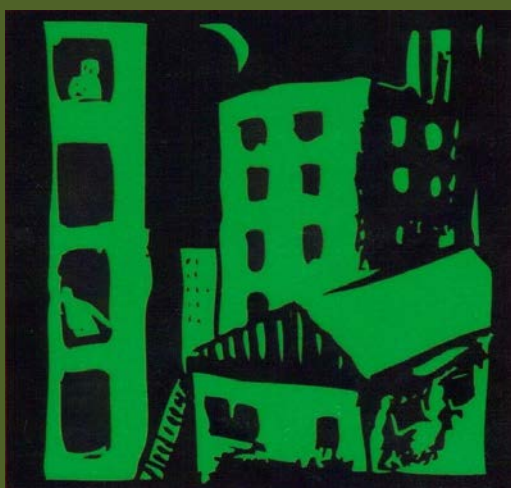


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**Revisiting legal
harmonisation
under the Southern
African
Development
Community Treaty:
The need to amend
the Treaty**

TAPIWA SHUMBA*

*Post-doctoral Fellow, Law, Science and
Justice RNA, Nelson R Mandela School of
Law, University of Fort Hare*

1 INTRODUCTION

International trade is important for economic development across the world including in Africa. Even the General Assembly of the United Nations has recognised that international trade is “the primary instrument for economic

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development.”¹ This is true for Africa which continues to struggle to shake off the bonds of poverty. In an effort to maximise participation in international trade, African countries have entered into various bilateral and multilateral trading agreements and arrangements with each other and with the rest of the world. This has culminated in various regional free trade areas and customs unions arrangements. These initiatives aim to promote the movement of goods, services, capital and people within the continent. However, to promote international trade, it is not adequate for them to merely focus on export promotion initiatives; “there is also a need to tackle impediments to trade, which includes the problem of diversity of laws.”² The continent’s colonial legacy which introduced arbitrary borders and foreign legal traditions has made the issue of harmonisation of laws even more imperative.³ The emergence of various legal harmonisation initiatives at regional level is testimony to the need for legal harmonisation within the African context. However, despite apparent legal diversity in SADC, there is not much tangible progress towards the harmonisation of laws. This raises the question whether this is due to lack of political will or whether there is scope for such harmonisation under the SADC Treaty. This article analyses the Southern African Development Community (SADC) objectives focussing particularly on whether legal harmonisation is achievable under the current SADC Treaty framework. It considers the question whether the current SADC Treaty creates an adequate framework for effective legal harmonisation using regionally adopted community laws. It proposes the amendment of the SADC Treaty to make legal harmonisation one of SADC’s objectives in line with similar initiatives on the African continent.

2 LEGAL HARMONISATION IN THE AFRICAN CONTEXT

The pressures of globalisation and the need for the harmonisation of laws are as prevalent in Africa as in the developed world.⁴ As far back as 1963, the Charter of the Organisation of African Unity obliged Member States “to co-ordinate and harmonise their general policies” in a number of fields, including economic co-operation.⁵ This focus on economic integration was entrenched with the signing and resultant ratification of the Abuja Treaty Establishing the African Economic Community in 1994 (Abuja Treaty).⁶ A successor to the Organisation of African Unity (OAU), the African

¹ United National Resolution 1707 (XVI) of 19 December 1961. Available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/60/IMG/NR016760.pdf?OpenElement> (accessed 16 June 2014). Bamodu G “Transnational law, unification and harmonization of international commercial law in Africa” (1994) 38(2) *Journal of African Law* 125 at 128.

² Bamodu (1994) at 128.

³ Fagbayibo B “Towards the harmonisation of laws in Africa: is OHADA the way to go?” (2009) 42(3) *CILSA* 309 at 310.

⁴ Schwenzer I “Regional and global unification of sales law” (2011) 13(3-4) *European Journal of Law Reform* 370 at 370.

⁵ See Art II (2) of the Charter of the Organization of African Unity, 49 UNTS 39/2 ILM 766 (1963).

