 16 sub-Saharan African countries. The OHADA Treaty created in 1993 in Mauritius set up a system of business laws and implementing institutions. There has been significant development in the harmonization of commercial laws, unifying eight subjects of business law precisely (which include general commercial law, secured transactions law, enforcement and debt collection, accounting and auditing, insolvency law, arbitration and transportation by road). However, there remain challenges in ensuring that each of these statutes is directly applicable in each member country.

Reflections

It is the example of Ecobank that provides the grounds for argument that a regional approach to integration in Africa should be encouraged as a sensible option in order to bolster the development of the banking and financial sector in Africa.

The COMESA-EAC-SADC Tripartite FTA example applies a combination of solid laws, enforcement mechanisms and institutions while retaining some parts of national sovereignty in order to ensure the enforcement of the laws and policies domestically. It is these RECs that form the building blocks for the new *continental sovereignty*.

With this in mind, the structural characteristics of African economies are quite unique to the continent, and even though monetary integration can help promote financial stability, the pace and structure of monetary integration within Africa must be tailor-made to suit its environment.

In my humble opinion, emphasis on the rule of law as the center of a robust RFI arrangement does not in any shape or form downplay the importance of the other socio-economic and political elements necessary for a rigid RFI arrangement.

My polemic however subscribes to Pescatore's observation instead, as he affirms that: 'The process of integration can have no real consistency and, above all, no real stability or lasting force unless we succeed in giving it a sufficiently solid institutional and legal framework.'[106] Consequently, this chapter revealed the issues surrounding the legal obstacles to trans-boundary (cross-border) economic and financial activity.

Part Four

2.5 Conclusion

From all indication, the two areas in need of thorough attention with respect to African Regional Integration are firstly the drafting of treaties and secondly the regional enforcement mechanisms. The chapter exposes the fact that many of the REC Treaties are ambiguous and have been poorly drafted. This poses problems for the entire African integration agenda because a weak foundation of the REC Treaty frameworks will undoubtedly result in a weak outcome for the overall integration project. Little wonder the progress of economic integration in Africa is extremely lethargic. There is need for reformation of the treaties to ensure articulate provisions and definitions for strengthening the supra-nationality of the RECs which would of course include strengthening the powers of the regional enforcement institutions. Whatever the case, these must be matched with considerable action and implementation on the ground.

Nonetheless, the RECs remain building blocks of the AU/AEC and as such stay central to this process because the success of the RECs would no doubt reflect in the overall success of the AU/AEC project. This plan is still lagging behind schedule and given the current state of affairs it is inconceivable for a Single Currency to be achieved by 2028. The deep legal and institutional challenges which the RECs face have resulted in their failure to accomplish their own sub-regional integration objectives within the set timetable.

All the same, there exists a changing narrative of investing rather than aiding in Africa, in spite of the political, cultural, religious and economic issues still impact on this narrative. The conventional cynicism exuded by many observers reflects the hardboiled stereotype; concretized over decades, fueled by the negative images of Africa which have for so long dominated the news headlines- famine, poverty, disease, conflict and corruption inform the basic understanding of the status quo in the African continent. This default position sometimes glossed by well-meaning sympathy is a stereotype which I concede transcends a world cup and encompasses every aspect of life and economic activity. As a result, for

[106] Pescatore P: *The law of integration: Emergence of a new phenomenon in international relations, based on the experience of the European Communities*; Leiden, A.W. Sijthoff, 1974, p.2

decades the continent had been snubbed from the global fora and exerted very limited influence in international debates.

It therefore comes as no surprise that this single story of Africa- the story of catastrophe- was no different with regards to Africa's role in the international financial markets which is of particular relevance here. Africa's role was for many years marginalized for numerous reasons which include: corruption and poor governance, political instability, weak domestic economies, failure to adhere to international financial standards including poor financial reporting and bad accounting practices, politically-controlled and weak regulatory regimes. These were worsened by feeble legal systems with poor laws, institutions and impuissant enforcement mechanisms even for basic laws such as contract laws, insolvency and bankruptcy laws and property rights. These shortcomings have for decades formed a single story for the African continent.

This chapter in part advocates my contention that there is indeed a less-told story unfolding in Africa; a story of reform and economic growth, clampdown on corruption, business opportunity and job creation. In her book *Reforming The Unreformable*, globally renowned economist Ngozi Okonjo-Iweala who typifies a new generation of enlightened reformers bent on changing the course of the African continent describes vividly her experience as part of the team in Nigeria which implemented a far-reaching set of economic and political changes. She recounts the story of how a dedicated team of reformers with shrewd political will set out to revamp a series of broken institutions. In the process, Nigeria's economy was given a face-lift in ways that helped create a robust platform for more sustained long-term growth.[107]

It now makes sense why enthusiasts like the celebrated Nigerian writer Chimamanda Adichie warned on the danger of the single story when she said: "The single story creates stereotypes, and the problem with stereotypes is not that they are untrue, but that they are incomplete. They make one story become the only story."[108] Political will which is also needed to stop the barriers of integration is unfortunately not translating fast enough to improvements on the economic side of things.

There is no doubt as to the huge advantages that regional economic integration brings to Africa. Nonetheless, it seems the outlined plan under the AEC Treaty is far more

[107] Okonjo-Iweala N*: Reforming the Unreformable*: Lessons from Nigeria, MIT Press, 2012

[108] TED Talks Lecture: *The Danger of a Single Story*; Oxford, England; July 2009; available online at http://africa.harvard.edu/chimamanda-adichie-the-danger-of-a-single-story/ (accessed 11 April 2014)

sophisticated that the Member States and indeed the AU's readiness for it. Given the legal and institutional bottlenecks that engulf the main RECs in the continent, the agenda should be watered-down and made more realistic. Any realistic ambition for the economic integration agenda should factor in revisions, additions and modifications following a thorough study of the real obstacles of integration to enable the development of sustained solutions. As Africa's role in the global sphere increases, this cannot be over-emphasized. The prevalence of trade obstacles which are no longer fashionable such as corruption, post-colonial affiliations and stifled political commitment continue to bring about a strain on the realization of the integration agenda. Others like geographical and infrastructural setbacks, military tensions and so on only make matters worse. These development issues will be addressed in the succeeding chapter in line with the African agenda.

This chapter goes on to stress that any solution for *continental sovereignty* must be measured, and consistent with inclusive and legitimate policies, and a strong civil society. This requires new thinking and very difficult choices as the challenges grow more pronounced with a changing world. *Continental sovereignty* remains Africa's best hope as a solution for its wider problems abovementioned.

The argument for an indigenous solution relevant to the needs of the African continent is made in the next chapter. Here the European model of regional integration is scrutinized in order to shape the thoughts of achieving organic *African sovereignty* by virtue of strengthening and empowering existing institutions in the continent.

CHAPTER 3: REGIONAL FINANCIAL INTEGRATION, THE EUROPEAN MODEL AND AFRICA

3.1 Introduction

This chapter is divided into four parts. Part one opens with a discussion on the relevance of regional financial integration (RFI) and whether its benefits to a state individually outweigh those of the region as a whole. This is a particularly topical issue with no outright and clear-cut answer. Nevertheless, I will attempt to use the EU experience to ascertain whether it should serve as a model for other regions especially African RECs in terms of how it has handled the pros and cons as a result of the financial integration process within this region. This will showcase the extent to which individual countries are willing to stay integrated not just during the good times, but also during crisis for instance during the GFC. After all, history shows that some countries tend to develop protectionist measures in order to solve domestic problems during financial crisis.

The second part focuses on the example of the EU because it has established the most advanced regional trading system in the world. In fact, many of the other regional systems around the world are modeled on it including the African models which were discussed in the preceding chapter. To fully understand this idea of a single market, the development of the EU will be reviewed. From a purely historical viewpoint, European integration is a much broader notion, thus the EU is merely a step towards the achievement of full and complete European integration. It will be seen that this European integration process remains incomplete, both in terms of its content and geographical coverage and thus can be viewed as a kind of midway amalgam of an international organization and a federation, still subject to further fruition.

Drawing from this, it will be noted that in the early period following the establishment of the EEC in 1958, banking and financial matters were treated as part of the larger trade objectives. Some progress was possible in the development of early central bank co-operation within the

Community although a large degree of close contact already existed between the parties involved at the international level.[1]

The third part will therefore apply this unique legal structure of EU law within the realms of the banking and finance sector. This will involve an understanding of the Single European Market and an understanding of the doctrine of *mutual recognition* in line with the ingenuity behind the construction of a single or internal market, given that regional arrangements are believed to normally trigger a breach of the WTO agreements which prohibit member countries from discriminating between their trading partners. This is so because, the principle of most-favoured-nation (MFN) treatment insists on member countries treating each other equally and trading without discrimination: if one member is granted a special favour (such as lower customs duty rates for one of your products) then the same must be done for all other WTO members.[2]

Admittedly, it comes as no surprise that the African integration project is highly influenced by the European model. At this point, an assessment of the extent to which the African integration project has been inspired by the EU is essential. The thesis draws from the experience of the EU to determine the adequacy of the RECs in Africa. The EU model is no stranger to the continent owing to the fact that most RECs have sought to introduce the EU framework for trade integration, single market and single currency. The thesis argues that the African continent must first strive to develop the existing community institutions organically by strengthening and empowering them in the short and medium term before making any attempts to replicate the advanced EU institutions.

Part four will delve into the intricacies of the Economic and Monetary Union (EMU), which form the core of the EU economic architecture. In this light, a dissection of the relationship between the EU and the EMU in relation to the GFC will also be made bringing to the fore the European

---

[1]Walker G.A.: *European Banking Law: Policy and Programme Construction*; BIICL, London, 2007; p.234-287. Walker offers a comprehensive and exhaustive discourse on the evolution and state of affairs of the banking and finance programme in the EU- much of this will be reflected and summarized in this chapter.

[2]There are over sixty regional arrangements in the world which provide for either bilateral or multilateral arrangements between countries. These have to be notified to the IMF because when establishing a regional trading system, preference is automatically given to member countries at the expense of the other members. This is true because the arrangements in place will allow member countries to trade easily amongst each other while making trade difficult with those outside the system; this is obviously contrary to the WTO rules as the MFN treatment principle is undermined.

sovereign debt crisis. The significance of the Greek debt crisis is important here because it was triggered by Greece's irreversible surrender of sovereignty to the EU, the sort of which is required to sustain an African-wide sovereignty. This investigation is overly important for the African project as it provides insights to learn from. These insights reveal the suitability of eventual full European integration which could either inspire or discourage the African integration project enthusiasts.

Part One

3.2 Regional Financial Integration: Features and Relevance

In accordance to an IMF working paper, RFI refers to a process, market driven and/or institutionalized, that broadens and deepens links between financial markets within a region.[3] The authors assert that at the very least, this process of RFI would normally involve eliminating barriers to cross-border investments and differential treatment of foreign investors. Also, financial links can be further broadened and deepened by taking the form of harmonizing national policies, laws and institutions. Moreover, as time goes by, cohesion of regional frameworks, operational structures and information systems, and convergence of prices and risk assessments mean the national financial markets within the region effectively function as one.[4]

Since the late 1980s, the geography of the financial world has changed dramatically. In many regions across the world, major strides have been taken towards the implementation of the plan for a single market in goods and services, so far as the financial sector is concerned. The aim is conspicuously to create a legislative and administrative open space in which an enterprise incorporated in any Member State may compete throughout that region on equal terms with all the other companies in different states within the region.[5]

---

[3]Wakeman-Linn J & Wagh S: *Regional Financial Integration: Its potential contribution to financial sector growth and development in Sub-Saharan Africa*; African Finance for the 21st Century, High- Level Seminar organized by the IMF Institute in collaboration with the Joint Africa Institute, Tunis, Tunisia, March 4-5 2008; Session IV: Beyond Banking: Regional Financial Integration; available online at http://www.imf.org/external/np/seminars/eng/2008/afrfin/pdf/wakemanlinn.pdf p.2 (accessed 04 January 2014)

[4] Ibid. Taking this concept further, a group of countries may set up a regional bond or stock market, distinct from and potentially coexisting with national markets, with the specific intent of pooling resources, risks and returns.

[5]This involves not only the ability of companies to conduct their business operations but also equal opportunity for companies to raise capital and finance within the regional financial markets. More concretely, the process of RFI would mean dismantling barriers to the cross-border flow of capital and financial services, such as capital controls

It is worth noting that a key factor underlying this process has been the increased globalization of investments coupled with the desire to seek higher rates of return and the opportunity to diversify risk on an international scale. Simultaneously, many countries have in turn encouraged inflows of capital by dismantling restrictions, deregulating domestic financial markets, and improving their economic environment and prospects through reforms which are principally market-oriented.[6]

At this juncture, it must be pointed out that cross-border integration can carry on either globally or regionally. In other words, a country can integrate with the world as a whole or with the region where it is located. The former tends to take the form of increased financial links with major financial centres such as London and New York because network externalities give these centres an advantage in the provision of financial services. For the same reason, regional integration likewise is facilitated by regional centres for instance in the case of Hong Kong [Special Administrative Region (SAR)] and Singapore.[7]

---

and withholding taxes. This consequently opens a state's financial markets and institutions to foreign players as well as permitting local market participants to invest abroad. For example, companies whose securities are listed in one Member State must have the ability to sell those securities in other States, without the need to comply afresh with a different set of regulations and on-going obligations in every State. This normally would mean harmonising national standards and laws, through either the mutual recognition of standards or the adoption of commonly agreed minimum (legal) standards. [See Bamford C: *Transparency and the end of doing good by stealth*; *Financial Crisis Management and Bank Resolution*: Edited by Labrosse J, Olivares-Caminal R, Singh D; Informa, London 2009. Ch.5 p. 83]

[6]This was very common with many developing and transition economies especially in East Asia, Latin America, and Eastern Europe who removed restrictions on international financial transactions, at the same time that they were relaxing regulations on the operation of domestic financial markets and moving away from regimes of financial repression. Policies aimed at increasing the openness of domestic financial markets to foreign investors have included the removal of controls on capital outflows and the liberalization of restrictions on foreign direct investment. [See Agenor P R: *Benefits and costs of International Financial Integration: Theory and Facts*; The World Economy, Volume 26 Issue 8, August 2003, p.1089-1118.]

[7]Garcia-Herrero A & Wooldridge P: *Global and regional financial integration: progress in emerging markets*; BIS Quarterly Review, September 2007, p.57- 70. In any case, whether integration proceeds globally or at the regional level, the impact of potential benefits varies to some extent. For example, Garcia-Herrero and Wooldridge suggest that business cycles are less correlated among distant economies, and so risk-sharing might be best facilitated through global integration. They also stipulate however that geographical proximity is an important determinant of trade and financial flows, and hence economic growth might be given a greater boost by regional integration (Garcia-Herrero & Wooldridge, p.58).

The three main forces which usually determine the broadening and deepening of cross-border financial links and thus considered the key drivers of financial integration have been identified as: first, the changes in the behaviour of local and foreign market participants, for example, over the past two decades, advances in communications and computing technology and the consequent increase in the availability of information have contributed to a weakening of investors' home bias. At the same time, an increasing number of firms have opted to raise capital in international markets, including through the cross-listing of shares on major stock exchanges abroad.[8] Secondly, the unilateral action by national authorities in the 1980's as they liberalized their financial systems and implemented other market-oriented reforms and thirdly; multilateral action by a group of countries especially in recent times (presumably inspired from the Bretton Woods summit) has promoted the development of a range of well-functioning systems in the international community. Subsequently, many countries have taken steps to harmonize national standards with these international ones.[9]

In general terms, financial integration has two principal economic benefits; namely *economic growth* and *risk-sharing*. By encouraging the allocation of capital to its most productive use and promoting the development of the financial system, integration would enhance growth prospects. Secondly, by allowing cross-border financing and investment, it facilitates portfolio diversification and, therefore the sharing of risks across states. According to Garcia-Herrero and Wooldridge, "such risk-sharing allows income to be insured against country-specific shocks and thus consumption to be smoothed over time." (Garcia-Herrero & Wooldridge, p.59) The question now which follows is; how much of these benefits can countries enjoy over time? The answer is it depends *inter alia* on the extent of the relationship between regional and global integration.

[8] (Garcia-Herrero & Wooldridge n.8)

[9]These actions have also been encouraged by formal trade and investment agreements. Such agreements often give a greater impetus to regional than to global partly because of the difficulties of reaching agreements among a large number of countries. The EU as will be discussed later is the best known example of a collective effort to achieve an integrated regional market. Nevertheless, it is worth noting that these multilateral actions can usually promote integration, but they are not necessarily sufficient for its advancement as certain agreements may not be accompanied by the broadening and deepening of financial links among market participants within the region. (Garcia-Herrero & Wooldridge pp.59-60)

3.2.1 RFI: Pros' and Cons

The benefits and costs of RFI can be viewed either from the perspective of individual investors (such as the opportunity to diversify international risk; abovementioned) or from the perspective of the countries initiating the process of integration. This discussion will focus exclusively on the second point of view. To start, in a generalized answer, RFI can help small financial markets take advantage of the "systemic scale economies" that accrue to larger systems.

Also, regional financial markets can expand the scale of opportunities for financial intermediation. Pooling national savings can facilitate the financing of large investment projects, where funding for such projects might be scarce or unavailable at the national level.

Again, larger markets can make it more cost effective to improve aspects of the financial infrastructure, such as payment systems, regulatory and supervisory regimes, all of which have high initial fixed costs.

In addition to this, regionalization can introduce efficiencies in financial markets, given that by raising the number and diversifying the types of financial institutions that operate in a particular local market, competition is fostered thereby lowering the prices of financial products and services.

Furthermore, small financial systems are more likely to be incomplete; in the sense that, they are typically skewed in terms of the available institutions (for example banks rather than non-banks) and instruments (debt instead of equity). This is not made any easier by the usual absence of information markets due to the lack of high cost credit rating services.

As seen, regional financial markets are better able to cope with risk because they allow for greater diversification of assets and markets for individual investors. This encourages individual financial systems to tap into a collective pool of reserves in the event of a shock or speculative attack.

More so, regional reporting requirements can propel greater accountability and transparency on the part of national monetary authorities. Regional institutions can also become familiar with central banks and pressures from the national fiscal authorities.

Finally, regional integration can lead to a harmonization of business practices, laws and institutions, thus benefitting from those prevailing in the most developed member state.[10] This is of central relevance with regards to the partial surrender of sovereignty in terms of financial law-making which will be the core of deliberation in Chapter five with regards to the establishment of Continental Sovereignty for Africa.

These can be summarized around four main considerations which explain the analytical arguments in favour of financial openness. They are: (i) international risk-sharing, (ii) the positive impact of capital flows on domestic investment and growth, (iii) much-improved macroeconomic discipline and; (iv)an increased efficiency including greater stability of the domestic financial system which is associated with the entry of foreign investors.

On the other hand, the experiences of recent times have led many policy-makers and academics to acknowledge that the functioning of RFI could also have potential costs. Most perceptible is the likelihood of cross-border spill-overs of financial distress and contagion risks;[11] these are brought to bear in the latter part of this chapter following the European Sovereign Debt Crisis.

Where financial systems are small and underdeveloped, a few large financial institutions with complex balance sheet linkages and exposures across markets, beyond the monitoring ability of the local monetary authorities, may make it difficult for the regulatory and supervisory authorities to do their job effectively, with associated risks.[12] These disadvantages could be summarized

[10] Wakeman-Linn and Wagh (n.3)

[11]Hamid F; *Financial integration*: "*Key concepts, benefits and risks", in Integrating Europe's Financial markets*, editors Decressin J, Faruqee H and Fonteyne W; (IMF, Washington DC, 2007)

[12]Besides, there are limits to the benefits that can accrue from RFI as this depends on the commonalities and differences of member state profiles. When the members of a regional sub-grouping have very similar structures and challenges, regionalization may pool rather than solve national problems. For instance, where all member financial systems are characterized by excess liquidity and high interest rate spreads, which might indicate a region-wide lack of viable investment projects and long-standing structural problems. It has been argued that RFI without national efforts to address the core problems will not be effective here. Some authors illustrate how the benefits from harmonising practices and laws might also be limited in a regional grouping with similar low initial conditions. And even after some form of RFI, several small country groupings may still not reach the threshold needed to benefit from economies of scale. Therefore a combination of regional and multilateral liberalization may be what works best for low-income countries such as those in Africa.

In addition, while advanced members can serve as effective benchmarks for other members, a regional under the following: (i) the high degree of concentration of capital flows and the lack of access to financing for relatively smaller countries, (ii) capital flows domestic misallocation, (iii) weakening of macroeconomic stability, (iv) short term flows pro-cyclicality (v) instability of capital flows, contagion and herding (vi) risk of penetration by foreign banks.[13]

Drawing from this, global and regional financial arrangements will usually demonstrate some pros and cons depending on factors such as their trade objectives, membership coverage and supporting institutional framework notably the governing laws. Regional models as will be seen can create considerably deeper levels of integration in terms of the scope of trade inter-dependence even though this develops the tendency of over-protection, exclusion and distortion sometimes. Nonetheless, it should be possible to monitor these tendencies through the existing global trade and finance framework in place.

It is nevertheless irrefutable that the financial crisis reminded that, although financial integration improves the access to financial markets and the opportunities for risk diversification, it may also increase the scope for financial contagion across countries. It is therefore paramount that the financial stability arrangements keep pace with the degree of financial integration.

At this juncture, it makes sense to examine the RFI experience in the EU which is characterized by a high degree of financial integration within the Eurozone; and highlight those aspects which have made it a role model for other regions across the world to follow suit. It is also imperative to review how the EU handled the recent GFC; as it were, despite having arguably the most advanced regionally integrated financial system, it still failed to stop both the crisis from occurring as well as spreading across the region. Examples will be drawn from this study to measure the degree to which individual member states are willing to stay integrated especially during times of crisis because practice has sometimes shown that some countries tend to 'go

---

grouping with asymmetric partners raises the risk that financial resources will flow primarily towards the member country with the most viable investment options, inhibiting the development of credit markets in smaller countries- even though the smaller markets may still benefit from improved payments and regulatory regimes, and possibly from improved financial services for people who save. Conversely, financial institutions which may have sought increased market share by expanding to un-served customers and areas may instead seek to compete for the business of already-served customers in the regional markets now open to them; hence leaving certain areas under-serviced. (See Wakeman-Linn and Wagh p.4)

[13] Wakeman-Linn and Wagh (n.3) offer a comprehensive analysis of the advantages and disadvantages of RFI from an economic perspective.

solo' in protecting their own domestic interests during times of global (and in particular regional) crisis.

Part Two

As will be seen, the main problem is that there exists a single global market place, with control however being done at the national and domestic level through national laws and national regulators. We are faced with *a global market and local control conflict*. Having identified this problem, the question now beckons, what happens if this global market versus local control problem is transferred unto a regional basis with a resulting *regional market and local control conflict*? To answer this question the European Banking and Finance programme will be considered. Integral to this consideration, this part will deal with the following three issues: 1.) The differentiation of the various layers of European financial integration in terms of integration within the EU and the development of European Law; and the specific forms of integration within the European Monetary Union; 2.) The risk of a sovereign debt crisis such as the Greek scenario and the challenges it presents to regional financial integration; 3.) Distinguishing between the EU responses and those taken by European governments.

3.3 The EU Experience

Seating at the core of a thriving regional integration system between countries is a clever arrangement typically referred to as a single or internal market model. Thus, over the years there have been copious opinions reflecting a broad spectrum of views resulting from debates regarding its sustainability and the means through which its full economic and associated benefits can be achieved. In recent times, the most appropriate solution to resolve the abovementioned conflict has been *via* the doctrine of *mutual recognition*. Whether this solution remains appropriate going forward remains to be seen.

The larger European integration initiative has, in particular, included the development of an increasingly substantial single market in banking and financial services which constitutes both an essential support area within the EU as well as an important independent commercial sector in its own right. To properly understand the genesis of the EU, a reflection upon the long process of economic and political integration is required, as it details a process which is deeply rooted in the military, political and economic history of Western Europe and, in particular the product of choices made in Europe and elsewhere at the end of World War II. Historically, the

EU can be considered in terms of the Treaties which have been set out over the course of the last fifty years even though being a legal scholar, this may sound prejudiced.[14]

Therefore, rather than considering Europe as a single initiative, it can be regarded as a number of intersecting communities, agreements and other arrangements under international law. These Treaties have eventually set out the EU's constitutional basis by establishing the various EU institutions concurrently with their remit, authority, procedures and objectives (policies and agenda). The EU can only act within the capabilities awarded to it through these treaties. In addition, amendments to the treaties require agreement and ratification of every single signatory.

This has resulted in the construction of by far the most developed regional trading system in the world within which exist a combination of complex, interconnected cross-border markets and relations, in all industrial, commercial, banking and financial industries. Simultaneously, considerable progress has also been achievable in other socio-political areas as well as in areas dealing with justice and home affairs.

It is difficult to establish when the idea of a single Europe was conceived as the attractiveness of an open European marketplace based on trade and commerce, dates from the restoration of trading and commercial ties from the 11th and 12th centuries onwards. In fact, digging deeper into historical archives, it dates back to the period of Europe governed by the Roman Empire when efforts towards the safeguarding of a unified Europe continued in various designs including the concept of 'Christendom' as established by the Roman Catholic Church, and the 'Christian Commonwealth of Europe' under Henry IV of France as seen in chapter one which recounted the development of sovereignty. Fast forward to 1946; then British Prime Minister Winston Churchill offered what at the time must have appeared to be an astonishing and even fanciful proposal for the revival and transformation of the Continent.[15]

---

[14] Mulhearn C. & Vane H. R.: *The Euro: Its Origins, Development and Prospects*; Edward Elgar Publishing Ltd, Cheltenham, 2008. (for an economic analysis of the EU's development)

[15] See Winston Churchill speech calling for a United States of Europe, delivered at the University of Zurich, 19 September 1946; available on The Council of Europe website: http://www.coe.int/t/dgal/dit/ilcd/archives/selection/churchill/ZurichSpeech_en.asp (accessed 15 January 2014). He argued that the way forward was: "To recreate the European fabric, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, safety and freedom. We must build a kind of United States of Europe. In this way only will hundreds of millions of toilers be able to regain the simple joys and hopes which make life worth

The prescience of his remarks indicated the potentiality of how large European nations will combine with the smaller nations for the collective good. This issue of integration did not normally extend to the monetary, banking and financial domain at the early stages. Instead, monetary relations in post war Europe were heavily conditioned by the general economic imperatives for reconstruction and by the specific influences of three institutions: the Bretton Woods system, the Marshall Plan, and the European Payments Union.[16]

3.3.1 Treaty Law

Given that relations across Europe were badly damaged after the war[17] the Europeans challenged themselves to formulate a new set of relationships between each other by securing limited *functional* economic initiatives. Here, common core interests will be identified and

---

living." He carried on by identifying the essential constituents of new Europe by stating that: "The first step in the recreation of the European family must be a partnership between France and Germany....There can be no revival of Europe without a spiritually great France and a spiritually great Germany". He added: "The structure of the United States of Europe will be such as to make the material strength of a single state less important. Small nations will count as much as large ones and gain their honour by a contribution to the common cause."

[16] The following review on the treaties is obtained from Professor Walker's academic comments (n.2). The Bretton Woods system which established the World Bank, IMF and WTO as seen in Chapter two boosted these international initiatives in order to enhance post-war reconstruction. In spite of this, it was recognized that currency stability alone would not be enough to facilitate the physical and economic recovery of the war-torn countries in Europe. Hence, the United States agreed a four year aid package worth $13 billion to underwrite European reconstruction. This initiative was officially the *European Recovery Programme* and became known as the *Marshall Plan*, named after then US Secretary of State George C. Marshall who proposed the urgent need to help the European recovery in his address at Harvard University in June 1947. In order to coordinate the distribution of this money, the European recipients established the Committee for European Economic Cooperation (CEEC), the forerunner of today's Organization for Economic Cooperation and Development (OECD). The European Payments Union (EPU) which allowed economies to trade deficit positions with other members effectively enabled the transfer of liabilities to itself as these liabilities obviously had to be settled. The EPU facilitated currency convertibility and stimulated intra-European trade; this was a notable achievement at a difficult time and although it was dissolved in 1959 after a steady improvement in economic conditions, it allowed the introduction of the general convertibility of Europe's currencies. It fact it has been considered the first instance of European monetary cooperation in the post war period.

[17] A world war which amongst other things was arguably caused predominantly by disagreements regarding economic assets notably money, most especially regarding the Ruhr district (the strategically located and buoyant centre of Germany's coal, iron and steel production); little wonder it was on the basis of the agreements reached over this coal and steel that many point to the birth of European Integration and the EU.

worked on from which expansion and modifications could follow in subsequent years as the confidence and health of relations between the countries involved improves over time.[18]

Naturally as coal and steel were the most important resources at the time in Europe, the main factors and products of production of coal and steel and then all the factors which co-constitute production such as goods, workers and capital needed to be handled first. This endeavour towards *functional integration* led to the:

a.) *<u>The Treaty of Paris, 1951</u>*

This Treaty was signed in 1951 and provided for the establishment of the European Coal and Steel Community (ECSC). The Treaty of Paris was signed by France, Italy, Germany, Belgium, the Netherlands and Luxembourg, who are often referred to as the original six founders of European integration.

More so, it is worth noting that the ECSC is credited for recognizing the need for authority and legislation by thus providing the platform for the supra-national institutions that would later govern. They are: the Council of Ministers (made up of representatives from each of the then six Member States), the High Authority or executive arm (to operate as an independent executive to take decisions and procure funds, fix maximum and minimum prices for coal and steel and enforce the original competition provisions set out in the Treaty), an Assembly (a representative body consisting of delegates appointed by the parliaments of the Member States) and a Court of Justice (to rule on the interpretation of the Treaty, review the acts of the new institutions set up and consider competition actions; and dispute resolution).[19]

---

[18]This was a particularly clever way forward especially as the hugely grandiose and ambitious plan to create a European Defence Community (EDC) in order to harness military potential between member countries had failed. It was a matter of going back to basics and starting to build on these relations from the bottom-up, rather than taking up these grand proposals when relationships were still at a very fragile and sensitive state

[19] Designed by Jean Monnet and implemented by Robert Schuman. The former was a French civil servant while the latter was the then French foreign minister. The signal event which announced the start of the process of European integration is known as the Schuman Declaration. This declaration presented Monnet's plan as an invitation from the French government to West Germany to participate in the ECSC. It provided for the placing of French and German coal and steel production under a single 'High Authority' (an executive branch). The declaration opened by taking up Churchill's theme of the need for a rapprochement to overcome opposition between France and Germany. Nevertheless, the words of the declaration made it clear that Schuman was proposing much more than the shackling of the means of war. They went on to acknowledge the need for the pooling of state sovereignty. There was however a limitation since all these countries in the EEC were members of the Bretton Woods system, it meant that their

b.) *The Treaty of Rome, 1957*

Even though there was recorded success of the new functionalism adopted in the area of coal and steel, the process of European integration continued to face difficulties and in May 1955, the Benelux group (Belgium, Netherlands and Luxembourg) submitted a memorandum to the governments of France, Germany and Italy which proposed using the ECSC model to develop the transport and atomic energy infrastructures of Europe. At the same time, the memorandum made a case for an economic community defined by a common European internal market. The scale of investment suggested that a shared approach to the development was the right one. The six countries met at Messina, Italy and agreed that their collective interests would best be served. Thus, the 'Spaak committee' (which consisted of the foreign ministers of the six member countries including Paul-Henri Spaak, then Belgian foreign minister whom the committee was named after) came up with a report which identified key factors; namely: the development of common institutions, the gradual fusion of national economies, the creation of a *common market* and harmonization of social policies. All these were intended to pave the way for higher levels of economic integration.

The result came in 1957 when two Treaties were signed by the Six in Rome; called the Treaties of Rome. One created the European Atomic Energy Community, known as the EURATOM Treaty, and the other created the European Economic Community (EEC) often referred to as the Treaty of Rome.[20] The latter has proven to be the undoubted driver of European integration since 1957.

---

currencies will be fixed against one another, and against all other currencies inside the system. They would therefore enjoy both intra-market openness and mutual exchange rate stability. Unfortunately however, by the late 1960s, the Bretton Woods system was beginning to show signs of considerable strain which posed a dilemma for them. Should the Bretton Woods system fail, they would still courtesy of the Treaty of Rome, have an integrated market but the currencies that underpinned it would no longer be fixed against one another. The clear danger was that currency instability for the six could threaten the very considerable collective economic progress they had made in the 1950's. For example, the growing integration of the French and German economies would be unlikely to proceed smoothly in the presence of severe and unpredictable oscillations between the franc and mark.

[20] While its purpose was 'to lay the foundations of an even closer union among the peoples of Europe' although this would be pursued by the extended economic functionalism provided for with the establishment of the Common Market, the purpose of EURATOM was to create a specialist market for atomic energy and provide for its managed distribution across Europe as well as develop energy policies and sell surpluses to non-European countries. In addition EURATOM Treaty is considered the parallel treaty and obvious extension of the ESCS as some including the French considered atomic energy was future of the world.

c.) *The Merger Treaty, 1967*

The treaty was signed in Brussels on 8 April 1965 and came into force on 1 July 1967. It assimilated the executive bodies of the three separate communities of the ECSC, EURATOM and EEC into a single institutional structure. It set out that the Commission and the Council of the EEC should replace the Commission and Council of EURATOM and the High Authority and Council of the ECSC. Although each Community remained legally independent, they nevertheless shared common institutions (prior to this treaty, they already shared a Parliamentary Assembly and Court of Justice and were known together as the European Communities). Considering the fact that these could always be extended and developed, the combination of this single European Council, European Commission, European Court of Justice, and European Parliament has been mooted by many as the beginning of the modern European.

Meanwhile, the growth and progression of the EEC to fit in this much larger international arena was thwarted as a result of its failure to attain its goal of achieving a *Common Market* at the end of its 'transitional period' due to disagreements and problems within the community in conjunction with larger international problems. While all counties were anxious to achieve the benefits from a full and effective common market, many were often reluctant to make the necessary compromises to achieve that result. Following the recessions of the 1970's and protectionist pressures brought about by some of these governments the delays were further

---

It included a number of general principles which specified the 'task' and the 'principal activities' of the new EEC. The main activities included elimination of customs duties, quantitative restrictions and other measures having equivalent effect in the area of goods. A number of common policies were also adopted including the four free movements (goods, person (establishment and workers), services and capital) as well as a common agricultural policy (CAP), a common fisheries policy and a common transport policy. Measures were also included to ensure the prohibition of any anti-competitive practices (competition policy) and a harmonization or approximation policy for national laws to allow the common market to function.

It makes sense to mention the fact that the Treaty of Rome provided for the establishment of the Common Market within a 'transitional period' of twelve years from date of signing (thus the end of this 'transitional period' had to be the 1st January 1970) to be achieved in three four year periods (corresponding with Commission appointment terms). Despite some early success, early progress was limited due to the underlying difficulties in harmonizing the separate laws.

Furthermore, the French president Charles de Gaulle also objected to the qualified majority voting with France withdrawing from participation in the Council which subsequently led to the Luxembourg Accords of January 1966 (aimed at resolving differences within the EEC), which allowed member countries to veto major issues.

prolonged. All this, was unfortunately coupled with the collapse of the Bretton Woods system in early 1970's which disrupted international trade and most of all the international financial markets. This was a massive setback for the EEC as it attempted to interact with the other countries across the world in this complex global financial market. In fact, the problems were aggravated by the early 1980's Developing World debt crisis. This raised concerns over competition in the International setting especially from North America and the Far East.

While all this could be corrected by the creation of a fully integrated single European market, it was difficult to see how this would be achieved despite the continuing initiatives adopted by the commission particularly in the banking area.

3.3.2 Completion of the Single Market (Treaty Law post-1980)

Meanwhile, a new Commission was appointed and Jacques Lucien Delors (former French Finance Minister) was appointed President in January 1985. Delors era injected a new and fresh momentum to the process of European integration. To neutralize the pressures during the early 1980s, a number of ideas were adopted most significantly, that of *mutual recognition* based on the decision of *Cassis de Dijon*[21](*Cassis*) in 1979 which subsequently developed into a new integration policy in place of the earlier full harmonization approach set up under the Treaty of Rome.[22] It was decided that it was better to focus on a more limited programme of legislative measures to complete the effective operation of the internal economic market within Europe rather than to proceed with the earlier full harmonization programme which had been subsequently extended to include such matters as regional policy, research and development and environmental policies.

---

[21] *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (Case120/78) [1979] ECR 649. See also the Commission's Communication on its interpretation of the decision a year later in 1980 (OJ No C256, 3.10.80, p 2). This followed an earlier communication which had been sent to the Parliament, the Council and the Member States (see COM (1980) 30 DEF, 24.1.800. It is important to note that it was in this Communication that the words 'mutual recognition' were first used as the ECJ never used them in *Cassis* (contrary to popular knowledge).

[22]The various Heads of State and Governments of the Community had been unanimously steadfast and reiterated their commitment towards a European single market in European Council meetings in Copenhagen 1982, Fontainebleau and Dublin 1984. With the acceptance of the essential equivalence of the objectives of national legislation, mutual recognition could be an effective strategy for bringing about a common trading market. Following the rulings of the Court of Justice, the European Parliament has stressed the principle that goods lawfully manufactured and marketed in one Member State must be allowed free entry into other Member States. Immediate and full recognition must be the rule where harmonization of supporting regulations and standards is not considered essential

In this connection, the then Vice-President Lord Francis Cockfield prepared the Commission White Paper published in June 1985 on *Completing the Internal Market* which set out the objectives of the Single Market. This was based on the necessity to remove all obstacles to free trade (of which he identified 300 of them) and to adopt a programme of new directives which would guarantee the efficient operation of the single market based on the policy of mutual recognition.[23]

In addition to proposing that a complete programme be set within a specific timetable, Lord Cockfield also wished to create a new philosophical framework and a new approach distinct from the traditional emphasis on goods, services, people and capital. Hence, rather than focusing on *free movement* as such, it was decided that the removal of obstacles or barriers to trade be stressed irrespective of the particular area of activity involved. Furthermore, the treatment of goods and services had to be done on the same terms in a bid to correct the stagnation which had arisen in the services area.

It must nevertheless be pointed out that while the Commission accepted that pure mutual recognition could remove barriers to trade, it acknowledged that it would be inadequate for the purpose of constructing an expanding and competitive European market. The Commission also noted that a harmonization policy on its own would be over-regulatory, and as such take a significant amount of time to implement. This inflexibility would potentially constrain innovation. The new approach to be adopted would accordingly proceed on the basis of the mutual recognition of non-essential standards with legislative harmonization through directives under Article 100 being restricted to core health and safety requirements that would be obligatory in all Member States. The separate 'mutual acceptance' of national standards would also be promoted through the agreed notification and standstill procedure set up under Directive 83/189/EEC in connection with non-standardized areas pending further European harmonization.

---

[23] With this new emphasis on the preparation of general directives which would create working frameworks and minimal essential regulations the Commission translated into the larger single market area the earlier policy which had adopted with its New Approach in the banking area. In so doing the Commission was concerned not to make any early mistakes which had arisen with regards to attempting to follow a full harmonization programme.

In its earlier 1980 communication, the Commission had referred to the Court's statement in *Cassis* (Para.14) with regard to lawful production and first placement. It subsequently developed this into an independent free standing principle. To the extent that the first separate reference to mutual recognition was in the White Paper, it has to be regarded as only constituting an executive or administrative construct under European law. This would then be given some further judicial support subsequently by the Court although the Court would continue only to consider specific Treaty provisions and not attempt to convert this into any more general doctrine. While the supposed juridical base would remain *Cassis*, care has to be taken in light of the weakness of the original judgment in these terms.

Lord Cockfield was particularly concerned to ensure that this New Approach was applied to services and goods on an equal basis and in the White Paper, the Commission noted that it was particularly regrettable that progress on the freedom to provide services across internal frontiers had been much slower than that achieved in relation to the free movement of goods. As a factual matter, the Commission viewed it necessary to establish a common market in services as one of the prerequisites for the return to economic prosperity with trade and services being as important as trade in goods. As a result, the Commission considered early action was required in order to open up the market in traditional albeit evolving service areas like banking, insurance and transport as well as new areas like information technology and audio-visual services. As for the liberalization of the financial services, this would represent a major step towards financial integration within the community and to the widening of the Internal Market.

The White Paper noted that the accent was increasingly been placed on the free circulation of financial products which had been made easier by developments in technology. More so, the Commission noted that the approach adopted in the *Cassis* judgment could be applied in the financial areas. It stated that there ought to be the possibility of facilitating the exchange of such financial products using a minimal co-ordination of rules as the basis for the mutual recognition by the Member States of the action taken by each to safeguard the interests of the public (relevant in discussions dealing with the concept of *minimum harmonization*).

Concomitantly, the minimum amount of harmonization to be effected especially in connection with the supervision of on-going activities is to be effected on a *home country control* basis under which the primary task of supervision is attributed to the competent authorities of the

Member State of origin.[24] Although acknowledging the work which had already been carried out in the banking, insurance, securities and collective investment areas, Lord Cockfield and his team were constantly motivated by curiosity and as such a number of further measures were proposed.[25]

d.) *The Single European Act, 1986 (SEA)*

All the relevant constitutional amendments were effected under SEA. It provided for the amendment of the Treaty of Rome to include a definition of the 'internal market' set out in Article 8a (18).[26] The earlier condition for unanimity was replaced by majority voting in a number of cases and in this light, a new co-operation procedure was introduced to make the European Parliament more closely involved in the elective process.[27] This paved way for the setting up of a Court of First Instance within the European Court of Justice.[28]

---

[24] Para 103; all necessary information must be communicated to the home country while host authorities are to have a complimentary role without fully being deprived of power. While there would have to be a minimum harmonization of relevant surveillance standards in this regard, this would not be allowed to delay further necessary and overdue decisions. Goods lawfully manufactures and marketed in one Member State must be allowed free entry into all other Member States following the rulings of the Court of Justice and further confirmed by the European Parliament.

Where the harmonization of regulations and standards was not considered to be essential from either a health and safety or an industrial point of view the immediate and full recognition of differing quality standards, food composition and similar requirements must be the rule. There is no obligation on the buyer of goods to prove the equivalence of a product produced according to the rules of the exporting State. A major initiative was also to be launched to secure the mutual recognition of tests and certification procedures within the Community to avoid wasteful duplication; Para. 78. Where harmonization of regulations was still required in certain areas, enterprises could only be required to meet a single set of rules to enjoy free circulation throughout the Community; Para. 79.

[25] It is worth mentioning that the UK joined the EEC finally on 1 January 1973 after two previous attempts had failed. Other Treaties of Accession followed suit in 1981, 1986, 1995. It is worth mentioning that Lord Cockfield was a British Conservative politician who was expected to adhere to the euro-scepticism of then Prime Minister Margaret Thatcher but however became a crucial driving force in orchestrating the ground work for the creation of the European Single Market in 1992.

[26] Please see Mulhearn (n.14) for the principal economic argument for the creation of a European single market which lay in the potential benefits for businesses and households

[27] Article 100 provides for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affecting the establishment of the common market. Article (94) then provided the basis for the adoption of harmonisation measures in any area relevant to the operation of the common market where no other express provision was set out in the Treaty. The scope of the common market was defined in Article 3 to include attainment of the four freedoms (goods, persons (workers and establishment), services and capital) as well as the promotion of common policies in agriculture, transport and social services and the protection of competition. Article 235 separately provided for the adoption of measures whenever necessary to achieve a Community objective where

e.) *The Treaty on European Union or Maastricht Treaty (TEU), 1993*

The EU was consequently launched under the Maastricht Treaty. It was agreed in December 1991 and signed by heads of state or government on 7 February 1992 in the Dutch city of Maastricht. The EU was based on three pillars consisting of the original European Community (including the ECSC the EEC and the EURATOM), in addition to a new Common Foreign and Security Policy and, a Justice and Home Affairs Policy.

The distinction between the varied levels of integration within EU law is based on the Treaty structure of the EU. While the EEC constituted one of the 'three pillars' of the EU and concerns the social and economic foundations of the single market. The second and the third pillars were created by the Maastricht Treaty and involve Common Security and Defence Policy and Internal Security. Decision-making under the second and third pillars is not subject to majority voting at present. The Maastricht Treaty created the Justice and Home Affairs pillar as the third pillar. Subsequently, the Treaty of Amsterdam transferred the areas of illegal immigration, visas, asylum, and judicial co-operation to the EEC (the first pillar). Now Police and Judicial Co-operation in Criminal Matters is the third pillar. Justice and Home Affairs now refers both to the fields that have been transferred to the EC and the third pillar.

---

no express legislative power is contained in the Treaty.

Almost 200 directives had been adopted by the mid-1980s in such areas as motor vehicles (over 60 measures alone), foodstuffs, cosmetics and pharmaceuticals, dangerous products, consumer electrical goods, mechanical products and weighing equipment.