⁶ See Arts 3 and 4 of the Treaty Establishing the African Economic Community signed on 3 June 1991 at Abuja Nigeria. Available at http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf (accessed 18 June 2014). See also Oppong RF “Private international law and

Union (AU) was formally launched at the Durban Summit in 2002.⁷ The AU is Africa's premier institution and principal organisation for the promotion of accelerated socio-economic integration of the continent. Among the objectives of the AU is the co-ordination and harmonisation of the policies of existing and future Regional Economic Communities (RECs).⁸ However, despite an emphasis on closer integration, no specific reference is made to legal harmonisation or the role of law in the integration process.⁹ The need for legal harmonisation can at best be deduced from the aspirations of the AU. The AU is not in itself an organisation for the harmonisation of laws; however, it is the epicentre of regional integration and the organisation from which the legitimacy of integration in African RECs also stems. The African RECs are seen as building blocks towards continental integration. The Abuja Treaty's paragraphs 1 and 3 of Article 88, hence, provide for the protocol on relations between the African Economic Community and RECs for the co-ordination, harmonisation and integration of these RECs under the African Economic Community.¹⁰

Apart from the Organisation for the Harmonisation of Business Laws in Africa (OHADA), a regional organisation for the harmonisation of laws; other RECs in Africa have also embarked on legal harmonisation. More important, for this discussion are, among others, the East African Community (EAC) and the Common Market for East and Southern Africa (COMESA), which have an intricate relationship with SADC. The approach these regional communities have adopted towards legal harmonisation has significantly exposed the shortcomings of the SADC Treaty on this subject.

The EAC was established in 1967, later dissolved in 1977, and only resurfaced in 2000. It is an organisation of five States in the eastern part of Africa, comprising Tanzania, Uganda, Rwanda, Burundi and Kenya. Its headquarters is in Arusha, Tanzania. According to the EAC Treaty, the objectives of the EAC are to develop policies and programmes aimed at widening and deepening co-operation and integration amongst its Member States. To that effect, the Member States agreed to co-operate in many areas,

the African economic community: a plea for greater attention" (2006) 3 *Journal of South African Law* 497 at 503; Oppong RF *Legal aspects of economic integration in Africa* (Cambridge: Cambridge University Press 2011) at 165-187.

⁷ Maluwa T "The transition from the Organisation of African Unity to the African Union" in Yusuf AA & Ouguerouz F (eds) *The African Union legal and institutional framework: a manual on the pan-African organization* (Leiden: Martinus Nijhoff Publishers 2012) at 31-32.

⁸ Article 3 of the Constitutive Act of the African Union signed on 11 July 2000 in Lome Togo. Available at <http://www1.uneca.org/Portals/ngm/Documents/Conventions%20and%20Resolutions/constitution.pdf> (accessed 15 June 2014). Integration is sought to be achieved gradually through Regional Economic Communities. See also Ferreira-Snyman MP & Ferreira GM "The harmonisation of laws within the African Union and the viability of legal pluralism as an alternative" (2010) 74(4) *THRHR* 608 at 609; Oppong (2006) at 503.

⁹ Oppong (2006) at 504.

¹⁰ See Preamble to the Protocol on Relations between the African Union and the Regional Economic Communities adopted on 28 February 1998. Available at <http://www.afrimap.org/english/images/treaty/AU-RECs-Protocol.pdf> (accessed 14 February 2014). See also Oppong (2011) at 165-187.

including legal matters. This new vision of the re-invented EAC is a reflection of the inspiration provided by the OHADA.¹¹

The aim of the EAC is to have regional commercial laws, particularly in those areas that fall within the ambit of the EAC Treaty.¹² The EAC enacted laws are automatically integrated into its Member States' domestic laws and "take precedence over the similar national laws in related matters."¹³ At regional level, the EAC is currently working on legislation on intellectual property law, contract law, public private partnership law, the law on the recognition of foreign commercial law, and the law related to enforcement measures and procedures for debt recovery. These uniform laws will become automatically binding once they are adopted by the East African Legislative Assembly. The EAC Court of Justice created under the Treaty has jurisdiction in all matters relating to the application and interpretation of the EAC Treaty. The Court also plays an advisory and counselling role to Member States on issues relating to the EAC Treaty laws, rules and procedures.¹⁴

The COMESA Treaty was signed on 5 November 1993 in Kampala, Uganda, and ratified in December 1994. The main goal of COMESA is to fully integrate the EAC and SADC into an economic union through trade and investment.¹⁵ Under the COMESA Treaty, the objective is to deepen and broaden the integration process among Member States through the adoption of more comprehensive measures. These measures include the harmonisation and approximation of laws of the Member States "to the extent required for the proper functioning of the common market."¹⁶ The harmonisation of laws is therefore an explicit goal of the COMESA. The area of harmonisation is broad and focuses on investment rules, regulations and practice. The COMESA created its own Court of Justice with an advisory and interpretive role on all issues relating to the Treaty and its provisions whilst also serving as a dispute settlement mechanism.¹⁷ It has jurisdiction to hear referrals from Member States and from the Secretary General of the COMESA as well as from natural or legal persons challenging decisions of Member States.¹⁸

¹¹ Idris MB "Harmonization of business laws in Africa - an insight into the laws, issues, problems and prospects" in Dickerson CM (ed) *Unified business laws for Africa: common law perspective on OHADA* 2nd ed (London: International Executive Development Programs 2012) at 23.