[28] For criticism of the Single Act on the basis that it qualified the scope of the original Treaty provisions by focusing only on the completion of the 'internal market,' see Pescatore P: *Some Critical Remarks on the 'Single European Act'*; 24 CMLR 9 (1987), 11. Pescatore argues that the effect of this was to substitute the one-sided notion of an internal market based on arbitrary selection of Treaty objectives for the well balanced and complex concept of the Common Market. Pescatore also criticised the decision not to give the definition of the internal market set out in Article 8a direct effect. The Luxembourg Conference (which negotiated the Single Act) adopted a separate —Declaration on Article 8a which confirmed that the setting the date of 31 December 1992 did not create an automatic legal effect. This was despite the Commission recommendation that Article 8a should have direct effect. While some commentators assert that the internal market represents a new substantive legal concept and that proceedings may be commenced against the Council under Article 175 if it fails to act (See for example Ehlermann C D; *'The Internal Market Following the Single European Act'* (1987) 24 *Common Market Law Review*, Issue 3, p.361–409); others have argued that the Declaration was only an interpretative communication with no legal effect. [Toth A G; *On Law and Policy in the European Court of Justice*, Y.E.L. 1987, p. 411-413.]

Furthermore, TEU which included certain new constitutional principles and paved the way for greater political integration, also set out a procedure and timetable for creating an Economic and Monetary Union (EMU) (subject to third stage opt-outs for the United Kingdom (UK) and Denmark) and provided for the implementation of the 1989 European Social Charter under a Social Protocol (subject to UK exception).[29]

f.) *The Treaty of Amsterdam, 1999*

This is commonly known as the Amsterdam Treaty, and was signed on 2 October 1997, coming into force on 1 May 1999; it made considerable changes to the TEU. Earlier Treaty amendments were consolidated under the Amsterdam Treaty and it intended greater importance on citizenship and the rights of individuals. This was an attempt to achieve more democracy *via* increased powers for the European Parliament including the promotion of equality between men, protection and improvement of the environment, a high degree of competitiveness and sustainable economic development; a Community area of freedom, security and justice, the beginnings of a Common Foreign and Security Policy (CFSP) and the modification of institutions in the build-up to enlargement. The Treaty also provided for central and eastern European expansion and further work on European citizenship.[30]

[29] Other changes included: (i) the establishment of a Committee of Regions, (ii) the Court of Auditors became a Community institution, (iii) increased powers for the European Parliament under a new co-decision procedure, (iv) greater co-operation in the areas of culture, education, vocational training and youth, (v) increased co-ordination on healthcare programmes and levels of health protection, (vi) new initiatives in the area of consumer protection, (vii) the development of trans-European networks, (viii) co-ordination of research and development activities, (ix) further work in the area of social and economic cohesion, (x) further environmental initiatives, (xi) confirmation of the Community's commitment to integration with the world economy, (xii) full free movement of capital and (xiii) new rules on international transport.

[30] All earlier Treaty amendments are incorporated under a new renumbering. Decisions are to be taken as 'openly as possible' and as closely as possible to the citizen with the Council of European Union being able to suspend treaty rights where there has been a persistent and serious breach of human rights. More so, Justice and Home Affairs is incorporated within the Treaty and extended to include Policy and Judicial Co-operation in Criminal Matters (PJCC). The Treaty is also amended to include the gradual abolition of border checks under the Schengen Agreement in 1985.

The veto rights provided under the Luxembourg Accords are brought within the Treaty as new powers are conferred in the area of non-discrimination and a new title on employment included with a separate advisory Employment Committee being set up.

Further provisions are amended or included with regard to public health, consumer protection, co-decision, regional consultation and fraud. Groups of Member States are also allowed to co-operate in specific areas without the necessary involvement of all others under a new flexibility principal.

The Amsterdam Treaty did not however settle all institutional questions once and for all. Work is still in progress on reforming the institutions to make them capable of operating effectively and democratically in a much enlarged EU. The most pressing issues here are the composition of the Commission, the weighting of Member States' votes, and qualified majority voting. These questions were addressed in subsequent Treaties.

g.) *The Treaty of Nice, 2003*

The treaty was signed by European leaders on 26 February 2001 and came into force on 1 February 2003. It is generally concerned with amending the composition of the institutions, voting procedures, enlargement and promoting enhanced co-operation. It reformed the institutional structure of the EU to withstand eastward expansion, a task which was originally intended to have been done by the Amsterdam Treaty, but failed to be addressed at the time.

Qualified majority voting rights (QMVs) were re-rated resulting in more power being given to the larger countries (including France, Germany, Italy, Spain and the UK).

h.) *The Treaty of Lisbon 2009*

Initially known as the Reform Treaty, it was signed by the EU member states on 13 December 2007, and entered into force on 1 December 2009. It amends the TEU and the Treaty of Rome. In this process, the latter was renamed the Treaty on the Functioning of the European Union (TFEU). Critics of the Treaty of Lisbon, such as former Danish Member of the European Parliament (MEP) Jens-Peter Bonde argued that it would centralize the EU, and weaken democracy by moving power away from national electorates.[31]

Typically, the Treaty attempts to deal with expansion and reforming the institutions but has encountered difficulty in doing for the simple reason that once countries have acquired powers over the years, they are reluctant to give it up. This is particularly relevant to the new (eastern European) countries coming into the EU who have limited or no voting rights. This raises issues of disproportion as some countries (the bigger countries) ultimately benefit from enlargement much more at the expense of the smaller countries.

[31] See Bonde J P; *From EU Constitution to Lisbon Treaty*; Forlaget Notat; Allingåbro, 2008 p.41

3.3.3 Development of the EU Single Market legal structure

The legal development of the European internal market can be summarized into the following five categories which are considered below. This categorization is what lies at the heart of the distinctiveness of EU law as compared to any other model of regional integration in the world. In fact, the proposals put forward in chapters one and two to solve the *African problem* including the *spaghetti bowl* dilemma and relational issues, were derived from these categories.

a.) *<u>Supremacy of EU Law:</u>*

This is sometimes referred to as primacy of European law. It is the principle by which the laws of EU member states that conflict with laws of the EU must be ignored by domestic courts so that the EU law can take effect. This was established in the important ECJ case *Costa v ENEL*[32]where the court ruled that EU law would not be effective if Mr Costa could not challenge national law on the basis of its alleged incompatibility with EU law: ―It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question. As a matter of fact, some countries have written the precedence of Community law into their constitutions. For example, Article 29 of the Constitution of Ireland states that: "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities..."[33]

b.) *<u>Direct Effect:</u>*

The concept *direct effect* emerged in the ECJ case *Van Gend en Loos*[34] which decided that a citizen was able to enforce a right granted by EC legislation against the government. This applied to all individuals across Europe. It was completely revolutionary and again concretizes the EU's matchlessness as compared to any other attempts at single market programmes anywhere else in the world. It was the first time the principle of *direct effect* had been established and ever since, it has been subsequently loosened in its application to treaty

[32] Case 6/64, *Falminio Costa v. ENEL* [1964] ECR 585, 593

[33] Available online at http://www.irishstatutebook.ie/en/constitution/index.html#part7 (accessed 12 January 2014)

[34]*NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, EURLex case 26/62. Direct applicability means that EU law becomes part of the national law without intervention of Parliament.

articles. Thereby, the ECJ expanded the principle, holding that it is capable of applying to virtually all of the possible forms of EU legislation most especially regulations[35]and in certain circumstances directives.[36]

c.) *Mutual Recognition:*

This was the outcome of the *Cassis de Dijon* case in 1979. The case concerned the sale by an importer of Crème de cassis, a blackcurrant flavoured liqueur, produced in France. The German government had a law restricting the minimum amount of alcohol which should exist in certain products being sold as a liqueur. The importer was prohibited by the German authorities from importing Cassis de Dijon into Germany on the grounds that its alcoholic strength was too low. German law prevented the sale of any drink with alcohol content between less than 25%. Therefore the importer was told that the product could not be sold as they intended to sell it. The importer argued that this represented a quantitative restriction on trade, which would be in breach of Article 28 of the Treaty of Rome. As such, the ECJ held that the German legislation represented a *measure having equivalent effect* of restricting trade, and that the law was in breach of Article 28 of the Treaty. It added that there are no valid reasons why a product that is lawfully marketed in one member state should not be introduced in another member state.[37] This created a double test of (i) lawful production and (ii) first placement in one member state to enjoy free movement across the community.

It is worth mentioning that, *Cassis* was a narrower judgement of an earlier case in 1974 called

[35]Article 288 TFEU (former Art 249 TEC) explicitly provides that regulations "Shall be binding in its entirety and directly applicable in all Member States" the ECJ has confirmed that they are therefore in principle directly effective stating that "Owing to the their very nature and their place in the system of sources of Community law, regulations operate to confer rights on individuals which the national courts have a duty to protect"- Case C-253/00 *Munoz* [2002] ECR I-7289 para.27

[36] Unlike Treaty provisions and regulations, directives cannot have horizontal effect (against another private individual or company), as this is adjudged contrary to the principles of equality [see *Marshall v Southampton and South West Hampshire AHA* (1986) ECJ-Case 152/84) [1986] ECR 723]. As such, Directives are currently only vertically directly effective (i.e. against the state, a concept interpreted broadly by the ECJ, including state schools and other —emanations of the state).

[37] To soften this wide opening of the gates for intra-Community trading, the court went on to provide four exceptions normally referred to as *mandatory requirements* which might be accepted as necessary for restricting trading: —..The effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer‖- this replaced the much broader *reasonableness test* set out in *Dassonville* 1974 (infra n.44) (mandatory requirements was the wishy-washy translation of the French phrase *"Exigences Impératives"*

Procureur du Roi v Benoît and Gustave Dassonville[38] simply referred to as *Dassonville*. This is so because, in *Cassis*, the ECJ sought to limit the range of the *Dassonville* decision by reducing the gamut of restrictions.[39] In Dassonville the ECJ had held that the Belgian legislation which required the certificate of authenticity from a trader importing Scotch whisky (having purchased this whisky in France where no such requirements existed) represented a *measure having equivalent effect* of restricting trade, and was in breach of Article 28 of the Treaty. In other words, the restriction meant that it was perfectly possible for a French seller of Scotch whisky to sell the whisky, whilst a short distance away in Belgium, a trader selling the same whisky would be subject to restrictions thus, effectively creating a restriction on their ability to compete with the French trader. The court stated: "All trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."

Thus, contrary to popular belief following the Treaty of Rome, the ECJ in *Dassonville* established that discriminatory and non-discriminatory rules of member states that hinder trade shall be illegal. Thereby developing an *effects test* which provided that discrimination must not be the only precondition for a restriction to be illegal but anything else which restricted trade. This strong pro-trade bias against the domestic regulations of the member states proved to be very broad and as such was narrowed in *Cassis*.[40] The ECJ did not nevertheless forget to

---

[38]EURlex (Case 8/74) [1974] ECR 837. This was the leading case regarding the free movement of goods and competition as it provided the Court with its first important opportunity to consider the meaning of free movement of goods provisions.

[39] Horspool M & Humphreys M: *European Union Law* (5th edition), OUP, Oxford 2008, p.316–317.

[40] Silhouetted against the transformation of its decision making (harmonization) mechanism, the development of the ECJ jurisprudence, with respect to the interface of free markets and state regulation, has oscillated as it pursues an appropriate balance between deeper integration and domestic regulatory autonomy. The ex. Article 30 of the Treaty of Rome amounts to a combination of GATT Article III: 4 (National Treatment) and XI: 1 (Prohibitive of Quantitative Restrictions and Measure Equivalent to Quantitative Restrictions). It states: "Quantitative restrictions on imports and all measure having an equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States ".

Before the 70's, there was a spectrum of views on the interpretation of the Article, ranging from narrow ('protection test') to a wider (an 'obstacle' test). Meanwhile, the view adopted by the Commission was that indistinctively applicable measure would fall within the prohibition of ex Article 30 only if they were 'disproportionate'. (infra n. 41; Cho. p.71-72). These disparaging views were concomitant with the failure of the general programmes to be adopted in 1970 due to overwhelming disagreements between member states. (This was solved by direct effect) (The differing views were clarified somewhat post *Cassis de Dijon*.)

provide an outlet for escape from an overly draconian application of the rule as long as the questioned measure was found to be *“reasonable” and “indistinctively applicable”* to all community nationals. This outlet was available even for purposes that lay beyond the breadth of the exhaustive list of ex Article 36 of the Treaty of Rome such as the prevention of unfair practices.[41]

In strictly banking and financial law terms, it is worth noting that one of the main obstacles to cross-border trade in the banking and financial industry was *regulation*. Historically, national regulations have always tended to restrict trade. Regulations in place are normally restrictive on banks and financial institutions coming from abroad to operate within your country; this is an obstacle to cross-border trade and in order to create a single market place, this obstacle must be removed. On the one hand, there are problems which arise if they are removed and on the other hand, obvious problems if they aren‘t. For example if German banks are told they cannot come into the UK to operate unless they are willing to comply with all the national laws and regulations, they will find it very difficult to come in because it could end up being a very expensive and time consuming process (retraining staff, building up capital to set up offices and branches and so on). If however, these obstacles are removed and they are told to come in freely, exempt from restrictions and regulations and all the laws there is a danger Britain could be undermining the stability of its local financial market place (and potentially the whole regional trading system which has been established) because it cannot be known whether they are regulated or not in Germany.

This was a major problem which requires compromise; hence within Europe the solution put forward was *mutual recognition*.

[41]Cho S.: *Free markets and social regulation: a reform agenda of the global trading system*; Kluwer Law International, London, 2003, p.71-75.Subsequently *Cassis* elaborated on this prototype of the ‘rule of reason’ by tempering further the interpretive rigours of *Dassonville* (hence the mandatory requirements). This was a significant hermeneutical innovation for overcoming the pro-trade bias embedded in *Dassonville*.

In spite of the *Cassis* judgment which granted considerable regulatory leeway to member states, the shadow of Dassonville remained an overwhelming presence for a very long time. In particular, even indistinctively or equally applicable measures still needed to be ‘justified’ by the proportionality test in order to escape the reach of ex Article 30 of the Treaty of Rome. This vestigial rigour which continuously interfered with the domestic regulatory autonomy often contradicting local socio-political sensibility turned out to be more severe and burdensome as integrative market forces embrace member states at an ever increasing rate. Angst over diminishing regulatory sovereignty was also reflected and fuelled by the ethos of ‘subsidiarity’ which influenced the Social Charter Movement (1989) (Cho, page 73).

d.) *<u>State Liability:</u>*

The principle of State Liability for compliance with EU law emerged from the case *Andrea Francovich and Others v. Italian Republic*[42]. This concerned a compensation scheme which Italian workers were entitled to under an EU directive. Since state liability is enforced through national courts, the ECJ stipulated that national procedures should determine how state liability is enforced. The procedures for claiming damages from the state before national courts must comply with the principles of equivalence (to those procedures available for similar claims for damages) and effectiveness (to secure that EU law is respected). So long as it respects these two principles, the Member State can prescribe its own procedures for claims. Here the ECJ acted in a formative rather than purely responsive or interpretative manner in developing a number of core doctrines or principles of European law. This more interventionist and aggressive policy was, in particular, considered necessary during the late-1960s and early-1970s with the delays and relative successes possible in other areas of European harmonization and integration.[43]

e.) *<u>New Legal Order:</u>*

From a holistic point of view, the progress of EU Law has been largely shaped by the ECJ. In the landmark case of *Van Gend en Loos* in 1963, the ECJ ruled that the EC, through the will of Member States expressed in the Treaty of Rome, ―constitutes a *new legal order* of international law for the benefit of which the states have limited their sovereign rights albeit within limited fields. It established that provisions of the Treaty of Rome were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Community's member states.[44] This is the principle of *direct effect* above explained. *Van Gend en Loos* is acknowledged as being one of the most important, if not the most important, decision in the EU‘s development.[45] The application of this rule was unlike

[42] Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357

[43] A number of general principles have also been recognised as forming part of European Community law. These general principles may be derived from the underlying Treaties themselves as well as from principles of national laws within the Member States or other international Treaties or international laws. The main general principles of Community law recognised by the Court over time have included the following: human rights, equality, proportionality, legal certainty, due process, good faith, fairness and force majeure.

[44] Kent, Penelope; *Law of the European Union*; 4th Edition, Pearson, Harlow, 2008; *Van Gend en Loos* was the first case in which the ECJ considered direct effect.

[45] Craig P and De Búrca G; *EU Law*: Text, Cases and Materials; 5th Edition; OUP, Oxford, 2011; Ch. 7

anything ever seen in any regional integration system and was indeed the first of its kind.[46] The evolution of this structure demonstrates the undoubted uniqueness of the EU as compared to any other regional integration system in the world. It will be interesting to note the success and shortcomings of the application of this European structure of integration within the confines of banking and finance activities. An appreciation will be made in the wake of the GFC on how the EU handled the crisis at the regional level with lingering factors initiated at the national level.

Part Three

3.4 EU Banking and Finance Law

Drawing from the historical content above, it is noticeable that in the early period following the establishment of the EEC, banking and financial matters were treated as part of the larger trade objectives. Some progress was possible in the development of early central bank co-operation within the Community although a large degree of close contact already existed between the parties involved at the international level mainly through the work of the G10 in Basle.[47] The objective of these efforts was to begin to create more effective co-ordination of the activities of the central bankers within Europe especially with regard to monetary policy although it was unclear at that time to what extent this could be carried forward and be effective in practice.[48]

---

[46] *Van Gend en Loos* is authority for the proposition that articles of the EC treaty are directly effective (as distinct from directly applicable) in their application against the state. The case illustrates the creative jurisprudence of the ECJ as the concept of direct effect is not mentioned in the treaty. The court held that such a doctrine was necessary in order to ensure the compliance of Member States with their obligations under the Treaty of Rome. Additionally, it typifies a procedure of enforcement of EU law at the national level - direct effect does not require the Commission to bring an action against the state. This is significant, because it provides a more effective, distributed enforcement mechanism.

[47] Walker G.A.: *European Banking Law: Policy and Programme Construction*; BIICL, London, 2007, p.234-287

[48] In this early period the only action which was taken in the banking and credit area was the creation of early systems of central bank co-operation. This began with Council Decision 64/300 on co-operation between the central banks of the Member States. The basic objective was to set up a committee of central bank governors to achieve closer co-ordination of monetary policies between the Member States by ensuring that consultation was secured before major decisions were taken. The Committee is made up of each of the governors of the central banks of the Member States or by a member of a directing body of the institution. The Committee is required to hold consultations on the general principles and broad lines of policy of the central banks and to exchange information at regular intervals about the most important measures falling within the competence of central banks and to examine those measures. The Committee is also required to review the monetary trends inside and outside the EC. Although the importance of the Committee decline with the development of the European Monetary System is has subsequently been given greater responsibility in connection with the implementation of stage one of Economic and Monetary

With reference to the law of free of movement (goods, people, capital, services and establishment), those particularly relevant to the banking and finance sector specifically are the free movement of capital,[49] services and establishment. In fact, the banking and investment services measures which have been adopted by the Council of Ministers were based on the provisions in the Treaty of Rome dealing with the free movement of capital, freedom of establishment and free provision of services.[50] It is nevertheless worth noting that as the objective was to remove discrimination against incoming firms whereas the relevant Directive was accordingly based on the principle of national treatment, as such, the Directive was superseded by the decisions in *van Binsbergen*[51] and *Reyners*[52] in which the European Court held that the underlying Treaty provisions were of direct effect from the end of the transitional period. These were landmark in the development of free movement of establishment and services.

The directives to be adopted under the General Programmes were either intended to give effect directly to the underlying rights of establishment or free provision of services or to establish common provisions that would allow these rights to be exercised in practice.[53] The construction

Union in the Community. A further Directive was adopted on March 22, 1971 to strengthen central bank co-operation within the framework of co-ordination of national monetary and credit policies having regard to the general economic policy guidelines laid down by the Council. (See Walker; *European Banking Law: Policy and Programme Construction*)

[49] (Ibid Walker) - Although no specific measures with regards to banking or investment services were adopted during this initial period the First and Second Council Directives implementing Article 67 of the Treaty in respect of the free movement of capital were proposed. Although these Directives provided for the progressive abolition of all restrictions on the movement of capital between Member States, as provided for in Article 67(1), very limited progress was made in the area for a long period due to the exercise by certain Member States of the safeguard clauses provided for in these Directives and the Treaty.

[50] While the court attempted to develop its more general policy of free movement, the commission has been working on the construction of necessary secondary legislative programmes in each of the areas of activity (and sub-activity) set out in the original General Programmes adopted under the Treaty of Rome. [See General Programme for the abolition of restrictions on freedom of establishment and General Programme for the abolition of restrictions on freedom to provide services (OJ No. 2, 15 January 1962, 36/62); See also, Commission *Completing the Internal Market* 1985] (Walker p.233)These General Programmes included specific references to banking and insurance.

[51] *Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* Case 33/74 [1974] ECR 1299

[52] *Reyners v. Belgium State* Case 2/74 [1974] ECR 631.

[53] Although it had been originally understood that some form of prior harmonization or pre- compliance would only be

of a new banking and financial programme has since proceeded through the adoption of a number of particular legislative measures. The aim of these has generally been to give effect to the underlying rights of establishment and services provided under the Treaty of Rome and simultaneously construct appropriate supporting supervisory and regulatory systems across Europe.

In this light, to assess the issue of programme completion in the banking and financial area and to consider the work being done by the commission, the basic structure of the banking and financial programme is reviewed and the recent integration efforts referred to.

From the onset, it was difficult to agree common standards in all detailed technical areas, which frustrated many in the member states. In the banking area specifically, difficulty arose because it was initially unclear whether some degree of harmonisation was necessary before the rights of establishment and services granted under the Treaty of Rome could be exercised and if so whether it would subsequently be possible to agree all of the relevant terms within a single measure. As a result, work in this area was carried out through the establishment of an initial advisory group in 1966 and then a more formal Committee of Experts in 1968. The advice provided by the first working group, it was decided that some harmonisation would be required although the Commission had earlier produced a draft free movement directive which was adopted in 1973.[54] A first draft of a fully consolidated directive was produced in July 1972[55]

---

required in the insurance sector, it was subsequently realized that this would also be necessary for banks. Furthermore, the importance of securities markets as independent sectors would be recognized subsequently. The problem that arose however was that, no guidance was provided in the Treaty with regard to the content and structure of the harmonization or pre-compliance to be secured. It was simply assumed that the relevant requirements in each area would be harmonized.

[54] Council Directive 73/183/EEC of 28 June 1973 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of self-employed activities of banks and other financial institutions.

Following its further work, the Commission's separate Committee of Experts produced a first draft banking measure on a German-Dutch model in 1972. This was necessary in light of the generally underdeveloped nature of the French laws at that time and unnecessary institutional complexity within the Italian system.

[55] An original group of national experts had been asked to advise the Commission on whether measures would have to be harmonized within the banking area between the then six original Member States and on the content of any harmonized provisions required. The initial Working Group met between 1966 and 1968 and the objective was to compare the existing national laws and consider whether any material differences existed and possible grounds of harmonization. The Working Group, in particular, examined licensing, solvency, liquidity, risk concentration and legal form issues. The expert group reported end of 1967 and beginning of 1968.

although its consideration could not proceed further with the accession of the UK, Ireland and Denmark in 1973 as a result of disagreements between the member states especially as a result of persistent resistance from France and Italy who wanted to protect their domestic policies.

As a partial alternative to this full harmonization within the banking area, the Commission adopted a new framework approach.[56] This involved identifying a number of core regulatory areas within the banking area and developing separate directives in respect to each. As a result of this change in approach, some of the main outline provisions set out in the original 1972 draft were retained within the proposal in 1974 for the 'First Banking Directive' which would later be adopted in 1977.[57] Other initial standards set out in the proposal for the First Banking Directive related to minimum own funds, the number and suitability of directors, control, conditions for withdrawal of license, reciprocity and information exchange. Also, the First Banking Directive anticipated passport rights, home country control and transitional minimum harmonization.

One of the particular problems that had arisen by the early 1970s was that new financial ratios (especially with regard to capital adequacy) had to be developed with the changes that had taken place in banking market structure and practice. In light of the complexity of the issue and underdeveloped nature of each of the national systems at that time, it was decided to undertake

---

The Committee produced in July 1972 a 'Draft Directive for the co-ordination of the legal and administrative provisions for the taking up and exercise of the "independent operator" activities of credit institutions' (see XIV/508/72-D, Orig, D). The draft 1972 Directive contained a full set of measures for the full supervision and regulation of credit institutions. The draft consisted of 9 Parts and 41 articles. (See Walker p.237)

[56] A more general directive to remove discrimination in regulatory banking practices was announced by Monsieur Françoise Treppaniers at a banking conference in London on 16 January 1974. The preliminary 'umbrella' directive would include basic provisions concerning conditions under which licenses were issued, minimum levels of liquidity, risk and solvency, competition, accounting disclosure requirements, winding-up, banking operations and third country arrangements. Monsieur Trappaniers was speaking on behalf of Monsieur Henri Simonet, Vice-President of the European Commission for Taxation, Financial Institutions and Company Law. The Commission had to reconsider its approach to the whole problem of harmonising banking rules in the communities and had attempted to separate from the generality of the subject various aspects which would be treated separately. See 'EEC wants rules on banking harmonised,' *The Times* (16.1.1974), p 16, column 3

[57] See First Council Directive 77/780/EEC on the co-ordination of laws, regulations and administrative provisions relating to the take up and pursuit of the business of credit institutions of 12 December 1997 (OJ L 322 12.12.1997, p 30)

a data collection and examination exercise through the Banking Advisory Committee (BAC) which was set up under the Directive.[58]

The underlying policy was, nevertheless still essentially determined by harmonisation, and the only difference was that harmonisation would now be effected through multiple rather than a single directive. Consequently, the underlying integration policy implemented changed fundamentally with the integration process now re-launched with the adoption of a new approach based on the 'mutual recognition' of national laws and regulations.

3.4.1 Mutual Recognition Integration Approach

Mutual recognition defined by Walker is ―based on the identification of core aspects of control within which certain minimum common standards are established. In the banking and financial area, in particular, the additional principle of home country control also allows for supervisory allocation or division of key functions between the home and host territories. Mutual recognition also requires each set of national authorities to recognize the authority of the license provided by the home country. This includes both the validity of the home license and its operational effectiveness within the jurisdiction of the host territory.[59]

---

[58] The BAC was distinct from the European Contact Group (*Groupe de Contact*) which had been set up in 1972 to facilitate operational contact and co-operation between national supervisory authorities in the banking area. The BAC was accordingly instructed to monitor financial ratios and attempt to develop common standards acceptable in all national territories under the Directive.

[59]Walker; *European Banking Law*; p.240- Walker points out that ―the difference between mutual recognition and full harmonisation is that it is not based on the establishment of a full set of common standards but only a minimum level of protection within selected agreed areas. In the financial area, pre-compliance is also not sufficient as with full harmonisation. Rather continuing compliance is secured through the operation of the supervisory allocation secured under home country control. Continuing rather than prior compliance is then effected.

The two integration approaches are accordingly different in terms of standards and compliance. Both, however, provide for regulatory withdrawal principally through exemption from the application of the host regulatory requirements and, in particular, the local core prohibition on the (unauthorized) conduct of the particular financial activity concerned. The host requirements are accordingly relaxed in each case and the validity and scope of the license (and authorization) provided by the home country recognized in the local territory. Full and framework harmonisation also operate on a mutual recognition basis to a certain extent. The difference is that the recognition now operates on the basis of reciprocal compliance with agreed minimum standards in certain pre-defined areas rather than with compliance with a full of range of pre-set common standards. In the banking and financial area, this also operates on continuing rather than simple initial market entry basis. (Walker p.240-241)

In applying this new mutual recognition based integration approach in the banking and financial area, the most important measure created in order to provide a full range of access rights was the Second Banking Directive.[60]

These measures were supported by the Own Funds Directive and the Solvency Ratio Directive which created a basic system of credit risk capital cover[61] and an earlier Large Exposures Directive which introduced formal concentration limits for the first time.[62] The main measures in the banking area were then drawn together and restated in a Consolidated Banking Directive in May 2000.[63]

The general effect of these measures was to give effect to the underlying Treaty rights of establishment and cross-border provision of services[64] and operated within a new general regulatory framework defined in terms of *mutual recognition, minimum harmonisation and home country control*. The underlying objective is then to provide for both full market access and proper market control concurrently. The supporting control system is then generally based on a number of separate regulatory and supervisory provisions. The regulatory requirements are generally concerned with initial authorisation[65] and continuing compliance.[66]These regulatory

[60] Council Directive 89/299/EEC on the own funds of credit institutions of 17 April 1989 (OJ L 124, 5.5.1989, p 16) as amended by Directive 91/633/EEC of 3 December 1991 (OJ L 339 , 11.12.1991, p 33) and Directive 92/16/EEC of 16 March 1992 (OJ L 75, 21.3.1992, p 48); and Council Directive 89/647/EEC on a solvency ratio for credit institutions of 18 December 1989 (OJ L 386, 30.12.1989, p 14) as amended by Directive 91/31/EEC (OJ L 17, 23.1.1991, p 20).

The purpose of the Own Funds Directive was to establish certain common standards for the calculation of the own funds (capital) of credit institutions that would be available to ensure the continuity of credit institutions and to protect savings. Whereas, the Solvency Ratio Directive provides for the calculation of a total risk-adjusted asset figure of a bank (including off-balance sheet items) and imposes the 8% minimum requirement.

[61] Council Directive 89/299/EEC on the own funds of credit institutions of 17 April 1989 (OJ L 124, 5.5.1989, p 16) as amended by Directive 91/633/EEC of 3 December 1991 (OJ L 339 , 11.12.1991, p 33) and Directive 92/16/EEC of 16 March 1992 (OJ L 75, 21.3.1992, p 48); and Council Directive 89/647/EEC on a solvency ratio for credit institutions of 18 December 1989 (OJ L 386, 30.12.1989, p 14) as amended by Directive 91/31/EEC (OJ L 17, 23.1.1991, p 20).

[62]Concentration limits for credit institutions were introduced under Council directive 92/121/EEC on the monitoring and control of large exposures of credit institutions of 21 December 1992 (OJ L 29, 5.2.1993, p 1) following an earlier Commission Recommendation 87/62/EEC (OJ L 33, 4.2.1987, p 10).

[63] See Directive 2000/12/EC May 2000 relating to the taking up and pursuit of the business of credit institutions [CBD].

[64] See CBD, Article 18 (formerly SBD, Article 18(1)).

[65]The initial market entry or authorization is generally based on a minimum capital requirement (Article 5(1)), management and shareholder suitability (Articles 6(1) and 7(2)) and basic internal controls (Articles 8 and 17).

obligations are then supplemented by a number of further basic supervisory provisions which are principally concerned with the monitoring and oversight of credit institutions to ensure, in particular, that they comply with basic regulatory obligations imposed.[67] Market exit (as opposed to entry) is partly dealt with through the Deposit Protection Directive[68] (liability resolution) and the Winding-Up Directive[69] (asset realization). These essential regulatory and supervisory measures are then supplemented by further specific transactional requirements such as with regard to bank charges and guarantees, consumer protection and payment and settlement.[70]

Further to these measures, directives have also been adopted in the securities and investment services area. The Investment Services Directive created an equivalent set of rights for investment firms as credit institutions in 1993.[71] This was supported by the Capital Adequacy Directive which set out the minimum capital requirements to be applied to banks and investment firms in respect of securities related market (or position) risk as well as foreign exchange, some operational and commodity risk.[72]

It is imperative to understand that any meaningful progress in the banking area was only possible once full free movement of capital had been secured across Europe during the late 1980s and early 1990s.[73] It is worth pointing out that the in *Casati*[74] the ECJ recognised from

[66]Continuing regulatory compliance is based on capital adequacy (the Own Funds and Solvency Ratio Directive (CBD, Articles 34-47) and large exposures (Articles 48-50) , suitability of controllers (Articles 7 and 16), restrictions on commercial holdings (Article 51), administrative and internal controls (Article 17) and separate requirements on bank and branch disclosure. Compliance is secured through various supervisory procedures imposed.

[67]The supervisory framework set up is generally based on consolidated supervision (Articles 52-56), consultation and co-operation between authorities (Article 28), information exchange (Article 30), inspections and verifications (Article 29) and disciplinary measures (Article 32).

[68] Directive 94/19 of 30 May 1994 on deposit guarantee schemes (OJ 1994, L135/5). This followed an earlier Commission Recommendation 87/63 concerning the introduction of deposit guarantee schemes in the Community of 22 December 1986 (O J L33/87).

[69] See Directive on the Winding-up and Liquidation of Banks 2001/24/EC adopted 4 April 2001. See also Directive on the Reorganization and Winding-up of Insurance Undertakings 2001/17/EC adopted 19 March 2001.

[70] See, Section 4.V

[71] Council Directive 93/22/EEC on investment services in the securities field of 10 May 1993 (OJ L 141, 11.6.1993, p 27).

[72] Council Directive 93/6/EEC on the capital adequacy of investment firms and credit institutions of 15 March 1993 (OJ L 141, 11.6.1993, p 1)

[73] Although capital Directives date from 1961 and 1963, Member States had relied on standstill provisions until further measures were adopted in 1986 and 1988. See generally, Age F. P. Bakker, *The Liberalisation of Capital Movements*

the onset that free movement of capital is 'one of the fundamental freedoms of the Community.'[75] Nonetheless, it established that unlike the other freedoms, the Treaty provisions concerning it were not directly effective and could therefore not be relied upon in the domestic courts.

A number of crucial measures have been adopted accordingly in each major financial sector (including capital). With these provisions, an attempt has been made to reconcile the basic conflict that arises in attempting to provide full market access with proper market control in any regional trading system. Substantial progress has been achieved although a number of significant gaps and omissions remain. It is for this reason that the more recent consolidation and completion work of the Commission is of essential importance to the longer term development and ultimate success of this work.

3.4.2 Post-Maastricht: The Way Forward for Programme Consolidation

To ensure an effective banking and financial programme be constructed within Europe, an original *Action Plan for the Single Market* was firstly proposed at the Amsterdam European Council Summit in 1997 to make sure that all of the directives adopted under the 1985 White Paper had been properly implemented and worked effectively to the greatest advantage of European citizens and businesses.[76]

The original Action Plan was followed by a framework document in the banking financial area in October 1998.[77] This *Framework for Action* had been requested by the June 1998 Cardiff European Council and was to be presented at the following Vienna Council. Given that the Commission recognized the fact that plenty of work still had to be done, the Framework was generally based on the adoption of a number of measures in the area of regulation, wholesale and retail financial markets as well as improved supervisory co-operation and other financial co-

---

in Europe-The Monetary Committee and Financial Integration 1954-1994 (1996).

[74] Case 203/80 [1981] ECR 2595

[75] Para.8 of judgement (ibid)

[76] See Communication of the Commission to the European Council, *Action Plan for the Single Market* (CSE (97) 1 final) of 4 June 1997

[77] See Commission Communication, *Financial Services: Building a Framework for Action* COM (1998) 625 final of 28 October 1998

ordination such as in taxation, competition policy and infrastructure.[78] The Commission was then asked to prepare a programme timetable to achieve the objectives set.[79] An implementation paper was subsequently produced in May 1999.[80] A Financial Services Policy Group (FSPG) was also set up to assist the Commission identify relevant priorities. The group consists of personal representatives of the national Finance Ministries and although it was only

---

[78] See Commission; '*Financial Services Commission proposes Framework for Action*' (28 October 1998); available at available http://europa.eu.int/comm/internal_maketen/en/finances/general/fsen.htm. (accessed 14 January 2014).

Regarding the regulatory devices, it was accepted that the existing framework of measures established must be continually revised to reflect changing market conditions. While the framework of measures adopted was generally satisfactory, the legislative structure had to be revised to ensure that they were as speedy, flexible and streamlined as possible. Also, there was concern to improve existing rules through better implementation, enforcement and clearer and more uniform interpretation by proceeding with the production of interpretative communications to assist national authorities and market participants and present detailed suggestions for discussion on a better approach for further prudential financial services legislation.

Again, it was acknowledged that while the introduction of the Euro would assist in the development of a large and liquid European capital market, this would not, singlehandedly integrate capital markets. That said, regulatory, administrative and tax obstacles have caused a high degree of market fragmentation in combination with other financial and corporate governance distortions a number of Member States were significantly under-developed. To solve, it was recommended that issuers should enjoy easy access to European wide capital markets on competitive terms. Investors should be free to invest their assets without encountering legal, administrative or information barriers. Investment service providers should also be able to operate throughout the EU without confronting overlapping sets of legal and administrative formalities. Hence, the main recommendations were accordingly access, investment and compliance driven.

[79] Six main objectives were identified; they included: (a) equip the EU with a legislative apparatus to meet present and future challenges; (b) eliminate remaining capital market fragmentation to minimise the cost of capital raised on EU markets; (c) make the advantages of open markets available to both users and suppliers of financial services; (d) encourage the closer co-ordination of supervisory authorities; (e) promote the emergence of an integrated infrastructure at EU level; and (f) reduce barriers to the single market resulting from disparities in taxation. See Commission; *'Financial Services Commission outlines Action Plan for single financial market'* (11 May 1998) available http://europa.eu.int/comm/internal_maketen/en/finances/general/action.htm. (accessed 14 January 2014)

[80] See Commission, *Financial Services: Implementing the Framework for Financial Markets: Action Plan,* COM (1999) 232, 11 May 1999.

This identified a number of issues requiring urgent action to ensure the proper functioning of the European financial market (and the 'benefits of the single currency'). The 5 main areas recommended for reform were:

(a) the EU should be endowed with a legislative apparatus capable of responding to new regulatory challenges; (b) any remaining capital market fragmentation should be eliminated to reduce the cost of capital raised on EU markets; (c) users and suppliers of financial services should be able to exploit freely the commercial opportunities offered by a single financial market at the same time as benefit from a high level of consumer protection; (d) closer co-ordination of supervisory authority should be encouraged; and (e) an integrated EU infrastructure should be developed to underpin retail and wholesale and financial transactions. See 1999 Communication, p 3.

set up to assist with the Action Plan preparatory work, the Commission has found them of considerable value and has recommended that some more formally constituent equivalent bodies be set up to operate on a continuing basis.

A separate report was also prepared in the capital market area by a Committee of 'Wise Men' under Baron Alexandre Lamfalussy. The Committee produced an initial paper in November 2000 and a final report in February 2001.[81] The final report, in particular, recommended the establishment of two further committees in the securities area (a European Securities Committee (ESC) and a European Securities Regulators Committee (ESRC)) and the adoption of a four part (level) approach to European capital market reform.[82]

---

[81] See Initial Report of the Committee of Wise Men, *The Regulation of European Securities Markets* (9 November 2000); and Final Report of the Committee of Wise Men, *The Regulation of European Securities Markets* (15 February 2001).

[82] Despite the potential benefits available, a number of obstacles continued to plague the realization of a Single Market in the securities area. In addition to regulatory and implementation difficulties, differences in legal and taxation systems as well as other trade, political and cultural barriers worsened significant areas of legislative 'blockage' at the European level. The system was generally considered to be too slow and rigid involving too much ambiguity and erratic implementing rules.

In response to these difficulties, the Committee produced a series of general principles for securities regulation and recommended that a new four level approach be adopted for regulatory reform in the capital market area. Level one generally involved having framework principles produced at the European level within the existing legislative procedures available. Level two provided for more detailed implementing rules to be developed through two new specialist committees consisting of the ESC and ESRC. Level three promoted the enhanced co-operation in implementing relevant measures at the national level and level four guaranteed strengthened enforcement would also be secured through Commission action across Europe. As such, the general effect of these recommendations would be to improve both the legislative process at the European level as well as the common content and effective implementation of these measures at the domestic or national levels. The underlying objective is to ensure that the legislative process within Europe is made speedier, more flexible and responsive with the existing institutional obstacles identified being removed or, at least, reduced as far as possible. This would then have consequential regulatory benefits at the national level.

Walker points out that —Although directed at the securities area, these proposals are also capable of more general application. Most of the main recommendations made were not concerned with or directed at securities markets specifically, it is surprising that equivalent institutional arrangements in the banking and insurance area were not considered or, at least, referred to expressly. The Committee presumably felt constrained by its original ECOFIN mandate and subsequent directions. One possible reason for the securities focus may also have been the perceived lack of progress achieved in that area as against the other main financial sectors and consequent potential benefits that may be realized. Even allowing for this, the final financial programme will only be of value if all necessary intra-sector and cross or inter-sector progress is achieved. The Lamfalussy recommendations are accordingly of considerable value although only as one part of the larger integration efforts being undertaken. (Walker p. 271)

In fact a number of Progress Reports were subsequently issued by the Commission on the measures proposed to give effect to the Action Plan.[83] These considered the legislative progress of each of the measures recommended in the 1999 programme as well as further measures subsequently adopted. Related market developments and substantial progress were noted simultaneously with particular difficulties in the adoption of certain measures.

There is little doubt that the new mutual recognition approach adopted by the Commission within Europe supported by the principles of minimum harmonisation and home country control, has allowed agreements to be reached on minimum regulatory requirements as well as supervisory provisions. As a result, an Internal Market in banking and financial services has been constructed on the basis of the mutual recognition of national authorization and licensing systems although only the most minimum regulatory and supervisory framework have been created in each financial sector. Considerable differences still remain in terms of substantive regulatory content and operational market supervision.

Indeed, substantial economic benefits followed from the creation of a single market in banking and financial services; however Walker warns that the larger welfare gains that may arise must be protected from possible market and systemic collapse the sort experienced with the GFC. Moreover, whether the balance between immediate economic advantage and longer-term market and economic stability has been properly achieved remains to be seen.

More generally, the Commission has been concerned with dealing with selective omissions (mainly through resource constraints) rather than with conducting any more specific or detailed process of substantive regulatory and supervisory revision.

Walker continues by asserting that ‘the most important elements within the recent completion proposals are possibly regulatory content simplification, legislative procedural revision and improved supervisory co-operation.’[84]Improvements in these areas would be of significant value although possibly still insufficient in themselves to correct the deficiencies identified in terms of regulatory and supervisory content, mutual review and market support as well as possible

[83] See Commission, *First Progress Report* (29 November 1999); Commission, *Second Progress Report* (31 May 2000); Commission, *Third Progress Report* (8 November 2000); Commission, *Fourth Progress Report* (1 June 2001); Commission, *Fifth Progress Report* (30 November 2001); and Commission, *Sixth Progress Report* (3 June 2002).

[84] Walker, p.275

political interference and enforcement problems. These will also only be of limited effect if they are restricted to capital market programme reform. Rather than correct, this may only confirm existing cross-sector inconsistencies within Europe. The result may simply be to strengthen rather than resolve the sector disparities that already exist.

While agreed political compromises that balance comparative or relative advantage and disadvantage of one Member State as against another may also be of value, this may be wholly inappropriate in such a complex and important area as financial market stability. It is essential that each measure is fully and carefully considered and an appropriate result produced in each case. Political ambition and self-interest must not be allowed to undermine or lessen inherent supervisory or regulatory quality, coherence and operability.

Having said this, there is overwhelming evidence suggesting that extensive work has been undertaken in the banking and financial area. As a factual matter, a great deal of significant clarification has been achieved in addressing the difficulties which have arisen. I cannot agree more with Walker who holds that the main issue of concern now is proper programme completion (including existing programme revision) and implementation. He stipulates that it will involve ensuring that all residual gaps or deficiencies are corrected and that the programme agreed is then applied and operates in an effective and consistent manner within all Member States in practice. In addition, a necessary degree of commitment must then be made with adequate resources allocated at the European and national levels to ensure that this is achieved. In a nut-shell, ―the final objective must be the full and effective implementation of all necessary measures and the construction of an appropriate level of operational comparability and consistency in national regulatory and supervisory practice.[85] Even if new formal institutional structures cannot be agreed and are considered to be unnecessary or inappropriate, closer co-operation and co-ordination of activity at all operational levels must nevertheless be ensured. To be effective ultimately, the European financial system may have to move from formal (but still only nominal and superficial) mutual recognition to a considerably more substantial mutual co-operation and co-ordination based system of relevant activity in all operational areas.

Thus, I concur with Walker‗s concession that ―traditional mutual recognition may have to be replaced over time by increased mutual assistance and mutual reliance as authorities develop

[85] ibid

common operational and administrative systems involving closer co-operation and co-ordination of all relevant activities. This is the idea upon which the notion of *African sovereignty* is based.

3.4.3 Africa and the EU model

An investigation on the extent to which the features of the EU regional arrangement have been embraced by the RECs in Africa will now be carried out. The example of the EC legal framework which is backed by the ECJ is used because firstly the AU and REC Treaties have all drawn inspiration from the European model and secondly stated previously stated, it is the most advanced regional arrangement in the world. Dealing mainly with institutional aspects, the thesis lays out two areas of comparison between the legal frameworks: the regional enforcement mechanisms within the treaties and the financial regulatory systems.

i.) *Regional Enforcement Systems*

The effective functioning of the EC depends largely on the role played by the ECJ. Article 220 of the EC Treaty expressly gives the ECJ the responsibility to ensure that the law is observed in the interpretation and application of the treaty. Therefore, in interpreting and enforcing these primary and secondary laws of the EC, the ECJ is a pivotal institution in the community.[86]

The ECJ has the power to interpret treaty provisions at the request of national courts or tribunals.[87] The referral of landmark cases such as *Van Gend en Loos* and *Costa v Enel* to the ECJ and the subsequent implementation of its interpretation nationally is testament to the existence of the supremacy of EU law.[88]The general framework of community law has been greatly influenced by its jurisprudence thereby contributing to the development of the common market which enabled the integration process.

---

[86] The three main functions of the ECJ include: i) Hearing actions against community institutions (Arts 230–233 EC Treaty); ii) Hearing actions against Member States (Arts 226–228, EC Treaty); iii) Providing preliminary rulings on the interpretations and validity of community at the request of national courts (Art 234, EC Treaty).

[87] Article 234 EC Treaty

[88] In *Van Gend en Loos*, when the supremacy of EC law was questioned, the ECJ held that 'the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields.' The ECJ hereby signalled clear advocacy for the supremacy of EC law.

In cases such as *Van Dyn*[89] and *Rutili*[90] the court encouraged the integration process by ruling against barriers to free movement of people imposed by Member States. Similarly, in cases such as *Reyners* and *Van Binsergen*, the ECJ ruled against barriers to the free movement of services.

Regarding the free movement of goods, the ECJ by playing a more vigorous role ruled in *Cassis* that a Member State's measure was 'equivalent to a quantitative restriction' and as such, violated the provision for free movement of goods.[91] This is in marked contrast to the situation in Africa as the REC treaties unlike the ECJ, have failed to grant regional enforcement mechanisms the authority to hear cases referred to them by national courts.[92]

Additionally, in the case of ECOWAS, as there was no provision made for national courts to refer cases to the community court, the latter could not exert the kind of influence the ECJ had through the various referrals of landmark cases such as *Van Gend en Loos* and *Costa v Enel* by establishing the supremacy of EC law. The two cases that unearth this inadequacy are *Olajide Afolabi and Frank Ukor*[93]discussed in Chapter Two. This shortcoming prevents the ECOWAS Court of Justice from playing a fundamental role in the development of the ECOWAS common market goals.

ii.) <u>*Financial regulatory systems*</u>

Following the GFC, Europe retracted to the drawing board and began a system overhaul in respect of regional financial market regulation and supervision. The resulting regulatory framework is known as The European System of Financial Supervision (ESFC). This institutional architecture was primarily built upon the EU's strong recognition of the concept of supra-nationality, a robust EU legislative system and the existence of efficient and reliable financial supervisory authorities within Member States. This is hardly the case with the African RECs which struggle to demonstrate these qualities. The ESFS which functions as an interconnected system of EU and national authorities working hand in hand consists of three

---

[89] Case 41/74, *Van Duyn v Home Office* [1974] ECR 1337, where the ECJ ruled that Art 48(1) and (2) of the original EEC Treaty on the free movement of workers imposed a precise obligation and leave the community and Member States authorities 'no discretions as to implementation.'

[90] Case 36/75, Rutili v Minister for the Interior [1975] ECR 1219.

[91] Article 28;EC Treaty

[92] See ECOWAS example at Para. 2.3.1 (Chapter 2: Africa -Towards Monetary Integration at p.73-75)

[93] ibid

levels of authority: a) the European Systemic Risk Board (ESRB)[94] which is the highest tier, b) the European Supervisory Authorities (ESA)[95] which is the middle tier, and c) the National Supervisory Authorities which sit at the lowest tier.[96]

All this plays out nicely because the concept of supra-nationality has been fully embraced by the EU and its Member States. Essentially, Member States delegate decision-making powers to EU institutions as a fundamental part of their EU membership. These institutions in turn are accorded the responsibility of providing oversight and/or direction to the member countries. Sadly, this feature is conspicuously absent in the African RECs.

Furthermore, in a bid to set-up a single, harmonized European rulebook, the ESA has been accorded EU legislative authority to create legally binding technical standards. This rulebook applies to all domestic authorities and financial firms operating within the single market.[97] In a nut-shell, the rulebook carries the same binding effect as EU regulations it is binding in its entirety and directly applicable in all Member States. For all intents and purposes, national financial supervisory authorities can directly influence rule-making at the European stage. Clearly, this is possible only because all EU Member countries acknowledge the supremacy of EU law. Conversely, due to the absence of the supremacy of regional law in African RECs, it is

[94] In accordance with EU Regulation 1092/2010 (2010) OJ L 331/1 (ESRB Regulation) Art 2, the role of the ESRB is to supervise the financial system in its entirety and to prevent widespread financial distress; Art 3 outlines its three main functions which include: to monitor and assess systemic risk; to provide early warnings when systemic risks loom; and to issue policy recommendations for corrective action and monitor their implementation.

[95] Ibid ESRB Regulation, Art 1(3); The ESA was established by transforming the former advisory 'Level 3' Lamfalussy Committees (Committee of European Banking Supervisors, Committee of European Insurance and Occupational Pensions Supervisors and the Committee of European Securities Regulators) into Authorities. They determine universal technical standards for all EU financial firms and have the authority to intervene during a crisis. As things stand, the ESA authorities are: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA). These ESAs work simultaneously with the national supervisory authorities and are therefore made up of national banking supervisors, national insurance supervisors and national securities supervisors.

[96]The national banking supervisors, national insurance supervisors and national securities supervisors which form the lowest level in the EU mechanism have the responsibility of supervising the day-to-day activities of individual firms.

[97] Art 8(2) of the EU Regulations establishes the following: EU Regulation 1093/2010 [2010] OJ L331/12 (EBA Regulation), Art 8(2); EU Regulation 1094/2010 [2010] OJ L331/48 (EIOPA Regulation), Art 8(2); EU Regulation 1095/2010 [2010] OJ L331/ 84 (ESMA Regulation), Art 8(2). These provisions grant the ESA the authority to form 'regulatory technical standards' and 'implement technical standards'. This again is different from the previous 'level 3'Lamfalussy Committees position where powers were limited only to the issuing of guidelines.

highly unlikely that a regional equivalent of financial supervisory authorities accorded with this level of authority can be created. This regional authority will hardly have the authority to create laws, and should it manage to create the laws, will struggle to implement them because they will barely be recognized domestically. Previous discussions illustrate how African countries have acquired the reputation of ignoring regional provisions, talk less of implementing them.

Also, although the power to declare emergencies rests with the EU Council in consultation with the ESRB and European Commission however relevant[98], the ESA has unprecedented authority to intervene in emergencies and take remedial action for instance; banning certain products and restricting some financial activities.[99]Whilst the ESAs have the authority to mediate, arbitrate and enforce their decisions,[100] they can also resolve disputes between domestic authorities, particularly in areas requiring co-operation or joint decision-making by supervisory authorities in two or more member countries.[101] Further, these decisions could be appealed before a joint board of appeal for the ESAs- all three of them.[102] This arrangement is impossible within African RECs because the disparity in the levels of expertise of the various financial authorities across the continent inhibits the creation of a single financial rulebook.[103] This is worsened by the fact that as noted above, financial supervisory authorities in most African countries are impuissant when it comes to enforcing laws and decisions. As things stand, it is therefore inconceivable to visualize an African equivalent to the ESA with the ability to mediate, arbitrate and enforce its decisions and/or have the authority to resolve disputes between national authorities.

Reflections

It is worth noting that even though the EU financial regulation regime had thus far been successful as a result of Member States implementing financial harmonization directives, the application of these harmonized directives in Member States was sometimes inconsistent and subsequently destabilized the single market agenda. It is now believed that this challenge will be diminished considerably by the new regulatory framework because although financial

[98] ESRB Regulation, Art 3(e)

[99] Art 18 of their respective Regulations.

[100] EBA Regulation, Art 17

[101] Ibid, Arts 19 and 56

[102] Ibid Article 58

[103] For example it is argued that implementing the IFRS has been challenging because the technical skills/expertise required for full implementation are lacking in most African countries. See Robert Bruce's report for more on this: www.ifrs.org/News/Features/Africa+embraces+IFRSs.htm (accessed 24 September 2014)

supervision still rests with national authorities, the addition of a regional perspective under the new framework will enable the national authorities work hand-in-hand with the ESA to better carry out their functions. Conversely, there exists no harmonized banking law regime operating in the African RECs without a monetary union agenda and banking supervision is decentralized and carried out at the domestic level. In the African RECs with a monetary union agenda like CEMAC, although a common banking law is in place with centralized supervision carried out by Banking Commissions, what is now imperative is the strengthening of supervisory powers and the elimination of political and domestic interference. This interference always interrupts the work and effectiveness of the Banking Commissions.

With regards to a regional regulatory mechanism for capital market integration, apart from South Africa, most countries within the various African RECs are still at the virgin stages of development and other than the case of the BVRM in WAEMU, there is no regional capital markets regulatory regime among Africa's RECs.[104]

In summary, considering the differing historical and geopolitical trajectories of each case, the EU financial regulatory institutions are far sophisticated and advanced for the African system to adopt in the short and medium term. To this end, emphasis must be paid to strengthening the regulatory and supervisory powers of the existing institutions in Africa especially the community courts, central banks and national and community regulators. The elimination of political and domestic interference is imperative as well. These will enable the institutions in Africa to develop at an organic rate as they must show the ability to handle less sophisticated matters before moving on to the more advanced. The sort of organic growth recommended here, can be gleaned from the Ecobank example referred to in Chapter Two. The bank started in one of the

[104]Following the World Bank's world development indicators, the first group consists of South Africa, Egypt, Morocco, and Nigeria which contain the biggest markets in Africa with market capitalisation between $52 billion and $1,012 billion; the second group includes Kenya, Tunisia, BRVM, Mauritius, Sudan, Botswana, Uganda, Ghana, Tanzania, Malawi and Zambia with market capitalisation ranging from $2.8 billion to $14.4billion; the third group comprises of Libya, Namibia, Swaziland, Cape Verde, Algeria, Mozambique, Cameroon and the BVMAC with much smaller capital markets with market capitalisation ranging from $0.04 billion to $1.1 billion; and the fourth group consists of newly created and nascent capital markets such as Rwanda and Angola. (See Salami I: '*African financial markets- going global or staying at home?*' JIBLR 2011, 26(11); p.558-559). The main factor determining capital market growth in developing states especially in Africa is economic growth (infra 3.6.9 below). Also the importance of sound legal infrastructure cannot be overemphasized. In Angola for instance the creation of a capital market scheduled for 2011was postponed as many of the country's companies do not meet the listing requirements. (Salami: *African financial markets- going global or staying at home?* p. 568)

smaller countries in Africa in 1985 but has morphed into a Pan-African financial giant.[105] Its business model is focused on delivering commercial success while contributing to economic development and financial integration. It has developed and implemented a common sustainability framework that focuses on driving economic transformation, promoting socially-responsible financing, attracting and retaining human capital, and protecting natural resources. Ecobank's "One Bank" concept—with its uniform technology platform, universal branding, and common policies across branches—enables continued expansion into new markets while providing all customers with a consistent, high level of service.[106] Clearly, the framework adopted should be more tailed to the indigenous needs in the African continent.

Only subject to outstanding progress from the organic development of these institutions, can further attempts to co-opt models of the more advanced EU regulatory framework such as the ECJ, ECB and ESFS in the very long term be made. I stress however that this can only be achieved by adopting the concepts necessary for *African sovereignty*; supra-nationality, the supremacy of community law, the strength and effectiveness of the legislative and enforcement powers.

There is no doubt that this discussion confirms the superior nature of the EU financial regulatory and supervisory arrangement, a success which blossoms as a result of the EU Member States' embrace of the concepts of supra-nationality, the supremacy of EU law, the strength and effectiveness of the legislative and enforcement powers and the implementation of the financial harmonization directives by the Member States even though this occurred amidst challenges. These crucial factors are blatantly missing in the African regional financial integration project and need to be adopted sooner than later to keep alive any chance of a successful Africa-wide integration agenda.

I nevertheless agree with commentators like Salami who caution however that, despite the robustness of this new framework, there still looms potential exposure to risks should national supervision authorities fail to agree on certain policies. This is possible because many technical rules are decided at Member State level, and there still are substantial variations between

---

[105] See Para.2.4.2, (Chapter 2: Africa: Towards monetary integration;p.85)

[106] See the Initiative for Global Development (IGD) Impact Case Study: *Ecobank-Unlocking Africa's Economic Potential*; online at :http://www.igdleaders.org/wp-content/uploads/IGD_Ecobank_Impact-Measurement_Case-Study.pdf (accessed 20 June 2015); p.1-2

Member States. Even so, Salami acknowledges that by ensuring a totally mutual exchange of information and views early on, the new authorities will significantly lessen any chances of disagreement.[107]

Part Four

3.5 The EU and the EMU

Nowhere have efforts towards closer co-operation and co-ordination been tried and tested than in the European Union, particularly with the monetary union where an even deeper form of regional integration has been experienced.

The EMU which brought about scepticism when first proposed in 1969 became a reality thirty years later in 1999. After decades of debate over whether a single currency was viable in Europe, scholars, commentators and enthusiasts are now cogitating on the more urgent question of whether this monetary union has made Europe better or worse.

To begin, a curious question beckons; why did countries such as France, Germany and Italy invent an entirely new currency as a replacement for the franc, mark and lira? To properly understand the genesis of the EMU one must reflect upon the long process of European economic and political integration detailed above[108]

Following the Delors Report in 1988 which considered how economic and monetary union in the Community could be best achieved and the Maastricht Treaty in 1993 which set out the timetable and criteria for member states to participate in the project, eleven countries were

---

[107] Supra n .44 pp. 384-385

[108]See Mulhearn C. & Vane H. R (n.14)

The issue of integration did not normally extend to the monetary domain at the early stages. There were some discussions of a single currency in the early 1950's by France, Belgium, Luxembourg, Netherlands and the United Kingdom but this led to nothing. Instead, monetary relations in post war Europe were heavily conditioned by the general economic imperatives for reconstruction and by the specific influences of the Bretton Woods system (fixed exchange rate system designed to stabilize the values of the major Western countries against each other, the Marshall Plan (which was a US 4 year aid package to underwrite European reconstruction as it was recognized that currency stability alone would not be enough to facilitate the physical and economic recovery of the war-torn countries in Europe), and the European Payments Union (which allowed member state economies to trade deficit positions with other).

deemed to have met the Maastricht convergence criteria in May 1998. They were Austria, Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Spain. They elected to proceed to the third and final stage of EMU and on the 1st of January 1999, exchange rates between their national currencies were irrevocably fixed and the Euro was now official. Nevertheless, it existed only in virtual form up until 1 January 2002 when it then assumed physical form. National currencies continued to circulate up until the end of February 2002 when they were then taken out of circulation and the Euro became the sole currency for participating countries. Also, Greece which had failed initially to meet the Maastricht criteria adopted the Euro on the 1st of January 2002 while Denmark, Sweden and the UK still retain their national currencies as they have opt-out clauses.[109]

3.5.1 EMU: A Chequered Framework?

Ruthlessly ambitious it may be, but the conception of an economically unified Europe is an astonishing development. After all, France and Germany and other European nations went to war with each other three times in the 75-year period from 1870 to 1945 hence, European leaders became convinced that the only way to secure a lasting peace was to unite economically and politically.

Today, the euro is second only to the US dollar in use and importance in international money and capital markets, which is indeed an impressive statistic for a currency which has been in circulation for just over a decade. The main economic rationale for a single European currency was to deepen economic integration among its members by reducing the costs of cross-border commerce, encouraging cross-border mergers, improving price transparency, increasing competition, and eliminating exchange rate risk. Before EMU, the focus was on the rates at which the pre-existing national currencies would be turned into Euros. After January 1, 1999,

[109] It is worth noting that doubt had been cast earlier on the feasibility of the EMU as European currency markets went into crisis in 1992, just as they had in the early 1970s, markets did not believe that the quasi-fixed European Monetary System exchange rates were sustainable given the disparate economic situations across European countries; for example, France was in recession, while Germany was in the midst of unifying. The British (who had only joined the European Monetary System in 1990) and the Italians were the first to be forced to break away from the agreed-upon exchange rate zones and to allow their currencies to depreciate in September 1992. Furthermore, the Irish punt, the Portuguese escudo, and the Spanish peseta all soon were allowed to depreciate as well. During the summer of 1993, the French franc also came under strong pressure, and European Union governments responded by changing the rules to allow exchange rates in the future to fluctuate.

the focus quickly changed to the value of the euro relative to other non-European currencies, especially the US dollar.

A strong case can however be made that EMU has thus far proven to be no more than the sum of its parts. The euro is less widely used than the combination of European currencies— the German mark, French franc, Italian lira, Dutch guilder, and so on—that it replaced. Some countries have benefited from the euro, most visibly those with lower costs of issuing government debt, while others have suffered under policies designed for the EU as a whole rather than their own economic circumstances. Small wonder, entry into the Euro was a much bigger structural shock for peripheral member countries such as Greece, Ireland, Portugal and Spain than for core member countries like Germany and France. With Germany having the biggest economy in the Euro-zone, one cannot help to wonder whether the Euro making Germany more powerful.

From a logical perspective, it seems to be the case because in a monetary union typically, changes in bilateral real exchange rates take place only through inflation differentials, since nominal exchange rates are fixed by definition. Countries across the euro area differ in many ways for example in their levels of per capita output, demography, industrial specialization, and structural policies related to factor and capital markets (Germany having a significant advantage in all these categories). As these imbalances within EMU—differences in growth, inflation, competitiveness, current account and budget balances—have, however, increased in the last ten years the differences suggest that countries across the euro area will vary in their trend rates of productivity growth and in the extent of their exposure to global shocks in particular industries. In other words, a country that imports more than it exports must also borrow to pay for those imports. Conversely, Germany's large trade surplus (net export position) means that it must also be a net exporter of capital, lending money to other countries to allow them to buy German goods.[110]

[110]Wolf M: *Germans are wrong: the eurozone is good for them*; Financial Times; 07 September 2010; Wolf argues that the challenge is to change the workings of the eurozone and reform its institutions in a way that makes the economy work for everybody.

See also Pearlstein S: *Forget Greece: Europe's real problem is Germany*. Washington Post, 21 May 2010. Pearlstein suggests that in the long run, the eurozone won't be fixed until Germany figures out how to generate growth and wealth without beggaring its neighbours and its trading partners.

Drawing from the above, the fundamental issue is that European economic integration is built on a group of countries of which each wants to stay largely as it was before integration. Although monetary union is now a reality, many citizens in Europe are still grappling with the question of how truly unified they care to be—as exemplified by the French and Dutch votes that blocked ratification of the proposed EU constitution in 2005. In fact some commentators argue that European institutions like the European Central Bank (ECB) are more like additions to the original member country institutions, rather than new constructions that efficiently take on European economic policy making.[111]

The ECB is subject to the same dilemma that exists for all European and in fact International institutions which is: a desire for more integration combined with reluctance to cede national political control. Europe‘s economy has been little affected by monetary union because the distribution of power among those in charge of EMU policy decision making, and the implementation of those decisions, remains too highly decentralized to take advantage of the possible gains.[112]

It should come as no surprise therefore, that the performances of European economies have not changed dramatically with integration and that the global role of the euro is not much different than the combination of currencies that it has replaced. Anyway, the resistance of the euro had not been tested greatly as it had not been under severe political and financial stress such as that which tested its functioning in terms of the severe macroeconomic and financial shocks[113] which occurred during the GFC and the sovereign debt crisis which resulted from it.

[111]Dominguez K.M.E.: *The European Central Bank, the Euro, and Global Financial Markets*; Journal of Economic Perspectives Vol. 20, Number 4, 2006, p.67-88

[112] Ibid; The ECB itself was modeled on the Bundesbank, both because Germany had a large influence on its design, and because of the perception that the Bundesbank represented ‘best practice’ among European Central Banks) in the context of an institution where a large majority of the members of the Governing Council are appointed in a highly decentralized fashion.

[113] Ibid; Whilst in the past, the US Federal Reserve has proved itself able to calm financial markets and keep the US economy reasonably on track even in the face of dramatic financial market turbulence such as the 1987 stock market crash, the collapse of Long- Term Capital Management in 1998, and the aftermath of the terrorist attacks of September 11, 2001, the true test of the influence of the ECB and the longevity of the euro had not yet come up until now.

Historically, the concept of economic and monetary union was sold to Europeans as the means by which they could achieve political and economic stability. Considering what followed the GFC and the sovereign debt crisis, it is clear that there are a number of potential challenges to this vision of stability which Europe now faces. In fact some commentators have lamented that since the establishment of the EEC in the 1950's, attempts at monetary integration and ultimately monetary union have tended to assume importance only as a result of financial crisis and subsequently becoming a vague objective as soon as the crisis recedes.[114] This sales pitch is one the African continent needs to consider carefully in order to mitigate the challenges which come with this form of deeper integration.

Despite the fact that historically, the idea of an EMU generated a plethora of conflicts of interest, the first decade of EMU in Europe has been a rich success. EMU has brought significant benefits to its member countries: it has led to remarkable macroeconomic stability and accelerated trade and, in particular, financial integration in the euro area. Many contributors have suggested enthusiastically that thanks to the successful first decade of EMU, the euro area and its Member States are today in a much better shape to weather these truly testing times than ever before.[115] They argue that the euro has protected EMU members during the crisis, and arguments that the crisis would lead to a breakup of the monetary union are neither new nor convincing. In fact, the crisis to them has made EMU even more, not less, attractive, and most EU countries that are not yet members of EMU are keen to join in the foreseeable future.

They argue that following the financial turmoil in 2007, other than the prevention of exchange rate and interest rate turbulences among the euro-area Member States that used to be common during periods of financial stress in the past, the ECB has adopted an accommodative monetary policy stance and has skillfully managed liquidity. This has helped to ease conditions in the interbank market and to anchor inflation expectations throughout this period of uncertainty.

[114]Arestic P, McCauley K, and Sawyer M: *From Common Market to EMU: A Historical Perspective of European Economic and Monetary Integration.* The Jerome Levy Economics Institute Working Paper No. 263, February 1999; available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=156554 (accessed 20 January 2014)

[115] Regling K, Deroose S, Felke R, and Kutos P: *The Euro after Its First Decade: Weathering the Financial Storm and Enlarging the Euro Area*; ADBI Working Paper Series No. 205, March 2010 available at: http://ssrn.com/abstract=1590024. (accessed 20 January 2014) See also, for a comprehensive outline of the successes of the EU: ECB conference 13-14 November 2008; *The Euro At 10- Lessons and Challenges*; available online at http://www.ecb.int/pub/pdf/other/euroattenen2009en.pdf (accessed 20 January 2014)

Finally, some commentators hold that the governance structure of EMU, while far from being perfect, has facilitated policy coordination across the euro area and the EU as a whole and the close interaction of all actors spurred a swift and bold policy response to the GFC.[116] Other important policy lessons to be learned from the crisis include policy coordination among the EMU members need to be improved and structural reforms accelerated. Also, the framework for the supervision of financial markets should be strengthened, and external representation streamlined. With the necessary political will, the GFC should serve as a ‘wake-up call’ and catalyst for deeper and broader economic and financial coordination and surveillance in the euro area.

---

[116] Ibid- The commentators urge us to imagine for a moment how the crisis might have unfolded in the euro area without the euro. The coordination problems would have multiplied. Sixteen European central banks would have had to struggle for coordinated liquidity provision while trying to keep exchange rates and inflation expectations in check.

In as much as I understand this argument and acknowledge the relative ‘stability’ brought about by the Euro, it is also true that the introduction of the euro is no panacea. In fact, the crisis has also revealed important weaknesses and vulnerabilities in the euro area. It brought into sharp relief an additional problem across the world anyway. As Mervyn King, former Governor of the Bank of England, observed and Lord Turner reiterated: ‘global banks may be global in life, but they are national in death.’(see Speech by Lord Adair Turner, 18/03/2009, available online at: http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0318_at.shtml (accessed 20 January 2014))-- King made this telling phrase on the event of the collapse of Lehman Brothers as it showed the world that decisions on fiscal support to prevent failure are national, and that national legal entities and national bankruptcy procedures have major implications for creditors. Those facts have major implications for the future supervision of global banks.

The reasoning behind the statement is that when central banks get into trouble, it is the national governments that have to support them, using national taxpayers’ money and creating significant holes in their own budget deficits. This ‘mortality mismatch’ creates significant tensions between moves to harmonise and globalise financial regulation on the one hand, and moves from national governments and regulators to enhance local supervision in order to protect their own taxpayers and budget deficits on the other. This is only one of the EU problems exposed by the crisis.

Furthermore, it exposed the vulnerability of Member States with significant macroeconomic imbalances, and underscored important shortcomings in the European regulatory and supervisory framework and in cross-border crisis resolution arrangements. A slightly cynical way of looking at it is that part of the reason why southern European nations like Spain and Greece suffered a great deal during the sovereign debt crisis is that the northern European nations were prepared to lend to them the cash in the first place. The construction boom in Spain, for example, wasn't financed out of nowhere: it was fuelled by enormous sums of cheap cash borrowed at very low rates. There were huge imbalances within the Euro-zone, hence big export surpluses in Germany were being channelled into housing and construction booms in the south. Most of the growth in those southern economies was built on debt which they could not get out of. An easy economic solution would be to devalue their currency, making exports cheaper and the economy eventually grows, but that is not an option as long as they remain in the euro. Without such growth, though, the tax base - vital for paying off any big public debts - will never increase.

3.6 EU Crisis-Response

At first, many commentators thought that mainland Europe was likely to be relatively immune from the worst impacts of the financial crisis – particularly after European governments decided not to take part in a joint bailout effort with the US in September 2008.[117] This view was predicated on the belief that Europe‘s financial sector was sufficiently removed from the US and UK markets. In the first phase of the crisis, governments focused primarily on short- to medium-term plans combined with ad hoc measures to address particularly urgent situations. These measures typically were undertaken by individual countries and the European Commission‘s activities, particularly in connection with its state aid review, have had an additional homogenizing effect.[118]

The implementation of any European response typically begins with the problem of ‘state aid' which is prohibited in the EU. As set forth in the Treaty of Rome, state aid is defined as ‘any aid granted by a Member State or through State resources . . . which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods'[119]

There are nonetheless a number of exceptions to the prohibition on state aid in Europe, which require prior notification to and approval by the European Commission. Of particular relevance is an exception where the aid is to ‘remedy a serious disturbance in the economy of a Member State.'[120]In a notable departure from the Commission‘s previous application of this exception, the Commission adopted a flexible approach to approving aid to financial institutions involved in the financial crisis. Thus, the Commission established a fast-track approval process for aid plans relating to financial institutions and has set forth guidelines to assist Member States in formulating plans that are likely to be approved.[121] Member States committed to report to the

---

[117] New York Times, The U.S. Financial Crisis Is Spreading to Europe, 30 September 2009

[118] *Martin D, Saba O and Alogna F G: European Responses to the Financial Crisis*: available online at: http://ssrn.com/abstract=1337586 (accessed 2 February 2014). Most of these structural measures of direct intervention fall under the state aid scrutiny of the Commission.

[119] Treaty of Rome; Article 87 states: ‘Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

[120] Art. 87, Sec. 3(b)

[121]European Commission, Communication, *The recapitalization of financial institutions in the current financial crisis:*

Commission every six months on plan implementation, with most of the plans being subject to re-notification. The Dutch guarantee plan was also approved, with recapitalization being approved on a case-by-case basis, consistent with the individually negotiated nature of that plan.[122]

In addition to the approval of the foregoing general plans, the Commission has also approved a number of ad hoc state interventions in specific institutions, notably including aid to Fortis Bank and Fortis Bank Luxembourg, Dexia and Northern Rock.[123] In response to the financial crisis, a number of jurisdictions worldwide have adopted a financial guarantee program, including Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Portugal,

---

limitations of aid to the minimum necessary and safeguards against undue distortions of competition (5 December 2008); European Commission, Communication, *The Application of State aid rules to measures in relation to financial institutions in the context of the current global financial crisis*, 2008/C 270/02 (25 October, 2008 (adopted 13 October).

It is worth mentioning that on 8 October 2008 the UK Government (under former Prime Minister Gordon Brown and former Chancellor Alistair Darling) were the first to announce a major bank recapitalization plan, described by the Bank of England as 'the largest UK government intervention in financial markets since the outbreak of the First World War.' The plan which was followed in several key respects by a number of other EU governments, had three elements: recapitalisation of the banks; the Credit Guarantee Scheme, which guaranteed banks' borrowing on the wholesale market (ultimately extended to £250bn); and an extension of the Special Liquidity Scheme to £200bn. In order to ensure confidence, and not single out any particular bank as requiring assistance, the Bank and the Government insisted that all the major UK banks join the scheme, even if they were not in particular need of capital.

[122] *See, e.g.*, European Commission, Press Release, *State aid: Commission approves Dutch emergency recapitalization of ING*, IP/08/1699 (13 November 2008)

[123] *See, e.g.*, European Commission, Press Release, *State aid: Commission clears state aid to rescue and restructure Fortis Bank and Fortis Bank Luxembourg*, IP/08/1884 (3 December 2008); European Commission, Press Release, *State aid: Commission approves joint aid from Belgium, France and Luxembourg to rescue Dexia*, IP/08/1745 (20 November 2008); European Commission, Press Release, *State aid: Commission approves UK rescue aid package for Northern Rock*, IP/07/1859 (5 December 2007).

Notwithstanding the approval of such interventions, the Commission may further investigate whether such assistance is made in an appropriate manner. For example, the Commission opened an in-depth investigation in March of 2009 into the restructuring of Dexia, based on the Commission's concerns and questions —about the viability of the proposed business model, whether Dexia's own contribution to its restructuring costs is sufficient and about the compensatory measures to eliminate the distortions of competition that may be caused by state aid. (European Commission, Press Release, *State aid: Commission opens in-depth investigation into restructuring of Dexia; authorizes certain urgent measures*, IP/09/399 (13 March, 2009). Commission review thus creates an added layer of appraisal and discussion prior to the implementation of European rescue plans, in contrast to the United States, where the bailout efforts have been largely at the level of the federal government.

Spain, Sweden, and the UK. The underlying rationales of these guarantee programs are the same throughout: to maintain bank liquidity. The guarantee programs are also the product of negotiations both with the Commission in the context of state aid, as discussed above, as well as with other Member States.[124] For example, the announcement by the Irish government that it would guarantee all debts and deposits of the country‘s six largest banks for two years was widely criticized in the UK and other Member States as putting non-Irish banks at a competitive disadvantage.[125]

In terms of new regulation, this has been moving at noticeable speed at the European level. Taking up the recommendations of the de Larosière report[126], the European Commission adopted a proposal for a new group charged with supervising risks to financial stability, which was named the European Systemic Risk Council (ESRC).[127] Although the ESRC‘s recommendations would not be binding, compliance would be exerted through the influence of the Commission and the European central banks who would participate in the ESRC, the quality of the ESRC‘s work, and the possible publication of the ESRC‘s recommendations.

Also, the Commission proposed that the European System of Financial Supervision (ESFS) be established, which would create a strengthened operational network among national supervisors. Although national regulators would continue to perform day-to-day supervision of

[124] Reactions in France had been somehow muted partly due to strong French participation in reforms being pushed forward at the European level. The French reaction may also be seen as a function of the perception here that the effect of the crisis on local financial institutions has been more contained than in the United States or the UK, as well as that the causes of the crisis are similarly primarily Anglo-American rather than continental. *See* Michel A : *Les banques françaises ont mieux résisté à la crise que leurs concurrentes*, Le Monde (20 February 2009)

[125] It is worth mentioning that the magnitude of impact varied across EU countries; while countries such as Ireland, Spain and the UK suffered from bursting asset bubbles, especially property markets, most of the continent experienced a severe contraction in credit. As such, responses have varied considerably by country; some countries such as Germany have deployed a wide range of policy tools while others like the Czech Republic have done very little.

[126] Jacques de Larosiere a French civil servant. His report proposes two main structures to prevent a repeat of the current financial crisis. Firstly, the setting up of a European Systemic Risk Council (ESRC) under the auspices of the European Central Bank, which would focus on threats to the EU economy as a whole rather than to individual companies. This idea is largely uncontroversial. However, the report's second proposal for a European System of Financial Supervision (ESFS) to monitor individual companies is proving more contentious. Under the draft ESFS framework, national supervisors for each of the banking, insurance and securities sectors would remain the main watchdogs of financial companies such as large banks or insurance firms that operate under their jurisdiction.

[127] European Commission, Communication, *European Financial Supervision*, COM (2009) 252 final (May, 27, 2009)

their home markets, the ESFS, working with the European Supervisory Authorities would perform a number of activities at an EU level.[128] The European Supervisory Authorities would be involved in the development and application of high-level supervisory standards and interpretative guidelines, ensuring the consistent application of EU rules (such as, for example, settling disputes and policing compliance by national regulators with existing EU legislation), and ensuring cooperation among national regulators across member states. Colleges of supervisors which are being set up for major cross-border institutions would become the ―lynchpins for the new system, helping to ensure communication between host and home authorities, as well as the development of a common European supervisory culture.

Nevertheless, some commentators point out that even though the Commission acted on the measures notified by the Member States on a fast and adequate manner, issuing a generally appropriate guidance according to cost/benefit analysis, it nevertheless was merely in response to the first wave of the crisis. Therefore, bank guarantees and recapitalisation are not necessarily sufficient to re-launch economic activity although the appropriateness of recapitalisation is acknowledged (only to sound institutions implying institutions with no major solvability risk and therefore have the possibility to recover when normal market conditions prevail.)[129]

All the same, these proposals for new institutions as the ESRC and ESFS at the EU level may be further harbingers of increased coordination within Europe. In this respect, the EU appears to be continuing to incrementally move toward a political and institutional integration which matches the existing monetary and economic integration, although noting that the result is by no means a foregone conclusion.[130]

---

[128] See the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and a European Securities Authority (ESA).

[129] Abel Mateus: *The Current Financial Crisis and State Aid in the EU*; available at: http://ssrn.com/abstract=1500532 (accessed 2 February 2014)

[130] *Cf.*, Mackintosh J, Parker G & Tait N: *Hedge funds threaten to quit UK over draft EU investment laws*, Financial Times (4 June, 2009); Barber T, Masters B & Parker G: *City fears UK is too weak to defend finance industry*, Financial Times (11 June, 2009); Bouilhet A: *Paris compte faire plier la City*, Le Figaro (11 June, 2009).

3.6.1 Role of the ECB, Governments and National Central Banks

All along, it had been less clear what role the ECB would play if a European bank were to suffer a major collapse, or if one country or region within Europe were to go into financial crisis. In fact, the Maastricht Treaty entrusted the ECB with the responsibility for monetary policy and did not give this institution supervisory powers or an explicit mandate for providing emergency liquidity support to individual banks. National authorities remained responsible for financial stability and as a result, in the euro area some bank regulatory functions are centralized, while others are allocated multiple, competing national regulators. In light of the potentially precarious economic and financial situation of some Member States, one could identify the lack of a lender of last resort as a significant source of weakness for the euro area.[131]

The ECB has been criticized for being slow to lower its interest rates and embark on unconventional monetary policy.[132]The ECB did, however, launch an unprecedented policy of supplying unlimited short- and long-term liquidity at fixed rates to the market. The ECB has consistently argued that supplying liquidity is more suitable for the European economy than the approaches taken by central banks in Japan, the UK and US.[133] Although the ECB has recently considered ―printing money to purchase assets,[134] it has reiterated its belief that its large-scale short- and long-term liquidity facilities are more appropriate for the European financial model.[135]

[131] In fact some have even asked for the more radical solution of a European Union federal government in order to speak unanimously on equal terms with other continental powers. See Montani G: *Which European Response to the Financial Crisis?; Perspectives on Federalism*, Vol. 1, single issue, 2009, available at: http://ssrn.com/abstract=1583066 (accessed 2 February 2014)

[132] Some commentators have criticised the ECB for being ―behind the curve and excessively cautious in its response to the financial crisis, when compared with the central banks of Japan, the UK and US: *Wall Street Journal*, ECB's Work Isn't Yet Done, 6 May 2009; Krugman P, *New York Times*, A Continent Adrift, 16 March 2009

[133] Edmonds T and Marshall J: *European Responses to the Financial Crisis;* available online at: http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snbt-05099.pdf (accessed 2 February 2014)

[134] Financial Times, *The economic crisis has ECB policymakers boxing clever*, 20 May 2009

[135] Trichet JC: *The financial crisis and our response so far,* Keynote address by Jean-Claude Trichet, at the Chatham House Global Financial Forum, New York, 27 April 2009

Recent developments in financial markets in Europe have made the ECB step in and guarantee support for some non member states. This is an unprecedented move. The ECB used, for some time, to provide technical assistance to central banks in countries neighbouring the euro-zone. Such dialogue reinforces cooperation between the EU and its neighbours, including countries which are supposed to adopt the euro. However, the ECB never acted as a potential lender of last resort for a non euro-zone country so far.

The ECB's decision indicates how much the European financial landscape has changed since the creation of the monetary union. This is now characterized by a growing number and increasing strength of banking groups

Unlike the central banks of Japan, the UK and US, the ECB has been reluctant to pursue a policy of expanding its balance sheet to purchase government (and other) securities.

In terms of central banks and national governments on another side, the crisis has caused a significant re-evaluation of financial regulation at all levels of governance: the global, regional (EU), and national. Little wonder Julia Black points out that for many observers it has also called into question the model of financial capitalism that financial institutions, governments, and regulators have created.[136] More immediately however, it required a reconfiguration of the relationship between the markets and the state. Governments have been accustomed to hearing the dictum that they should move from 'rowing to steering'[137]In fact, Black sensationalizes how the financial crisis saw governments move from steering, to throwing lifelines, bailing out, rowing, and ultimately re-building the boat. But most governments have made it clear that they are reluctant shipbuilders and rowers and would prefer to return to steering as soon as possible, though with a firmer grip on the tiller.[138]

Clearly financial markets are global, and financial regulation has long been marked by the mismatch between global markets and national rules (in the UK for example, central to the management of the crisis was the role played by the Tripartite Authorities: the Treasury, the Bank, and the former Financial Services Authority (now Financial Conduct Authority (FCA)).Thus despite calls for harmonized action, we have seen national governments take unilateral and sometimes protectionist action for example the French and UK governments' tax

---

with significant cross-border activities. And, although in theory each subsidiary of a banking group is a legal entity subject to the legislation of the EU's member state in which it is established, in practice, a deteriorating position in one location could well lead to significant contagion effects. The GFC has brought about a quite paradoxical situation: it is not necessarily subsidiaries in non member states which cause the trouble in the main, but overall practices (such as over-leverage and involvement in the origination and distribution of securities) of banking groups headquartered in countries which do not necessarily belong to the euro-zone. Ironically, the ECB is forced to step in because of poor practices in its principal geographic area of concern. From this point of view, the ECB's financial support has been extended to for example, the National Bank of Hungary may be seen as a pre-emptive move attempting to maintain the existing financial stability in a wider euro-zone area.

[136] Black J: *Managing the Financial Crisis- The Constitutional Dimension*; LSE Law, Society and Economy Working Papers 12/2010 p.2; available online at www.lse.ac.uk/collections/law/wps/wps.htm and the Social Sciences Research http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619784 (both accessed 4 February 2014)

[137] Osborne D and Gaebler T; *Reinventing Government;* New York: Longman, 2001

[138] Black; (n.136) *Managing the Financial Crisis* p.3

on bonus pools.[139] However, the crisis had to be managed within the context of EU regulatory regimes on banking regulation and state aid. Moreover, this was a global crisis, and the cross-border character of banking services meant that this international dimension brought about an unprecedented impact for the crisis response at national level. No event exposed this truth more than the sovereign debt crisis which ensued within the eurozone following the GFC.

The importance of the lessons learnt from the Greek debt crisis to the Africa integration project cannot be overemphasized considering that it was triggered by Greece's irreversible transfer of sovereignty, the like of which is demanded from African states in order to uphold an *African sovereignty*.

3.6.2 Sovereign Debt Crisis: The Case of Greece

Some hold that an international financial crisis and a sovereign debt crisis mutually reinforce each other. A sovereign debt problem weakens many creditor banks further, both domestic and foreign banks, and the cost of bank bailouts compounds government deficits and debts. It has been said that international banking crises are almost invariably followed by sovereign debt crises[140] and some feel no pity for countries like Greece and blame them for adopting irresponsible macroeconomic and particularly fiscal-budgetary policies for years which eventually led them to their eventual calamity. The case of Greece within the EMU should be distinguished from the other cases of national crisis response within the wider EU.[141]

From a legal point of view, the emphasis here is regarding the unequivocal wordings of Article 125 of the TFEU (ex Article 103 of the Maastricht Treaty) which stipulates explicitly that neither the Community nor any Member State is liable for or can assume the commitments of any other

---

[139] Black suggests that in one sense, the UK government was fortunate because it remains outside the Euro-zone, and that the largest banks that failed were not foreign-owned, otherwise the crisis could not so easily have been managed within national borders. (Black,p.34)

[140] Rogoff K and Reinhart C: *This Time is Different: Eight Centuries of Financial Folly*, Princeton University Press, Princeton 2009

[141] The reform needed in the EU to reduce the likelihood of another financial crisis and also reinforce the internal market is to address the financial 'trilemma' [the term is derived from Pelmans J: '*the role of the EU in the financial and economic crisis*' (in Dutch), Netherlands Institute for International Relations Clingendael, The Hague, October 2009, p. 32.)] consisting of a combination of three elements: a) financial integration; b) stability of the financial system and c) regulation and supervision of financial institutions which is still predominantly based on autonomous policies and decisions of the individual member states.

Member State. In this regard, the legality of any bailout under the EU Treaty is uncertain implying that the law would have to be bent should EU leaders decide to forge ahead with a rescue package for any country in crisis which of course would set a very worrying precedence.

Some contributors argue that economic divergences within EMU, driven by uncontrolled public deficits and deteriorating competitiveness, could undermine the entire European Union project. In their view, the notorious discrepancy between high- and low-performing Member States ultimately creates a policy dilemma that leaves only three options.[142] First, the low performers would have to engage in permanent austerity policies, including repeated cuts in wages and social standards. However, such an option would hardly be politically viable and ultimately undermine the support of the Single Market project altogether. Secondly and alternatively, Germany, being the wealthiest high performer, would have to sustain the low performers. However, such an approach would have detrimental moral hazard effects, and would neither accord with the Treaty. Thirdly, to regain competitiveness, euro-area Member States with structural competitiveness disadvantages should exit the euro area and devalue. Having said that the legal, economic and ideological consequences of this radical choice must be scrutinized exhaustively before such a decision is made. This debate unfortunately is far outside the confines of this paper.

Considering the levels of concern which arose following the Greek government's deficit and debt levels, there is no doubt that the precarious nature of Greece's public finances is a test not only for the country's government/policymakers, but also for Europe's. Even though the case of Greece ushered in another phase of the GFC, some would say that tragedy was inevitable from the moment when Greece was admitted to the euro zone. Others would claim that woe was sure to befall such a disparate currency union sooner or later: if not Greece, then some other weak member of the club would have been the cause.

Greece had to undergo a dramatic budgetary tightening as its fellow Europeans and the IMF organized a humiliating bail-out. Some even talked probably mistakenly, of the beginning of the

[142] Hankel W, Schachtschneider K and Starbatty J: *Kein Bail-out zur Rettung des Euro-Raums. Frankfurter Allgemeine Zeitung*, 28 March 2009; seen in Regling K, Deroose S, Felke R, and Kutos P: *The Euro after Its First Decade: Weathering the Financial Storm and Enlarging the Euro Area*; available online at: http://ssrn.com/abstract=1590024 (accessed 14 February 2014)

end of the euro area.[143] Prior to joining the euro-zone, Greece had a long history of fiscal trouble, as it had spent half of the past two centuries in default.[144] When it joined the euro in 2001, its public debt was over 100% of GDP and many feared its chronic budgetary mismanagement might harm the currency. That notwithstanding, strong GDP growth served as a smoke-screen to cover the underlying weakness of the public finances.[145] In 2009, Greece‘s budget deficit reached 12.7% of GDP with its national debt close to €300bn (around 120% of GDP), and worries over whether the government will act to cut it had already begun to cause the markets to watch nervously as Greece attempted to deal with its dire economic straits. These led to protracted debates as academicians, pundits and commentators argued whether the EMU will be able to surmount the first serious challenge it faced or was it a fair-weather construction with basic design flaws. These debates were fuelled further by the anxiety about contagion which consequently turned the focus on to Portugal, Spain and the Republic of Ireland amid fears that the Greek debt crisis could undermine other debt-laden states that use the single currency.

The government announced austerity measures including public sector pay cuts in a bid to calm the situation down and regain some confidence. Despite these efforts, the financial markets still kept losing faith in Greece‘s ability to service its debt and this seriously underscored the triviality of the measures they had taken so far. To cut things short, Greece needed a huge bail-out.

Drawing from this, there are two pertaining questions of crushing concern which ignited debates. Firstly, how does this bail-out package and guaranties reconcile with the Maastricht Treaty which made neither bail-out provisions nor artificial devices available to address situations like this.[146] Secondly, also of equal concern, to what extent will these guaranties

---

[143]The Economist: *Greece's sovereign-debt crunch: A very European crisis*; 6 February 2010, Vol. 394 Issue 8668, p75-77.

[144] Ibid; reference to Reinhart and Rogoff: *This time is different: A Panoramic view of Eight centuries of financial crises*; 16 April 2008

[145]Nevertheless, Greece had admitted late 2004 that it forged its euro entry earlier in 2001 on the basis of figures that showed its budget deficit to be much lower than it really was. Available online at: http://news.bbc.co.uk/1/hi/business/4012869.stm (accessed 4 February 2014)

[146] This must be interpreted in conjunction with the provisions of Article 122, sec 2 (ex Article100 sec.2) which says that in case of exceptional occurrences beyond a member states control, the European Commission first makes some recommendations on which the Council can decide financial assistance, acting on qualified majority.

extend going forward and at what rates? Greece could be fortunate today, but what happens to others who find themselves in a similar situation in the future.