¹² Idris (2012) at 23-24.

¹³ Art 8 (4) of the Abuja Treaty.

¹⁴ EAC Treaty Art 28 (2). See also Idris (2012) at 24.

¹⁵ Art 3 of the Treaty establishing the COMESA signed on 5 November 1993 in Kampala, Uganda. Available at http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf (accessed 15 June 2014).

¹⁶ COMESA Treaty Art 4 (6) (b). See also Mancuso S "Trends on the harmonization of contract law in Africa" (2007) 13 *Annual Survey of International and Comparative Law* 157 at 172-173.

¹⁷ COMESA Treaty Art 19.

¹⁸ COMESA Treaty Arts 24-26.

SADC was formed to deepen economic integration for the attainment of economic growth and development in order to alleviate poverty.¹⁹ The overall aspirations of these regional communities are not different yet the provision for legal harmonisation under the SADC Treaty is glaringly missing, as will be shown below. The EAC and COMESA together with SADC have formed a tripartite relationship for the co-ordination and co-operation of the three RECs.²⁰ This was necessitated mainly by overlapping memberships of the three communities.²¹ The EAC and SADC have a strong relationship with COMESA in that most of the members of these two regional groupings are members of COMESA. The composite interrelationship between SADC, the EAC and COMESA reiterates the need for the harmonisation of trade laws as a necessary process for fostering and sustaining regional integration and economic development on the African continent.

3 THE SADC HISTORICAL OVERVIEW AND GENERAL BACKGROUND

SADC started as Frontline States whose objective was the political liberation of Southern Africa. SADC was preceded by the Southern African Development Coordination Conference (SADCC), which was formed in Lusaka, Zambia, on 1 April 1980, with the adoption of the Lusaka Declaration (Southern Africa: Towards Economic Liberation). The formation of the SADCC was the culmination of a long process of consultation by the leaders of the then only majority ruled countries of Southern Africa, namely, Angola, Botswana, Lesotho, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe, working together as Frontline States. On 17 August 1992, at their Summit held in Windhoek, Namibia, the Heads of State and Government signed the SADC Treaty and Declaration that effectively transformed the SADCC into SADC. The objective of the organisation shifted to include economic integration following the independence of the rest of the Southern African countries.²²

¹⁹ Oosthuizen GH *The Southern African Development Community: the organisation, its policies and prospects* (Midrand: The institute for Global Dialogue 2006) at 39.

²⁰ The Tripartite Task Force was established in 2005. The Tripartite Task Force, headed by the Secretaries General of the COMESA and the EAC, and the Executive Secretary of the SADC, has met at least twice per year since 2006. The main focus of deliberations has been the harmonisation of REC programmes in the areas of trade and infrastructure development. In 2007, the Tripartite Task Force recommended that a Tripartite Summit of Heads of State and the Government of COMESA, the EAC and SADC be convened. The envisaged Summit would give important direction and political endorsement to the Tripartite's efforts to harmonise their various programmes and would increase the buy-in of Member States. The recommendation was accepted and the Tripartite Summit was held on 22 October 2008 in Kampala, Uganda. See COMESA-EAC-SADC Tripartite website available at: <http://www.comesa-eac-sadc-tripartite.org/about/background> (accessed 18 June 2014).

²¹ The Tripartite Task Force is also addressing challenges of overlapping membership through harmonising programmes across the three RECs. See COMESA-EAC-SADC Tripartite website. See also Kwandelwal P "COMESA and SADC: prospects and challenges for regional trade integration" (2004) at 14 International Monetary Fund Working paper WP/04/227. Available at <http://www.imf.org/external/pubs/ft/wp/2004/wp04227.pdf> (accessed 17 June 2014).