Finally, although the crisis has enhanced moves to greater internationalization and harmonisation of regulation at the global level, there are corresponding centripetal tensions which pull regulation back to the national level. The crisis has made it clear that the state ultimately underwrites the financial system. In the end, it is national taxpayers that pay and national budget deficits which suffer. Yet in turn, it is to the markets that national governments have to turn to raise the money necessary to resolve the problems those same markets have caused. The state and the financial markets are inextricably intertwined, whether they want to be or not. I concur with Black who underscored the fact that 'the markets may fear big government but governments are now beginning to fear big markets'. The turmoil illustrated that financial markets can pose a greater risk to the state and its taxpayers than the state can ever pose to the markets.[147]

3.6.2.1 Legality of the Bail-Out Package

Considering what was at stake, it came as no surprise how bitter, tense and argument-riddled the negotiations were between policymakers who sought to solve the Greek situation. For one, some of them most especially Germany were very reluctant to provide assistance[148] (instead suggesting IMF involvement) while the French mooted a European solution, and secondly, the mix of politics and pride across the Union only exacerbated the problem.[149] In particular the intertwined issues of Greek and French politics were obviously proving to be sensitive. It became ironic that an accord designed to unite France and Germany was now dividing them.

The importance of the legal element should not be divorced from these debates and this part attempts to understand the legal position. This will depend crucially on how two ostensibly contradictory articles in the TFEU are interpreted: one article allows for member states to provide financial assistance to another member state in case of an emergency beyond that country's control (Article 122). The other article explicitly prohibits member states from taking on

---

[147] Black, p.40

[148] Some observers are blunt in their suggestion that this was a mistake by Angela Merkel. See Jones E: *Merkel's folly*; Survival vol.52, no.3 June-July 2010, pp.21-38

[149] See Erlanger S: *Europe Looks to the IMF with unease as Greece struggles*; The New York Times, 24 October 2010

the financial 'commitments' of a national government (that is to assist in closing a budget deficit) (Article 125).

On one hand, Article 122 Sec. 2 states:

"Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned."[150]

On the other hand, the 'no bailout' clause (Article 125) states:

"The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project."[151]

In a written answer to former MEP Kathy Sinnott, the Council of Ministers suggested that the 'no bailout' clause is superior to the article allowing for financial assistance to member states.

On how article 122 can be used, it said: *"the Council recalls the terms of the Declaration on Article 100 of the Treaty establishing the European Community, which is attached to the Nice Treaty. According to this declaration, 'decisions regarding financial assistance, such as are provided for in Article 100 and are compatible with the 'no bail-out' rule laid down in Article 103..."*[152]

[150] Available online at : http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF(accessed 4 February 2014)
[151] ibid
[152] See European Parliament website, available online at:http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090507+ANN- 01+DOC+XML+V0//EN&query=QUESTION&detail=H-2009-0237&language=EN (accessed 4February 2014)

The Council therefore refers to a "Declaration on Article 100"[153] (that was attached to the Nice Treaty), which states that actions under article 100 must be *"compatible with the 'no bail-out' rule"* Given that the Council's written answer also revealed that the EU's member states have never set out exactly what "exceptional occurrences" beyond the control of a member state might constitute, it means that there‘s a legal ambiguity here thereby providing room for interpretation.

This, in turn, means that Greece‘s economic difficulties could be defined as an occurrence beyond the country‘s control (if linked to the GFC), thereby triggering Article 122 even though this would constitute a significant legal stretch. Therefore the outcome of the bail-out was welcomed by those who argued that if the GFC was not defined as an 'exceptional occurrence', then it will be hard to see what type of event could ever fall into this category.

It is clear that a bailout involved immense political and economic risks. Attempting to convince taxpayers in one country of the need for them to pay for the mistakes of a government in another country (which they obviously cannot vote out of office) is a particularly difficult undertaking. For many, it is fundamentally undemocratic and simply perverse to make taxpayers liable in this way. As a factual matter, many EU citizens would oppose using taxpayer funds to bail-out other countries in financial difficulties. This economic risk can be summed in what the FT‘s Martin Wolf has described as a ‘monstrous case of moral hazard for politicians.’[154]

In turn, the receiving country is likely to be forced to give up much of its control over its own economy because strict economic conditions are inevitably attached to the loans. Indeed, Greece experienced unparalleled intervention from the European Commission in its economic policies with such intrusion not easily justified to voters (citizens) at home who are always ready to make their voices heard.

Some observers considered the bail-out arrangement to be done in an ad hoc fashion clearly with the intention to deal with an emergency situation. As a result, they argued that the EU needed a scheme capable of dealing with the threat of sovereign default instead of muddling

---

[153] Available online at: http://eur-lex.europa.eu/en/treaties/dat/12001C/htm/C_2001080EN.007001.html (accessed 4 February 2014)

[154] Martin Wolf: *The Greek Tragedy deserves a Global audience*; The Financial Times, 19 January 2010

through on the basis of ad hoc measures. Their primary reason for argument was that the IMF was called in to help, and the country concerned refused to comply with the conditions of a support programme, the problem would only be worsened because the debtor country, would retain its main negotiating asset, namely the threat of a disorderly default, which would create systemic financial instability in the EU and possibly at the global level.

Having said this, on a regional basis, one of the biggest outcomes was that of humiliation.[155] Never had it been envisaged that a euro-zone country would need bailing out, yet because of Greece, the EU had to launch one of the biggest financial rescues ever attempted. Sceptics voiced out nevertheless that what the plan did was to buy time and to shelter Greece from the fierce winds of the markets. Whatever the case, what should have been a limited crisis resolved by fairly technical means turned into a crisis of the euro area, requiring a combination of political, economic and financial responses.

It is important to understand that one important underlying setback here is the political and cultural vulnerability of European integration. The historical, geopolitical motivation for EU integration to secure peace among formerly war-torn countries gradually receded over time. It had made way for a more egocentric approach of many Europeans, who tend to focus on their own economic advantages far from EU integration. More so, due to the ever increasing scope of EU regulations, the image of Brussels has suffered over time. Small wonder, under these preconditions, the envisaged strict enforcement of fiscal austerity in Greece by the European Commission caused several conflicts which eventually undermined political and cultural cohesion among EMU countries.[156]

On a strictly personal note I agreed with the bail-out package by joint EU-IMF funding to solve the immediate problem of contagion which otherwise would have escalated the domestic problem to a regional one and beyond. Nevertheless my reservations are contained in the fact

---

[155] For example, although the IMF is generally seen well specialized in crisis resolution and fiscal stabilization, with highly experienced and knowledgeable staff, politics still got in the way as it was seen merely as yet another opportunity for Americans to exert sizeable influence on European matters.

[156] Deborah Mabbett and Waltraud Schelkle: *Beyond the Crisis- The Greek Conundrum and EMU Reform*; Forum arguments; *Challenges Facing the European Monetary Union*; available online at http://www.intereconomics.eu/downloads/getfile.php?id=725 (accessed 4 February 2014)

that I also believe strongly in the assertion that *the best way to prevent failure is to prepare for it*. Market support mechanisms must be in place going forward to minimize this type of risk.

On another note, legal scholars could have mixed feelings in relation to the provisions of the Treaty Law. Thus far, it became evident that paragraph 2 Art 122 TFEU forms an underestimated legal basis whereas Art. 125 TFEU prohibits an assumption of the commitments of a Member State. The conflict between Art 125 and Art 122 TFEU cannot be solved by ignoring Art. 122. If the requirements of both articles are met, it is not about suppression but about harmonization.

There is no doubt that these two contrary provisions reflect the differing points of view of the economically stronger and weaker Member States during the negotiations on the Maastricht Treaty. The former wanted to exclude any possible behaviour that would contradict stability, while the latter supported a mechanism that contained solidarity. The final version of the Treaty did not clearly decide for one or the other option but rather put them alongside each other; thus each group could claim to have prevailed. If one tries to harmonize both provisions, Art. 125 TFEU cannot completely preclude financial assistance. Thus, a procedure equivalent to a bail-out can, as an exception, be admissible. Nonetheless; such measures can only be taken into account as last resort if there are no other means available to prevent a severe crisis and only under accordingly strict conditions.

3.6.3 Regional Risk and Exposure: Lessons for Africa

Drawing from the experience which the EU specifically the EMU suffered as a result of the regional risk and exposure due to the Greek sovereign debt crisis, there are a number of issues which need to be considered in order to plan any efforts made to fully integrate the African continent. These can be summarized in terms of five key issues: a.) costs, b.) masked fiscal problems, c.) policy dilemma, d.) political posturing; and e.) the political and cultural vulnerability of integration.

a.) *Costs*

The Greek sovereign debt problem weakened many creditor banks both national and foreign with the cost of these bank bailouts increasing government deficits and debts. In Africa, not many countries can contain any further strain on their national deficits and debts. In Europe, countries like Germany[157] and France[158] have the muscle to intervene and assist with bail-outs, the sheer size of their economies dwarfs those of the countries with the biggest GDPs in Africa - Nigeria[159] and South Africa[160]. Also, there are many countries which due to long years of conflicts and unstable governments (mainly dictatorships) have adopted irresponsible macroeconomic, fiscal-budgetary policies for years. Other countries have suffered droughts and other natural disasters which have led them to displace economic priorities. This could pose concern for the other more economically stable countries in the region.

b.) *Masked fiscal problems*

Drawing from the above, many African countries currently enjoy strong GDP growth averaging 6% in the continent. These figures could however serve as concealment of underlying fiscal problems largely due to weak public finances. For decades many African states have suffered from corruption and mismanagement of state funds by public officials. This has left incredible strain on state coffers including the need to increase national debt. There are concerns as to the effectiveness of the national policies and initiatives in different states taken to solve this problem of corruption and mismanagement and also to service their debts.

c.) *Policy dilemma*

There is no doubt that a disagreement will unfold between the high performing states from the low performers eventually creating a policy problem. This could pit the low performing countries that need to engage in austerity policies (thereby reducing social standards risking civil unrest) against the wealthier performers, who have to sustain these low performing states. This could lead to detrimental moral hazard effects which I wonder if Africa is prepared to handle. Consequently, these present a challenge in achieving economic coordination among states within RECs.

d.) *Political posturing*

It became evident during the Greek bail-out deliberations that Greece and France held positions on how to deal with the crisis based on political convenience and advantage. These positions

---

[157] $3.9 trillion (2014): see World Bank data available online at: http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (accessed 25 June 2015)

[158] $2.8 trillion (2014): see World Bank data above.

[159] $568.6 billion: see World Bank data above.

[160] $350.1 billion (2014): see World Bank data above.

were opposing and eventually divisive even for states that started an arrangement from the same unifying position. This can cause strain on the achievement of subsequent policy objectives for the region as a whole. As seen in the previous chapter in the case of the African RECs such as the AMU for example, Africa has already been blighted by several political conflicts including wars between states within the same RECs. Their inability to solve previous differences, allowing these to drag over many years shows the void in their readiness to deal with challenging issues for the good of the entire community. In the case of Germany and France, a resolution was eventually concluded. The same cannot be confidently said about the African example as for instance with the AMU, initiatives have been inactive and suspended indefinitely due to lack of resolutions.[161] More so, issues dealing with austerity measures further complicate matters.

e.) *Political and cultural vulnerability of integration*

Integration is generally motivated by historical and geopolitical reasons, over time however the approach taken by Member States tends to be selfish as they focus on the benefits enjoyed nationally as opposed to the attainment of the objectives outlined by the integration agenda. The Greek crisis revealed that although efforts towards deeper integration can be made, there still remain political and cultural tensions which pull the need for regulation back to the Member State at domestic level. African states need to show more commitment to comply with community laws and institutions despite this tendency because there are limits as to what a state can achieve on its own especially in terms of growing its financial system.

3.7 Conclusion

It is important to reiterate the fact that the EU is still acknowledged as the most advanced regional integration model in the world even though it has illustrated imperfections in its dealing with the GFC and the sovereign debt crisis in particular. Nevertheless, there is an ancient Chinese saying which goes '*a diamond with a flaw is still worth a lot more than a pebble without imperfection.*' What makes the EU unique is its prominence as *a new legal order* established by *van Gen Loos* in 1963, further concretized by the concept the *supremacy of European Law*, under *Costa v Enel* in 1964 and importantly the creation of legal rights which could be enforced by both natural and legal persons under the principle of *direct effect* established in *van Gen Loos* even though some claim it was a radical solution for compliance.

[161] See Chapter 2 *Africa- Towards Monetary Integration*, p.51

In order for a regional integration system to work successfully, a solid single market programme must exist within it. In the EU, particularly in the banking and financial services, the concept of *mutual recognition* supplemented by *minimum harmonisation* and *home country control* solved the compromise problem by striving to eliminate obstacles brought about by varied regulation policies across the EU. These obstacles created a regional access and domestic control conflict which is a subset of a much broader global access versus local control conflict.

This single market transformed into legal obligations through the establishments of Treaties over half a century. Its completion is far from over and I agree that proper programme completion (including existing programme revision) and implementation must be a priority. In fact, this could be at the expense of the landmark concept of mutual recognition because going forward increased mutual assistance and mutual reliance as authorities is more pressing and relevant, including the development of common operational and administrative systems involving closer co-operation and co-ordination of all relevant activities.

For the first time the design of the EMU was seriously tested and Greece‘s sovereign debt problem highlighted the scale of potential damage. It may be time to scorch the myth that one size fits all; as conventional thinking tells us. It seems to me that regional financial integration is overwhelmingly advantageous up until the point where there is a financial crisis. The problem lies with monetary and fiscal convergence between the EU member states and the EMU member states and then the EEA states with each other. More so, the fact that there are countries in the EU which are not part of the EMU such as the UK but nevertheless exert great influence in global monetary decisions, convergence and harmonisation poses huge challenges for the integration programme. As the euro does not encompass the whole of the EU, therefore whatever advantages it offers are, from an EU-wide perspective, at best only partial.

Considering that it was due to these rising interrelationships between markets that contagion spread the financial crisis into the EU while at the same time cross-border flows and international integration of financial institutions and markets grew remarkably (while supervision mainly remained on a national level), joining the euro-zone could however be a catch 22 decision for some countries especially after what happened to Greece. Some may not want to be part of the chaos while others may say we could as well get in, after all should anything happen, we will get bailed out. The bail-out was a damage limitation tool which to me was a good thing. As a lawyer however, it is frustrating to deal with conflicting provisions which deal with the same thing. Either there is a bail-out provision or not. It was the French philosopher Rene Descartes who asserted that something cannot be, and then not be at the same time; hence it either exists or it does not. Nonetheless, political divisions may arise between the weaker and stronger member states as a result.

The Greek case further highlighted a supplementary problem that confirmed the existence of economic sophistication which had distorted the order of things. This propelled policymakers to rethink earlier strategies which were established on the basis of natural convergence between the European countries. This effort must however begin by first confronting the challenges posed as a result of enlargement, by progressively absorbing all the newcomers and at the same time preserve the credibility of the euro area as a whole by strictly respecting the conditions of entry; the Maastricht criteria.

Drawing from this experience, there are five key issues which the chapter derives when assessing the regional risks. These should inform any consideration to surrender sovereignty in order to achieve further integration within the African continent. These are: a.) costs, b.) masked fiscal problems, c.) policy dilemma, d.) political posturing; and e.) the political and cultural vulnerability of integration. These issues create challenges in achieving fluid economic coordination within the RECs.

Furthermore, within the African context, even though it has been recommended that the articulation by the REC Treaty of the status of REC legal instruments in Member States and the strengthening of REC regional enforcement institutions are ideal regional remedies that would aid the attainment of REC goals, they alone cannot guarantee the complete realization of these objectives. Member States must accord supreme status to regional law and procedures. This supremacy must be recognized in Member States from top to bottom by all organs and at all levels of government without which the RECs would be unable to achieve their long term goals.

Concerning the adoption of EU financial regulatory and enforcement institutions in Africa, these are too advanced for the African system in the short and medium term. The chapter contends that in order to pursue *African sovereignty*, emphasis must be paid again to the concepts of supra-nationality, the supremacy of community law, the strength and effectiveness of the legislative and enforcement powers. The existing institutions must demonstrate consistently over time the ability to be independent and free from political pressures. This will provide the organic development of the existing institutions. It is only following the strengthening and empowerment of the existing institution in the continent that further attempts can be made to adopt the more advanced EU institutions such as the ECJ, ECB and ESFS.

All the same, this chapter discussed the benefits and consequences of surrendering national sovereignty within the regional context, the subsequent chapter however unveils that the idea of ceding national sovereignty does not only rest within a regional perspective. States have for many years also ceded parts of sovereignty at the global stage to global institutions in order to ensure *inter alia* global financial efficiency. The consequences of these efforts will now be observed.

CHAPTER 4: CHANGING SOVEREIGNTY WITHIN GLOBAL MONETARY MANAGEMENT

4.1 Introduction

Mount Washington Hotel, one of the most deluxe hotels in the world situated in a self-sufficient mountain resort in Bretton Woods, New Hampshire was chosen by President F.D. Roosevelt to host the United Nations Monetary and Financial Conference. The representatives of the United Nations gathered there for the meeting in July 1944 with a shared vision to 'save the world' in the wake of the greatest economic collapse (Great Depression) and one of the most disastrous wars in history (World War II). They sought world peace, freedom and security. The starting point would be to deliberate on post-war recovery including infrastructural reconstruction and also stabilising the economic and financial systems.

Today the international community continues to witness a proliferation of regulatory adjustments for banking and finance activities within national, regional and global levels. Following consideration of regional sovereignty in the preceding chapter and its relevance for the African continent, this chapter opens further lines of new thinking for the African continent by considering the importance of ceding national sovereignty to global institutions in order to encourage global integration as a solution to the residual global economic and financial problems. The chapter opines that as regional integration and eventual *continental sovereignty* is necessary to assist Africa in meeting its challenges within the continent, it is also imperative for Africa to increase and consolidate its influence on the global stage. This requires global integration which also necessitates the partial surrender of sovereignty to global institutions.

The first part of this chapter revisits the objectives of the Bretton Woods System and investigates whether these objectives were ever fully achieved. The second part offers an examination of the events which resulted in the end of this system by pointing to the causes of its ultimate collapse and their significance for future regulation of global financial markets. The significance of this for Africa is summarised in part three which also concludes the chapter.

Part One

4.2 The Bretton Woods System

In times of globalisation, there is the need for adaptability because the economic environment changes speedily. Capital movements become larger and more sophisticated and yet remain less controllable. Therefore, the need for a stabilising economic and financial system becomes increasingly apparent. Going about this is absolutely fundamental in safeguarding a successful sustainable regime.

Politically, it made sense to concentrate power in a small number of countries (in this case those who suffered most during the Great Depression and also the Allies of the War) and present a dominant power willing and able to assume a leadership role in global monetary affairs. Some consider this as an opportunity which the United States exploited to establish their hegemony over the rest of the world; after all once you have a big say on the running and control of global economic and financial systems, you basically control the world at large in terms of political and military power.[1]

Economically and financially, restructuring international finance and currency relationships were imperative. The plans for the system were developed by two memorable economists of that generation, the Minister of State in the U.S. treasury, Harry Dexter White, and the British economist John Maynard Keynes. The latter outlined the complexities of creating a system acceptable by all states in the following statement, " We, the delegates of this Conference, Mr President, have been trying to accomplish something very difficult to accomplish.[...] It has been our task to find a common measure, a common standard, a common rule acceptable to each and not irksome to any."[2]

In a bid to set up a system of rules, institutions, and procedures to regulate the international monetary system, the planners established the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD), which is the World Bank today. An International Trade Organisation (ITO) was also to be established, although subsequent

---

[1] See Chomsky N: *Hegemony or Survival: America's Quest for Global Dominance*; Metropolitan Books; New York, 2003.

[2] Moggeridge D (ed.), *The Collected Writings of John Maynard Keynes*(London: Cambridge University Press, 1980), vol. 26, p. 101

support from the US Congress was not available, and instead, the General Agreement on Tariffs and Trade (GATT) was implemented until a formal World Trade Organisation (WTO) could be set up in 1996[3].

Importantly, a replacement dollar exchange standard was established with the US dollar becoming the new anchor currency. The United States defined the value of its dollar in terms of gold at $35 per ounce and an obligation arose for all other members to define the value of their money according to what was called the "par value system" in terms of U.S. dollars or gold.[4]

It is worth noting that the Gold Standard had been suspended during World War I after a number of countries made attempts to restore a gold exchange standard following the War. In any case, the idea was subsequently abandoned with the beginning of the Great Depression between 1929 and 1933. An agreement was reached in a conference in Genoa in 1922, on the rules to operate the international financial system between WWI and WWII. It provided the establishment of central banks of issue which would be independent from state government and countries would re-adopt the Gold Exchange Standard and maintain convertibility of national currencies either directly into gold or into a tied gold currency.[5] However, many countries abandoned the Gold Exchange Standard in 1930 and 1931, and most of them adopted protectionist measures in the periods leading to the outbreak of WWII.

4.2.1 Bretton Woods System: Objectives for Global Financial Integration

Between the world wars, the most significant event was the World Monetary and Economic Conference, held under the support of the League of Nations in London 1933. It followed both the meetings in Genoa and the other in Rome in 1930 which established the Bank for International Settlements. The London conference sought to re-establish fixed uniformity for a wider range of currencies. This effort fell short as with the League of Nations, primarily because of a lack of support from the U.S. government. Three years later, the United States did sign an

---

[3] Gallant P & Dosoo G; *The Eurobond Market*; Woodhead-Faulkner, Hemel Hempstead 1992, 4-5.

[4] Dammasch S: *The Sytem of Bretton Woods: A lesson from history*; Available online at http://www.ww.uni-magdeburg.de/fwwdeka/student/arbeiten/006.pdf (accessed 05 October 2014)

[5] Eichengreen B; *Globalizing Capital: A History of the International Monetary System*; 2nd Edition, Princeton University Press, Princeton, 2008, p.60. Also, for a background on the Genoa Conference see Fink C: *The Genoa Conference: European Diplomacy*, 1921-1922; University of North Carolina Press, Chapel Hill 1984.

accord with France and the United Kingdom on a stabilization pact known as the Tripartite Agreement.[6]

During the 1930s, states had experienced a series of problems such as shortage of gold, exchange rate instabilities, the movement of "hot" money in and out of their realms, and the lack of a mechanism to adjust balance of payments problems.[7]

To resolve this, the IMF which was created to deal with these difficulties established an international monetary system that contained a stable exchange rates regime with some scope for revaluation ("pegged but adjustable"), provided for the convertibility of currency, provided a mechanism for overcoming short-term liquidity crises and an organizational actor for managing the system.[8] On the other hand, the World Bank was designed to help the economic and industrial reconstruction of Europe and to help developing countries achieve industrialization.

The purpose of the ITO was to propel states down the path of free trade, to stop them from defecting to protectionism as a way of responding to balance of payments problems for example by imposing import quotas as an alternative to devaluing their currency. This however proved to be too politically divisive, and so a decision on it was postponed until after the war. As a fallback option, a weaker agreement instead was established; the GATT.[9]

---

[6] This agreement, however, was an impromptu effort to ward off a potentially competitive devaluation of the French franc. Though successful on its own terms, the agreement lacked an institutional structure and a sustainable enforcement mechanism. It thus did little to prevent similar conflicts from arising in the future. See Boughton J M; *A New Bretton Woods?*; Finance & Development; March 2009, Volume 46, No.1

[7] Braithwaite J and Drahos P: *Global Business Regulation*, CUP, 2000, p. 97-101.

[8] See Williamson J: *The Failure of World Monetary Reform 1971-74*, NYUP, New York, 1977, p. 2-28.

[9] It is worth pointing out that the planners of Bretton Woods intended to create three multilateral institutions and not two as they also needed to realise the core objective of GATT which was to liberalise international trade in goods, services and investment through the gradual reduction of tariffs in terms of customs duties and charges. This arrangement was based on national treatment or non-discrimination between overseas territories and as such financial impediments on market access were prohibited outright while internal market regulation measures were subject to non-discrimination.

This provided the framework for the main global trading arrangements. This set the stage for the ensuing regional integration models which are replicated in many communities all over the world today. For example, membership of Selected Regional Trade Arrangements includes: Africa – CEAO (1973) Communauté Economique de L'Afrique de l'Ouest (West African Economic Community) (7 Members): Bénin, Burkina Faso, Cote d'Ivoire, Mali, Mauritania. Niger and Sènégal; EAEC (1967) East African Economic Community (3 Members): Tanzania, Kenya and Uganda; ECOWAS (1975) Economic Community of West African States. (16 Members): Bénin, Burkina Faso, Cape

Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea-Bissau, Liberia. Mali, Mauritania. Niger, Nigeria, Sénégal, Sierra Leone and Togo; IOC (1982) Indian Ocean Commission (5 Members): Comoros, France, Madagascar, Mauritius and Seychelles; PTA (1981) Preferential Trade Area for Eastern and Southern Africa. (19 Members): Angola, Burundi, Comoros, Djibouti, Ethiopia, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe; SACU (1910) Southern African Customs Union. Members (4): Botswana, Lesotho, South Africa and Swaziland; UDEAC (1964) Union Douaruère et Economique de 1'Afrique Centrale (Central African Customs and Economic Union). Members (6): Cameroon, Central African Republic, Congo, Gabon, Chad and Equatorial Guinea

Asia and the Pacific: ANZCERTA (1983) Australia-New Zealand Closer Economic Relations Trade Agreement (Free trade area formed in 1965). Members (2): Australia and New Zealand; ASEAN (1967) Association of South East Asian Nations. Members (6): Brunei (1988), Indonesia, Malaysia, The Philippines, Singapore and Thailand

Europe: Benelux Union (1948) Belgium-Netherlands-Luxembourg Economic Union. Members (3): Belgium, the Netherlands and Luxembourg; ECSC The European Coal and Steel Community. Members (12): Belgium, France, Germany, Italy and Luxembourg, the Netherlands. EEC and Euratom (1957) The European Economic Community and European Atomic Energy Community. Members (12): Belgium, Denmark (1973), France, Germany, Greece (1981), Ireland (1973), Italy, Luxembourg, the Netherlands. Portugal (1986), Spain (1986) and the UK (1973); EFTA (1960) European Free Trade Association. Members (7): Austria, Finland (1961), Iceland (1970), Liechtenstein (1991), Norway, Sweden and Switzerland

Middle East: ACM (1964) The Arab Common Market. Members (7): Egypt, Iraq, Jordan, Libya, Mauritania, Syria and Yemen; ECO (1985) Economic Cooperation Organisation (formerly the Regional Cooperation for Development). Members (3): Islamic Republic of Iran, Pakistan and Turkey; recently several states of the former Soviet Union and Afghanistan have become members (1992); GCC (1981) Cooperation Council for the Arab States of the Gulf (also known as the Gulf Cooperation Council). Members (6): Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates

Western Hemisphere: Andean Pact (1969), Andean Subregional Integration Agreement. Members (5): Bolivia, Ecuador, Colombia, Peru and Venezuela (Chile withdrew in 1976); CACM (1960) Central American Common Market. Members (5): Costa Rica (1962), El Salvador, Guatemala, Honduras and Nicaragua; CARICOM (1973), Caribbean Community. Members (13): Antigua and Barbuda, The Bahamas (1983), Barbados, Belize (1974), Dominica (1974), Grenada (1974), Guyana, Jamaica, Montserrat (1974), St Kitts and Nevis, St Lucia (1974), St Vincent and the Grenadines (1974), and Trinidad and Tobago; LAIA (1980) Latin American Integration Association (superseded Latin American Free Trade Association, LAFTA, signed in 196U). Members (11): Mexico and all South American Countries except Guyana, French Guiana, and Suriname.

USA-Canada: FTA (1988) United States-Canada Free Trade Agreement (also known as Canada-US Free Trade Agreement CUSTA). Members (2): The United States and Canada. US-Israel FTA (1975) United States-Israel Free Trade Agreement. Members (2): The United States and Israel.

As will be seen in Chapter four most especially with the European experience, the community borrowed some of the underlying ideas from and had been inspired to a significant extent by the operation of the GATT, however it went considerably further in terms of the nature or content and degree of market integration secured; this uncovers one of the main tension in terms of regional financial integration in Chapter four, which is that trade arrangements are voluntary and generally depend on the coincidence of mutual trading interests and supporting political good will.

The United States would emerge from the conference as the world's most powerful economy and since all governments generally agreed that if exchange rates were not to float freely, states would also require assurance of an adequate supply of monetary reserves (where the US comes in). It has been acknowledged by many that the institutions that emerged from this largely reflected US preferences.[10] In fact the headquarters of the two main institutions, IMF and World Bank are situated in Washington DC.

4.2.2 Bretton Woods System: Outcome

Many hold that, the singular success of Bretton Woods is attributed to the extraordinary circumstances in which it was held and to the care devoted to its preparation.[11] This was further solidified by the remarkable optimism portrayed by the negotiators and planners of this system. The willingness of the U.S. government to host the meeting, to take the lead in the design of the IMF, to commit itself to be the principal creditor and to accommodate the needs of other countries was imperative to the success of Bretton Woods. The two-and-a-half-year collaboration between planners which preceded the end of the war produced many revisions to the original proposals, not just to accommodate each other but also to make the design more appealing to other countries thus overcoming well known differences between the parties especially the US and Britain. Boughton submits that the unanimous agreement on the Articles was achieved as a result of the combination of a number of factors. Firstly, the careful development of a realistic plan; secondly, strong leadership from the two predominant countries, and finally the effect of a major crisis in stimulating the political will to act.[12]

Nevertheless, one of the most notable absentees in this grand plan for international institutions in the post war era was 'tax' and 'an object of regulation'. Communication between the planners around the time of Bretton Woods did not appear to discuss the coordination of tax policy between states. By implication somewhat, tax policy would be retained by the nation-state.[13]

---

[10] In fact it has been voiced that the Americans did not deliberately seek the responsibility of global monetary management and for a combination of reasons which include altruism and self-interest, they welcomed it wholeheartedly when they found themselves thrust with it; after all being the world's money manager was fitting of its newfound leadership role in the Western Alliance. Cohen B; *Organizing the World's Money*; Basic Books, New York, 1977, Ch.14

[11] Boughton (n.6)

[12] Ibid.

[13] Braithwaite (n.7)

Hence after a short burst of activity during its first two years, IMF lending shrank to an extremely small scale. The burden was then shifted to the one actor at the time with the financial and economic muscle required to shoulder responsibility for global monetary stabilization - namely, the United States of America.[14]

Free markets are a good thing, but if there is no appropriate regulation, they can spin out of control. In the case of Bretton Woods, what broke down were the rules of cooperation for the convertibility of the dollar into gold and the exchange rates regime. It became a problem to coordinate the balances between surpluses and deficits and many countries suffered this predicament including the US as they went from surplus to running trade deficits.[15]

Furthermore, it was not until after WWII that the currency of the debt was separated from the country of issuance following the introduction and subsequent expansion of the Eurodollar market[16]. The Euroloan and Eurobond markets began to expand during the late 1950s and early 1960s, following the restoration of currency convertibility in 1958. This was supported by the large volumes of US dollars that flowed into Europe and London and the restrictions imposed on US foreign currency lending and foreign investment[17]. By this time, New York had replaced London as the leading international financial centre although this was still only through the issuance of Dollar debt to domestic and foreign investors with the debt being traded in New York[18].

The creation of the Euro-dollar markets arose as a result of certain political events and financial opportunism as well as the general availability of dollar surpluses in Europe during the later

[14]Fortunately or unfortunately, as you would have it, the US was not only able but willing to take on that responsibility, in effect exercising its role as 'money manager of the world' (See Cohen (n.10))

[15] Braithwaite (n.7)

[16] Gallant & Dosoo (n.3) Ch.1

[17] Ibid; these were introduced under Regulations Q and D and interest equalisation tax.

[18] New York and Zurich were the only markets not damaged by WWII. Europe had a US$25bn trade deficit with the US between 1946 and 1950. All of the major currencies apart from the US dollar and Swiss franc were devalued in 1949 which created further concerns with regard to the availability of dollars and international liquidity. Aid was provided through the Anglo-American Financial Agreement and the Marshall Plan with foreign issues also being raised on the New York Stock Exchange. (See Gallant & Dosoo (n.3, p. 8-9))

post-war period. Soviet and Eastern Bloc countries initially transferred US dollar balances from the US to European banks to avoid potential forfeiture and loss.[19]

Again, a large number of US banks and investment houses (securities firms) had also set up branches in London which attracted US dollar deposits. These had been established to support US corporate investment in Europe in the post-War period. It is worth noting that this expansion of the market was also supported by the Bank of England[20] and by other Western European governments such as West Germany and Italy.

During this time, many problems arose including, enduring imbalances of payments between the Western industrialised countries which subsequently weakened the system of Bretton Woods. One substantial problem was that the US dollar had to be an international reserve currency at the same time as a national currency. This made the national monetary and fiscal policy of the United States free from external economic pressures, while heavily influencing those external economies.[21]

Also, the rigidity of the fixed-exchange rate regime posed a significant set-back for the par value system. The strain reveals an “ambiguity of the key notion of fundamental disequilibrium”.[22] The question is asked: “How could governments be expected to change their exchange rates if they could not even tell when a fundamental disequilibrium existed? And if they were inhibited from re-pegging rates, then how would international payments equilibrium be maintained?”[23] In practice, governments attempted circumventing this set-back although, the ensuing complexity of the exchange rate system exacerbated underlying worries of likely global liquidity shortage, thereby creating temptations for speculative currency shifts. This negatively impacted global confidence as well.[24]

---

[19] Ibid, p.10; also see Revell J; *The British Financial System*, Macmillan, London 1973; Ch.11.

[20] Rt. Hon Earl of Cromer (Governor of the Bank of England), *Bank of England Quarterly* (1962) 11, 265

[21] Dammasch (n. 4) p. 9-10

[22] Jones R J B: *Routledge Encyclopedia of International Political Economy*; Routledge, London 2001; p.99

[23] Ibid

[24] Ibid.

Part Two

4.3 Bretton Woods System: "Nixon Shock"[25] and Collapse

Some hold that these aforementioned issues only provided a smoke-screen which masked a deeper political conflict as concerns grew about the mounting commercially competitive threat from Europe and Japan in conjunction with the intolerable cost of subordinating domestic interests to help strengthen foreign allies.[26] Conversely, concern was growing in Europe and Japan about America's use of its privilege of liability financing (in fact France's Charles de Gaulle called it the 'exorbitant privilege').[27] The Europeans and Japanese had just one major weapon they could use to curb America's policy autonomy: their right to demand conversion of accumulated dollar balances into gold.[28]

More so, many countries wanted US dollars to meet their trade obligations and were happy to let the US run deficits since this provided liquidity in the international monetary system.[29] This situation however led to a crisis first anticipated by the economist Triffin in 1960.[30] As a result, US deficits continued to increase, partly because the US had to pay for its war in Vietnam. Subsequently, confidence in the dollar started to decline and countries began to seek the conversion of their dollars into gold.[31]It was becoming increasingly clear that the pegged rate system was incapable of coping with widening payment imbalances, and the confidence problem worsened as speculators became encouraged to bet on devaluation of the dollar or

[25] This was coined following a series of economic measures adopted by President Nixon to push back the economic problems resulting from the gold standard system. This culminated in the unilateral cancellation of the direct convertibility of the US dollar to gold. [For a report on this, see article by Lowenstein R: *The Nixon Shock*; Bloomberg Business Week Magazine; (04 August 2011)

[26] Cohen (n.10)

[27] Ibid.

[28] These days, China ironically wields this sort of power because the US policy autonomy will be severely jeopardised should the Chinese freeze their financial reserves.

[29] Braithwaite (n.7)

[30] Triffin R: *Gold and the Dollar Crisis*, Yale University Press, New Haven, 1960. He pointed out that if the US attempted to correct its balance of payments deficit it would cause a liquidity crisis. On the other hand, if it allowed its deficit to continue, other states would lose confidence in the dollar as a reserve currency and seek to convert their dollars back into gold. Triffin argues that the gold standard exchange regime is fundamentally flawed by its reliance on the pledge of convertibility by some national currency particularly the dollar into gold.

[31] Braithwaite (n.7)

revaluations of the currencies of Europe or Japan. Therefore, President Richard Nixon was determined to force the Europeans and Japanese to accept a mutual adjustment of exchange rates as concerns grew about America's rapidly deteriorating payments situation, as well as rising protectionist attitudes in the US Congress. Besides the US may have lacked effective control over the dollar exchange rate under the prevailing rule of the game but it still had the power to unilaterally change the rules. For that reason, on 15 August 1971, the convertibility of the dollar into gold was suspended, allowing it to find its own level in the currency markets.[32]

In February 1973, the Smithsonian Agreement was launched and the funds of all the industrial countries were set free to float independently. With these decisions, the two core elements, the par value system and the gold exchange standard, were effectively terminated and with this, the Bretton Woods system was relegated to history.

Following this new era of flexible and floating exchange rates, the need for a new and appropriate international monetary system became imperative. The major industrial countries were divided on how to respond, and as noted, developing countries resisted being left out of the discussions. The Group of Ten (G-10) industrial countries (Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, and the United States) took the lead by agreeing to currency realignments. Although the G-10 could not devise a solution on its own, it did agree to the creation of the Committee of Twenty (C-20), a ministerial advisory body that at the time represented the 20 countries and constituencies of the IMF Executive Board.[33]

Boughton points that even though the C-20 had the advantages of an already existent institutional framework and secretariat including the political support of both industrial and developing countries, it remained void of a realistic plan for restoring stability to the payments system. In fact, the goal of exchange rate stability was abandoned after two years and the IMF was subsequently mandated to exercise “firm surveillance” *via* bilateral and multilateral oversight. This mandate was eventually preserved in the Second Amendment of the IMF Articles of Agreement.”[34]

---

[32]Cohen (n.10)

[33]Boughton (n.6)

[34] See Articles of Agreement of the International Monetary Fund; available at https://www.imf.org/external/pubs/ft/aa/ (accessed 10 October 2014)

Meanwhile, the highly regulated nature of European financial markets during the post-War period and maintenance of restrictions on capital mobility meant that London emerged as the natural centre for the new markets. The City of London's open and liberal trading environment as well as stock of professional expertise and resources allowed it to become the natural focus for the new Euro-dollar based capital market. This new marketplace then arose partly as a result of the highly regulated nature of the US and European markets as well as the financial opportunities available in London.

Once established, growth in the new markets was boosted by a combination of factors including the modification of international savings and investment, deregulation, technological advancement, increased domestic and international competition as well as a more general increase in the demand for financial innovation which supported the evolution and development of this market.[35] These developments sum op the global benefits which could be gained from the development of global financial markets. They nevertheless come with their own demerits which will be investigated in Chapter Six.

4.4 Bretton Woods System: the Aftermath

Effectively, the Bretton Woods system could be summarised in practice as a 'one-power' monetary regime centred on the dollar despite being multilateral in its formal design. This was similar to the classical gold standard of the 19th century which centred on Britain's pound sterling.[36]

Following WWII in this connection, American policy-makers as earlier mooted perceived a need to promote the economic recovery of important allies in Europe and Japan, and maintain a sizable and aggressive military establishment abroad at the same time; which of course was expensive.[37]

---

[35] Bank for International Settlements (BIS); *The International Inter-Bank Market: A descriptive study* (July 1983). Available online at: http://www.bis.org/publ/econ8.pdf (accessed 10 October 2014).

[36] For a historical narrative on the classical gold standard, see Michael D. Bordo and Anna J Schwartz (eds): *A Retrospective on the Classical Gold Standard, 1821- 1931*; University of Chicago Press, Chicago, The National Bureau of Economic Research (NBER), 1984.

[37] The benefit of 'liability financing' (financing deficits with its own currency) signified that America could effectively spend as freely as its leaders thought necessary to promote objectives believed to be in the national interest. Thus, the US could issue the world's principal reserve currency in amounts presumed to be consistent with its own priorities and not necessarily those of foreign dollar holders. (Cohen n.10)

It is fair to say that the significance of the Bretton Woods system lies primarily in the inspiration it provided to international regimes. It was tediously negotiated and concretely kept alive in a couple of multilateral organizations."[38]

Following the events of 1971, states looked to the likes of the G-7 and the G-5 to coordinate international monetary policy. The meetings of G-7 finance ministers became a centre of monetary cooperation and these meetings were more about information exchange and consultation, conditional policy understandings, than about rule-based guarantees. Industrialized countries kept lines of communication open with each other and used the IMF to bring monetary and fiscal discipline to developing debtor nations.[39]

Some commentators also identify the speeding up of EC planning for monetary union as another consequence of the breakdown of Bretton Woods.[40] The thesis draws from the strength of this assertion to solidify the arguments for regional integration and regional financial integration discussed in Chapters Two and Three.

The beginning of the 21st century saw certain economists describe the emergence of a new international system involving an interdependency between states with generally high savings in Asia lending and exporting to Western states with generally high spending and consumption rates.[41] The most striking example of this interdependency is the relationship between China and America. They began using the term "Bretton Woods II" to describe this *de facto* state of

---

[38] It will be seen in Chapter 3 that the circumstances of the system's creation and collapse offered scholars invaluable material for assessing the relative importance of diverse variables in promoting or hampering economic cooperation between governments. This helped inspire eventual responses to the GFC.

[39] At the Bonn G-7 summit of 1978 for example, the US, Germany and Japan agreed to restart the world's economy, but this cooperation dissipated in the face of inflationary fears (Braithwaite n.7).

[40] Ibid- The European Monetary System (EMS) established in 1979 was intended to bring exchange rate stability to Europe by setting up an exchange rates regime in which the currencies of participating European states would adjust against one another within a fixed range rather than simply floating (this logic of European monetary union had been talked about since the early 1960s).

[41] Dooley, Folkerts-Landau, and Garber: '*An Essay on the Revived Bretton Woods System'* NBER Working Paper 9971(September 2003); available online at http://www.nber.org/papers/w9971.pdf (accessed 08 October 2014). For a critique see Eichengreen B: *Global Imbalances and the Lessons of Bretton Woods*; NBER Working Papers 10497 (May 2004); available online at http://www.nber.org/papers/w10497.pdf (accessed 08 October 2014)

affairs. Others have called it "New Bretton Woods" and it has also been used to call for the IMF and World Bank to be revamped in order to meet the demands of the current age.[42]

Another pertinent issue of relevance which will be brought to fruition in Chapter Six is the nature of the relationship between the efforts to revise rules on global finance at the expense of efforts for other looming challenges of this century such as climate change, poverty reduction, peace and security. Some hold that programmes like the structural adjustment of the developing countries initiated by the World Bank and the IMF adversely increased poverty in those countries. Additionally, large-scale agrarian and industrial projects destabilised national economies and destroyed the environment and social patterns. This analysis finds that the inner structure of the Bretton Woods institutions ignore the interests of the people living in developing countries as their rights to speak are only limited and proportional to the amount of money that each country contributes.[43] I must however hold that arriving at a consensus between these issues or elaborating further is beyond the scope of this thesis.

Part Three

4.5 Global Advantage: Significance for Africa

There are a number of issues which need to be considered in order to fully absorb the global advantage for the African continent brought about by global financial integration. Any efforts to plug Africa further into global financial markets should be on the back of a solid *African sovereignty* platform without which the lingering risks will persist. The six main points have been summarized as follows: *differing economic and financial environment*; *global confidence*; *political affiliations*; *interdependency between states*; *uniform financial market rules*; *vulnerability to financial crisis*. These are now outlined below:

a.) *Differing economic and financial environments*

It is true that when a country attains a developed financial system they become financially integrated with the rest of the world. The financial system in Africa is still developing in comparison with the financial systems of the more developed systems in Europe, North

[42] Brenner R: *"What is Good for Goldman Sachs is Good for America The Origins of the Current Crisis"* Center for Social Theory and Comparative History, UCLA; April 2009; available online at: https://escholarship.org/uc/item/0sg0782h (accessed 08 October 2014)

[43] Dammasch (n.4)

America, South America, Australia and Asia. Capital movements are larger, faster and more sophisticated, yet remain less controllable. Global financial markets are familiar with the speed of capital mobility, modification of types of global savings and investments, technological advancement, increased global competition as well as a more general increase in the demand for financial innovation at the global stage.

It is therefore essential for the African solution to ensure the continental financial architecture is stabilised in order to validate increased participation in crucial global financial matters. By adopting continental sovereignty, the process of modernising and advancing the continental financial system becomes less precarious.

b.) *Global confidence*

The demonstration of strong commitment to navigate the complexities in improving a financial system and the resulting progress that follows will provide a significant boost in confidence for the African continent. This renewed confidence at the global level will go a long way to prevent any negative perceptions ascribed to the continental financial architecture. Also, progress will illustrate the continental institutions' ability to handle recurring risks. The methods of dealing with indigenous challenges would serve as important and relevant contributions at the global stage. This can in turn better inform global policy makers and global institutions on alternatives to be applied in different parts of the world. The African continent can stake a claim for a bigger role in these discussions only if key stake holders are confident in its ability to make significant contributions based on its experience. The progress in developing its continental financial system will give these key global players the requisite confidence to deal with Africa differently.

c.) *Political affiliations*

It is obvious that the Bretton Woods system concentrated economic and financial power in the hands of a few countries notably the United States. As they assume the leadership role in global monetary affairs, there is the tendency to exert amounts of influence for political expediency, convenience and benefits. This raises the issue of fairness and creates a limitation because the United States for example could cherry pick the nations in Africa it wants to deal with and present difficult and unfavourable conditions which underlie the relationship. Could this mean that countries can withhold trade partnerships and arrangements with others based on their dislike of the other's domestic record on say human or gay rights or their dislike in the other's specific national economic policies? The answer to this question is out with the scope of this thesis and no attempt will be made to answer it.

This sort of exploitation if permitted could be detrimental for the continent most especially the smaller and less performing countries. Conversely, some wealthier nations could move to take advantage of relationships with key global leaders for their own selfish national benefits.

d.) *Interdependency between States*

In connection to sub-heading (c) above, the emergence of a new international system involving interdependency between states has been recorded. This has been seen for example in the case of China and the United States where huge savings in the former are lent to the latter to fund its high spending and consumption rates. Global integration could pave the way for this type of interdependency. African policy makers need to determine whether this sort of relationship will assist in the continent and at what costs.

Evidently, financial openness is often regarded as providing important potential advantages for both foreign investors and recipient countries. Access to world capital markets expands investors' opportunities for portfolio diversification and provides a potential for achieving higher risk-adjusted rates of return. From the perspective of the recipient country, there are potentially many benefits as well. For example, access to world capital markets allows countries to borrow in order to pacify consumption in the face of adverse shocks, and to maximise potential growth and resulting welfare gains

e.) *Uniform financial market rules*

The need to have common measures, a common standards, a common rules governing the African financial market framework is crucial to enabling the continent adhere to uniform rules governing the global financial markets. Compliance with local rules provides the requisite conduct to demonstrate adherence to uniform rules at the global level.

f.) *Vulnerability to financial crisis*

Global financial integration could heighten a country's vulnerability to financial crisis in particular with regards to contagion and reversals in capital flows. In fact, minimising the risks of integration requires the existence of well-functioning domestic and regional financial markets. This also is required at the continental level. *African sovereignty* would ensure the smooth operation of national and regional financial systems with the application of sound economic and financial policies as well as strong institutions, thereby mitigating any risks and exposures at the global level.

Reflections

Considering both RFI and Global financial integration, the latter is more likely to encourage risk-sharing than the former because business cycles tend to be more closely correlated among neighbouring countries than among distant ones. Again, the importance of local information and common time zones for financial markets could create a role for regional integration to improve welfare. Evidence suggests that gravity models work well for financial and trade deals, thus even in an age of efficient global communications, financial markets still find significant advantages in geographical proximity.[44] These all work in favour of the African continent. Moreover, information asymmetries or differences in investment styles could cause investors in neighbouring countries to act differently from those in distant countries; hence RFI might help to diversify the global investor base.[45] Nevertheless, financial integration be it regional or global is not without its disadvantages especially considering that financial markets are not perfect.[46]

4.6 Conclusion

Over the course of history, attempts to revise the global financial architecture have come in response to a crisis; and if at all successful, it has only been partial. When problems were clearly identified and the major countries agreed on the type of solution required, deliberations within a group of those countries usually provided the necessary leadership for reform. In the most successful efforts, leadership came from a small inner group that was willing to include, listen to, and absorb ideas from a wider set of participants.

---

[44]Portes R and Rey H (2000); *The determinants of cross-border equity flows: the geography of information*; Centre for International and Development Economics Research Working Papers, no C00-111

[45] Ibid

[46] The process of regional financial integration does not necessarily preclude integrating globally through overall capital account liberalization; they are quite different. Low-income countries lacking in sound policy and strong institutions might be especially vulnerable to macroeconomic volatility from exposure to global financial markets. Regional rather than global liberalization of trade in financial services may be a more advisable preliminary step for these countries and put less of a strain on the regulatory authorities. Drawing from this, regional integration should not be understood as a substitute for global integration, they all bring their own potential benefits and costs. Thus they can have a complimentary relationship. (See Wakeman-Linn and Wagh n.3 at p.92)

The Bretton Woods system no longer exists and its procedures and institutions needed to adjust to changing market forces beyond its control. However, for all intents and purposes, its aims and objectives are as valid today as they were in the past. I submit that Bretton Woods provided confidence and enabled the world's biggest economies to get together and set up implicit or explicit principles, norms, rules and decision-making procedures around which the global financial architecture should function.[47] More so, I agree strongly that inspiration towards many models of regional integration most notably the European case study found their source within the integration efforts made at Bretton Woods. This further develops the assertion and common theme of the thesis that cooperative solutions are the most appropriate means to the achievement of a sustained resolution to economic and financial challenges; and this necessitates the partial transfer of sovereignty in terms of economic and finance policies.

The chapter illustrated that the Bretton Woods system unearthed a global advantage for financial markets integration by: modifying the nature of international savings and investment, deregulation, technological advancement, increased domestic and international competition and an increase in the demand for financial innovation. This global advantage if exploited in the wrong way will result in vulnerability to risk and exposure.

It is in this spirit that the chapter offers thoughts for the African continent to determine its preparedness for a bigger role in global financial markets. The importance of attaining successful *African sovereignty* as a pre-condition to maximizing the global advantage cannot be overemphasized. Six main points have been identified and summarized to provide a better understanding of the exposure which could result from miscalculated global integration. They are: a.) *differing economic and financial environment*, b.) *global confidence*; c.) *political affiliations*; d.) *interdependency between states*; e.) *uniform financial market rules*; f.) *vulnerability to financial crisis*. The must be the existence of a solid economic and financial policy as well as strong institutions both at the national and regional levels to enable the robust and sustainable basis for the African sovereignty. Only then can a leap towards increased global participation be practicable.

Having said this, the next chapter prompts a rethink of existing international financial laws and procedures in the wake of a GFC. This raises concern for the African continent to consider in the areas mentioned above as the continent strives to acquire more influence in international

[47]See Parker G, Barber T and Dombe D: *"European Call for Bretton Woods II";* Financial Times; 16 October 2008

discussion forums concerned with global monetary management matters. It will consider the ravaging effect of the GFC which started in 2007 and analyse policy maker responses which tightened financial regulation and market control. It however nullifies any argument that these responses are an end-product. The thesis contends that they are merely a step towards the development of a more sustainable and reliable integrated global financial framework.

CHAPTER 5: GLOBAL FINANCIAL CRISIS AND CRISIS RESPONSE: A TALE FOR AFRICA

5.1 Introduction

A search on Google for 'the global financial crisis', will return tens of millions of results in under a second. Staggering as these numbers may be, most of these results may be considered irrelevant depending on your expertise and interest area. Nevertheless, they relate to a global outpour of varied opinions by experts and novices' alike, spanning differing walks of life, ranging from economists and financiers to lawyers, philosophers, and even climate change enthusiasts. In spite of this contrast, they all have something to argue for or against issues pertinent to the Global Financial Crisis which started in 2007 (GFC). Whatever the case, no matter how inconsistent these arguments and opinions are, one thing is for sure, there is a unanimous agreement of how serious and frankly cataclysmic the effects of the GFC were.

Notwithstanding, I believe deeply in the inherent and intricate value of free markets, particularly, free financial markets. Even though their effectiveness has been challenged beyond measure recently, I nevertheless hold the view that now is the time to showcase and explain the benefits of financial markets, even if this is unpopular in some civic quarters. Generally, financial markets in themselves are vulnerable because of human intuition. Considering the stubborn human characteristic to make quick profits in the shortest possible time, these markets could be abused, exploited and easily spun out of control without a watchful eye.

Having said this, the GFC has caused a rethink of the importance awarded to supervisory and regulatory institutions from a legal perspective and the increased influence of government in these matters. In addition, the more general fiscal and monetary issues and policy management of modern complex economies are defining of this age.

In its attempts to remain plugged into the global financial framework and exert more influence in matters of policy, Africa must consider the effects of global financial market integration and its impact within the continent. While, the preceding chapter expounded the theory of a global advantage which can be gained from further integration at the global stage, this chapter seeks to uncover the risk and exposure that comes with this integration efforts. An analysis of these global risks and how to manage them will provide informational insights for African policy makers and governments in their quest to insert the phenomenon of *African sovereignty* on a global platform.

The first part of this chapter revisits the occurrence of the distinct events which constitute the GFC; a timeline so to speak. Part two delves into the triggers of the GFC and attempts to confer possible corrections. In this spirit, the third part will envisage these corrections in light of the crisis response at the global level, with the perspective of the global response geared towards an international regulatory agenda for the global financial markets; the US and UK responses remain central to this discussion. This Global response will be discussed with focus most especially on the G20 in relation to *systemic risk* and *financial stability* –and more broadly on *growth* and *stability*. In addition, a review of the efforts made during the Bretton Woods system will be done on a comparative basis in order to identify the lessons learnt today as a result of the `insufficient` approaches taken during the Bretton Woods system.

Part four will investigate the impact of the GFC on the African continent and consider the need for *African sovereignty* as a buffer to provide more protection for the African financial system while enabling it to fit properly within the global financial framework. The chapter will close with recommendations in this section.

There is indeed voluminous amount of information on this topic and the wide-ranging material available for analysis is unsurpassed. Only the relevant issues will be highlighted to avoid duplication. From these materials, it will be showed that there were multiple triggers that set the GFC rolling and no one factor should be addressed in isolation. This chapter contends that to hold the view that only bankers, complex financial instruments or the sub-prime mortgage crisis particularly in America caused the crisis, is flawed and myopic. A toxic cocktail of factors accounted for the onslaught of this complex multi-faceted crisis and bankers singularly contrary to popular belief did not cause the crisis. In fact, it will be seen that in spite of the conditional technical issues, the lack of reliable lender of last resort mechanisms, including appropriate market support models did to a large extent exacerbate the crisis which would have been contained if these were in place.

Part One

5.1.1 GFC: An Overview

There are certain elements which intersect between this GFC and previous crises. As MacNeil and O'Brien point out- *"common features would include the easy availability of credit as a result of loose monetary policy; the relaxation of lending standards associated with that process, speculative bubbles in property and financial assets driven both by excess liquidity and a herding mentality among investors; and the moral hazard problem associated with central banks acting as lender of last resort to banks deemed too big to fail. Features associated with this financial crisis much more so than those experienced in the past include the impact of financial innovation in creating difficult to value products, the globalisation of financial services; and the effect of regulatory arbitrage in creating a shadow banking system that was able to operate largely outside regulatory purview."*[1]

They nevertheless go on to lament the fact that despite the admission of these background influences, it is much more problematic to identify direct causality to any of them. Of course this alone carries significant ramifications for the regulatory reform agenda. They go on to insinuate that the interconnectedness of the causes is illustrative of the difficulty that arises in attempting to establish specific causality. Thus, the answer will not rest exclusively in one particular solution given than the genesis in itself does not lie in any single causal factor. They advise that focus should dwell on the significance of the interaction between the multiple failures associated with crisis rather than on segregated attempts to ascertain causal linkages. They warn against for instance, the construction of simplistic narratives focusing on corporate greed or regulatory incompetence without pre-ascertaining how and why social norms were so eroded in the first place. As a factual matter, this could risk misdiagnosing the problem at hand and furthermore compromise the search for the solution altogether. More so, they maintain that causality itself is inevitably a contested issue, with resolution dependent upon the relative strength of individual corporate or professional actors.[2]

They however caution that the failure of financial capitalism indicts a much wider range of market players, and as such crucifying only bankers will not solve the problem. MacNeil and

[1]Edited by MacNeil I & O'Brien J: *The Future of Financial Regulation*; *Introduction*; Hart Publishing, Oxford and Portland, Oregon, 2010, p.4

[2] ibid

O'Brien deftly explain this by highlighting the evidence of current debates over the accountability of central banks and regulators, and the turf wars that were being fought on both sides of the Atlantic over the survival, shape and remit of regulatory authorities. In addition, they emphasize that an ideational meta-failure of the terms of reference that underpinned the trajectory of corporate governance and financial regulation reform in the decades either side of the turn of the millennium encompasses these micro-failures.[3]

Although it seemed to be a protracted GFC, four distinct phases can be identified which are all consistent with a pattern of plummeting confidence and a rising sense of uncertainty.

The first phase of turmoil started from an initial credit or liquidity contraction in August 2007 and then to successive bank and financial institution failures and bail-outs in the summer of 2008. This then escalated to the second phase which saw a full stock-market crisis in the autumn of 2008 after the collapse of Lehman Brothers, leading to the third phase which was a Global Recession as attention had naturally shifted from crisis in the credit and financial markets unto the real economy. A fourth phase emerged in a sovereign-debt crisis within the Eurozone and notably the case of Greece.[4]

There is no doubt that the second phase was forthrightly the most dramatic since the stock market crash and consequent Great Depression in the late 1920's and early 1930's. As George Walker stated in exactitude "if the five days between Monday 15 September and Friday 19 September 2008 were not unsettling enough, the global financial system teetered on the edge of collapse three weeks later between Monday 6 and 10 October 2008."[5] He described this period as the brink of an 'Armageddon' with the likely return to a primitive financial era void of all the niceties of the global financial system which had been painfully built over the years.[6]

---

[3]A particular striking feature of corporate and regulatory responses to the GFC has been the paucity of institutional memory. MacNeil and Obrien draw from both Congressional hearings in Washington and testimony provided to the Treasury Select Committee in Westminster to make this assertion. In fact, they ask us to recall the use of similar defences during the conflicts of interest investigations that accompanied the collapse of Enron, WorldCom and Tyco in the accounting scandals at the turn of the century.- (MacNeil & Obrien, p.5)

[4] See Para 3.6.2 at p.146

[5] Walker G A; *The Global Credit Crisis and Regulatory Reform*; Edited by MacNeil I & O'Brien J: The Future of Financial Regulation; 2010, p. 179

[6]Walker G A; *Financial Crisis- Three days in September*; University Lecture notes; University of Glasgow; September 2010

As will be seen later in the chapter, US markets remained unstable as the lengthy and somewhat muddled agreement of the $700bn Troubled Assets Relief Programme (TARP) bail-out plan did not seem to resolve matters. Concomitantly, European leaders fell short in agreeing on any combined response to salvage the situation. Things only took a turn for the better when the UK Government under the leadership of former Prime Minister Gordon Brown and former Chancellor of Exchequer Alistair Darling, were forced into engineering an inspired though abnormally hasty and dramatic lead in adopting the first informed and comprehensive package of response measures to the crisis on the morning of 8 October 2008.

Discussions on these measures would then set a chain of discussions at the G7 Finance Ministers and central bankers' meeting on the weekend of 11th and 12th October 2008 shifting to the G20 'Bretton Woods II' meetings held in Washington and then in Paris, London and Italy. At this juncture, a re-examination of the causes of the GFC is crucial.

5.2 GFC Timeline

Chaos began with credit contraction in the inter-bank markets starting August 9th 2007. Inter-bank liquidity tightened and ultimately froze following the suspension of payments by BNP Paribas on three investment funds. Prior to this, one of the initial indicators of a problem in the financial markets was the US sub-prime mortgage crisis which was characterized by sub-prime mortgage foreclosures and hence the consequent decline of the securities which backed these mortgages.

Also, rumour was rife on Northern Rock's discreet request for liquidity assistance from the Bank of England on the 14th September 2007. The withdrawal of funds from Northern Rock beginning the following day created a classic 'bank run'. Their share prices plummeted, and they were eventually nationalised on February 17th 2008.[7]

---

[7]They were brought into public ownership despite the fact that there had been private sector bids on the table, notably one from a consortium led by Richard Branson's Virgin Group, which were all rejected by Treasury. It was the first major casualty from the credit tightening in the UK. This was unquestionably within the rules as the bank was still solvent. The open facility was fully collateralised and a decent though undisclosed interest rate was charged.

Northern Rock's own business model which relied substantially on wholesale funding also meant that deposit withdrawals were not a major problem. These only represented 28% of its funding which could easily have been raised elsewhere before the crisis. The difficulty was that this model is dependent

On the other side of the Atlantic, the Federal Reserve remarkably aided the purchase of Bear Sterns by JP Morgan on the 17th March 2008 after they announced a special $30bn facility to enable the takeover. This was remarkably the first time in recent years that the Federal Reserve assisted in the bail out of a non-commercial bank. Some level of calm ensued after the managed acquisition of Bear Sterns as most people considered the most vivid phase at the time happened to be over. Nevertheless, not many saw the subsequent drama coming, six months later.

By the end of summer 2008, the crisis and original pressure in the credit markets had spread to other financial sectors, many of which were non-commercial banks. The Federal National Mortgage Association (colloquially known as Fannie Mae) and The Federal Home Loan Mortgage Corporation (Freddie Mac) were other colossal casualties. However, the US government announced they will take control of the struggling agencies and provide the required $200bn which will enable both institutions to stay solvent. Furthermore, the government continued to cover their debts by acquiring $5tn of mortgage-backed securities. This was done in a bid to stabilise the $12tn US mortgage market.[8]

---

on a continuous flow of funds through the inter-bank and wholesale markets. Northern Rock was then largely punished for its own efficient use of the markets although this does raise significant concerns with regard to liquidity cover and gearing ratios which will now be re-considered. (Walker n.5)

The former FSA was severely criticised for its supervision of Northern Rock and published a summary of the review conducted by its internal audit division into the supervision of Northern Rock. The review confirmed four main failings in connection with Northern Rock. Firstly, there had been a lack of sufficient supervisory engagement with the firm with the supervisory team not following up rigorously enough with management on the business model vulnerability arising through changing market conditions. Secondly, there had been a lack of adequate oversight and review by FSA line management on the quality, intensity and rigour of the firm's supervision. Thirdly, there had been inadequate specific resource directly supervising the firm and fourthly; a lack of intensity by the FSA ensuring that all available risk information was properly utilised to inform its supervisory actions. The FSA Board nevertheless confirmed its support for the philosophy of outcomes focused and principles based regulation with financial firms being primarily responsible for ensuring their own financial soundness. The Board accepted the regulatory failings identified although it noted that even if Northern Rock had been supervised to a higher standard, its funding difficulties and subsequent public acquisition would not have been necessarily avoided. (Walker n.5)

[8] Cf. with the more modest $100bn of mortgage debt the UK Treasury acquired in the case of Northern Rock.

5.2.1 Collapse of Lehman Brothers

Undoubtedly the largest and most complex liquidation in US history- Lehman Brothers filed for Chapter 11 bankruptcy on the 15th of September 2008 with over $600 billion in assets. The drama that unfolded in the seventy-two hours preceding its demise was a mere 'aperitif' compared to that which ensued thereafter.

This by no means downplays the seriousness of events which occurred before Lehman's collapse as they are befitting of a Hollywood blockbuster. Phone calls were made transatlantic, negotiations were fierce, and deals were contemplated. When a last ditch effort made to get Barclays to buy the 185 year old Wall Street Giant Institution hit a brick wall, there was a chilling realization that bankruptcy was the only card left to play.

The actions of the authorities were deemed inconsistent given that days before, they had announced a support package for Fannie Mae and Freddie Mac. This time around, they made it clear that they would not stop Lehman from collapsing and should any rescue package crop up, it will have to be from a private purchaser.

It is worth noting that then Treasury Secretary Hank Paulson and Board Chairman of the Federal Reserve Ben Bernanke had been bitterly criticised on both sides of the aisle on Capitol Hill for their actions taken to bail out Bear Sterns, Fannie Mae and Freddie Mac.[9] It could be said that these criticisms influenced their decision not to intervene in the Lehman debacle.

The US authorities arranged a meeting at the Federal Reserve at 6pm on Friday the 12th September 2008 and invited the most senior executives of the largest US, UK and other

[9]Right wing Republicans objected to interference with the private markets while left wing Democrats criticised the support provided to the Wall Street elite. Kentucky Republican Senator Jim Bunning had argued that, 'Simply put, it is socialism' and 'A calamity for a free market system' and argued that Paulson and Bernanke should be resign. Paulson had acted 'like the Minister of Finance in China'. Stern School of Business, New York University, Professor Nouriel Roubini, had stated that 'Socialism is indeed alive and well in America' but that this was 'socialism for the rich, the well-connected the Wall Street'. Stewart J: *'Eight Days – The battle to save the American financial system'* The New Yorker (21 September 2009) 59-81, 60 col.2. (Walker G A; *Financial Crisis- Three days in September*; September 2010)

European financial groups in New York.[10] The SEC Chairman Christopher Cox was also present. Following an introductory address were Paulson confirmed that no public funds would be available and that Lehman may not open for business the following Monday morning, the bank representatives were divided into three working groups[11] to attempt an impromptu rescue solution[12] Discussions continued until 9.30pm on the Friday and reconvened at 8am the following morning.

In light of these prevailing circumstances, the two main potential purchasers of Lehman were Bank of America under Kenneth Lewis and Barclays Capital under Bob Diamond. Nonetheless, concerns had also arisen with regard to the third largest securities firm on Wall Street, Merrill Lynch under John Thain. While a solution on Lehman was still being deliberated, Thain decided to approach Lewis once it had become clear that Lehman may be allowed to fail. He agreed to meet Thain in order to discuss a possible alliance. Lewis confirmed he was looking at a full acquisition, and subsequently a price of $29 a share was agreed. Merrill's acquisition was approved by the board of Merrill Lynch and Bank of America by telephone with the deal being concluded at the offices of the Bank's lawyers between 7.30pm and 1:00am the following Monday morning.

With time running out before the markets opened on the Monday morning, only Barclays remained as a potential purchaser. The stumbling block of any possible deal was the fact that the UK authorities needed assurance from the US authorities that a guarantee of about $25-$30 billion (similar to that provided in the Bear Sterns situation) will be provided to facilitate the acquisition. The tripartite UK authorities had reservations – substantial reservations – about Barclays acting as the white knight for the Wall Street firm and would only agree to a deal on stringent terms. In particular, the Chancellor of Exchequer Alistair Darling wanted to know what Barclays was letting itself in for with Lehman – an institution nursing huge losses from the US sub-prime mortgage market – and whether Paulson was prepared to sweeten a takeover with US taxpayers' cash. The UK authorities needed a quid pro quo financial commitment from the

[10]Attendees included: Lloyd Blankfein, Goldman Sachs; John Thain, Merrill Lynch; John Mack, Morgan Stanley; Jamie Dimon, JP Morgan Chase; Vikram Pandit, Citigroup; and Brady Dougan, Credit Suisse, as well as other representatives from the Royal Bank of Scotland, Deutsche Bank and BNP Paribas.

[11]The first group considered the valuation of Lehman's distressed assets and possible shared contributions. Disposal and recapitalisation was considered by the second group with the third group considering bankruptcy.

[12]Paulson subsequently admitted that, "If there's a chance to put in public money and avert a disaster, we're open to it." Stewart (n.9)

US to mitigate the risk of acquiring Lehman, (a commitment that Paulson was not prepared to make). Darling was also fearful that Barclays had not conducted adequate due diligence on Lehman Brothers and that its distressed assets could infect the rest of the UK financial system. In addition, Barclays also knew it would need US taxpayer funds if it was to proceed with the takeover of an institution which had billions of pounds of outstanding trades that needed to be guaranteed before any takeover could be completed.[13] Alas, Paulson could not give Darling the assurances he had been seeking-- and the rest is now history.[14]

Timothy Geithner, then President of the Federal Reserve Bank of New York and Bernanke had maintained that there was no legal authority to support Lehman Brothers as a whole especially considering the fact that any bail out by Federal funds will have most certainly guaranteed a loss for the US tax payer[15]

Up until Monday 15th September 2008, the norm of the year-long financial crisis was that governments would always offer a bailout to banks in trouble besides Darling had nationalized Northern Rock seven months earlier, while Paulson had orchestrated a takeover of Bear Stearns.

[13]Barclays was still interested in purchasing Lehman although this was subject to the distressed assets being transferred to a separate 'Newco' and funding being secured for the US$15-16bn shortfall for up to one month until the Barclays' acquisition could be complete. In fact, Barclays had approached Warren Buffett although he was only prepared to provide support for up to US$5bn with no other single private source of funding appearing available. A Bank of America representative had separately suggested that the Federal Reserve provide up to US$60bn in support for Lehman's distressed assets. (Stewart (n. 9); (see Walker- *Three days in September*).

[14]It is worth mentioning that Paulson claimed that somehow it was the British regulators who got in the way of a rescue deal for Lehman. In his memoir, which focuses on the time surrounding Lehman's bankruptcy filing, Paulson recounts the desperate efforts to save the bank from failing. He personally called Mr. Darling to plead with him not to stand in the way of the rescue. However, Mr. Darling "…made it clear, without a hint of apology in his voice, that there was no way Barclays would buy Lehman. He offered no specifics, other than to say that we were asking the British government to take on too big a risk, and he was not willing to have us unload our problems on the British taxpayer." ---Paulson H: *On The Brink-Inside the Race to Stop the Collapse of the Global Financial System*; Business Plus-Hachette Book Group Inc, New York 2010, p.211)

[15] Speech by Bernanke on 15 October 2008 and statement by Paulson to the Market News International wire service. Paulson later added, 'There's no law that any of us could have used' Stewart (n.9). Geithner later admitted that, 'If we had had the authority to prevent a system threat, I would have been prepared to act despite the political costs.'

After 15th September, every financial institution from HBOS in the UK to Goldman Sachs in the US was perceived to be at risk. The financial markets were convulsed by a month of panic that saw bank shares drop precipitously, confidence sapped and governments forced to abandon their free-market principles to save the global financial system from collapse.[16]

5.2.2 Post Lehman

Given that the US authorities had estimated that the end of Lehman would not have any serious systemic consequences, it is fair to say their decision would have been different had they known then what they know now about the consequences of allowing Lehman to fail.

As aforementioned, this event has been universally highlighted as that which transformed the credit crisis to a full blown stock market crash and ultimately a Global recession.

Meanwhile, another huge US name was teetering on the brink of oblivion – little wonder this time around the US government acted. AIG, an insurer with $1 trillion in assets, 116,000 employees and its name on Manchester United Football Club shirts, was faced with the imminent prospect of going bust and the Federal Reserve hurriedly stumped up $85bn in return for an 85% stake in the company. AIG's chief executive was summarily fired by the government in a rescue which Bernanke, later described to Congress as the event which infuriated him the most during the entire GFC: “If there is a single episode in this entire 18 months that has made me most angry, I can't think of one other than AIG.”[17]

Also, significant market pressure was applied on Washington Mutual (WaMu), however it was allowed to close on the 25th September 2008 by the Federal Deposit Insurance Corporation (FDIC). J P Morgan acquired its deposit and retail branch business and also its mortgage portfolio but without any unsecured debt or liabilities of the holding company. With assets of over $300billion and deposits of almost $200billion at the end of June 2008, needless to say, it was the largest single US bank bankruptcy.[18]

---

[16]Elliott L & Treanor J: ***Lehman's fall to earth: the last hours of a Wall Street giant***; The Guardian, 3 September 2009

[17]Clark A; *How the Collapse of Lehman Brothers pushed Capitalism to the brink*; The Guardian, 4 September 2009

[18]A number of institutions in the UK including Royal Bank of Scotland (RBS) and others had been able to raise substantial additional amounts of capital earlier in the year with an astonishing $430bn in total. Following Northern Rock, significant amounts of pressure continued to be heaped on institutions most dependent on wholesale funding

Also the money market funds were under pressure as they began to suffer immediate redemption requests on the morning of Lehman's closure. These funds permitted individuals to participate in the US Treasury bill and bank certificate of deposit market[19] and later company commercial paper.

By the following day after Lehman, redemption requests rose to US$40bn in total and the New York Federal Reserve refused to provide any further assistance. No further funds could be provided through credit lines and the company ultimately 'broke the buck' for the first time in recent history and revalue itself at US$0.97 a share. These redemption requests increased again on Wednesday 17 September with credit contraction spreading further to the corporate commercial paper market as major blue chip companies were unable to raise funds. Redemption requests had then led to the closure of the commercial bill market with market money funds not being able to purchase short-term corporate paper.

As a result, the Treasury was then forced to announce on the morning of Friday 19 September 2008 that temporary guarantee facilities would be provided for all money market funds.[20] Ironically, the statement added that this was necessary to protect 'the integrity and stability of the global financial system'.[21] In my opinion, this was surprising, given that only days ago, this cataclysmic situation could have been averted with only a $25-$30 billion guarantee facility being provided to Barclays. Now the US authorities had to guarantee a market worth almost $4trillion. The Treasury was anxious to prevent any further collapse in confidence,[22] as this followed attempts to develop a more comprehensive package that would allow the authorities to limit the danger and control the effects of the downturn.

---

such as Bradford & Bingley and Halifax Bank of Scotland (HBOS). A combination of falling asset prices on their balance sheets and continued contraction within the inter-bank and money markets exacerbated the situation.

[19] Investors could only purchase Treasury bonds in amounts of US$10,000 with market money funds allowing them to benefit the higher rates on government and bank paper. Funds also later purchased corporate commercial paper which allowed companies to cover their payroll and raise other short-term capital. The market was worth $3.5-4tn by summer 2008. Money market investment was considered to be very secure with no funds ever having lost net dollar value (referred to 'breaking the buck'). (See Walker: *Three days in September*)

[20] Stewart- Walker: Three days in September

[21] ibid

[22] Stewart notes that David Nason, an Assistant Treasury Secretary, had told the Investment Company Institute that, 'You're getting this whether you want it or not … This is about confidence, investors feeling safe. Each time we've hoped for a break, we didn't get it. We're using overwhelming force.'

As if all this was not bad enough, stock markets felt the wrath of the crisis as the value of shares in banks and other financial institutions plunged continuously during September and early October 2008. The panic continued nonstop and no one seemed to have a solution for it. Realising that they were all witnessing history unfold, World and industry leaders including those in the US, the EU, World Bank, IMF and so on, watched nail-bitingly as the global financial system as we knew it went into freefall.

Calm only began to surface only when former UK Prime Minister Gordon Brown and Chancellor Alistair Darling announced an informed three part solution (even though in a rushed manner) in order to prevent further falls. This comprehensive package was based on *bank recapitalisation, additional inter-bank liquidity and a credit guarantee support scheme.* This would then form the basis for other national and international responses to the crisis.[23]

Looking back at all this, I am strongly of the opinion that the initial credit crisis could have been contained if properly managed and appropriate market support systems were activated by the Central Banks, and of course an escalation of this crisis only became possible when Lehman was allowed to close. It is true that issues of lender of last resort functions of Central Banks are raised here in line with Walter Bagehot's persuasion of the Bank of England to acknowledge that it is its duty to support the market in times of panic.[24] Also, rightfully, arguments of moral hazard can be put forward especially the worry that some institutions will make it now an objective to grow as large, as global and as interconnected and ultimately systemic as possible because they will be bailed out should the risky activities they carry out back-fire.[25]

Unprecedented contagion resulted as a result of how systemically important Lehman was and controversy remains with regard to the extent of the then available legal authority to bail-out systemically-important-institutions. This inconsistency invalidates the reason given on legal grounds especially in light of bailing out AIG days later[26] and some hold the view that the grounds can be explained in terms of perceived market impact rather than strict legal authority

[23] See Para. 5.4 below

[24] Bagehot W: *Lombard Street, a Description of the Money Market. 1873,* EP Dutton & Co., New York 1910

[25] The issue of moral hazard was raised in Chapter 3 at Para. 3.6.2 and 3.6.2.1; p148

[26] This would nevertheless be corrected in the legislation brought forward by the Obama Administration post-crisis.

or political intent.[27] In fact, Barney Frank had once said that markets will never believe them until they let one of these companies die.[28] There is no doubt that withholding the legal authority to save such companies is the fastest way to communicate this commitment.[29]

Besides, it is absurd that the Central Banks of the biggest economies in the world did not know the scope of their legal authority in matters on this nature. That notwithstanding, there is little doubt that the decisions to support AIG and to proceed with the TARP are endorsed on systemic grounds although concerns remain with regard to the manner in which this was managed.

Fair to say lessons have been learnt and what is considered systemic has to be put into context, defined and should not be a question that takes people by surprise. It should not be an issue of discretion at the hands of policy makers; especially elected government officials whose decisions are likely to be influenced by the electorate. For instance General Motors was bailed out on the pretext that idle suppliers and unemployed auto-workers in Detroit and elsewhere where considered systemic, after all their votes do count. In fact, some commentators have further qualified it, stating that systemic does not only apply to the ramifications in a technical sense that result but also importantly from the general *expectation* of a bail out prevalent in the financial markets.[30] This makes sense considering that the rate at which panic spreads with the mere thought of a large financial institution not getting bailed out, then expect same treatment if you are a large financial institution as well.

Underlying these consequences however were pre-existing conditions which triggered the GFC in the first place. In order to rebuild from the rubble, lessons ought to be learnt from the mistakes, and identifying these triggers is essential. Again, no single factor caused the crisis but rather a combination of factors, hence, one must refrain from cosmetically and simplistically providing isolated solutions. These triggers will now be discussed.

---

[27] Walker n.5

[28] Barney Frank is the Member of the US House of Representatives from Massachusetts and was the Chairman of the House Financial Services Committee from 2007-2011. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, 124 Stat. 1376-2223) was named after him and Senate Banking Committee Chairman Chris Dodd after they were credited in Congress for their work

[29] Cochran J: *Lessons from the Financial Crisis*; *Regulation*, Vol. 32, No. 4; Winter 2009-2010. P. 34-37

[30] ibid

Part Two

5.3 Triggers and Corrections

There is contention between financial market actors, policymakers and academics surrounding the origins of the GFC and how they can be corrected. However the vigour and depth of these debates have inspired five key pre-conditions of the GFC. They are*: massive accumulation of credit and debt stock; product complexity and lack of transparency; asset valuation: credit rating errors and mispricing of risk; risk separation and risk mixing; and lack of effective market support.*[31] These will now be analysed in more detail:

i.) *Massive accumulation of credit and debt stock*

In the decade preceding 2001, national economies enjoyed significant growth and sustained credit, asset price, housing and oil bubbles subsequently developed. Then came September 11 2001, and interests rates were kept down for the following five years although some economists argued that this was too long a period. This facilitated the availability of cheap credit and easy credit conditions, hence enabling mass accumulation of credit and eventual debt stock. Also, with the advancement of technology and financial innovation notably structured finance and securitization in particular, varied instruments and models were in place to precipitate this credit overabundance.

Furthermore, excess liquidity mainly in the form of savings predominantly in the Asian economies encouraged this availability of funds. I am however inclined to rebuff this suggestion as a cause of the GFC because there is nothing wrong with people or businesses saving away their cash. In blaming them lies the failure to recognize the crux of the matter at hand which is-- there exists societies fuelled by an insatiable corporate and household appetite for debt and consumption. Most especially in the US where the more debt you have in your name, and your ability to repay debts determines your credit worthiness. That notwithstanding, in the case of sub-prime mortgages some NINJAs (No Income No Job Applicants) were deceived into entering contracts without their full understanding of what they were getting into. These *teaser-rates* proved very controversial and their application has been stormily debated ever since.

[31] Walker G A: *Credit Crisis, Bretton Woods II and a new global response: pt 2*; BJIBFL, 2009 p.75-79

We cannot pin the stability of the financial system on the idea that nobody should ever lose money. Doing this will strangle the economy and crush financial innovation. Financial markets provide a platform upon which wealth is acquired, invested, protected, and ultimately transferred. About $194 trillion moved around the world prior the GFC- this reduced to round about $172trillion during the GFC and it has been rising ever since, returning to almost $200 trillion once again.

Granted, all this is subject to politics, but the availability of liquidity is beneficial for the functioning of each aspect of a country's economy.

In order to correct this, monetary authorities should monitor the effects of credit accumulation within the economy and if need be, adopt interest rate controls, regulatory restrictions or even fiscal charges through taxation where appropriate to limit disproportionate levels. Given that the authorities may not be able to manage price levels directly, nevertheless, with the above measures in place, they can control the volume and cost of money and credit in circulation within the economy. For example, although the availability of cheap credit is not a problem on its own, checks must be in place to ensure this does not facilitate the distortion of other asset price markets such as housing. It is worth noting that, corrective policies must be appropriate as any abrupt or drastic change in direction is unwarranted and could cause more harm than good.

ii.) *Product complexity and lack of transparency*

Since the early 1970's, mortgage pools in the US have been securitised and 're-securitized'. They have been mixed with other income streams to form the structured finance market. A number of complex financial products such as Structured Investment Vehicles (SIVs)[32] and Collateralized Debt Obligations (CDOs) emerged as a result of this innovation thus building upon earlier securitization and derivatives structures. The abovementioned products have been portrayed by an industry expert as belonging to the now "infamous club of complex financial instruments whose acronyms are said to form an alphabet soup."[33]

[32]These SIVs and conduits were used by securities firms and banks as off -balance sheet holding vehicles for asset management purposes. It involved the creation of new entities to issue mainly commercial paper to fund the purchase of high-yielding structured finance products.

[33] Tabe H: *The Unravelling of Structured Investment Vehicles: How Liquidity Leaked Through SIVs (Lessons in Risk Management and Regulatory Oversight)*; Thoth Capital LLP, Great Britain, 2010, p.1

Credit derivatives surfaced with a momentum which transformed the derivates market for good. Some of these included Credit Default Swaps (CDSs), Total Return Swaps (TRSs) and Credit Spread Swaps as well as other combination instruments including credit linked notes which had entrenched credit derivative components.[34]

Concurrently, the growth of non-bank institutions and credit companies restructured financial markets significantly.[35] Also, there was also substantial competition from aggressive new players in the markets including internet banks and lenders, off shore financial institutions for instance from the Channel Islands as well as supermarkets and other store card operators and credit providers who fought vigorously for their own share of the market.

The number of acronyms used thus far could indeed form a delicious alphabet soup given the assortment of letters. Having said that, this is simply all what they will appear to most people----letters----as many struggle to understand what these instruments are. In fact, Tabe points out that in the case of SIVs and SIV-lites, little was known about this obscure corner of finance up until the late 1990's and early 2000's and it had to take the liquidity crisis of 2007 for them to become familiar albeit infamously. He wittily suggests that SIVs became known to a wider audience other than the handful of financiers and medical researchers working on the pathology of simian immunodeficiency viruses.[36]

These substantially new levels of complexity in product design and unregulated investment and holding vehicles coupled with limited market knowledge if any, only concretized the argument that there was a lack of transparency surrounding these products. Small wonder, this has been dubbed 'financial engineering gone wrong'.[37]

It is important to note that amidst this financial engineering, one cannot overlook other innovative skills which played a vital role in sustaining this industry. A central ingredient in this

[34] The CDS market grew to $64trn, with total over-the-counter derivatives reaching an astonishing nominal $683.7trn figure by end June 2008. (See Walker G A: *Credit Crisis, Bretton Woods II and a new global response: pt 2*; n.31)

[35] This 'shadow banking system' covers any non-bank credit provider or asset manager including alternative investment management vehicles such as hedge funds, private equity funds

[36] Tabe, n.33, p.21-23

[37] McBarnet D: *Financial Engineering or Legal Engineering? Legal Work, Legal Integrity and the Banking Crisis*; Edited by MacNeil I & O'Brien J: *The Future of Financial Regulation; Introduction*; Hart Publishing, Oxford and Portland, Oregon, 2010 p.67.

financial modernization was legal creativity. Legal engineering was at the heart of fostering the practice of structuring creative transactions such that the driving characteristic is to deliberately and systematically thwart regulation and bypass regulatory control.[38]

McBarnet reconceptualises financial innovation as legal innovation and she stipulates that "Finding arguably legal ways round legal and regulatory obstacles is a key function of the lawyer's role for sophisticated clients such as banks, and sophisticated legal circumvention has been integral to the construction of innovative financial products in banking."[39] Also, she goes a step further to ridicule this phenomenon by saying that the crisis demonstrated that 'clever manipulation of law and circumvention of regulation may not be quite so clever after all'[40] given that its social costs can be grave.

To this end, I agree with her call for new aspirations towards a greater respect for the rule of law, a greater respect for democracy in law and a new legal integrity as she pushes for ethical standards in compliance with not just the rule of law, but the spirit of the law.

Regarding the more technical financial engineering, regulatory authorities must allow institutions to continue to innovate and expand and simultaneously maintain minimum levels of disclosure and transparency at all times in order not to undermine effective supervisory and market oversight. In the case of SIVs for instance, Tabe insists that far from popular belief, most SIVs were efficiently run bank-like entities and little in their structure, organisation and historical performance foreshadowed their demise.[41] Refraining from laying blame on personnel, he laments that their ultimate demise came as a result of a combination of factors such as maturity transformation, leverage, secondary market funding and asset illiquidity and the absence of reliable lender of last resort provisions; emphasising the fact that these vehicles were largely run by intelligent, risk averse managers who designed them to engage in leveraged maturity transformation similar to banks and insurance companies. He points out that the vehicles

[38] Examples of research carried out include McBarnet D; *Crime, Compliance and Control*; Dartmouth/Ashgate, Aldershot, 2004. A key issue to emerge from that research was the routine practice of 'creative compliance'. Seen in Doreen McBarnet; n.37 above.

[39] Ibid McBarnet, p.69

[40] Ibid, p. 81

[41] Tabe, n.33, p.5

bought highly-rated assets issued by banks and securitization entities and operated at lower leverage levels than many banks and other financial institutions that survived the crisis.[42]

There is little doubt that innovative financial products were enthusiastically believed to disperse risk, plus supported by mathematical models which senior executives often accepted *prima facie* neither questioning nor comprehending them. In fact, the financial structures set in place were so complex such that risk and even ownership became simply untraceable.

In this light, product complexity going forward, must not be allowed to divert or obstruct proper regulatory or market accountability. More so, proper disclosure systems need to be set in place in order to restrict the use of off-balance sheet financing techniques for regulatory avoidance purposes. These should ensure that all stakeholders including regulators, shareholders, creditors and other market counterparties can form an accurate and informed view of both the on and off-balance sheet conditions of any financial institution at any time before entering into any transactions.

iii.) *Asset valuation: credit rating errors and mispricing of risk*:

Some have reached the ultimate conclusion that credit rating agencies are to blame for the GFC. The argument stems from the suggestion that but for the mispricing of assets and risk coupled with a catalogue of credit rating errors, investors would not have been tempted to enter transactions which seemed at the time to be highly rated whereas they were not.

It is imperative that all debt instruments be properly and accurately graded and rated in every case. This shows that the issue was not strictly with banks purchasing structured debt (including US sub-prime assets) but the fact that these debts were not accurately assessed and rated by the credit rating agencies. Obviously with high ratings, banks and other investors not directly involved in the structured debt market where fully entitled to purchase high yielding and apparently low risk debt.

iv.) *Risk mixing and risk separation*

Novel methods of repackaging and restructuring debt also implied that the rating and trading of some financial instruments had been separated from certain underlying risks. Allocation and risk distribution across the market became increasingly blurred with the over-the-counter (OTC)

[42] ibid

nature of the sector and the use of off-balance sheet holding vehicles such as SIVs and bank conduits).[43] In short, risk distribution must be efficient and thoroughly managed.

v.) *Lack of effective market support*

One of the main problems brought to the fore was the inconsistency and delay in central banks carrying out their role as lender of last resort. The lack of government and central bank intervention most especially in the Lehman Brothers debacle underscored the crucial importance of such assistance.

Having said that, central banks should continuously review the operation of domestic and also cross-border inter-bank markets to ensure that they work efficiently in all conditions and at all times with appropriate funding facilities being made available whenever necessary. Individual bank liquidity regimes need similar revision to enable market and institutional regimes operate in unison. The core difficulty that arose with the GFC was that banks had transferred reserves into higher return structured assets (away from more traditional but lower yielding government bills and gilts) and were then caught out when the original credit ratings were shown to have been incorrect.[44] After all, banks have always looked to central banks for daily liquidity support with the relative level of underlying deposit cover simply being a matter of degree.

Minimum capital levels must be maintained to protect institutions from insolvency where asset values fall although these are only ancillary to the liquidity measures referred to. Unnecessary and unreasonably high levels of capital adequacy should certainly not be imposed on banks and other financial institutions where this is only to compensate for inadequate central bank liquidity management systems or facilities.[45]

---

[43] Walker notes that while many more traditional securitisations have involved the retransfer (outsourcing) of the immediate risk management of the debt back to the originating bank, this process becomes considerably more complex with structured finance which involves more than one level of securitisation or with the securitisation of more than one of type of instrument or income stream. Underlying credit or default risk (and especially high risk debt) must be managed by an appropriate institution in all cases. (Walker, n.31)

[44] Ibid Walker (n.31)

[45] ibid

Part Three

5.4 Global Crisis Response

Having reviewed the history of the GFC and understood its main causes and suggested corrections, it now makes sense to consider the global response to the crisis which ultimately curbed the damage. In parts, this response will be looked at in comparison with the period pre and post Bretton Woods drawing similarities and differences therein from previous crisis responses. After all there is little doubt that following the worst GFC since the Great Depression, there were great expectations for policy-makers to respond with equally ambitious and proportionate reforms. The G20 leaders' summits have encouraged these expectations; and like the Bretton Woods architects, the leaders appear to share a broad desire to assert greater public regulation over international financial markets. So far, however, their initiatives toward this goal have been more incremental than bold. Drawing from this, the adequacy of the efforts and recommendations made by the G20 will be evaluated. It will be seen that these various G20 initiatives move beyond the original Bretton Woods regulatory agenda given that the Bretton Woods architects did not anticipate the kind of highly integrated global financial marketplace we have today, they devoted little attention to this kind of international prudential regulation.