²² Key developments in the formation of SADC are the following: in the 1970s Angola, Mozambique, Tanzania, Botswana and Zambia form a grouping called the Frontline States to fight Apartheid; in May 1979 in Gaborone, Botswana, the Foreign Ministers of the Frontline States called on the Ministers

SADC now consists of 15 countries which have a total population of approximately 277 million people, which is just slightly above half of that of the European Union.²³ Three countries, the Democratic Republic of Congo (DRC), South Africa and Tanzania account for almost two-thirds of the total population, while the six smallest members (Seychelles, Swaziland, Mauritius, Botswana, Namibia and Lesotho) comprise only about 3 per cent of the total population.²⁴ The major reason for integration is therefore the belief that there is strength in numbers and in unity, and that this strength can speed up the pace of development as well as enhance security.²⁵

On the economic front, SADC struggles to shake off the bonds of poverty and underdevelopment. The Gross Domestic Product (GDP) of the entire SADC region was USD 575 billion in 2010. To this GDP, services contribute 51 per cent, industry 32 per cent, and agriculture 17 per cent.²⁶ However, of the total GDP, South Africa has the dominant economy, accounting for about three-quarters of the SADC's GDP.²⁷ Agriculture is the back-bone of the SADC regional economy in that about 70 per cent of the SADC population depends on agriculture for food, income and employment.²⁸ SADC countries are rich in natural resources and minerals, which include precious and base metals, industrial minerals and precious stones.²⁹ It is imperative for SADC to transform its natural resources and economic potential into reality. To achieve this, conditions conducive to trade and investment must be created and sustained. It is pointless for SADC to pride itself with its vast natural resources whilst more than half of its population is languishing in extreme poverty.

responsible for Economic Development to meet and consider an economic development initiative for the region; in July 1979 in Arusha, Tanzania, the Ministers of Economic Development drafted a Declaration paving the way for the SADC Committee, on 1 April 1980 in Lusaka, Zambia, the Lusaka Declaration (Southern Africa: Towards Economic Liberation) was adopted by the founding Members, Angola, Botswana, Zambia, Tanzania, Zimbabwe, Malawi, Namibia, Mozambique, Swaziland and Lesotho, paving the way for the establishment of the SADCC; on 17 August 1992 in Windhoek, Namibia, the Heads of State of SADCC Members signed a Declaration and Treaty establishing the SADC, which shifted the focus from co-ordination of developmental projects to a more complex task of integrating the economies of Member States; on 29 August 1994, in Gaborone, Botswana, South Africa acceded to the SADC Treaty, which accession was ratified in September 1994 whereupon South Africa became a Member; and on 9 March 2001 in Windhoek, Namibia, an Extraordinary Summit approved recommendations to restructure SADC to give effect to the change in focus of the new demands of regional integration of SADC and to efficiently and effectively realise the new objectives. See <http://www.sadc.int/about-sadc/overview/history-and-treaty/> (accessed 26 June 2014).

²³ SADC website available at: <http://www.sadc.int/about-sadc/overview/sadc-facts-figures/> (accessed 26 June 2014).

²⁴ SADC website.

²⁵ Chingono M & Nakana S "The challenges of regional integration in Southern Africa" (2009) 3(10) *African Journal of Political Science and International Relations* 396 at 397.

²⁶ SADC statistics available at: <http://www.sadc.int/about-sadc/overview/sadc-facts-figures/> (accessed 26 June 2014).

²⁷ This dominance is not always a pleasure. As the saying goes, if her neighbours "do not eat, then she won't sleep".

²⁸ See "Food security and climate change in SADC." Available at www.sadc.int/REDD/index.php/download_file/94/ (accessed 26 June 2014).

²⁹ Chingono & Nakana (2009) at 398.

4 SADC OBJECTIVES

SADC recognises the sovereignty of its Member States, but also acknowledges the need to promote co-operation amongst them in order to address the challenges of the dynamic and increasingly complex regional and global environments. The main objectives of SADC spelt out in Article 5 of the Treaty of the Southern African Development Community (SADC Treaty) are to: promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication; enhance the standard and quality of life of the people of Southern Africa; support the socially disadvantaged through regional integration; promote common political values, systems and other shared values, which are transmitted through institutions that are democratic, legitimate and effective; consolidate, defend and maintain democracy, peace, security and stability; promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States; achieve complementarity between national and regional strategies and programmes; promote and maximise productive employment and utilisation of resources of the region; achieve sustainable utilisation of natural resources and effective protection of the environment; strengthen and consolidate the long-standing historical, social and cultural affinities and links among the people of the region; combat HIV/AIDS or other deadly and communicable diseases; ensure that poverty eradication is addressed in all SADC activities and programmes; and mainstream gender issues in the process of community building.³⁰

The SADC Member States agree that issues of underdevelopment, exploitation, deprivation and poverty can only be overcome through economic co-operation and integration. The objectives of SADC are sought to be achieved through harmonising the political and socio-economic policies and plans of its Member States; encouraging the people of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC; creating appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions; developing policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally; promoting the development of human resources; promoting the development, transfer and mastery of technology; improving economic management and performance through regional co-operation; promoting the co-ordination and harmonisation of the international relations of its Member States; securing international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region; and developing such other activities as Member States may decide in furtherance of the objectives of the SADC Treaty.³¹

³⁰ Article 5 (1) of the SADC Treaty.