In another sense, however, contemporary reforms represent a less dramatic means by which to reassert public regulation over international financial markets. At Bretton Woods, negotiators reacted against laissez-faire approaches to international finance by endorsing national controls over cross-border financial movements. This made international financial regulation a sort of synonym for curtailing the international mobility of money. The rationale also went beyond a prudential one to include the protection of the policy autonomy of national governments from international market pressures. Little wonder national regulatory systems are unable to keep up with the evolving nature of cross-border finance. Regulatory systems remain locally bound, with laws and regulations designed to ensure national financial stability and to limit national costs from the failure of financial institutions operating the country. On the other hand however, cross-border financial firms that organize their business activities on a global or regional basis have emerged faster than ever before.

Initial Response:

With the collapse of Lehman brothers and with significant impetus from these events, the U.S. Senate passed a revised bill on the $700billion “Troubled Assets Relief Plan” (TARP), with the

House following suit. By this time, however, the financial crisis had moved to the real economy and a TARP alone was actually insufficient to hide the problems or prevent the resulting damage.

During the following week, domestic responses appeared rapidly, including most significantly a $600 billion rescue package from the United Kingdom by former Prime Minister Gordon Brown and the Chancellor of Exchequer Alistair Darling, focusing on three elements: capital, liquidity and funding.[46] These elements would subsequently become central to the international response to the systemic crisis. Following the emergence of a comprehensive global response, it has been sufficient to resuscitate the U.S. and global financial systems nevertheless unable to prevent the significant economic damage especially relating to unemployment.

This comprehensive approach included the following elements: Firstly, the use of "all available tools to support systemically important financial institutions and prevent their failure"; Secondly, ensuring that financial institutions "have broad access to liquidity and funding"; Thirdly establishing recapitalization schemes so banks can "raise capital from public as well as private sources"; Fourthly ensuring "robust and consistent" protection for depositors; And finally, taking action to "restart the secondary market for mortgages and securitised assets"[47]

In addition, on 8 October, the world's major central banks announced their first globally coordinated interest rate cut, with the U.S. Federal Reserve, European Central Bank, Bank of England, Bank of Sweden, Swiss National Bank and the Bank of Canada all cutting interest rates by 50bps and issuing a coordinated statement for the first time. Further, in the aftermath of the Group of Seven and IMF / World Bank / Financial Stability Forum meetings the following weekend, the Federal Reserve dramatically increased the provision of liquidity in dollar to the world's major central banks. These efforts built on earlier efforts: In December of 2007, the Federal Reserve authorized temporary reciprocal currency arrangements (swap lines) with the European Central Bank (ECB), Bank of Canada, Bank of England and Swiss National Bank (SNB) for up to US$24 billion dollars in total.[48] By late September of 2008, the Federal Reserve had made similar arrangements with the Bank of Japan, National Bank of Denmark, Bank of

---

[46] H.M. Treasury; *Financial support to the banking industry*, Press Notice 100/08, 8 Oct. 2008; available at http://www.hmtreasury.gov.uk/press_100_08.htm (accessed 12 March 2014)

[47] See Arner D W; *The Global Credit Crisis of 2008: Causes and Consequences*; (infra n.77)

[48] Ibid

Norway, Reserve Bank of Australia, and Bank of Sweden. The aggregate amount authorized over this period rose from US$24 billion to US$620 billion. By 13 October, the Federal Reserve had agreed to provide unlimited dollar liquidity to the ECB, Bank of England, Swiss National Bank and Bank of Japan.

While not sufficient to prevent widespread economic consequences, this coordinated approach and subsequent actions at the domestic and international level have been sufficient both to prevent the collapse of the global financial system and return it to operation. [49]

5.4.1 Global Financial Framework after Bretton Woods and Global Financial Integration

The Bretton Woods system was designed by the allied powers under the leadership of the United States and the United Kingdom. As discussed in Chapter Four, this design incidentally reinforced the economic positions of the US and UK; which is obvious to date. That design was overwhelmingly based on the grounds of trade liberalization, closed domestic financial systems, and fixed exchange rates. This focus on fixed exchange rates and closed domestic financial systems overshadowed efforts directed towards regulation, making this area subject to domestic law. Since that time, the world's economy has reintegrated and become globalized in many ways.

The first memorable change occurred in the 1970s with the collapse of Bankhaus Herstatt in Germany and Penn Central in the United States.[50] The result was a series of discussions among the major jurisdictions involved, hosted by the Bank for International Settlements (BIS) in Basel Switzerland[51], and later formalized as the Basel Committee on Banking Supervision, the Committee on the Global Financial System, and the Committee on Payment and Settlement Systems; all hosted today by the BIS.[52]

[49] Ibid

[50] This highlighted that not only was international finance of increasing importance, but also that there was significant interlinking between domestic financial intermediaries and systems which raised real cross-border risks.

[51] It was established in 1930 to act as a centre for central bank cooperation. However, the Bretton Woods Conference called for its liquidation. See Lastra R.M.; *Legal Foundations of International Monetary Stability*; OUP 2006 p.346

[52] See Weber R. & Arner D.; *Toward a New Design For International Financial Regulation*; University of Pennsylvania Journal of International Economic Law, Vol. 29, 2007, p392.

As international finance has developed and globalized, it has faced a number of crises, including: the developing country debt crisis of the 1980s; the global stock market collapse of 1987; periodic collapses of international financial intermediaries such as, Bank of Credit and Commerce International (BCCI), Barings, and Long Term Capital Management (LTCM); and financial crises with international implications in Europe, Mexico, East Asia, Russia, Turkey, and Argentina, among others. Each of these events resulted in international efforts to prevent similar situations through financial regulatory cooperation. Today, following development over the past decades, international financial regulation focuses not only on the Bretton Woods institutions and the BIS, but also on an ever-increasing number of international financial organizations such as the Basel Committee and the International Organization of Securities Commissions (IOSCO) as a result of varying levels of formality involved in the development, implementation, and monitoring of international financial standards.

However, the Bretton Woods system as designed never actually functioned: the International Trade Organization (ITO) was 'still-born' (though ultimately reincarnated as the WTO in 1994 after fifty years in the limbo as GATT).[53] Likewise, the role of the World Bank was assumed in many ways, first by the bilateral efforts of the United States through the Marshall Plan and related reconstruction initiatives, and later by the European Community with its aid programs for Southern and Eastern European countries, leaving the World Bank to focus on developing (mainly post-colonial) countries; the role it continues to play today. Nonetheless, the design for monetary relations, with the IMF at the centre of a system of fixed exchange rates based on the U.S. dollar and its link to gold, did function until the early 1970s.

Fifty years after the creation of the Bretton Woods system, the deficiencies of the existing international institutions and arrangements in dealing with the changed nature of global finance came dramatically to light through the Mexican, East Asian, and other financial crises that followed in the 80's and 90's. Since that time, the IMF, World Bank, and WTO have gradually been forced to adjust accordingly.

Following the Mexican financial crisis, the Group of Seven Industrialized Countries (G-7) called on other countries to support the international monetary system to develop financing arrangements to help prevent and deal with the beginning of international financial crises in

[53] See Jackson J.H., *The jurisprudence of GATT and the WTO*, CUP 2000; pp.21-23. This outlined the relationship between the ITO and GATT.

emerging economies.[54] The Deputies of the G-10 established a Working Party to consider the issues arising relating to the orderly resolution of sovereign liquidity crises, which was formally endorsed and released in May 1996.[55] Overall, in the immediate aftermath of the Mexican crisis, the emphasis was very much on improving existing mechanisms, however with a new focus on the development of international standards.

After the Asian financial crisis, the discussions on the IMF's role in transparency and liquidity increased, with a new focus on whether there was a need to reform the existing international financial architecture. These discussions first looked to the changed nature of international finance and the implications of these changes. Two specific areas received the greatest attention: *crisis prevention and crisis resolution*. Both of these issues largely arose due to the changed nature of the international financial system due to globalization. As the decade progressed, a clear feature of international finance was the occurrence of a series of financial crises, often with international or global implications; exactly the sort of crises that the Bretton Woods system was designed to prevent.

Following the US led international rescue after the Mexican financial crisis, leaders of the developed economies recognized the need to develop mechanisms to deal with the potentially systemic dangers of such crises. It became evident that a financial system that is robust is less susceptible to the risk of a crisis in the wake of real economic disturbances and is more resilient in the face of crises that do occur. In its report, the G-10 focused on three central elements necessary to the development of a robust financial system: Firstly, the creation of an institutional setting and financial infrastructure necessary for a sound credit culture and effective market functioning; Secondly, the promotion of functioning of markets so that owners, directors, investors, and other actual and potential stakeholders exercise adequate discipline over financial intermediaries; and thirdly, the creation of regulatory and supervisory arrangements that complement and support market discipline. In addition, the World Bank and regional development banks were given a leading role in providing technical assistance to countries seeking to build robust financial systems. The focus since the Mexican financial crisis has

[54]See G-7 generally, *Halifax Summit Communiqué*, June 16, 1995, available online at http://www.g7.utoronto.ca/summit/1995halifax/communique/index.html (accessed 12 March 2014) (providing the general results and findings of the summit).

[55] See G10; *The Resolution of Sovereign Liquidity Crises: A Report to the Ministers And Governors prepared under the auspices of the Deputies* (1996). A*vailable online at* http://www.bis.org/publ/gten03.pdf (accessed 12 March 2014)

therefore come to rest on the concept of "*financial stability*" as the primary target in preventing financial crises and reducing the severe risks of financial problems that do occur from time to time.

Financial Stability:

Financial stability was considered therefore both the absence of financial crisis and the normal operation of financial intermediaries and markets.[56] The emerging international strategy for the development of financial stability was described as a system of international financial standards.[57]

The G-7 at their Lyon Summit in 1996 directed the international financial institutions and international financial organizations— especially the IMF, World Bank and Basel Committee to develop standards for financial regulation to be implemented in developed, developing, emerging, and transition economies, as well as to develop solutions for domestic crises with international implications. As a result, a wide range of institutions and organizations have been producing standards in a number of areas. The only new institution to emerge from the auspices of these discussions was the Financial Stability Forum (FSF) in February 1999 which subsequently became the *Financial Stability Board (FSB)*.[58]

The FSF was established to serve the role of the coordinator in the system of international standards and to promote these standards. In addition to the international financial institutions, other formal international organizations, such as the OECD are of importance. Finally, much standard-setting takes place through various international financial organizations of varying levels of formality.

---

[56] Weber and Arner; *Towards a New Design for International Financial Regulation*; Quintyn M and Taylor M go a step further suggesting that "the achievement of financial stability... is now generally considered a public good." See Quintyn M & Taylor M, *Regulatory and Supervisory Independence and Financial Stability* 8 (IMF, Working Paper WP/02/46, Mar. 2002).

[57] This standard has four levels, incorporating both existing and new international institutions and organizations. At the first level, there is a structure and process which has mainly been established through political processes. At the second level, the process focuses on international standard-setting, largely of a technocratic nature. At the third level, there is the process of implementation of standards, in principle a domestic process, but with technical assistance through a variety of international, regional, and bilateral sources. At the fourth level, there is a process of monitoring the implementation of standards

[58]It was the Financial Stability Forum; describing the creation, purpose, and work of the Financial Stability Forum, now available online at http://www.financialstabilityboard.org (accessed 12 March 2014)

The FSF and the BIS served the primary role in coordination of the process of standard-setting and its purpose were primarily to promote international financial stability, secondly, to improve the functioning of markets, and thirdly to reduce systemic risk through enhanced information exchange and international cooperation in financial market supervision and surveillance. An important element of the standard-setting process involves monitoring the implementation of international standards around the world.

Implementation is primarily a domestic process, but it is supported by a range of international assistance mechanisms. Monitoring mainly takes place at the international level through the international financial institutions, especially the IMF and the World Bank. Specifically, the IMF works through its annual Article IV consultations.[59] The IMF and the World Bank collaborate through Reports on the Observance of Standards and Codes (ROSC) and Financial Sector Assessment Programs (FSAP). The OECD and the Financial Action Task Force on Money Laundering (FATF) also engage in monitoring, with the FATF playing an influential role in the context of money laundering and terrorism financing. At the regional level, regional development banks encourage implementation through their respective projects and reviews.[60]

In addition, regional economic associations should play a role; in cases such as the European Union, these associations may play a very important one. This is one of the loudest points advocated in the African chapter. At the bilateral level, some countries (especially the United States) are keen to support the implementation of certain standards, such as those of the FATF. Finally, at the market level, the rating agencies can play a role in monitoring standards.

5.4.2 Problems with large complex global financial institutions

Based on the information thus far, it can be said that international financial regulation is typically an accumulation of institutions, organizations, international standards, and domestic laws and

[59] Available online at http://www.imf.org/external/np/exr/facts/surv.htm (accessed 12 March 2014). The Fund's regulatory powers comprise also Article VIII, section 2. Article VIII (which remains unaltered since its original formulations) imposes some 'general obligations' upon member countries with regard to the absence of restrictions in international transactions. Article VI (as amended in 1976, effective 1978) refers to the 'obligations regarding exchange arrangements' which forms the basis of the exercise of surveillance by the Fund. See. Lastra R.M.; *Legal Foundations of International Monetary Stability*; p.393

[60] It is worth noting that the African development Bank, Asian Development Bank, European Bank of Reconstruction and Development and the Inter-American Development Bank are all exercising this role.

rules in many ways not designed to address the requirements of the continuing integration of domestic economies into an increasingly globalized financial system. While the original Bretton Woods design was for a coherent global economic governance structure, today's milieu of actors lacks any consistent overarching economic, institutional, or legal framework. In fact some commentators assert that international financial regulation has developed in reaction to the globalization of finance. The challenges that the Bretton Woods institutions face in the 21st Century are remarkably different from the challenges these two institutions- IMF and World Bank-confronted when they started operations in Washington DC in May 1946.[61]

In spite of all these, arguments have been made in favour of incorporating development issues explicitly in any framework- this suggestion fuels the discussion in Chapter Six which follows. Furthermore, it is argued that the system should be designed to address the realities of the global financial system and the increasing integration of domestic economies; in this context, the overall objective is to support financial stability and financial development. The Bretton Woods system was designed to support global trade but not global finance. As a result, it cannot simply argue in favour of returning to the old system but must look towards the requirements of today's reality.

Almost twenty years ago, the world experienced the first failure of a large complex global financial institution (LCGFI), the insolvency of BCCI.[62] Although the BCCI fiasco was not a collapse of systemic significance, it did result in major domestic regulatory reforms respecting cross-border supervision as well as serious international efforts to both prevent the failure of LCGFIs (especially banks) and begin a regulatory and policy conversation that continue today respecting how to develop systems, mechanisms and procedures to address such failures. Serious complications regarding insolvency issues (liquidation, set-off and so on) were raised given that the lack of agreement on an insolvency regime brought about conflicts with regards to the treatment of deposits and assets at branches in different countries

[61] See Lastra R.M.; *Legal Foundations of International Monetary Stability*; p347

[62] Because of its complex structure, BCCI operated largely on a non-transparent basis, with no single bank regulator or audit firm having a full view and control over the entire enterprise. Due to large scale fraud and corrupt and criminal practices at the core of the enterprise, the UK and US regulators, in conjunction with the Luxembourg and Cayman Island authorities, closed BCCI in 1991 and forced it into liquidation. For further discussion *see* Lord Justice Bingham, *Inquiry into the supervision of the Bank of Credit and Commerce International* (London: HMSO, Oct 1992); Kerry J & Brown H, **"***The BCCI Affair: A Report to the Committee on Foreign Relations US Senate* (Dec 1992, 102d Congress 2d Session Senate Print 102-140).

Unfortunately, as demonstrated by the current financial crisis, these efforts, while important, have not been sufficient to prevent the current global financial turmoil. Most importantly, they did not stop the collapse of Lehman brothers. As shall be seen later, the effective and timely resolution of insolvencies is probably one of the most important elements of a well-designed safety-net. The existence of weak financial intermediaries can undermine the entire financial system. Therefore, weak financial intermediaries should either be on a path that will restore their financial health or, if that is not deemed to feasible, closed in a timely fashion.[63]

In November 2008, the G20 highlighted the necessity of addressing the regulation of complex financial institutions both domestically and globally. Specifically, on 15 November 2008, following two days of meetings in Washington DC, the heads of government and finance ministers of the G20 released their *Declaration of the Summit on Financial Markets and the World Economy*.[64] In this Declaration, the G20 discussed the causes of the crisis and committed to supporting an open global economy, defining a range of actions to be taken (under the supervision of G20 finance ministers and experts who were tasked to do so) in order to reform financial regulation to avoid future crises. The G20 heads of government established five main principles to guide reforms: Firstly, strengthening transparency and accountability; Secondly, enhancing sound regulation; Thirdly, promoting integrity in financial markets; Fourthly, reinforcing international cooperation and fifthly, reforming the financial architecture.[65]

Historically, banking regulation developed as a response to crises resulting from the nature of banking business as a fractional reserve system based upon the management of credit and duration risks; a system works perfectly so long as depositors remain confident in the safety of

---

[63] Arner D.W.; *Financial Stability, Economic Growth, and the Role of Law*; Cambridge University Press, 2007 p140-141

[64]Available online at http://www.g20.org/Documents/g20_summit_declaration.pdf (accessed 12 March 2014) Built upon the G20 finance ministers and central bank governors communiqué from the previous week: G20, Communiqué: Meeting of Ministers and Governors, Sao Paolo, Brazil http://www.g20.org/Documents/2008_communique_saopaulo_brazil.pdf (accessed 12 March 2014)

[65] For each of these five principles, the leaders established a detailed action plan, incorporating immediate to be taken by 31st March 2009) and medium term actions, pending a second G20 heads of government summit in London in April 2009. The Action Plans addressed three areas: First, regulatory regimes. Available online at http://www.g20.org/G20/webapp/publicEN/publication/communiques/doc/G20%20Summit%20Declaration.pdf (accessed 12 March 2014).

their money with individual banks. As a result, the risk is that the collapse of one bank could lead to transmittable loss of confidence, resulting in bank runs, potentially causing the collapse not only of individual banks, but also of the banking system as a whole (systemic risk) and the consequent collapse of economic activity in general.[66] This risk today is considerably expanded and worsened as bank, capital and other financial markets and intermediaries have become increasingly interconnected to form a much broader financial system than had ever previously existed (which some may argue should have been anticipated by those behind the design of the Bretton Woods system).

5.4.3 Lender of Last Resort

In response to this existent problem, the theory of the need for a "lender of last resort" by Henry Thornton in 1802 (and later articulated by Walter Bagehot in 1873) was developed.[67] The lender of last resort would provide liquidity support in order to allow solvent banks with good collateral to meet depositors' demands and avoid closure. This will in turn support confidence and avoid potential systemic collapse. The next problem, of course, is the theory of 'moral hazard'. Specifically, in this context, moral hazard has two components: first, potential incentives to management to take additional (perhaps excessive) risks due to the promise of a government bailout; And second, the consequent risk to public funds due to the potential expense.[68]The response to this problem has been the development of what may be termed the traditional process of bank regulation and supervision. Under this formulation, the goal of the traditional regulatory and supervisory process should simply do as it says on the tin: the prevention and resolution of financial intermediary crises. Unfortunately, while the goal is simple, its achievement is anything but simple; Although bank and nonbank financial institutions are increasingly interconnected, the regulatory approach and policies vary considerably.

At the same time, international attention began to focus to a greater extent on these issues than ever before. In their April 2009 meetings, the G20 and FSF addressed these issues and the G20 communiqué stated that "major failures in the financial sector and in financial regulation

[66]See Arner D. & Norton J.J.; Building a framework to address failure of complex global financial institutions. Hong Kong Law Journal, Vol.39, 2009, p119.

[67] Ibid.

[68] Ideally, the second should not exist, but more often than not, authorities shift from pure liquidity support (which should not entail public expenses) to more general solvency support (which can entail very high public expense).

and supervision were fundamental causes of the crisis"[69], and committing "to extend regulation and oversight to all systemically important financial institutions, instruments and markets".[70]

It is worth mentioning that, there is a debate on the need for an international LLR as a consequence of the globalization and interdependence of financial markets across the world. The fear of domestic crisis to expand by contagion has led to the IMF as a de facto international LLR.[71]

5.4.4 Financial Stability Board (FSB)

In an annex to the April London communiqué, the FSF was renamed and reconstituted as the Financial Stability Board (FSB). Its main objective *inter alia*, was to "set guidelines. for, and support the establishment, functioning of, and participation in, supervisory colleges, including through ongoing identification of the most systemically important cross-border firms" and to "support contingency planning for cross-border crisis management, particularly with respect to systemically important firms", including "to support continued efforts by the IMF, FSB, World Bank, and BCBS to develop an international framework for cross-border bank resolution arrangements". At the same time, reflecting that such efforts are in reality in most cases still at

[69] G20, London Summit – Leaders' Statement, London, 2 Apr 2009, available online at http://www.g20.org/Documents/g20_communique_020409.pdf (accessed 12 March 2014)

[70] Ibid.

[71] As was seen in Chapter three, the adequacy of this assertion has tested within Europe on how to deal with Greece's budget crisis and discussions over a possible rescue plan. The UK and Sweden suggest that if Greece required help, IMF is best placed to assist. This breaks away from the positions held by others such as Germany and France. There are many dissimilar positions held by countries in the Eurozone but British officials suggest that the IMF might need to be brought in because the troubles of the Euro-zone's weaker states risked spreading contagion to non-euro countries, (which in my opinion makes absolute sense). On the other hand, other governments fear IMF involvement would represent a strategic setback for Europe's ambition to assert its global economic power with the help of a rock-solid currency and a shared sense of fiscal discipline. Greece's socialist government would also be tempted to avoid accepting an IMF bail-out for political reasons because it would imply a partial surrender of sovereignty to a 'US-based organization'. It will be interesting to find out how this unfolds given that it will certainly have a knock-on effect on the credibility of the IMF with regards to its ability to be the unchallenged 'international lender of last resort'.

For discussion points see Sachs J; *The International Lender of Last Resort: what are the alternatives?* Available online at http://www.bos.frb.org/economic/conf/conf43/181p.pdf (accessed 12 March 2014) an early stage, the G20 recognised "the importance of further work and international cooperation on the subject of exit strategies".[72]

In this respect, the working group concluded in its Recommendation 7 that "large complex financial institutions require particularly robust oversight given their systemic importance, which arises in part from their size and interconnectedness (or correlation) with other institutions, and from their influence on markets" with responsibility assigned to the FSB and prudential supervisors.[73]

It must be noted that, the FSF released the most considerable attempt thus far to address issues of failure resolution: the *FSF Principles for Cross-border Cooperation on Crisis Management*.[74] In this document, the FSF stated "the objective of financial crisis management is to seek to prevent serious domestic or international financial instability that would have an adverse impact on the real economy". At the same time, it recognised that such financial crisis management "remains a domestic competence", nonetheless requiring cross-border cooperation. In relation to preparation, authorities will "develop common support tools for managing a cross-border financial crisis, including: these principles; A key data list; A common language for assessing systemic implications (drawing on those developed by the European Union and by national authorities); A document that authorities can draw on when considering together the specific issues that may arise in handling severe stress at specific firms; And an experience library, which pools key lessons from different crises." In addition, supervisors will meet at least annually through the college framework, share a range of information on LCGFIs, and ensure that firms have internal contingency plans in place.[75]

While the recent pronouncements from the G20 and FSB are a very useful start, especially in relation to regulation, supervision and contingency planning for LCGFI failure, the statements,

[72]G20, London Summit – Leaders' Statement, Annex: Declaration on Strengthening the Financial System – London, UK, 2 Apr 2009, available at online at:
http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409__1615_final.pdf (accessed 12 March 2014)

[73] This could be noted as advantageous because the institutions which pose systemic risk are known and can be monitored closely. Conversely, it could be disadvantageous because the 'outliers' who are less monitored could engage in the riskiest activities, going un-noticed. This will be discussed in a subsequent chapter.

[74] "Financial Stability Forum Issues Recommendations and Principles to Strengthen Financial Systems", FSF Press Release 13/2009

[75] Ibid.

reports and principles to date while recognising the problems raised by LCGFI failure, largely leave actual resolution to domestic authorities. In the final analysis, individual jurisdictions will have to carefully act proactively and consider their own arrangements respecting potential failure of any LCGFI operating within their jurisdiction and take appropriate precautionary actions ex ante as there is still insufficient consensus in respect of actual insolvency arrangements for any international framework to emerge at present.[76]

5.4.5 Contagion and Systemic risk

Systemic risk had not been properly evaluated and handled in the past. Systemic risk is defined as: "*The risk that an event will trigger a loss of economic value or confidence in, and attendant increases in uncertainty about a substantial portion of the financial system that is serious enough to quite probably have significant adverse effects on the economy. Systemic risk events can be sudden and unexpected, or the likelihood of their occurrence can build up through time in the absence of appropriate policy, responses. The adverse real economic effects from systemic problems are generally seen as arising from disruptions to the payment system, to credit flows, and from the destruction of asset values.*"[77]

Following the demise of Bear Stearns in March 2008, market confidence continued to deteriorate, with financial institutions increasingly wary of dealing with one another, thus securities firms such as Lehman Brothers and Merrill Lynch, mortgage lenders such as Washington Mutual and Hypo Real Estate, quasi-public mortgage market institutions such as Fannie Mae and Freddie Mac, CDS providers such as AIG, and banking groups such as Citigroup, UBS and Royal Bank of Scotland (RBS) were all vulnerable, with each case signalling the potential for systemic risk.

While in each case there was potential systemic risk, it was the bankruptcy of Lehman Brothers on 15 September 2008 which finally triggered the global systemic financial crisis of autumn 2008. As a result of the crisis, the governments of the United States, the European Union and Switzerland, among others, were forced to intervene dramatically in order to prevent the systemic financial crisis from becoming a systemic financial collapse. Their efforts included interest rate cuts, massive liquidity infusions (quantitative easing), capital injections, guarantees

[76] Arner & Norton (n.66)

[77] See Arner D.W.; The Global Credit Crisis of 2008: Causes and Consequences; The International Lawyer; Vol.43, 2009, pp 98-99. G10; Consolidation in the Financial Sector (BIS 2001), 126-127.

and asset purchases.[78] This systemic financial crisis highlighted the need for significant changes in both domestic and global financial regulation to prevent future systemic financial crises.

As is often the case with financial crises, many of the underlying factors leading to the current global credit crisis arose from responses to previous crises. This crisis is no different and certain underlying factors date as far back as the design of the U.S. financial regulatory system in the Great Depression of the 1930**.** One of the underlying causes of the GFC was a divergence between domestic regulatory structures and the realities of global finance. This was most acutely the case in the US but also in the UK. In the context of the United States following the Great Depression, the economic response of the newly elected Roosevelt administration was the New Deal although ultimately it was the economic stimulus provided by World War II which finally brought the United States out of the Great Depression.[79]

The financial response however differed dramatically from the response to the GFC: instead of government intervention at an early stage, the government focused on market-based solutions, closing banks, liquidating firms, and so on. It was in many ways the response to the financial shock which ensured that the economic consequences would be severe. In addition to its economic interventions, the Roosevelt administration also initiated the wholesale redesign of the U.S. financial system through legislation. These series of legislation was designed to address all aspects of the U.S. financial system which essentially established a financial system divided into banking, securities and insurance sectors, with the intention of reducing contagious risks and excesses that were seen to have characterized the 1920s.[80]

---

[78] The result was a major economic crisis across the world, although it was not to the extent of the Great Depression of the 1930s.

[79] Kindleberger C.; *Manias, Panics and Crashes: A History of Financial Crises* (4th edition). New York, Wiley,2000.

[80] Policy and financial matters would be coordinated in the government by the Secretary of the Treasury and the Treasury Department, and the Federal Reserve System was reinforced in its dual role focusing on the sometimes conflicting objectives of monetary stability and LLR. The banking sector was to be regulated at both the state and federal level and significantly, *the Banking Act 1933(Glass-Steagall)* banned banks from participating in nonbanking activities. The term "investment bank" resulted from the division of existing financial conglomerates into banks, securities firms (henceforward `investment banks`) and insurance companies. The securities sector was to be primarily regulated by the Securities and Exchange Commission (SEC) under the various securities laws. Insurance matters were left purely to state law and state regulators. With certain changes, this regulatory system continues to exist (some assert that the complexity of this system was bound to produce overlaps and gaps of which they were

In 1983, the global financial system experienced a major episode of systemic risk although it did not lead to a systemic collapse; this was the Developing Country Debt Crisis. This forced developed countries led by the US and UK to develop a new internationally agreed minimum capital standard. The Basel Committee on Banking Supervision (Basel Committee), hosted by the BIS reached an agreement. The result of this meeting was the 1988 Basel Capital Accord and although only intended to apply to internationally active G10 banks, it became the international standard for bank capital regulation around the world and has been implemented through formal domestic legal arrangements in more than 100 countries.

At its simplest, the 1988 Accord was intended to reduce systemic risk through requiring banks to hold a minimum amount of capital against risks, and secondly, to limit regulatory competition and arbitrage, thereby providing a level playing field for internationally active banks. As a factual matter, the first goal was a response to the problems which resulted from the 1980s debt crisis, wherein large international banks made significant loans to developing countries, which subsequently defaulted. The subsequent default raised a very real risk of an international systemic banking crisis: Failure of the majority of the world's ten largest banks was only averted through careful regulatory leniency and financial restructuring efforts (for both the international banks and their developing country borrowers) across the second half of the 1980s.

In spite of this, by the end of the 1990s following the Asian crisis, the near failure (and bailout) of LTCM, these series of underlying events led to the view that a new model of universal banking had emerged.

Following amendments and modifications in the 1990s, recognizing that the 1988 Accord suffered from numerous problems (especially relating to the way in which it dealt with risk classification), the Basel Committee began work on developing a new capital accord in 1999; Basel II. After approximately five years of discussion, consultation and market testing, in 2004, the Basel Committee released the final agreed framework.[81] In 2005, the Committee released a slightly revised and updated version to address certain aspects of trading activities and, in 2006,

---

clearly brought to light in 2008). However, the financial and economic environment in which it operates has changed completely, not least as a result of globalization, technology and complexity.

[81]Basel Committee, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (Jun. 2004).

released a comprehensive document incorporating unchanged elements of the 1988 Accord and subsequent amendments into a single framework.[82]

Basel II is intended to provide an overall system of risk based supervision and risk management (internal and market) for banks.[83] Following this framework, Basel II implements a number of changes through elements based upon three ‘pillars’: Pillar I addresses minimum capital requirements; Pillar II addresses supervisory review; And Pillar III addresses market discipline through disclosure requirements. The system is intended to be an evolutionary system.[84]

5.4.6 Crisis and Response Reflections

The plan outlined by the G20 and being implemented by the FSB and others provides a significant comprehensive outline of the major issues which are to be addressed in this respect. Conversely, it does not provide a significant amount of guidance in respect of the future of finance.

As attempts are made to revamp the global financial architecture, some commentators stipulate that while international cooperation on regulatory reform is difficult to achieve on a piecemeal basis, it may be attainable in a grand bargain that rearranges the entire financial order. They argue that a new Bretton Woods conference, like the one that established the post-WWII international financial architecture, is needed to establish new international rules, including treatment of financial institutions that are too big to fail and the role of capital controls.[85] There is

---

[82] Basel Committee, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework – Comprehensive Version* (Jun. 2006) (Basel II).

[83] “Basel II is being introduced to shift supervision away from a detailed check-the –box approach to compliance with a more judgmental assessment of the effectiveness of risk management systems”. See Hoelscher D. & Parker D.: *Regulation and Crisis prevention in the Evolving global market* in Evanoff D.D., Kaufman G.G., LaBrosse J.R. (eds.); *International Financial Instability: global banking and national regulation*; World Scientific Publishing Co. Pte. Ltd, Singapore 2007 p412

[84] The three pillars are intended to support the fundamental objectives of (a) “strengthening the soundness and stability of the international banking system” while (b) “maintaining sufficient consistency that capital adequacy regulation will not be a significant source of competitive inequality among internationally active banks” through “promoting the adoption of stronger risk management practices by the banking industry.” Cf with Basle III which is due to be implemented in 2019 with focus on the risk of a bank run unlike Basle I and II that deal with bank loss reserves which banks are required to hold.

[85] Helleiner E.; *A New `Bretton Woods`*; Available online at http://www.cigionline.org/articles/2009/04/new-bretton-woods (accessed 12 March 2014)

also scepticism over those institutions that survived as they now appear to hold stronger market positions than ever, and that they will resist a systematic overhaul.

In addition, a new Bretton Woods would have to reform the currency system. The post-war order, which made the US more equal than others, produced dangerous imbalances. The dollar no longer enjoys the trust and confidence that it once did, yet no other currency can take its place.[86] Also, the IMF will have to be reconstituted to reflect better the prevailing pecking order among states and to revise its methods of operation.

Financial crises are inevitable. Regulation remains very important in reducing the frequency and severity of such failures and at the same time in providing appropriate incentives to stakeholders to maximise efficiency and minimise systemic risk. However, we need to bear in mind that over the past two decades, significant efforts have been made internationally and within major jurisdictions to upgrade prudential standards for financial institutions yet these were not sufficient to prevent the systemic crisis in autumn 2008. Key indicators should be devised in order to detect financial distress at an early stage and to assist its resolution in a timely manner so as to prevent a loss of confidence in the financial system.

For the regulator to be proactive in respect of financial crises, early detection of a financial crisis is essential. Causes of a financial crisis are multiple and diverse, therefore various signals can indicate an impending financial crisis. A financial crisis surfaces from various routes, depending on the group of people affected or to whom information on financial distress is available. All these will assist regulators to intervene in a preventive and prompt manner when a financial institution or the financial system begins to show signs of fragility prior to actual insolvency. In addition, if such preventive intervention is not successful, the regulator then needs to be able to act promptly and orderly in closing and liquidating failed institution.

The next part of this chapter places these preceding discussions within an African perspective. In this connection, a review is made on the extent to which the GFC affected the African continent, specifically Sub-Sahara Africa. Going forward, the argument for a new *African*

[86] In this light, it is worth mentioning that as China becomes a world leader, it must transform itself into a more open society that the rest of the world is willing to accept as a world leader. For the US the alternative is frightening, because a declining superpower losing both political and economic dominance but still preserving military supremacy is a dangerous mix.

sovereignty to offer better protection and a more appropriate support system for the financial markets will be made. This will enhance the continent's preparedness for any future crisis that may occur by mitigating the risk and exposure from global financial integration. However, I will revert to the point that any solution for Africa should go alongside global solutions for development problems. This matter is developed further in the subsequent chapter.

Part 4

5.5 Impact of the GFC on the African continent

Many African countries enjoyed strong economic growth in the early 2000's which positively changed their balance sheets. Better economic policies and a favourable external environment increased support in the form of debt relief and higher inflows.[87]

The GFC that started in 2007 affected African countries quite differently from developed and emerging economies. While developed countries were hit first by the systemic banking crisis in the US and Europe, Emerging markets were affected mostly by cross-border financial linkages through capital flows, stock market investors, and exchange rates. Developing economies suffered in terms of lagging growth and trade figures.[88]

Within Africa, emerging markets suffered first. South Africa, Nigeria, Ghana and Kenya were first hit by virtue of their financial links with the developed regions in the world. This resulted in a fall in equity markets, reversal of capital flows and pressures on exchange rates. In fact Ghana and Kenya postponed planned borrowing[89], and in South Africa and Nigeria external financing for corporations and banks became limited.

For the majority of other countries, the prices of commodities were pushed down due to a reduced global economic activity. These had adverse effects on export earnings and the

---

[87] See Regional Economic Outlook: Sub-Saharan Africa, Chapter 2: *"The Great Sub-Saharan African Growth Takeoff: Lessons and Prospects*," October 2008 (Washington: International Monetary Fund).

[88] IMF Report: *Impact of the Global Financial Crisis on Sub-Saharan Africa*: African Department, 2009; available online at: https://www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf (accessed 18 June 2015)

[89] Carnegie Endowment for International Peace: *Impact of the Financial Crisis on Africa*; 15 April 2009; available online at http://carnegieendowment.org/2009/04/14/impact-of-financial-crisis-on-africa-pub-22995 (accessed 20 June 2015)

external current account, fiscal revenues, and household incomes. In fact commodity exporters faced major deterioration in terms of trade. IMF research shows that in the past a 1 percentage point slowdown in global growth has led to an estimated ½ percentage point slowdown in sub-Saharan African countries.[90] Alas this time, the tightening of global credit compounded the impact of the reduced economic activity, thereby worsening risks for trade finance and other capital flows.

With regards to the more fragile states with more inherently vulnerable political and social situations concessional financing was affected. Countries like Burundi, Guinea-Bissau, and Liberia are dependent on very concessional financing.[91]

It is worth mentioning that unlike in the developed markets where a systemic banking crisis persisted, in sub- Saharan Africa, the commercial banks and other financial institutions remained stable. This is so because there are not many cross-border banking system linkages and there is less exposure to complex financial products. Also, low financial integration partly explains why Africa escaped both the sub-prime and banking crises. In fact no African country announced a bank rescue plan at the scale seen in many developed countries. No difficulties have been reported on African sovereign wealth funds and the eventual impact on their returns. Generally, African banks have not engaged in complex derivative products and are not heavily dependent on external financing.[92]

Furthermore the financial systems are fragmented and not well integrated with other global financial markets. However any further increase in integration with the global financial system will proportionately increase exposure to system risk. Nevertheless the IMF report suggests that prolonged crisis exposed the African financial system to growing risk.[93] This is so because:

[90] Ibid, p.3

[91] Ibid

[92] African Development Bank Working Paper Series: Impact of the Global Financial and Economic Crisis on Africa; Working Paper No.96, March 2009. Available online at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/BAD%2096%20Anglais%20%20INTERNET%20PDF.pdf (accessed 20 June 2015)

[93] IMF report (n.88, p.4-6)

(a) *Credit risk:*

A prolonged economic crisis increases credit risk. For example, domestic financial systems are susceptible to reduced client incomes and capabilities to service debt especially where credit growth has been rapid in recent years. Also, banks could incur losses on other financial assets, such as deposits with troubled correspondent banks.

(b) *Concentrated bank portfolios*

Furthermore, concentrated bank portfolios have become a source of vulnerability in several African countries. As global demand for most commodities such as oil, timber and cotton reduces, this causes a significant decline in prices and as such these industries are hard hit. Commodity exports are one of the main drivers of economic growth therefore reduction in these have an adverse effect on the growth of the economy. As a result, fiscal balances are also likely to reduce because tax revenues, tied to commodity sales would decline. Generally, rising demand for social spending compounds the stress on government budgets. With fewer resources at reduced prices, countries will struggle to reach their development goals in managing issues such as poverty. Also, there is growing dependence on export receipts from other industries such as tourism and transportation services in sub-Saharan Africa particularly in the low-income countries.[94]Problems in all these sectors could quickly spill over into the banking sector.

(c) *Stock market investments*

In countries such as Kenya, Nigeria and Uganda where high equity returns led to borrowing for investment in the stock market the banking systems are at most risk because they remain exposed to market volatility.

(d) *Contagion from foreign parent banks*

Also, the risks of contagion from distressed foreign parent banks to local subsidiaries within Sub-Saharan Africa could lead to parent banks withdrawing capital from their local African subsidiaries; calling in early the loans to their African subsidiaries; stop investing local profits in local subsidiaries; or a combination of these. This is particularly impactful in countries such as

[94] Oil and metal exporters have been hardest hit: oil prices have fallen over 60 percent from their mid- 2008 peak. Oil exporters are going from fiscal and current account surpluses in 2007–08 to deficits in 2009, putting pressure on fiscal and external accounts. Oil importers benefit from falling oil prices but are affected by the decline in the prices of other commodities, such as coffee, cocoa, or cotton, and by lower global demand.

Mozambique, Swaziland and Madagascar where the share of foreign bank assets reaches 100%. The headquarters of these foreign banks are located mainly in France, Portugal and the United Kingdom, where banking institutions suffered tremendous losses in stock capitalization and profit during the GFC. Nevertheless, the contagion effect on the subsidiary was weakened as compared to that of the parent bank following market capitalization because losses were not passed down to the African subsidiaries. In fact, some subsidiaries of foreign banks saw a considerable increase in their market capitalization. Examples include: Swaziland Nedbank, Bank of Africa Benin and Standard Bank of Ghana which saw their market capitalization increase between July 2007 and January 2009.[95]

It is worth adding that even remittances to African countries fell following the GFC due to job cuts and the decline of activity in the mining sector. This is quite significant because of the remittances have become a major source of externalise financing in many African countries. To put this into context, the total volume of remittances to Africa stood at $38 billion in 2007.[96] The slowdown in the amount of remittances has a direct adverse effect on the welfare of households which require these funds to sustain immediate pressing needs such as food, education, household bills and healthcare.

5.5.1 Going Forward – Crisis Response and *African Sovereignty*

Although Africa was isolated from a direct impact by the GFC, it was not completely insulated from risk and exposure. Even though it has underdeveloped and fragmented financial markets with partial links to the global financial system, there were other factors such as low commodity prices and reduced external demand that affected it. Nevertheless the African financial sector was hit relatively mildly as compared to the more developed and emerging regions.

The major challenge presented in Africa was that of navigating the GFC to mobilize resources in order to finance growth, development, investment projects and poverty reduction programs. This required African countries to improve their performance in resource mobilization at the national and regional level.

In terms of specific crisis response within the African continent, this remained pegged to the responses decided at the global stage as policy decisions at the global level which would filter

[95] ADB Working Paper (n.92, p.3)

[96] Ibid p.11

down to the African financial system. With regards to the banking sector for example, changes to the integration of African banks into the global financial market and banking organization structures remained negligible. Most African countries still have little access to capital flows other than through foreign direct investment.

To this end, improvement will require that African countries develop their performance in resource mobilization at the national and regional level. However, long-term strategies must be oriented toward building more resilience to the crisis and sustaining growth. Also, supporting domestic growth drivers is essential at both the national and regional levels. This will require close collaboration between key sector departments such as trade and finance, tourism, mining and other export oriented activities is also essential at the national and regional level.

The financial sector, especially banks, must be monitored vigilantly in order to minimize vulnerabilities and mitigate risks. This is essential given that African financial systems are dominated by the banking sector.

At this juncture, I advocate the need for strengthening existing regulatory and supervisory institutions in the continent most especially the Central Banks in a bid to award the financial system and economies more protection. These institutions are capable of managing financial activity and simply need the requisite authority to do so. Not one put on paper but rather one backed by strong political will and commitment. This recommendation is rooted in the concept of *African sovereignty* which has been elaborated over the course of the preceding chapters. African sovereignty will ensure the a robust financial system structure for the entire continent and provide a suitable ecosystem for the drivers of economic growth to flourish.

5.6 Conclusion

This chapter identified five main causal factors of the GFC. They should be dealt with through appropriate action. I find Walker’s recommendations very useful in terms of addressing the corrections of these causes. He asserts that credit accumulation must be monitored and managed appropriately by the monetary authorities at all times.

Also, appropriate standards of transparency and disclosure must be maintained especially in relation to the more complex innovative products and financing techniques which are common place in this century. Existing and new instruments must be valued and rated properly with their effects on associated bank and other financial institution share prices properly assessed.

Again, the quality and effectiveness of individual bank internal risk management systems must be confirmed in every case. Areas of underlying high risk activity (such as sub-prime lending) should insofar as possible be managed directly and immediately and not incorporated into larger more complex products with the destabilising effects that that may have on the repackaged debt and the subsequent solvency of the purchasing banks or other institutions concerned. Furthermore, with regards to liquidity and capital reserves requirements, there is need for central banks to continue developing new techniques for inter-bank management.

Other technical causes of the GFC can be summarised into three key headings as: *the inconsistent closure of Lehman brothers; the consequent cyclic systemic contagion in all markets; and loss of investment confidence.* All these had drastic effects on the outlook of the GFC.

As the narrative moved from crisis prevention and crisis resolution during the Bretton Woods era to growth and stability following the GFC, it now appears obvious that regulation of financial markets was not duly given as much deserved attention during the Bretton Woods discussions. This is the principal distinction with respect to global responses to the GFC. All in all, while much of the detail had been previously addressed by the FSB, the G20 Declarations have established the framework for the content of financial regulation going forward. I am thereby inclined to think that the move to the G20 is a step in the positive direction. It finally acknowledges and gives countries like China, India, Brazil and South Africa the opportunity to work together as the leading transition countries to shape an international financial architecture more responsive to developing economies. This simply did not happen during the Bretton Woods system as everything centred on the USA and UK (the allies, who of course won the war and bore the biggest burden, financially and otherwise).

From an African viewpoint, the impact of the financial crisis has been transmitted to African economies not through the systemic banking risk and contagion that plagued the advanced and emerging economies, but rather through the global recession that followed.

It is worth noting that the GFC came at a time when some African countries had made significant progress in their development goals. However, the shortage of export revenues, foreign finance, and slower economic growth dented any further progress. Consequently, this could add more strain on the residual problems which the continent suffers and likely deepen poverty rates. Also, the economic deficiencies are likely to be spilled into the financial markets as a result of failing new businesses and an increase in credit defaults.

It is therefore imperative that African economies remain stabilized in order to achieve development goals. Therefore, African countries need to improve resource mobilization at national and regional levels be developing closer cooperation and collaboration between key sectors and encouraging long-term strategies to ensure resilience to the crisis by sustaining economic growth.

In the meantime, attention should be shifted towards protecting the poor in order to reduce the human impact of any crisis as the GFC. These residual development matters and global solutions are now considered in the next chapter.

CHAPTER 6: AFRICA, DEVELOPMENT LAW AND GLOBALISATION

6.1 Introduction

Chapters Two and Three provided a review of what constitutes the legal and institutional requirements to ensure sustained financial integration. On the back of this, it is clear that financial markets and financial integration have been core drivers of regional and global integration generally. The efficient operation of financial markets is *condicio sine qua non* to economic growth whether within a domestic or regional context. In terms of fostering and sustaining this economic growth in Africa, it is imperative that a continental solution for Africa must consider development and globalization issues to provide a more comprehensive solution on how to negotiate and manage Africa's residual difficulties. Certainly, these issues are normally country or region specific however a number of common factors can be identified.

This chapter advocates the need for these solutions to be connected with broader global solutions within which the African continent can form an important part. In short *African sovereignty* should be superimposed on a larger framework of strategic and sustainable global programmes which are strategic and sustainable.

The looming constraints which hold back the economic development and progress within Africa are frustrating even though reports of rapid economic growth rates continue to flow. The enjoyment of the continent's rich natural resources, cultural diversity and intellect have been delayed by a vicious economic and legal environment which begs the question whether these are indeed a gift or a curse. Although many indigenous factors within its control account for this vicious environment, significant endogenous factors out of its control have played their own part.[1]

[1] The economic and development conditions in Africa were mostly articulated by the UK Commission for Africa set up by the UK government under Prime Minister Tony Blair: '*Our Common Interest; Report of the Commission for Africa; March 2005'*; available online at http://www.commissionforafrica.info/wp-content/uploads/2005-report/11-03-05_cr_report.pdf (accessed 01 May 2014). The report which includes a substantial record of the analysis and evidence considered delves into the specific problems within Africa and possible solutions as part of a larger development plan. The main assumption made was that Africa must drive its own development by taking ownership

This chapter is divided into two parts. The first part discusses development and globalization issues and establishes the New Global Development Agenda to form the basis for a global strategic programme to resolve the world's most pressing challenges including: *poverty and debt reduction, governance and capacity building, energy use and climate control, peace and security*. These problems overlap with the residual challenges Africa faces and as such the need for a continental solution to factor in the global solutions is essential.

The second part provides the conclusion which also considers the significance for Africa. This will enable the continent to ascertain what lies ahead especially in terms of sustaining its competence and preparedness to remain part of the bigger global framework of global economic and financial markets.

Part One

6.2 Development amidst Globalization

Contrary to popular conception, the world is not necessarily managed through domestic politicians despite their political, military and economic pretensions. As a matter of fact, the earlier 19th century Westphalia model of inter-state diplomacy seen in Chapter One has since been replaced by the new economically inter-dependent and market dominated global financial structure of the 1990s and beyond.[2] Following an earlier period of initial cross-border bank expansion during the 1960's and early 1970's, a new single global market place in financial services has been created especially with the significant improvements available in telecommunication and computer software and hardware support as well as associated changes in capital mobility and market de-regulation.[3]

---

of its destiny. Its recommendations centered on governance and capacity building, peace and security, inclusion, growth and poverty reduction, trade, resources, implementation and delivery, impact and effect. In addition to chapters in each of the main areas in which recommendations are made, it includes an overview of the case for action, the legacy and causes of the lost decades and an African perspective on culture, change and development. The report stresses that the measures proposed constitute a coherent package for Africa and they must be delivered together.

[2] For comment see: Walker G A: *Emerging Markets Law- One World, One Market*; (University Lecture notes, University of Glasgow, September2012)

[3] Ibid

Walker stresses that the most powerful elements within the new global condition or framework created are the markets themselves and subsequently, domestic economies and domestic politicians and administrators must have regard to larger economic and market forces and the constraints that they impose in determining their local positions and postures.[4] He goes on to note that even the largest countries are now subject to the heavy restraints imposed on their activities by the new global financial forces. In short, the objective of good national governance has become the creation of a robust local economy that can fit and operate within the new inter-connected global financial system created.[5]

Within the European context for example, following earlier failed attempts at political and military union after the first and second world wars, attention turned to economic functionalism as the new dominant integration tool. Countries could be brought together on the basis of closely defined areas of co-operation having regard to specific matters of common interest. This co-operation could then be extended to other more general economic areas. The increased degree of common interest and dependence created would then generate levels of increased trust, familiarity and confidence.[6] This attitude represents the quintessential philosophy of the central theme of this thesis which is-*Continental Sovereignty* within Africa. It is expected that this economic functionalism and associated core doctrine of *mutual recognition* will become one of the central doctrines for increased cross-border integration in Africa and many other parts of the world.

In fact Walker underscores the fact that more recently, cross-border funds transfers and investment have become the main stimulants of global integration and following the creation of 24 hour securities markets during the late 1980's and early 1990's, a new single global financial market place was constructed. The associated social, cultural and political linkages that have emerged would have become impossible without the underlying improvements achieved in capital and financial mobility and cross-border payment and investment. In fact, the human and social or societal development cannot be achieved without some minimum level of economic or financial security.[7]

---

[4] Ibid

[5] Ibid

[6] Ibid

[7] Ibid; I agree with Walker who shrewdly endorses the role of financial markets and states that they typically generate funds that support and advance individual and social wellbeing; and also normally generate the surplus needed to

Accordingly, the construction of a stable and robust market is an essential requirement for all subsequent economic, political and social development. Thus, it is good to note that African financial markets have come a long way, from a period of barely any involvement in the international financial markets, to one of growing international relevance, even during financial instability. They still have a long way to go as many of the markets remain small, underdeveloped and marginalized from international financial transactions. Even though financial integration can considerably enable African financial markets attain their full potential, other development issues require strong commitments from African states as well as the rest of the world.

The ensuing paragraphs will now conduct an appraisal of a number of recommendations which attempt to create the basis for a new development system and larger infrastructure within which common global concerns can be dealt with in a consistent and integrated manner. This global development agenda and priority programme is a set of recommendations which remains mindful of the complex issues and conflicting opinions and interests involved in its implementation. Realistically, the achievement of any perfect model solution will be impossible. Nevertheless a move towards beneficial compromise may reconcile many of the conflicting positions concerned. Whilst this may remain incomplete in terms of adoption and implementation at any particular time, the more important accomplishment would at least begin to move towards the underlying objectives and themes on which common agreement already exists.

6.2.1 New Global Development Agenda

The following five key ideas can spearhead the priority actions which should begin attempts of some immediate and longer-term direction to the processes concerned. They are: *sustainable*

---

ensure the less advantageous are able to share in the benefits- (this applies both within national systems and between countries at the international level). Markets and the new global financial markets specifically are not the core causes of all difficulties in the world as many critics point out; in truth they carry out essential functions without which even the most primitive societies could not survive. For instance, they stimulate and promote national, regional and international trade and integration and provide necessary resources for welfare development and support at both the domestic and global level.

development, global governance, individual and cultural protection, climate control and non-exhaustive energy use, collective peace and security.[8]

(a) *Sustainable Development:*

This must be based on a clear and achievable set of restated policies and goals in connection with the promotion of meaningful *development, fair trade and appropriate debt reduction*. In terms of the restatement of development goals, the Millennium Development Goals (MDGs)[9] (though selective and somewhat narrowly drafted) remained a good starting point in pre-2000's in identifying the necessary needs and objectives to be secured within a narrow timeframe to help curtail hardship across many communities the world over.[10]The idea of development must be extended beyond the simple growth or economic indicators to include more general social conditions and individual welfare issues.[11] In addition to the development restatement, a new fair trade agenda must also take centre stage. This should correct the earlier shortcomings of the Uruguay Round which more or less penalized poorer countries.[12] These have now be labeled Sustainable Development Goals (SDG's)[13] which replace the MDGs as they tend to address wider global challenges on a broader scale. New trade negotiations began in Seattle, Washington USA in November 1999, and subsequent meetings held in Doha, Qatar in November 2001, Cancun in September 2003 and the proposed final meetings in Hong Kong, December 2005. Early difficulties arose surrounding the US farm subsidies which were doubled rather than reduced in 2002 under a new Farm Bill. Some progress was attained in Hong Kong even though this bore little connection to the original pro-development objectives of the Doha Round. A more equal level of benefit distribution is imperative within the larger global financial and trading system. A reform of the funding investment programmes run by the leading global

---

[8] G A Walker: *Global Development: A New Strategic Order And Priority Programme*; (University Lecture notes, University of Glasgow , September 2012)

[9] Available online at: http://www.un.org/millenniumgoals/ (accessed 01 May 2014).

[10]The restated common principles could be set out in the form of an international treaty or convention whilst the other larger objectives relating to governance and operation within this new environment should also be considered within earlier preambles and additional protocols. Therefore, as the comprehensive development restatement is produced, a larger global order of principles to guide policy and political action must also be in place.

[11] Reid D: *Sustainable Development: An Introductory Guide*; Earthscan, London, 2005.

[12] While Sub-Saharan Africa lost $1.2billion in trade per year, 70% of profits were realised by developed countries ($350billion). The latter enjoyed tariffs four times higher as capital flows and investments were liberalised rather than labour movement which paid very little attention to unskilled labour services. For comment see Stiglitz J: *Making Globalisation Work*; Allen Lane London 2006; pp.77-78.

[13] Available online at http://sustainabledevelopment.un.org (accessed 01 May 2014)

financial institutions as well as separate agreement on the final trade rules need to be agreed under the Doha Round. Concessions are necessary as the new funding and trading regimes should operate as fairly and as inclusively as possible.[14]

Finally, debt reduction should also be core to the sustainable development agenda. During the 1990s, third world debt doubled to $1.5 trillion, increasing further to $3 trillion by 1999. In fact between 1990 and 1997, developing countries paid out more in servicing debt than loan receipts. There is no doubt that developing countries must be assisted in servicing of external debt commitments including full cancellation where appropriate.[15]

(b) *Global Governance:*

After establishing a firm sustainable development agenda as outlined above, it becomes sensible to revise current arrangements on how the leading international financial institutions and development bodies function and operate. The underlying tasks and operational structures of each agency should be reconsidered following current global needs and altered financial circumstances. Granted, the relevance of the functions of many major development agencies remain important, the scope of their operations and assistance can be extended. For example, well funded and efficient organizations such as the European Bank for Reconstruction and Development (EBRD) could assist other non-members and share the benefits of its technical

---

[14] The new revised trade agenda should encourage developed countries to allow non-reciprocal open market access thereby giving specific attention to the needs of developing countries. For instance, the imposition of non-tariff barriers should be strictly controlled while decision making and transparency more wholly should be improved. It is possible to construct a fairer and more pro-development trade regime although all relevant obstacles need to be eliminated to ensure this works properly. See Stiglitz J: *Globalisation and Its Discontents*; Penguin Books, London 2002; Stiglitz J: *The Roaring Nineties: A New History of the World's most Prosperous Decade*; Penguin Books, London 2003.

[15] For comments on the Third World debt crisis, see Susan George who outlines how just a few select countries continue to accrue wealth, while a vast majority sink deeper into the abyss of poverty and insecurity; George S: *A Fate Worse than Debt: The World Financial Crisis and the Poor*; Penguin Books, London 1988.

Another connected criticism points out that the original loan terms were tied to strict structural adjustment programmes most of which were based on economic deleveraging including privatizations and withdrawal of government from many public functions. Ever since, various initiatives have attempted to deal with debt servicing problems, most notable is the IMF/World Bank Heavily Indebted Poor Country Initiative (HIPCI) which was criticized for its strict conditions and limited availability. A more substantial deal was agreed at the G8 meeting in Gleneagles, Scotland in July 2005 which allowed a more substantial debt write-off.

expertise.[16] Also, the IMF could have an important role to play in the design of a new global financial order. All this is to ensure coherence and above all, global financial stability.

(c) *Individual and Cultural Protection:*

Some issues arise with regard to the extent to which legal protections should be adopted relating to the rights of persons individually and collectively within local communities. Under human rights laws, these basic protections already exist however debates have also considered the extent to which countries have legally recognized economic rights including the right to development. These were earlier considered under the 1974 Declaration on the Establishment of New International Economic Order (NIEO) and subsequently in the Charter of Economic Rights and Duties of States (CERDS). The NIEO particularly recognized the sovereign equality of all states and the self-determination of all peoples and the full and permanent sovereignty of every state over its natural resources and economic activities. Also, it referred to the preferential and non-reciprocal treatment of developing countries, the extension of development assistance free of political or military conditions, promotion of the transfer of technology and strengthening

[16] Speaking of reform, the main organisation needing substantial revamping is the IMF. Its original objectives need reconsideration especially following the collapse of the Bretton Woods system. It must start considering its role in the 21st Century and beyond of managing international financial reserves and crisis especially given the considerable pressures on its sources of funding. It was to revisit this issue of its funding sources, including its economic policies and its voting structure to reflect more democratic balanced inclusion; after all emerging economies like Brazil, India, and South Africa are growing economically from strength to strength. Correspondingly, problems arise with regards to the World Bank too. Its role and functions must be revised accordingly including its funding and voting structures, representation, and efficiency. The main funding problem centres on the fact that each of the organisations within its larger group receives adequate resources consistently. For instance, difficulties arose in 2007 with refunding the International Development Association (IDA) as per the earlier promises on debt reduction in Gleneagles in 2005(For comments see Guha K; *Embattled Wolfowitz seeks more cash*; Financial Times 05 March 2007). All major, financial institutions, agencies and development banks need to carry out meaningful roles within the broader integrated support network. Walker also points out separate problems which arose with regards to Paul Wolfowitz's leadership of the World Bank which may also have far-reaching and long-lasting consequences on the institution's overall performance. This is mainly due to the criticism lodged at him following his support of the Iraq War while he was in the US Defence Department among other shortfalls. (Walker ,n.2)

These issues of funding spill over into problems with conditionality as a number of countries have expressly stated that they will not voluntarily borrow funds from the IMF mainly as a result of the severity of conditionality obligations imposed previously on them. They have resorted to other sources of support such as in Asia following the May 2000 Chiang Mai Initiative under which the Association of South East Asian Nations (ASEAN) agreed with China, Japan and South Korea that they would set up a new regional arrangement based on exchange of currency reserves after their initial idea to create an Asian Monetary Fund was rejected (despite Japan's pledge of $100billlion initial investment).

of mutual economic, trade, financial, and technical cooperation between developed and developing countries on a preferential basis (Article 4).

In the same wavelength, CERDS referred to the individual and collective rights of states to eliminate colonialism, apartheid, racial discrimination and neo-colonialism as a prerequisite for development and the obligation of developed countries to grant generalized, preferential, non reciprocal and non-discriminatory treatment to developing nations to support their trade and development needs (Articles 16 and 18).[17]

Although both sets of provisions were never formally implemented, they are commonly referred to in international discussions and negotiations. A series of further initiatives must be spearheaded to ensure the protection of human rights, individual and collective development within the larger global architecture.[18]

---

[17] It is worth noting that the CERDS was adopted by the UN although the US, UK, Belgium, Denmark, Germany and Luxembourg voted against it with 10 further abstentions. They opposed based on the content and structure of the rights to be conferred as well as the effective creation of corresponding Treaty obligations under public international law.

[18] In terms of *human rights*, all countries including the developed and developing must sing along using the same hymn book. The USA for example cannot call on other nations to observe human rights if it cannot observe the obligations itself especially in relation to the maintenance of detention camps in Guantanamo and the use of torture in US-managed camps. The rhetoric may shift from left to right depending on the political leadership but the underlying flaw exists. The Universal Declaration of Human Rights originally signed in 1948; The International Covenant on Civil and Political Rights came into effect in 1966 and the International Covenant on Economic, Social and Cultural Rights in 1976. A Vienna Declaration and programme of action was adopted by the World Conference on Human Rights in 1993 to provide uniform interpretation. The European Convention on Human Rights (ECHR) was drafted in 1951 and came into effect in 1953. This was implemented in the UK under the Human Rights Act 1998.

Regarding the right to *individual (human or personal) development*, it has proven difficult to define and embody this right in international treaty language. In 1977, the UN General Assembly Resolution 2626 referred to the link between human rights and development and the need to promote the full dignity of the human person and the development and well being of society. The preamble to the UN Charter went on to recognise the legal basis for a Right of Development and under Articles 55 and 56; also the Universal Declaration of Human Rights in 1979. This right was reaffirmed under Resolution 34/46 and in subsequent statements. The right to development was expressed as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised (Article 1). The Declaration on the Right to Development (UNDRD) was subsequently adopted on 4 December 1986 although the US, Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden voted against while the UK abstained. Regardless of the adoption of UNDRD, attempting to give legal effect to this fundamental right is problematic. Problems remain with defining the right precisely, avoiding the dilution of *d.)* *Climate Control and Non-Exhaustive energy Use*:

Although many do not consider environmental issues as directly relevant to development discussions, climatic effects do have an increasingly noticeable impact on the socio-economic and cultural conditions within all countries with disproportionate damage suffered mainly in developing nations. Global warming and climate degradation have increased concerns with scientific agreement identifying atmospheric concentrations of carbon dioxide and other greenhouse gases including methane as the main cause.[19]*Carbon trading* has been a useful initiative as the reduction of carbon emissions is a bold step n the right direction. The Framework Convention on Climate Change was agreed in 1992 in Rio de Janeiro and The Kyoto Climate Convention was subsequently agreed in Japan in 1997 although the US did not support.[20]A general commitment was however agreed to reduce greenhouse gas emissions by 5.2% by 2012. Specific national targets range from 8% reductions for the EU, 7% for the US, and 6% for Japan. Following Russia's commitment, the protocol came into effect on 16 February 2005. Many countries consider carbon trading an effective response as this will allow

---

more core human rights, confusing individual and collective benefit and the extent to which this can properly be formulated as a legally binding obligation under international law. It seems more sensible to secure the legal protection of this individual right under human rights rather than development law.

In relation to *collective development*, the former President of the World Bank James Wolfensohn promoted the need to include individual protections within any development framework by proposing a Comprehensive Development Framework (CDF) which would allow the main international financial institutions to secure relevant macro-economic objectives as well as structural, social and human development objectives. The human components included education and knowledge (CDF5), health and population matters (CDF6), water and sewage issues (CDF7), energy (CDF8) and sustainable development and environmental and cultural issues (CDF10). These proposals, in spite of how legitimate they appeared brought about numerous debates. Many commentators criticised the over-extension of the mandate and resources of the international financial institutions that full achievement of the CDF program required. Nonetheless, the idea was retained by the World Bank and taken forward in certain follow-up papers (World Bank- *Supporting Development Programmes Effectively* (November 2004); *Enabling Country Capacity to Achieve Results* (2005); The construction of a more complete development framework remains a necessary goal although it needs to be evaluated whether this can be achieved by one or more specific organisations especially the World Bank- within their existing *modus operandi* and resource allowances.

[19] Naomi Oreskes confirmed in 2004 that from a study of the abstracts of 928 scientific articles, between 1993 and 2003, 75% attributed the cause to human activity; Oreskes N; *The Scientific Consensus on Climate Change*; Science (December 2004). The Intergovernmental Panel on Climate Change also agreed that human actions were very likely the dominant cause (90% probability) in 2007.

[20] China and India and other developing countries were not required to reduce carbon emissions although they can participate in voluntary reduction initiatives.

countries and governments to buy and sell relevant concessions. Developing countries on the other hand criticize this as being flawed as the markets themselves drive the increased energy consumption and noxious emissions.

Also, the need to invest in *alternative energy* sources including solar energy, wind power, water power, bio-fuel, geothermal and nuclear energy have been widely promoted in several quarters although problems persist in relation to availability, proximity, reliability, efficiency, sustainability and corresponding environmental impact and degradation. In terms of nuclear energy for instance, there is no denial of the political and security debates which are uncovered especially regarding Iran, Israel and the US.

Another very difficult political challenge will be to include the most rapidly developing nations such as China and India in any global solutions. China's reliance on coal-fired energy production and high levels of domestic coal use could possibly undermine all progress made elsewhere. A carefully constructed set of compromises and concessions may have to be agreed to ensure that all parties including the US, China and India participate and contribute to arriving at some satisfactory conclusion. To put this into perspective, China is currently the second largest producer of carbon dioxide after the US although it is expected to be first by 2030. This issue of *development country contribution* is absolutely critical to the achievement of any international protocols set out to reduce green house gas emissions.

(e) *Collective Peace and Security:*

It is known that long term economic and financial stability would be impossible without underlying political stability. Hence, more serious than any other is the need for a stable international political order. Central to this requirement are *energy security* and *International relations and the US Foreign Policy*.[21]

---

[21] The predominant threat that exists with respect to energy security is in relation to disputes that arise over energy supply and use. Agreeing on and protecting these energy supply contracts for the major economies remains central in this issue.

International relations have changed significantly over recent decades especially with the collapse of the Berlin Wall, the end of the cold war and collapse of the Soviet Union. The US has emerged as the sole superpower in a new world order characterised by globalisation, increased trade and cultural linkages. (Dubbed Pax Americana by Robert Cooper- *The Breaking of Nations*; Atlantic Books, London 2003; Cooper investigates the nature of the current order and chaos of the 21st century, examining periods of disorder including during the 14th century, the Hundred Years War, the Thirty Years war and the First and Second World Wars. Along with the Pax Americana abovementioned, he considers the Pax Romana and Pax Britannica and looks forward to a Pax Globalis under which peace and security will become the responsibility of all countries and all continents working together). Whilst this American hegemony comes with great responsibility, its foreign policy has been intensely criticised especially with the war in Iraq. (For an analysis of America's perceived imperialism which connects information repression within the US ad aggressive empire-building abroad, See Noam Chomsky- *Deterring Democracy*; Vintage Books, London 1992. Also See Chomsky N: *9-11*, Seven Storeys Press, New York 2002 which questions the US reaction to the bombings on 9/11 and the subsequent interventions in Afghanistan and Iraq.

Little wonder global political instability can be understood in terms of resentment against emergent US dominance and hegemony worsened by President G W Bush's aggressive foreign policy and significant policy mistakes. This political enmity stands on underlying religious but more importantly cultural divisions and the main clashes have been summarised by Samuel Huntington in terms of the forceful promotion of continuing Western Universalism (based on the assumption that Western ideals reflect the only set of true and correct values) as against rising Muslim militancy and Asian and Chinese economic development. (See Huntington S P: "*The clash of civilizations*"; Foreign Affairs 1993; he goes on to explain that the only way to secure world peace is through the construction of an international order based on respect for cultural diversity and civilization balance. See Huntington S P: *The Clash of Civilizations –and the Remaking of World Order*; Simon and Shuster, London 1996.). In the same vein, I also agree wholly with Robert Cooper when he questions the effectiveness of direct social engineering and the imposition of Western democratic models in overseas territories. He asserts that conflicts in the Middle East and Africa can only be dealt with through local involvement and while America is powerful, it is not large enough to be responsible for the whole world. More countries must co-operate in promoting world peace under a new Pax Globalis (Cooper182-186).

In constructing a new global political order, there must be the acceptance of the US military and technical dominance alongside the recognition of other powerful economic sectors emerging in other parts of the world such as China and India. A new sense of common collective policy should be promoted based on a series of accepted principles reflecting the structure and needs of the new world order. These would typically include but not limited to: sovereign respect, multi-polar relations, political tolerance, economic cooperation, technological exchange and the absence of military intervention (except in extreme cases where the protection of indigenous peoples not already under the protection of any legitimate local government and only where intervention is agreed at the appropriate international level). Instead of agreeing a new treaty framework, these could be incorporated into a new international economic agreement. It will be sensible to promote an economic and market based solution.

Another issue of utmost importance is the *global governance* structure which needs to be set-up to police this new global political order. It is necessary to begin to construct a new global governance framework. Many difficulties arise with regard to existing institutional structure governing international relations especially operating under the United Nations system. There is now the increasing need for more general democratic inclusion of people in their immediate governance structures as well as for a larger participative role in global relations and share in the benefits of globalisation. Some immediate level of democratic inclusion can be provided through reform of the voting and membership rules within the main international financial institutions (including principally the World Bank and IMF) and other international organisations (including the UN Security Council).

Part Two

6.3 Significance for Africa

African financial markets have come a long way from hardly any involvement in the international markets and presence in international discussions decades ago, to a period of growing global relevance. However, there still remains a long way to go in terms of translating this growing relevance into meaningful impact implemented on the ground within their countries especially when faced with domestic and global challenges. This will no doubt require strong political will and commitment from the countries' leaders as well as robust enforcement mechanisms.

Also, the need for African States' involvement in realizing the new global development agenda especially in relation to sustainable development and global governance cannot be overemphasized. It remains crucial that they have a seat on the table with regards to negotiations and dictating policy reforms in these areas. This has been witnessed for example with the inclusion of South Africa (December 2010) into the BRICS (Brazil, Russia, India, China and South Africa) in reference to this grouping of emerging national economies with significant influence in global affairs.[22]

Generally there is the recurrence of similarities in problems faced by different countries in Africa such as poverty, xenophobia, infringement of women rights, infringement of gay rights, conflict over natural resources, terrorism and so on. Whilst the origins of these problems may be rooted in differing historical, religious and cultural backgrounds, addressing them must be central in any development agenda for economic advancement in Africa.

In a global context, appropriate adjustments can be made within the global market system to ensure that African countries compete fairly. It is possible to design or streamline existing trade, monetary and development rules to create conditions of fair involvement and proportionate

[22] This acronym was coined by Jim O'Neill a former Goldman Sachs economist in his game-changing paper: *Building Better Global Economic BRICS*; Global Economies Paper No:66 available on http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf (accessed on 03 May 2014). He has also recently coined another acronym of block nations suggested to be the next economic giants- MINT (Mexico, Indonesia, Nigeria, and Turkey); from an African perspective, the mentioning of Nigeria is a sign of growing responsibility in global affairs discussions. (See BBC article: *The MINT countries: Next economic giants?* Available online at: http://www.bbc.co.uk/news/magazine-25548060 (accessed 03 May 2014)

participation for the African continent. Instead of assuming that all countries can always be treated identically, the developed nations have a responsibility to deal with emerging or transitional economies on a proper sequenced and fair basis. Achieving this feat can be done through the construction of appropriately funded and supported, sequenced and sustainable development programmes that cover all relevant economic and social systems. Additionally, appropriate adjustments having regard to local social, economic and political structures can be built-in. These adjustment mechanisms must reflect the capabilities and capacity of all participating territories (developed and developing) otherwise ineffective markets will be established. More so, suitable corrective devices and components to limit or prevent abuse by individuals or groups of individuals are imperative as markets themselves are not abusive, but are vulnerable to unruly abusers if the appropriate rules and regulations are absent. African sovereignty will guarantee strong enforcement institutions and fitting corrective measures to validate this requirement.

There are four key issues which could be extracted from this programme which should be of consideration for the African continent in their approach to adopting any global plan going forward. These are: *economic functionalism, maximizing the role of financial markets, suitable arrangements for servicing debt and minimizing overdependence and servitude towards developed nations*.

(a) *Economic and financial functionalism:*

The progress of *continental sovereignty* in Africa will no doubt demonstrate its familiarity in achieving close cooperation in matters of common interest. In this case, economic and financial functionalism can serve as a vital tool to increase integration between Member States in Africa with those in the rest of the world. This will thereby solidify their influence on the global stage because of the renewed trust and confidence other countries will have in the continent. The ability to advance common interest initiatives in economic and financial matters within the continent will stand in good stead in determining the continent's ability to find common ground with the rest of the world to resolve common residual problems.

(b.) *Maximizing the role of financial markets:*

As mentioned earlier, the efficiency of financial markets is an integral condition for economic growth. The African continent should pay more attention to the role of financial markets and develop them further in order to continuously maximize the benefits derived. These financial markets generate the liquidity to support and advance the wellness of citizens. Although this is not usually pursued, there is scope for developing these financial markets in order to generate the necessary funds to resolve the more immediate indigenous problems within the states with the benefit of the citizens at the fore.

(c.) *Suitable arrangements for servicing external debt:*

For many years African countries suffered the misfortune of exploitative external debt arrangements which resulted in payments for servicing these debts outweighing the debt repayments themselves. This had punishing ramifications for the countries as they suffered tremendous strain on their budgets and public finances. Over time, some of these debts (which had accrued over decades) were cancelled but after severe consequences. Going forward, there is need for Africa to assert itself by negotiating appropriate credit facilities in order to sustain any development agenda in the continent.

(d.) *Minimizing overdependence and servitude towards developed nations*:

There is the likelihood of unfair relationships developing between African states with the developed nations given proximity at the global stage. This could be in the form of unfair trade deals or natural resource concession arrangements which prove exploitative for the African state. This is more likely with the smaller weaker nations who feel helpless in these negotiations. This is a very important determinant in the quality of influence Africa can attain at the global stage.

From the above, it is logical to imply that even if Africa achieves greater influence in the global market space, it will only remain one voice among many and will still need to work its way through the international system. Nevertheless this platform provides a step in the right direction. Africa may not be the loudest and most vocal voice, however it will certainly be a voice amongst many, even if the chorus is not harmonious because different voices will say different things. An influential voice for Africa will be a huge achievement considering all the pitfalls that have come its way; the continent would have arrived by design and not delay.

6.4 Conclusion

World leaders have continued to deliberate albeit in an exasperating and repetitive manner on the development of strategic programmes to help confront problems dogging the world as a whole such as *poverty and debt reduction, governance and capacity building, energy use and climate control, peace and security.* Suitable solutions must not only target problems such as bad governance, disease, geographical and infrastructural hindrances singly but rather be based on combining targeted initiatives centered on a common structure with suitably tailored individual programmes for specific countries. This combination touted as a global development agenda and priority programme was expounded in this chapter.

Having considered these, it was Scottish Economist Adam Smith who voiced his criticism of the use of force in emerging colonial territories to allow European powers "to commit with impunity every sort of injustice" although the discovery of America and the opening of the trade routes to Asia were considered by him to be the "two greatest and most important events recorded in the history of mankind". Smith also looked to a time when nations would be able to respect the rights of one another with equality of courage and force arising through extensive commerce and trade.[23] It is hoped that Africa's relationship with the rest of the world from the Americas, Europe, Asia and everywhere in between can be reformed and rebuilt based on a new trade and service related economic respect and interdependence.

[23] Walker, n.2

CHAPTER 7: CONCLUSION

7.1 Introduction

This thesis brings out a new *continental sovereignty* for Africa as it tosses up issues of law with reference to financial integration and how these are being approached in the African continent. At its centre, financial integration encompasses legal interactions between national, regional and global financial systems. The theory developed suggests that effective financial integration and in particular monetary consensus is the result of correctly structured and managed layers of cooperation between national, regional and global community arrangements, within robust legal frameworks and institutions. In other words, the new African sovereignty involves a community with well-defined and managed relations most especially legal interactions between African nations and their regional arrangements within a broader continental and global community.

Considering the development of this theory and its application to the African story, the thesis concludes that Africa's financial integration efforts have been largely imperfect as the interactions between nation states, and their regional communities have been plagued by weak institutions and legal systems implying that these attempts were not thoroughly thought through. Unless these imperfections are rectified, this thesis argues that any African integration project will be flawed and destabilized. Nevertheless Africa's financial integration project is progressing through differing stages of integration, from free trade areas to complete monetary unions although particular emphasis must be paid in revamping the legal structures and empowering enforcement mechanisms of these arrangements as well as staying connected within wider regional and global solutions where Africa must remain plugged and form an integral part.

7.2 Thesis Threads- An Overview

In summary, the thesis has disclosed five important themes. These are: *Sovereignty; African Sovereignty; Regional Integration; Globalization;* and *Global Development.* These are considered as extractions from the various chapters in the thesis.

7.2.1 Sovereignty

As discussed in Chapter One, the new African solution called *continental sovereignty* surfaces from the changing nature of sovereignty whereby countries surrender parts of their sovereignty in order to work together to solve mutual challenges. As such, the chapter defined the nation state and national identity through the lenses of the historical renaissance (pre-1550), reformation (1550-1650), enlightenment (1650-1775), and revolution (1775-1850). This established the modern state and public international law which set in place the idea of independence from which nation states carry out their modes of operation all over the world. In essence this prompted countries to desire running themselves as the principles they established rejected monarch and church control.

This independence includes the freedom to determine and conduct money matters within the confines of the state. Therefore any surrender of this freedom is bound to bring about apprehension. In this respect however, the chapter reveals the *African problem* to be that of multiple national sovereignty and overlapping sovereignty whereby African countries are still unable to solve unique problems plaguing the continent such as war, poverty and disease. In most cases any resolution to these problems is sourced from outside the border which usually includes interactions between different legal systems. This lends credence to the truth that as the world gets smaller, challenges overlap between nations and mutual solutions are imperative. It is no different with the integrating nature of financial markets which have made a single state's solo-competence to resolve monetary and financial matters impracticable. It is based on this reality that the argument of *African Sovereignty* develops because increasingly, national constraints have been met by regional and global consensus. This foundation sustains the central narrative of this thesis. Thus the chapter considered the aspect of *African challenge* in tandem with the changing nature of sovereignty and how deeper monetary consensus and cooperation can provide the solutions for these challenges.

Here, c*ontinental sovereignty* was introduced as my recommendation for Africa in a bid to resolve many of its underlying challenges. This recommendation can be summarized under nine headings: *supra-nationality and supremacy of regional law; strengthen the regional financial integration communities; revamping payment systems; indigenous needs should dictate regional standards; national supervisory co-ordination; strong regulatory and supervisory regimes within member states; sound regulatory strategy; strong legal and judicial regimes; and economic growth enhancement.*

The chapter also provided a description of the relational issues of law as the relationship which exists between community law, community institutions and those of its member states. It argued that the need for a smooth relationship between the platforms for interaction between the RECs and their member states and amongst the member states themselves will assist in minimizing jurisdictional conflicts. The allocation of authority to the community and its institutions over those of member states is vital to this platform. Nevertheless, the thesis focused mainly on the legal and institutional structures and the interactions between different legal and judicial systems in reference to regional arrangements *vis-a-vis* domestic systems.

7.2.2 African Sovereignty or Continental Sovereignty

Chapter Two sought to provide a new model of cooperative integration for Africa based on mutual alliance and reliance drawing from regional perspectives. It brought out the complication of overlapping and duplicated sovereignty in Africa labeled the *'spaghetti bowl'* as the starting point of the *African problem* by outlining the different RECs in Africa and expanding on the eight specific RECs which have been recognized by the AU. These are: ECOWAS, SADC, EAC, COMESA, ECCAS, AMU, CEN-SAD, and IGAD. It provided a description of the RECS and specified the institutional structure and governing features of these RECs. This revealed that the RECs are in differing grades of development and are progressing through the different stages of integration at varying speeds. Any solution for Africa will require the RECs to be divided into groups depending on the similarity in development. This will help to untangle the *spaghetti bowl* and simplify the overall continent-wide-integration project.

Following on from the description of this complexity, this chapter proposed effective financial integration by virtue of correctly structured and managed legal frameworks incorporating the fluid relationships between states, communities, legal systems and institutions. The emphasis was based on further and deeper integration (constraints on national sovereignty) to resolve problems faced by investors who must negotiate existing RECs to operate. In this regard, the chapter sought to showcase examples of successes to indicate the manner in which the complexity is being negotiated and managed in some RECs and Member States. This success cases illustrate the re-conceptualization of sovereignty within Africa. To further enhance the redefinition of sovereignty which can inspire a project towards *continental sovereignty*, examples are drawn from cases such as the establishment of the COMESA-EAC-SADC Tripartite FTA whose primary objective is to strengthen and deepen economic integration of the Southern and Eastern Africa region.

Furthermore, there is acceleration in Africa's growth trends and the continent is gaining greater access to international capital as total foreign capital flows are on the rise. The chapter highlights the McKinsey report which illustrates how the rate of return on foreign investment in Africa is higher than in any other developing region. In this connection, the development of the capital markets is discussed notably with the increase in stock exchanges in the Africa over the last two decades. Also, some changes in the banking sector are mentioned and the Ecobank example is used to demonstrate how a banking institution adopted a business model based on economic development and financial integration to become a colossal Pan-African Banking and Financial Institution.

The discussion was focused entirely on the banking and finance sector with emphasis on monetary consensus. The chapter argued that the best way forward for Africa's integration agenda and as seen with the COMESA-EAC-SADC Tripartite FTA example is a combination of robust regional communities with strong laws, enforcement mechanisms and institutions while retaining some parts of national sovereignty in order to ensure the enforcement of the laws and policies domestically. It is these RECs that form the building blocks for the new *continental sovereignty*.

With regards to strengthening the legal system, the chapter went on to recommended that the African regional integration agenda will benefit greatly from more efficient drafting of treaties and secondly the bolstering of regional enforcement mechanisms. All these must be matched with decisive action and implementation. In essence, it was revealed that many of the REC Treaties are ambiguous and have been poorly drafted resulting in the sluggish progress of the integration agenda.

Nevertheless, the chapter asserts that the growing story in Africa is that of investment and economic growth as opposed to aid and recession, despite the fact that lingering political, social, economical, cultural and religious issues still influence this changing story. Generally, it is accepted that political will is essential in encouraging the integration agenda and sustaining investment and economic growth.

7.2.3 Regional Integration

Developing the above successes further, Chapter Three showcases a *regional advantage* with the example of the EU given that it is the most sophisticated regional arrangement in the world. It strives to determine whether this EU model is appropriate for replication within the African continent. The model will examine the extent to which countries are willing to surrender sovereignty and remain integrated to enjoy mutual benefits and also to manage mutual problems.

Tracing the trajectory through the development of Treaty Law, the uniqueness of the EU model can be simplified as follows: the prevalence of *supremacy of European Law*, under *Costa v Enel*; the creation of legal rights through the principle of *direct effect* established in *van Gen Loos*; the concept of *mutual recognition*; *state liability* and the prominence of a *new legal order*. Putting these together, the banking and financial services sector in the EU provides a glaring example of the successful workings of regional integration. Here there is a robust single market programme in place which brings to the fore the importance of the concept of *mutual recognition* supplemented by the doctrines of *minimum harmonization* and *home country control*. These help a great deal in resolving the regional access and domestic control conflict emanating from global access and local control conflict seen above with globalization. Again this conflict arises as a result of the need to surrender parts of sovereignty in these matters. Even though this single market programme metamorphosed into legal obligations through Treaty Laws, its completion is still far away. The chapter suggests that the concept of mutual recognition could be replaced by *mutual assistance and mutual reliance* which includes the development of common operational and administrative systems to ensure closer cooperation and coordination of all relevant activities especially with reference to monetary issues.

Nevertheless, the chapter concedes that the benefits of regional integration are still dented by *regional risks and exposures* as witnessed in the EMU with the sovereign debt crisis and the region's handling of the GFC. Hence the over-all regional advantages discussed are at best only partial from an EU-wide perspective.

From a legal perspective, the interrelationships between markets were tested deeply as contagion spread following the financial crisis into a sovereign debt crisis with Greece bearing the greatest brunt and needing an imminent arrangement of a bailout package. Although the bailout is supported in this chapter, the deliberations over the legality of this bailout posed serious concerns for lawyers. This centered on navigating the interpretations of the two contradictory articles in the TFEU: while Article 122 allows for the provision of financial assistance by member states to each other in case of an emergency beyond that country's control, Article 125 explicitly prohibits member states from taking on the financial 'commitments' of another national government.

All in all, policymakers were forced to rethink earlier strategies which established the motive for the natural integration between the European countries. This however leaves the criteria of the Maastricht Treaty as the strongest point of reference to fall back on as the model for other regional arrangements such as those attempted in Africa to emulate especially in terms of tackling the regional risks posed as a result of enlargement. This in no way dents the overall success of the EU integration agenda which has provided the platform for other communities to replicate.

Having said this, in no other continent has the European example been more imitated than in the African continent. It is on this basis that the narrative central to this thesis, that of the *African challenge* was considered further in this chapter. Here, a succinct compilation of the legal and institutional differences between the experience of the RECs in Africa and the regional integration project in Europe. There is no doubt that there is an over-abundance of lessons Africa can learn from the European example so far.

Drawing from the Greece case study, there are five key issues which were identified to assess regional risks and exposures. These issues were highlighted in order to provide informative insights to African policy makers as they consider surrendering more sovereignty to achieve deeper and further integration within the African continent. These are: *costs, masked fiscal problems, policy dilemma, political posturing; and the political and cultural vulnerability of integration.* These issues can inhibit the fluidity of economic coordination within the RECs.

Furthermore, concerning the African efforts for *continental sovereignty*, the chapter recommends an organic development of existing regulatory and supervisory institutions in Africa in the short and medium term instead of unrealistically striving to achieve an EU-type financial regulatory framework. It is my contention that the EU model is too advanced for the African system in the short and medium term. The chapter therefore advocates for existing institutions to consistently demonstrate their ability over time to be independent and free from political manipulations. It is only on the back of stronger and independent existing regulatory and supervisory institutions in the continent can there be any further attempts made to co-opt the more advanced EU institutions such as the ECJ, ECB and ESFS.

7.2.4 Globalization

The notion of surrendering sovereignty to acquire closer cooperation between states does not rest only in a regional framework. Chapter Four confirms that for many decades, efforts have been made towards global integration and global financial integration in particular. States have ceded national sovereignty in the areas of economic, fiscal and monetary policies for the sake of global financial market efficiency. This chapter advocates the need for Africa to also to increase and consolidate its position on the global stage by ceding more sovereignty to global institutions for integration purposes. These constraints on national sovereignty can prove advantageous in the medium and long term as there are benefits to be gained in order to meet Africa’s recurring challenges.

Nonetheless, the chapter accepts that being part of the global financial design exposes the challenges of modern sovereignty and modern monetary sovereignty which could have devastating consequences if unprepared.

The chapter discusses the events that followed the Great Depression and the Second World War, and underlined the efforts which were made to revamp the global financial framework. Though partial success was recorded, the chapter demonstrates how countries came together to resolve mutual challenges. In this case infrastructural, economic and financial recovery was vital to the establishment of robust laws and institutions to enable the smooth operation of global financial markets. Relinquishing parts of national sovereignty in these matters was the basis for constructing the new global monetary management system that emerged.

This new system of global monetary management hatched in Bretton Woods, USA was the flagship arrangement whereby global leaders came together to reform procedures and institutions notably in monetary matters in order to adjust changing financial market dynamics. The chapter underscores the benefits which came with this system for global financial markets. Some of these were: the nature of international savings and investment was modified, deregulation was extensive, technological innovation was commonplace, better domestic and international competition ensued, and there was an overall increase in the demand for financial modernization.

The chapter points out that the various models of regional integration such as the EU drew inspiration from the Bretton Woods system because it initiated a cooperative solution to attain higher objectives for economic and financial programmes. On another hand, the chapter reminds that the notion of sovereignty withers when economic and financial challenges co-mingle between different nations and different communities which have different motives which stem from differing political, socio-economic, cultural factors *inter alia*. Evidently, as seen with the Bretton Woods system, the lines of jurisdictional divide become blurred in these sorts of arrangements and the moment a cooperative agenda of global advantages is exploited in the wrong way, things spiral out of control and lead to eventual crisis.

It is in this light that the chapter deduces the significance of this global design for the African continent especially considering the need for broader participation at the global stage to assist in building solutions for its indigenous problems on the ground. The chapter offers thoughts for the African policymakers to determine the continent's readiness and predisposition for a bigger role in global financial markets. It stresses however that the need for successful *African sovereignty* as a prerequisite to maximize the global advantage and position the continent in a more influential role within the global financial market architecture. There are six main points which were identified to provide a better understanding of the exposure which could result from ill-judged global integration. They are: *differing economic and financial environment*, *global confidence*; *political affiliations*; *interdependency between states*; *uniform financial market rules*; *vulnerability to financial crisis*.

To this end, Chapter Five exploits the elements of *global risk and exposure* within the context of the GFC which started in 2007. The five main causes of the crisis were underlined to include: accumulation of massive credit and debt; complex products and limited transparency; erroneous asset valuation and; co-mingling of risks; and lackluster market support.

The devastating consequences of these causes were exposed in combination with other important triggers such as the inconsistent closure of Lehman brothers; cyclic systemic contagion in all financial markets; and the loss of investment confidence. The global responses which were examined can be summarized as *increased financial regulation* and *increased market control.*

Furthermore, the chapter shows that the global responses which followed the GFC were considered as another glaring example of collective cooperative solutions provided by global leaders in response to a crisis which affected the entire global financial market. An attempt is made to contrast the manner of this response with that of the Bretton Woods era. The latter is seen to have focused more on crisis prevention and crisis resolution whilst the response following the GFC focused on growth and stability particularly because the elements of systemic risk and contagion continued to create panic during the crisis. In a nutshell, the responses post-GFC articulated more regulation of financial markets as opposed to deregulation during the Bretton Woods system.

From an African viewpoint, the chapter also considered the impact the GFC had on the African continent It pointed out that although Africa did not suffer directly from contagion and systemic risk in the banking system as was the case in the developed markets, African economies suffered rather through the global recession and reduced economic activity because of a shortage of export revenues, foreign and trade finance. The adverse effects on its development goals were also underscored as countries struggled to mobilize funds to achieve development goals such as poverty reduction and investment.

To this end, the chapter proposed *African sovereignty* as an appropriate solution to offer better protection to the African financial system and enable it to fit comfortably within the global financial system. This will be done by strengthening existing regulatory and supervisory institutions especially the Central Banks. The chapter held however that any solution should factor in development issues in order to mitigate the impact on the welfare of citizens.

All the same, it is held that the challenges of risk and exposure which can arise following global integration should not undermine its overall benefits of collective harmonization of laws and institutions notably in banking and financial matters. It is established that despite the constraints on national sovereignty, global integration brings about mutual advantages and limitations. It is in this connection that the chapter argues for a framework of responses involving the inclusion of important countries like China, India, and Brazil and other emerging African countries like South Africa and Nigeria in working together to shape an international financial architecture to correspond with the nature of integrated challenges faced this day. These countries all have important roles in global financial markets and as these markets continue to integrate deeper over time, it is sensible to have all hands on deck in order to develop sustainable solutions for mutual global challenges.

This is the sort of response framework which requires the African continent to have a strong presence in international discussion fora in order to exert more influence on these global economic and finance matters. It is unlikely that African representation from emerging nations such as South Africa and Nigeria at the global stage will be sufficient and have a significant impact for the continent as a whole. These countries are more likely than not to seek solutions beneficial for their own economies. Therefore, the adoption of *continental sovereignty* will provide the platform from which the entire African continent can speak through one voice and ensure the attainment of solutions which are mutually beneficial for the continent as a whole.

7.2.5 Global Development

In light of globalization above, Chapter Six goes further to discuss the need for *African sovereignty* to be superimposed on a larger platform of global programme solutions in order to circumvent the continent's residual difficulties. It highlights the necessity to incorporate development initiatives within broader global economic objectives to promote growth benefits within the continent. As stated however, this requires strong political will. The chapter asserts that African States' involvement must be fundamental in achieving the new global development agenda especially in relation to sustainable development and global governance. As typified by the BRICS, it is of utmost importance that African countries have a say in negotiating and dictating global policy reforms most especially in the banking and finance sector.

In the same light, the need for apposite adjustments to be structured within the global market system to guarantee fair competition between countries is also mentioned. This includes streamlining existing trade, monetary and development policies to create conducive conditions of involvement and proportionate participation. The chapter outlines the construction of an adequately funded and managed sustainable development programme which encompasses all the necessary socio-economic structures (which reflect the potential and capacity of all participating nations) as the basis for this favourable global market environment. This programme can be outlined as follows: *a.) sustainable development; b.) global governance; c.) individual and cultural protection; d.) climate control; e.) collective peace and security.*

There is the perception however that this programme is bedeviled with policies that encourage some sort of economic slavery or servitude; with the development of a theory of dependence by weaker nations on the stronger and more influential developed nations. Besides, implementation has been very sluggish and exasperating despite the fact that there have been too many conferences, communiqués, and statements by global policymakers and leaders with very limited action. The arguments in the chapter therefore urge the developed nations to continue to bear the responsibility of ensuring the fair and sequenced participation of emerging economies in the global playing-field. Above all, a suitable legal structure with strong global rules and regulations including effective corrective measures is necessary to deter and discourage unruly abuse by individuals or financial institutions. As evidenced with the GFC markets themselves remain vulnerable. The need for Africa to maintain one voice has never been more pivotal for *continental sovereignty* because a cooperative and coherent endeavour to resolve mutual challenges is better achieved unanimously through the international system.

7.3 Summing Up and Thesis Close

There is little doubt that the prevalence of legal issues abound in financial integration. These issues are rampant mainly when dealing with the interactions between national, regional and global laws and institutions in relation to how and where they overlap. Generally however, the magnitude of attention given to these legal issues normally depends on the grade or stage of integration attained. Although financial integration has been acknowledged to come with many advantages as many nation states and economic arrangements around the world enjoy a plethora of benefits, there are still risks and disadvantages which dent its effectiveness. Nevertheless, vibrant financial integration models center on those with strong legal principles and enforcement mechanisms to confront the resulting risks and exposures as those brought about by the thumping GFC at the global level and the Greek sovereign debt crisis at the regional level. From this, it is evident that global markets are vulnerable to huge global crisis and similarly regional markets are susceptible to regional crisis.

From a regional perspective, the regional communities in Africa have made efforts to incorporate these legal principles and mechanisms into their agendas by attempting to copy the EU example. Nevertheless, the application and implementation is lackadaisical. With regards to those that are being adopted and implemented, the full beneficial impact on the financial integration agenda in the continent remains to be seen. In fact, the question still lingers as to whether this one-stop-shop example is conducive for Africa and whether the continent has the social, cultural and political readiness for the effective adoption of these legal principles and mechanisms. My answer to this is the need for the existing community laws and institutions in Africa to be developed organically. They must be strengthened and empowered to provide the requisite competence. When progress of this organic development and evidence of significant success rates is evident, then the necessary confidence will be achieved to make further attempts at copying the European example. There have been instances which record some success and these need to be built upon. This provides the fabric for a redefined notion of sovereignty for the African continent- *African sovereignty*.

The potential to foster financial integration and the overall benefits that come with it based on this new *African sovereignty* has been apparent in regional communities such as COMESA, SADC and the EAC. It is recognized that the future success of Africa's Integration project depends on how other regional arrangements within the continent apply these legal principles and mechanisms in proportion to their stage of integration by drawing inspiration from other successful application examples within Africa.

Going forward, it is worth recollecting that this thesis began by appreciating the priorities of a nation state through the doctrine of sovereignty, and how apprehensive countries become when required to surrender some of this sovereignty for the mutual resolution of challenges faced. Defining the changing nature of sovereignty which involves the ever growing need to relinquish some parts of national sovereignty has exposed a number of legal issues that currently surround global and regional financial integration processes in general and monetary corporation in particular. Nevertheless this thesis is unable to exhaustively address all pertinent issues simultaneously. In my opinion, the most important and immediate issues worth prioritizing for the African continent to sustain *continental sovereignty* are firstly, validating the relationship between the various regional communities; secondly, strengthening the community laws and institutions and empowering national enforcement structures; thirdly, overcome the notorious duplicity of memberships of the communities; and finally and most importantly, laying a robust legal basis for the African Integration Agenda to evolve.

Furthermore, another priority would be for member states to endorse laws to implement respective regional treaties preceded by thorough research on any likely conflicts between existing regional and domestic laws. Steadfast political will and compromises must subsist in order to set aside differences. This is to ensure the efficient implementation of the regional treaties and laws at the national level. In this regard, the training of legal practitioners such as judges, lawyers, and other auxiliaries of the law like law enforcement officials must be prioritized as well. Broadly, this will require the inclusion of regional law into local education curricula and other educational campaigns geared towards creating awareness about the overall African

Integration project. As the regional arrangements continue to move up the various degrees of integration, the legal issues especially those involving monetary matters will become more significant. Therefore, it only makes sense for all stakeholders in the communities, including the member state governments and policy makers, businesses and scholars to put all hands on deck and pay more attention to this viable solution for Africa.

BIBLIOGRAPHY

LIST OF CASES

Andrea Francovich and Others v. Italian Republic [1991] European Court Reports I-5357

Casati (Case 203/80) [1981] European Court Reports 2595

Falminio Costa v. ENEL (Case 6/64) [1964] European Court Reports 585, 593

Frank Ukor v Richard Lalaye ECW/CCJ/APP/01/04 (2004)

Island of Palmas Case (Netherlands v USA) (1928), 2 United Nations Reports of International Arbitral Awards 829

Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid (Case 33/74) [1974] European Court Reports 1299

Marshall v Southampton and South West Hampshire AHA (1986) (European Court of Justice-Case 152/84) [1986] European Court Reports 723]

Munoz (Case C-253/00) [2002] European Court Reports I-7289

NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration (Case 26/62) [1963] European Court Reports 1

Olajide Afolabi v Federal Republic of Nigeria ECW/CCJ/APP/01/03 (2003)

Procureur du Roi v Benoît and Gustave Dassonville (Case 8/74) [1974] European Court Reports 837

Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Case120/78) [1979] European Court Reports 649 [Cassis de Dijon]

Reyners v. Belgium State (Case 2/74) [1974] European Court Reports 631

Rutili v Minister for the Interior (Case 36/75) [1975] European Court Reports 1219

Socio- Economic Rights and Accountability Project (SERAP) v Federal Republic of Nigeria and Universal Basic Education Commission, Judgement No ECW/CCJ/APP/0808 (2009)

Van Duyn v Home Office (Case 41/74) [1974] European Court Reports 1337

BOOKS AND BOOK CHAPTERS

Anghie A: *Imperialism, Sovereignty and the Making of International Law*; Cambridge University Press, Cambridge, 2004

Arner D.W: *Financial Stability, Economic Growth, and the Role of Law*; Cambridge University Press, Cambridge, 2007

Bagehot W: *Lombard Street, a Description of the Money Market. 1873,* EP Dutton & Co., New York, 1910

Balassa B: *The Theory of Economic Integration*; Greenwood Press Westport, Connecticut, 1961

Bamford C: *Transparency and the end of doing good by stealth*; *Financial Crisis Management and Bank Resolution*: Edited by Labrosse J, Olivares-Caminal R, Singh D; Informa, London, 2009

Barry Jones R J: *Routledge Encyclopedia of International Political Economy*; Routledge, London, 2001

Bartlett R: *The Making of Europe*; Penguin Books, Harmondsworth, 1993

Bodin J*: Six books of the Commonwealth*; (Tooley M J translated), Blackwell, Oxford (no confirmed date)

Bonde J P; *From EU Constitution to Lisbon Treaty*; Forlaget Notat; Allingåbro, 2008

Bordo M and Schwartz A J(eds): *A Retrospective on the Classical Gold Standard, 1821- 1931*; University of Chicago Press, Chicago, The National Bureau of Economic Research, 1984

Braithwaite J and Drahos P: *Global Business Regulation*; Cambridge University Press, Cambridge, 2000

Bull H & Watson A: *The Expansion of International Society*; Clarendon Press, Oxford, 1984

Bury J: *The Invasion of Europe by the Barbarians*; Norton, New York, 1967

Cho S: *Free markets and social regulation: a reform agenda of the global trading system*; Kluwer Law International; London, 2003

Chomsky N: *9-11*, Seven Storeys Press; New York, 2002

Chomsky N: *Deterring Democracy*; Vintage Books, London, 1992

Chomsky N: *Hegemony or Survival: America's Quest for Global Dominance*; Metropolitan Books; New York, 2003

Cohen B: *Organizing the World's Money*; Basic Books, New York, 1977

Cooper R- *The Breaking of Nations*; Atlantic Books, London, 2003

Craig P and de Búrca G; *EU Law*: *Text, Cases and Materials*; 5th Edition; Oxford University Press, Oxford, 2011

d'Entreves A P: *Natural Law*; Hutchinson, London, 1970

Davies N: *Europe: A History*; Pimlico, London, 1970

Eichengreen B: *Globalizing Capital: A History of the International Monetary System*; 2nd Edition, Princeton University Press, Princeton, 2008

Ellis J: *American Creation*; Alfred A Knopf, New York, 2007

Fink C: *The Genoa Conference: European Diplomacy, 1921-1922*; University of North Carolina Press, Chapel Hill 1984

Fletcher R: *The Conversion of Europe*; Fontana, London, 1998

Franklin B (ed. Ketchum R); *The Political Thought of Benjamin Franklin*; Hackett Publishing, Indianapolis, 2003

Frey L & Frey M: *The French Revolution*; Greenwood Press, Westport, 2004

Furet F: *Interpreting the French Revolution*; Editions Gallimard, Paris, 1978

Gallant P & Dosoo G; *The Eurobond Market*; Woodhead-Faulkner, Hemel Hempstead, 1992

George S: *A Fate Worse than Debt: The World Financial Crisis and the Poor*; Penguin Books, London, 1988

Gianviti F: '*The Objectives of Central Banks*' in Giovanoli M and Devos D (eds): *International Monetary and Financial Law: The Global Crisis*; Oxford University Press, Oxford, 2010

Grand E & Pauly L (eds): *Complex Sovereignty*; University of Toronto Press, Toronto, 2005

Greenwood C: *Sovereignty a View from the International Bench*; in Rawlings R, Leyland P, Young A: *Sovereignty and the Law: Domestic, European and International Perspectives*; Oxford University Press, Oxford, 2013

Greer T & Lewis G; *A brief history of the Western World; Harcourt Brace College Publishers*; New York, 1997

Hinsley F H: *Sovereignty*; Alden Press, Oxford, 1966

Hinsley F: '*The Concept of Sovereignty and the Relations between States'*, in W. J. Stankiewicz, ed., *In Defense of Sovereignty*; Oxford University Press, New York, 1969

Hoelscher D. & Parker D: *Regulation and Crisis prevention in the Evolving global market* in Evanoff D.D., Kaufman G.G., LaBrosse J.R. (eds.); *International Financial Instability: global banking and national regulation*; World Scientific Publishing Co. Pte. Ltd, Singapore, 2007

Horspool M & Humphreys M: *European Union Law* (5th edition), Oxford University Press, Oxford, 2008

Huntington S P: *The Clash of Civilizations –and the Remaking of World Order*; Simon and Shuster, London, 1996

Jackson J.H: *The jurisprudence of GATT and the WTO*, Cambridge University Press, Cambridge, 2000

Jackson R: *Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape*; Jackson R, James A, Clapham C et al; *Sovereignty at the Millennium* (ed. R Jackson); Blackwell, Massachusetts, 1999

Jackson R: *Sovereignty: The Evolution of an Idea*; Polity Press, Cambridge, 2007

Keen M: *The History of Medieval Europe*; Penguin Books, Harmondsworth, 1991

Kent P: *Law of the European Union*; 4th Edition, Pearson, Harlow, 2008

Kerry J & Brown H; *"The BCCI Affair: A Report to the Committee on Foreign Relations US Senate;* December 1992, 102d Congress 2d Session Senate Print 102-140

Kindleberger C: *Manias, Panics and Crashes: A History of Financial Crises* (4th edition); New York, Wiley, 2000

Kissinger H; *Diplomacy*, Simon & Schuster, New York, 1994

Laski H: *The Foundations of Sovereignty and other Essays*; Harcourt, Brace and Co., New York, 1921

Lastra R M: *Legal Foundations of International Monetary Stability*, Oxford University Press, Oxford, 2006

Lord Justice Bingham; *Inquiry into the supervision of the Bank of Credit and Commerce International* (London: Her Majesty's Stationery Office, October 1992)

Loughlin M: *Why Sovereignty?;* Rawlings R, Leyland P, Young A (eds): *Sovereignty and the Law: Domestic, European and International Perspectives*; Oxford University Press, Oxford, 2013

Lowe V: '*Sovereignty and International Economic Law*'; Shan W, Simons P, Singh D (eds); *Redefining Sovereignty in International Economic Law,* Hart Publishing, Oxford, 2008

Lyons G & Mastanduno M (ed.): *Beyond Westphalia: State Sovereignty and International Intervention*; John Hopkins University Press, Baltimore, 1995

Machiavelli N: *The Prince*; Bull G (ed); Penguin books, London, 1961

MacNeil I & O'Brien J: *The Future of Financial Regulation*; *Introduction*; Hart Publishing, Oxford and Portland, Oregon, 2010

Madison J; The Federalist, No. 51, reprinted in Hutchins, *Great Books of the Western World*, 43, 162-5

Maresceau M: *'The EU Pre-Accession Strategies: a Political and Legal Analysis'*; Maresceau M and Lannon E (eds), *The EU's Enlargement and Mediterranean Strategies: A Comparative Analysis,* Palgrave, Basingstoke, 2001

Martin E A and Law J (eds.): *Oxford Dictionary of Law;* 6th edition, Oxford University Press, Oxford, 2006

Mattingly G: *Renaissance Diplomacy*; Dover Publications, New York, 1988

McBarnet D: *Financial Engineering or Legal Engineering? Legal Work, Legal Integrity and the Banking Crisis*; Edited by MacNeil I & O'Brien J: *The Future of Financial Regulation*; *Introduction*; Hart Publishing, Oxford and Portland, Oregon, 2010

McBarnet D; *Crime, Compliance and Control*; Dartmouth/Ashgate, Aldershot, 2004

Merrill J: *The Founding of a Nation: a History of the American Revolution 1763-1776*; Hackett Publishing, Indianapolis, 2004

Moggeridge D (ed.): *The Collected Writings of John Maynard Keynes;* Cambridge University Press, London, 1980, Volume 26

Molle W: *The Economics of European Integration: Theory, Practice, Policy*; Aldershot, Dartmouth, 1994

Mulhearn C & Vane H. R: *The Euro: Its Origins, Development and Prospects*; Edward Elgar Publishing Ltd, Cheltenham, 2008

Ngozi Okonjo-Iweala: *Reforming The Unreformable*; Massachusetts Institute of Technology Press, Cambridge, Massachusetts, 2012

Okeke C; *The Theory and Practice of International Law in Nigeria* (Fourth Dimension Enugu Nigeria 1986) 172.

Oppong R F; *Legal Aspects of Economic Integration in Africa*; Cambridge University Press, Cambridge, 2011

Osborne D and Gaebler T: *Reinventing Government;* New York: Longman, 2001

Paulson H: *On The Brink-Inside the Race to Stop the Collapse of the Global Financial System*; Business Plus-Hachette Book Group Inc, New York, 2010

Pescatore P: *The law of integration: Emergence of a new phenomenon in international relations, based on the experience of the European Communities*; Albertus Willem Sijthoff, Leiden, 1974

Philpott D: *Revolutions in Sovereignty*; Princeton University Press; Princeton, 2001

Pickett T: *Invention nations: Justifications of the authority in the modern world*; Greenwood Press, Westport, 1996

Rawlings R: *Introduction: Sovereignty in Question*; Rawlings R, Leyland, Young A (eds): *Sovereignty and the Law: Domestic, European and International Perspectives*; Oxford University Press, Oxford 2013

Reid D: *Sustainable Development: An Introductory Guide*; Earthscan, London, 2005

Revell J; *The British Financial System*; Macmillan, London, 1973

Rogoff K and Reinhart C: *This Time is Different: Eight Centuries of Financial Folly*; Princeton University Press, Princeton, 2009

Sachs J: *The End of Poverty: Economic Possibilities for Our Time*; Penguin Press, New York, 2005.

Salami I: *Financial Regulation in Africa: An assessment of Financial Integration Arrangements in African Emerging and Frontier Markets*; Ashgate Publishing Limited, Farnham Surrey, 2012

Stiglitz J E: *Globalisation and Its Discontents*; Penguin Books, London, 2002

Stiglitz J E: *Making Globalisation Work*; Allen Lane, London, 2006

Stiglitz J E: *The Roaring Nineties: A New History of the World's most Prosperous Decade*; Penguin Books, London, 2003

Strandsbjerg J: *Territory, Globalization and International Relations*; Palgrave Macmillan, Basingstoke, 2010

Tabe H: *The Unravelling of Structured Investment Vehicles: How Liquidity Leaked Through SIVs (Lessons in Risk Management and Regulatory Oversight)*; Thoth Capital LLP, Great Britain, 2010

Triffin R: *Gold and the Dollar Crisis*; Yale University Press, New Haven, 1960

Tsoukalis L; *The New European Economy Revisited*; Oxford University Press, Oxford, 1997

Vincent J; *Realpolitik*, in Mayall J (ed), *The Community of States*; George Allen & Unwin, London, 1982

Walker G A: *European Banking Law: Policy and Programme Construction*; British Institute of International and Comparative Law, London, 2007

Walker G A: *The Global Credit Crisis and Regulatory Reform*; Edited by MacNeil I & O'Brien J: *The Future of Financial Regulation*; Hart Publishing, Oxford and Portland, Oregon, 2010

Wallace W: *The Sharing of Sovereignty: the European Paradox*; in Rawlings R, Leyland P, Young A: *Sovereignty and the Law: Domestic, European and International Perspectives*; Oxford University Press, Oxford, 2013

Watson A: *The Evolution of International Society*; Routledge, London, 1992

White G E: *Nation, State and Territory*; Rowman & Littlefield Publishers, Lanham, 2004

White G: *Nation, State, And Territory: Origins, Evolutions and Relationships Volume 1*; Rowman & Littlefield Publishers; Lanham, 2004

Williamson J: *The Failure of World Monetary Reform 1971-74*; New York University Press, New York, 1977

Wood G: *The Radicalism of the American Revolution*; Alfred A Knopf, New York, 1992

Zimmern A E: *Nationality and Government, with other wartime essays*; Chatto and Windus, London, 1918

ARTICLES

Agenor P R: *Benefits and costs of International Financial Integration: Theory and Facts*; The World Economy, Volume 26, Issue 8, August 2003

Alfaro L, Kalemli-Ozcan S and Volosovych V: *Capital flows in a globalised world: the role of policies and institutions;* The National Bureau of Economic Research Working papers, no. 11696, (2005)

Arestic P, McCauley K, and Sawyer M: *From Common Market to EMU: A Historical Perspective of European Economic and Monetary Integration.* The Jerome Levy Economics Institute Working Paper No. 263, (February 1999)

Arner D & Norton J J: *Building a framework to address failure of complex global financial institutions*; Hong Kong Law Journal, Volume 39, 2009

Arner DW: *The Global Credit Crisis of 2008: Causes and Consequences*; The International Lawyer; Volume .43, 2009

Bakker A F P, *The Liberalisation of Capital Movements in Europe*-The Monetary Committee and Financial Integration 1954-1994 (1996)

Barber T, Masters B & Parker G; *City fears UK is too weak to defend finance industry*, Financial Times (11 June, 2009)

Black J: *Managing the Financial Crisis- The Constitutional Dimension*; London School of Economics Law, Society and Economy Working Papers 12/2010

Boughton J; *A New Bretton Woods?*; Finance & Development; March 2009, Volume 46, No.1

Bouilhet A; *Paris compte faire plier la City*, Le Figaro (11 June, 2009)

Brenner R: *"What is Good for Goldman Sachs is Good for America The Origins of the Current Crisis"* Center for Social Theory and Comparative History, University of California Los Angeles; April 2009

Broadman H: *Africa's Silk Road, China and India's New Economic Frontier*; The World Bank, Washington, USA, 2007

Clark A:*How the Collapse of Lehman Brothers pushed Capitalism to the brink*; The Guardian (4 September 2009)

Clover C and Belton C: *Retreat from Moscow- Investors take flight as global fears stoke a Russian Crisis*; Financial Times (18 September 2008)

Cochran J: *Lessons from the Financial Crisis*; *Regulation*, Volume 32, No. 4; Winter 2009-2010

de Benoist A, '*What is Sovereignty?*' (1999) 116 Telos 99

Dominguez K.M.E.: *The European Central Bank, the Euro, and Global Financial Markets*; Journal of Economic Perspectives Volume 20, Number 4, 2006

Dooley M, Folkerts-Landau D, and Garber P: '*An Essay on the Revived Bretton Woods System'*; The National Bureau of Economic Research Working papers 9971(September 2003)

'EEC wants rules on banking harmonised,' *The Times* (16 January 1974)

Ehlermann C D: *'The Internal Market Following the Single European Act'* (1987) 24 Common Market Law Review, Issue 3

Eichengreen B: *Global Imbalances and the Lessons of Bretton Woods*; The National Bureau of Economic Research Working papers 10497 (May 2004)

Elliott L & Treanor J: *Lehman's fall to earth: the last hours of a Wall Street giant*; The Guardian, (3 September 2009)

Erlanger S: *Europe Looks to the IMF with unease as Greece struggles*; The New York Times, (24 October 2010)

Financial Times, *The economic crisis has ECB policymakers boxing clever*, (20 May 2009)

Fondad, The Hague, (December 2005)

Garcia-Herrero A & Wooldridge P: *Global and regional financial integration: progress in emerging markets*; Bank for International Settlement Quarterly Review, September, 2007

Guha K: *Embattled Wolfowitz seeks more cash*; Financial Times, (05 March 2007)

Hamid F; *Financial integration*: "*Key concepts, benefits and risks"; Integrating Europe's Financial markets*; Decressin J, Faruqee H and Fonteyne W (IMF, Washington DC, 2007)

Hankel W, Schachtschneider K A and Starbatty J: *Kein Bail-out zur Rettung des Euro-Raums. Frankfurter Allgemeine Zeitung*; Regling K, Deroose S, Felke R, Kutos P (eds): *The Euro after Its First Decade: Weathering the Financial Storm and Enlarging the Euro Area*, Asian Development Bank Institute Working Paper No. 205 (28 March 2009)

Honohan P and Lane P; *Will the euro trigger more monetary unions in Africa?;* United Nations University/World Institute for Development Economics Research Working Papers No. 176, 2000

International Monetary Fund, "*Regional Economic Outlook--Sub-Saharan Africa, Recovery and New Risk*" (IMF World Economic and Financial Surveys, April 2011)

Jones E: *Merkel's folly*; Survival, Volume 52, no.3 June-July 2010

Kew J and Patterson M; *"Nigeria Becomes World's Worst Market on Bank Losses"* Bloomberg, (1 April 2009)

Krugman P; *A Continent Adrift*, New York Times, (16 March 2009)

Levine R and Zervos S; *Stock Markets, Banks and Economic Growth*; (1998) 88 American Economic Review 536

Lowenstein R: *The Nixon Shock*; Bloomberg Business Week Magazine, (04 August 2011)

Mackintosh J, Parker G & Tait N; *Hedge funds threaten to quit UK over draft EU investment laws*, Financial Times (4 June, 2009)

Mayda A and Steinberg C; *Do South–South Trade Agreements Increase Trade? Commodity-Level Evidence from COMESA*, International Monetary Fund (IMF) Working Paper 07/40 (IMF, 2007)

Michel A : *Les banques françaises ont mieux résisté à la crise que leurs concurrentes*, Le Monde, (20 February2009)

Mistry P: *Africa's Record of Regional Co-operation and Integration*: (2000) 99 African Affairs 553

Montani G: *Which European Response to the Financial Crisis?;* Perspectives on Federalism, Volume 1, single issue, 2009

Nellor D; *The Rise of Africa's Frontier Markets*; Finance and Development, A quarterly magazine of the IMF; September 2008, Volume 45, Number 3

New York Times: *The U.S. Financial Crisis Is Spreading to Europe*, (30 September 2009)

Oreskes N: *The Scientific Consensus on Climate Change*; Science, (December 2004)

Parker G, Barber T and Dombe D: *"European Call for Bretton Woods II";* Financial Times; (16 October 2008)

Pearlstein S: *Forget Greece: Europe's real problem is Germany*. Washington Post, (21 May 2010)

Pelmans J: '*The role of the EU in the financial and economic crisis*'; Netherlands Institute for International Relations Clingendael, The Hague, (October 2009)

Pescatore P: *Some Critical Remarks on the 'Single European Act'*; 24 Common Market Law Review, Issue 9 (1987)

Portes R and Rey H: *The determinants of cross-border equity flows: the geography of information*; Centre for International and Development Economics Research Working Papers, no. C00-111 (2000)

Quintyn M & Taylor M W: *Regulatory and Supervisory Independence and Financial Stability* 8 (IMF, Working Paper WP/02/46, March 2002)

Quintyn M and Taylor M W: *Building Supervisory Structures in Sub-Saharan Africa – An Analytical Framework*; IMF Working Paper; Monetary and Capital Markets Department, (2007)

Rolbiecki J: *Dante's Views on the Sovereignty of the State*; The Catholic Historical Review; Volume 9, No. 1 (April 1923)

Rt. Hon Earl of Cromer (Governor of the Bank of England), *Bank of England Quarterly* (1962) 11

Salami A: '*African financial markets- going global or staying at home?*'; Journal of International Banking Law and Regulation 2011, 26(11)

Salami I: *Legal and Institutional Challenges of Economic Integration in Africa*; European Law Journal, Volume 17, No.5, September 2011

Salami I; *Financial Regulation in African frontier markets: can the EU approach work?*; Law and Financial Markets Review Volume 5, No. 5, September 2011

Samuel P Huntington- "*The clash of civilizations*"; Foreign Affair, 1993

Stewart J B; '*Eight Days – The battle to save the American financial system*'; The New Yorker (21 September 2009)

Taylor C: *"Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?"*: (1996-1997) 17 Northwestern Journal of International Law and Business 850

The Economist: *Greece's sovereign-debt crunch: A very European crisis*; 6 February 2010, Volume 394, Issue 8668

Toth A G; *On Law and Policy in the European Court of Justice*, Yearbook of European Law 1987

Walker G: *Credit Crisis, Bretton Woods II and a new global response: pt 2*; Butterworths Journal of International Banking and Financial Law, 2009

Wall Street Journal, *ECB's Work Isn't Yet Done*, (6 May 2009)

Weber R & Arner D; *Toward a New Design For International Financial Regulation*; University of Pennsylvania Journal of International Economic Law, Volume 29, 2007

Wolf M: *Germans are wrong: the eurozone is good for them*; Financial Times; (07 September 2010)

Wolf M: *The Greek Tragedy deserves a Global audience*; The Financial Times, (19 January 2010)

Zimmermann C D: *The concept of monetary sovereignty revisited*; European Journal of International Law, 08/2013, Volume 24, Issue 3

ACADEMIC COMMENTS

Walker G A: *Emerging Markets Law- One World, One Market*; University Lecture notes; University of Glasgow, distributed September 2012

Walker G A: *End of Poverty- Emerging Market Country Studies*; University Lecture Notes; University of Glasgow, distributed September 2012

Walker G A: *Financial Crisis- Three days in September*; University Lecture notes; University of Glasgow; distributed September 2010

Walker G A: *Global Development: A New Strategic Order And Priority Programme*; University Lecture notes; University of Glasgow, distributed September 2012

ONLINE RESOURCES AND OTHER PUBLICATIONS

"Financial Stability Forum Issues Recommendations and Principles to Strengthen Financial Systems", Financial Stability Forum Press Release 13/2009

Adichie C N; TED Talks Lecture: *The Danger of a Single Story*; Oxford, England; (July 2009); available online at: http://africa.harvard.edu/chimamanda-adichie-the-danger-of-a-single-story/

Africa embraces IFRSs: available at www.ifrs.org/News/Features/Africa+embraces+IFRSs.htm

African Development Bank Working Paper Series: *Impact of the Global Financial and Economic Crisis on Africa*; Working Paper No.96, March 2009. Available online at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/BAD%2096%20Anglais%20%20INTERNET%20PDF.pdf (accessed 20 June 2015)

African Union, *Regional Economic Communities: History and Background of Economic Community of Central African States*; available online at: http://www.africa-union.org/root/au/recs/eccas.htm

African Union, *Regional Economic Communities: History and Background of Economic Community of Central African States*, available online at http://www.africa-union.org/root/au/recs/eccas.htm

Arestic P, McCauley K, Sawyer M: *From Common Market to EMU: A Historical Perspective of European Economic and Monetary Integration.* The Jerome Levy Economics Institute Working Paper No. 263, February 1999; available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=156554

Articles of Agreement of the International Monetary Fund: available at: https://www.imf.org/external/pubs/ft/aa/

AU; *Minimum Integration Programme 2009-2012*; May 2009: available online at http://www.africa-union.org/root/ua/Annonces/2010/EA/MIP/MIP%20Small%20Doc%20English%20Version%20for%20Web.pdf

AU; *Minimum Integration Programme 2009-2012*; May 2009; available online at: http://www.africa-union.org/root/ua/Annonces/2010/EA/MIP/MIP%20Small%20Doc%20English%20Version%20for%20Web.pdf

Bank for International Settlements (BIS): *The International Inter-Bank Market: A descriptive study* (July 1983); available online at http://www.bis.org/publ/econ8.pdf

Basel Committee, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework* (Jun. 2004)

Basel Committee, *International Convergence of Capital Measurement and Capital Standards: A Revised Framework – Comprehensive Version* (Jun. 2006) (Basel II).

BBC article: *The MINT countries: Next economic giants?* Available online at: http://www.bbc.co.uk/news/magazine-25548060

Besson S: '*Sovereignty in Conflict*' (2004) 8(15) European Integration online Papers; available at: http://eiop.or.at/eiop/pdf/2004-015.pdf

Brunel C: *'Maghreb Regional Integration'*, Ch. 3, p.7 available at: https://piie.com/publications/chapters_preview/4266/03iie4266.pdf

Carnegie Endowment for International Peace: *Impact of the Financial Crisis on Africa*; 15 April 2009; available online at http://carnegieendowment.org/2009/04/14/impact-of-financial-crisis-on-africa-pub-22995 (accessed 20 June 2015)

Committee on Payment and Settlement Systems: *Core Principles for Systemically Important Payment Systems*' (Bank for International Settlements, January 2001); available online at: http://www.bis.org/publ/cpss34e.pdf

Communication of the Commission to the European Council, *Action Plan for the Single Market* (CSE (97) 1 final) of 4 June 1997

Consolidation in the Financial Sector (Bank for International Settlements 2001)

Constitution of the USA at: http://www.senate.gov/civics/constitution_item/constitution.htm#a3

Dammasch S: *The Sytem of Bretton Woods: A lesson from history;* available online at: http://www.ww.uni-magdeburg.de/fwwdeka/student/arbeiten/006.pdf

Doing Business, *Measuring Business Regulation: Explore Economies*; available online at: http://www.doingbusiness.org/rankings

ECB conference (13-14 November 2008): *The Euro At 10- Lessons and Challenges*; available online at: http://www.ecb.int/pub/pdf/other/euroattenen2009en.pdf

Ecobank: available online at: http://www.ecobank.com/group/aboutus.aspx

ECOWAS Protocol A/P1/7/91 on the Community Court of Justice Art 9(2)

ECOWAS Treaty 1975

ECOWAS Vision 2020; available online at: http://www.ecowas.int/wp-content/uploads/2015/01/ECOWAS-VISION-2020.pdf

Edmonds T and Marshall J: *European Responses to the Financial Crisis;* available at: http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snbt-05099.pdf

Edmonds T and Marshall J: *European Responses to the Financial Crisis;* available online at: http://www.parliament.uk/briefingpapers/commons/lib/research/briefings/snbt-05099.pdf

EU Commission Communication, *Financial Services: Building a Framework for Action* COM (1998) 625 final of 28 October 1998

EU Commission, *Fifth Progress Report* (30 November 2001)

EU Commission, *Financial Services: Implementing the Framework for Financial Markets: Action Plan,* COM (1999) 232, (11 May 1999)

EU Commission: *'Financial Services Commission outlines Action Plan for single financial market'* (11 May 1998) available at: http://europa.eu.int/comm/internal_maketen/en/finances/general/action.htm.

EU Commission: '*Financial Services Commission proposes Framework for Action*' (28 October 1998) available at: http://europa.eu.int/comm/internal_maketen/en/finances/general/fsen.htm

EU Commission: *First Progress Report* (29 November 1999)

EU Commission: *Fourth Progress Report* (1 June 2001)

EU Commission: *Second Progress Report* (31 May 2000)

EU Commission: *Sixth Progress Report* (3 June 2002)

EU Commission: *Third Progress Report* (8 November 2000)

European Commission, Communication, *European Financial Supervision*, COM (2009) 252 final (May, 27, 2009)

European Commission, Communication, *The Application of State aid rules to measures in relation to financial institutions in the context of the current global financial crisis*, 2008/C 270/02 (25 October 2008)

European Commission, Communication, *The recapitalization of financial institutions in the current financial crisis: limitations of aid to the minimum necessary and safeguards against undue distortions of competition* (Dec. 5, 2008)

European Commission, Press Release, *State aid: Commission approves Dutch emergency recapitalization of ING*, IP/08/1699 (13 November 2008)

European Commission, Press Release, *State aid: Commission approves joint aid from Belgium, France and Luxembourg to rescue Dexia*, IP/08/1745 (20 November 2008)

European Commission, Press Release, *State aid: Commission approves UK rescue aid package for Northern Rock*, IP/07/1859 (5 December 2007).

European Commission, Press Release, *State aid: Commission clears state aid to rescue and restructure Fortis Bank and Fortis Bank Luxembourg*, IP/08/1884 (3 December 2008)

European Commission, Press Release, *State aid: Commission opens in-depth investigation into restructuring of Dexia; authorizes certain urgent measures*, IP/09/399 (13 March, 2009)

Final Communique of the 1st Joint COMESA-EAC-SADC Tripartite Summit: *Towards a Single Market* ;Kampala, Uganda, 20 October 2008; available at: http://www.comesa-eac-sadc-tripartite.org/sites/default/files/documents/Final%20Communique%20%20The%20Tripartite%20Summit%202008.pdf

Final Communique of the 2nd COMESA-EAC-SADC Tripartite Summit held on 12 June, 2011 in Johannesburg, South Africa: available online at: http://www.comesa-eac-sadc-tripartite.org/sites/default/files/documents/Communique%20of%20the%202nd%20Tripartite%20Summit%20-%20English%20-%2012.06.2011.pdf

Final Report of the Committee of Wise Men, *The Regulation of European Securities Markets* (15 February 2001)

Financial Sector Integration in Three Regions in Africa (African Development Bank, Tunis, 2010): available online at: http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and Operations/AfDB%20Regional%20Financial%20Integration%20REPORT_EN.pdf

G10 *The Resolution of Sovereign Liquidity Crises: A Report to the Ministers And Governors prepared under the auspices of the Deputies* (1996); available online at: http://www.bis.org/publ/gten03.pdf

G7 Halifax Summit Communiqué, (June 16, 1995): available online *at* http://www.g7.utoronto.ca/summit/1995halifax/communique/index.html

H.M. Treasury; *Financial support to the banking industry*, Press Notice 100/08, (8 Oct. 2008) available at http://www.hmtreasury.gov.uk/press_100_08.htm

Helleiner E: *A New `Bretton Woods*`; available at http://www.cigionline.org/articles/2009/04/new-bretton-woods

Hobbes T; *Levitian*: online at http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html

http://dev.ihrda.org/doc/ecw.ccj.jud.01.04/view/

http://eur-lex.europa.eu/en/treaties/dat/12001C/htm/C_2001080EN.007001.htm

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF

http://igad.int/

http://news.bbc.co.uk/1/hi/business/4012869.stm

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619784

http://politics.ioconline.org/home.html

http://siteresources.worldbank.org/AFRICAEXT/Resources/Africa_Silk_Road.pdf

http://ssrn.com/abstract=1583066

http://ssrn.com/abstract=1590024

http://ssrn.com/abstract=1622274

http://sustainabledevelopment.un.org

http://www.au.int/en/member_states/countryprofiles

http://www.britannica.com/EBchecked/topic/415676/Ninety-five-Theses

http://www.ceeac-eccas.org/

http://www.ceeac-eccas.org/index.php/fr/a-propos-de-la-ceeac/organes-de-la-ceeac

http://www.cemac.int/

http://www.censad.org/index.php/la-cen-sad/organes.html

http://www.cilss.bf/

http://www.comesa.int/

http://www.cossesadc.org/

http://www.douala-stock-exchange.com/indiceref_us.php

http://www.eac.int/

http://www.ecowas.int/

http://www.ecowas.int/ http://igad.int/

http://www.ecowascourt.org/cases.html

http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090507+ANN-01+DOC+XML+V0//EN&query=QUESTION&detail=H-2009-0237&language=EN

http://www.financialstabilityboard.org

http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf

http://www.fsforum.org

http://www.g20.org/Documents/2008_communique_saopaulo_brazil.pdf

http://www.g20.org/Documents/Fin_Deps_Fin_Reg_Annex_020409__1615_final.pdf

http://www.g20.org/Documents/g20_communique_020409.pdf

http://www.g20.org/Documents/g20_summit_declaration.pdf

http://www.g20.org/G20/webapp/publicEN/publication/communiques/doc/G20%20Summit%20Declaration.pdf http://www.imf.org/external/np/exr/facts/surv.htm

http://www.imf.org/external/pubs/ft/fandd/2008/09/nellor.htm

http://www.imf.org/external/pubs/ft/wp/2007/wp0740.pdf

http://www.irishstatutebook.ie/en/constitution/index.html#part7

http://www.maghrebarabe.org/en/

http://www.nber.org/papers/w10497.pdf

http://www.nber.org/papers/w9971.pdf

http://www.ohada.com/traite.php

http://www.sacu.int/

http://www.sadc.int/themes/economic-development/finance/capital-markets/

http://www.state.gov/s/inr/rls/4250.htm

http://www.uemoa.int/Pages/Home.aspx

http://www.un.org/en/members/

http://www.un.org/millenniumgoals/

https://escholarship.org/uc/item/0sg0782h

IMF Report: *Impact of the Global Financial Crisis on Sub-Saharan Africa*: African Department, 2009; available at: https://www.imf.org/external/pubs/ft/books/2009/afrglobfin/ssaglobalfin.pdf (accessed 18 June 2015)

Initial Report of the Committee of Wise Men; *The Regulation of European Securities Markets* (9 November 2000)

Mabbett D and Schelkle W: *Beyond the Crisis- The Greek Conundrum and EMU Reform*; Forum arguments; *Challenges Facing the European Monetary Union*; available online at: http://www.intereconomics.eu/downloads/getfile.php?id=725

Martin D, Saba O and Alogna F: European Responses to the Financial Crisis: available online at: http://ssrn.com/abstract=1337586

Martinez L: '*Algeria, The Arab Maghreb Union and Regional Integration*'; Euromesco Paper, October 2006; available online at: http://www.euromesco.net/euromesco/images/59_eng.pdf

Maruping M; *Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination*: Africa in the World Economy - The National, Regional and International Challenges, Fondad, The Hague, (December 2005); available at: http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf

Mateus A: *The Current Financial Crisis and State Aid in the EU*; available online at: http://ssrn.com/abstract=1500532

Mayda A and Steinberg C; *Do South–South Trade Agreements Increase Trade? Commodity-Level Evidence from COMESA*, IMF Working Paper 07/40 (IMF, 2007); available online at http://www.imf.org/external/pubs/ft/wp/2007/wp0740.pdf

Montesquieu's The Spirit of the Laws (translated De L'Esprit des Loix); [Charles Louis de Secondat, Baron de Montesquieu: The Complete Works of M de Montesquieu (London: Evans T, 1777, 4 Volumes, Volume 1 available online at: http://oll.libertyfund.org/titles/837

O'Neill J: *Building Better Global Economic BRICS*; Global Economies Paper No: 66 available at: http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf

Oxford dictionary: http://www.oxforddictionaries.com/definition/english/enlightenment

Protocol A/P.l/7/91 on the Community Court of Justice: available online at: http://www.courtecowas.org/site2012/pdf_files/protocol.pdf

Protocol on the Statute of the African Court of Justice and Human Rights: available online at: http://www.au.int/en/sites/default/files/treaties/7792-file-protocol_statute_african_court_justice_and_human_rights.pdf

Regling K, Deroose S, Felke R, and Kutos P: *The Euro after Its First Decade: Weathering the Financial Storm and Enlarging the Euro Area*; Asian Development Bank Institute Working Paper Series No. 205, March 2010; available at: http://ssrn.com/abstract=1590024.

Revised Treaty establishing the Economic Community of West African States, 24 July 1993, (1996) 8 Afr. J. Int‘l & Comp. L. 187-227 [ECOWAS Treaty],

Roxburgh C, Dorr N, Leke A et al: *McKinsey Global Institute-Lions on the move: The progress and potential of African economies*; (June 2010) available online at http://www.mckinsey.com/insights/africa/lions_on_the_move

Sachs J: *The International Lender of Last Resort: what are the alternatives?*; available online at http://www.bos.frb.org/economic/conf/conf43/181p.pdf

Speech by Grimaudet F; *Remonstrances aux Etat's d'Angers* (1560) - to the Provincial Assembly of Angers on 14 October 1560

The Constitutive Act of the African Union (11 July 2000) [African Union Act); available online at: http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf

Treaty for the establishment of the East African Community, 30 November 1999, 2144 U. N. T. S. I-37437, Art 8(4)

Trichet J C: *The financial crisis and our response so far,* Keynote address by Jean-Claude Trichet, at the Chatham House Global Financial Forum, New York, 27 April 2009

ttp://www.au.int/en/organs/recs

UK Commission for Africa: '*Our Common Interest; Report of the Commission for Africa; March 2005'*; available online at: http://www.commissionforafrica.info/wp-content/uploads/2005-report/11-03-05_cr_report.pdf

UNECA: *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities*; (2006); http://www.uneca.org/sites/default/files/publications/aria2_eng.pdf

Wakeman-Linn J & Wagh S: *Regional Financial Integration: Its potential contribution to financial sector growth and development in Sub-Saharan Africa*; African Finance for the 21st Century, High- Level Seminar organised by the IMF Institute in collaboration with the Joint Africa Institute, Tunis, Tunisia, March 4-5 2008; Session IV: Beyond Banking: Regional Financial Integration; available at: http://www.imf.org/external/np/seminars/eng/2008/afrfin/pdf/wakemanlinn.pdf

Winston Churchill speech delivered at the University of Zurich, 19 September 1946; available at http://www.coe.int/t/dgal/dit/ilcd/archives/selection/churchill/ZurichSpeech_en.asp

World Bank data: available online at: http://data.worldbank.org/indicator/NY.GDP.MKTP.CD

World Development Indicators 2012; available at: http://databank.worldbank.org/data/views/reports/tableview.aspx?isshared=true&ispopular=series&pid=3

www.bloomberg.com/apps/news?pid=email_en&refer=home&sid=aHYaT8.nfkg0

www.ifrs.org/News/Features/Africa+embraces+IFRSs.htm

www.lse.ac.uk/collections/law/wps/wps.htm