³¹ Article 5 (2) of the SADC Treaty.

Looking at the objectives and aspirations of SADC, one cannot miss the running thread of regional integration and co-operation for economic development. Economic development is the pivot for achieving the goals and resolving the problems of the region. Economic development can never be detached from trade. Trade has become the main vehicle for economic development across the globe.³² States want to trade in order to improve the lives and welfare of their people. Co-operation on issues of trade has always been of strategic importance. Conflicts in the earlier part of the 20th century have shown how devastating the consequences of lack of co-operation in trade and economic development matters can be.³³

To achieve its objectives and implement its programmes, SADC has established a number of institutions. At the turn of the millennium SADC restructured itself, giving birth to more institutions and development plans. The SADC Treaty now provides for eight institutions, namely, the Summit of Heads of State or Government; the Organ on Politics, Defence and Security Co-operation; the Council of Ministers; the Integrated Committee of Ministers; the Standing Committee of Officials; the Secretariat; the Tribunal;³⁴ and the SADC National Committees. The Summit is empowered to create other institutions if necessary³⁵ and it in fact created the SADC Parliamentary Forum which is not provided for by the Treaty itself. These institutions play a critical role in the realisation of SADC's objectives. There cannot be any meaningful integration without strong institutions that drive the process. These institutions are therefore also important for the creation and sustaining of any process for the harmonisation of laws. Based on the experience in other regions, these institutions have the ability to foster integration and development if they are capacitated and supported with adequate resources and driven by political will.

5 TOWARDS A SADC COMMUNITY TRADE LAW

Internationally, there is much agreement that "conflicts and divergences arising from the laws of different states in matters relating to international trade constitute an

³² Grammling S "Reconciling trade and development in Southern Africa: challenges for trade unions" FES/NALEDI Training Course on "Trade and Development" for Trade Unionists of SADC Countries Johannesburg 9-11 July 2007 *Conference Report*. Available at <http://library.fes.de/pdf-files/bueros/genf/04973.pdf> (accessed 23 June 2014).

³³ World wars are also blamed on protectionism. See Lamy P *Managing global security: the strategic importance of international trade* (2007). Available at http://www.wto.org/english/news_e/spl_e/sppl66_e.htm (accessed 4 June 2014).

³⁴ The Tribunal is currently suspended pending its restructure. See point 24 of the Final Communiqué of the 32nd Summit of SADC Heads of State and Government, Maputo, Mozambique, 18 August 2012. This suspension is a step backwards as far as upholding the rule of law in SADC is concerned. See Ruppel OC "The case of Mike Campbell and the paralysation of the SADC Tribunal" in Laryea ET, Madolo N & Sucker F (eds) *International economic law voices of Africa* (Cape Town: Siber Ink 2012) at 152, where he concludes that "the rule of law is in a state of flux in SADC."

³⁵ Article 9 of the SADC Treaty.

obstacle to the development of world trade.”³⁶ In fact, the challenges posed by legal diversity in cross-border trading have been identified since the medieval era, hence the development of a *lex mercatoria*.³⁷ In the 20th century, the establishment of The Hague Conference, the International Institute for the Unification of Private Law (UNIDROIT) and most importantly the United Nations Commission on International Trade Law (UNCITRAL) was primarily based on the realisation that legal diversity might be a serious barrier to international commercial transactions, whether at regional or global level.

This article submits that in southern Africa, diverse, fragmented, archaic and inaccessible, laws are major barriers to the free flow of goods in the region and therefore affecting both intra-regional and international trade as well as the attraction of foreign investment.³⁸ The membership of the SADC represents at least three main legal families, namely, those of English common law, Roman-Dutch law, and civil law origin. Each country, in turn, recognises various sources of law, including African customary laws, religious laws and constitutional law. Every country has its own legal system, its own system of legal thought, its own method of law-making, and its own process of judicial determination of disputes.³⁹ Although there is no empirical evidence showing the direct relationship between economic growth and harmonised trade laws in SADC, scholars argue that there is the potential for increased trade in a more harmonised system due to the predictability and accessibility of the laws applicable, among other things. “The law, being a vehicle for economic co-operation and development, is required to facilitate ... growth; which is why with the need to increase international trade there has been a corresponding increase in the demand for legal co-ordination and harmonisation.”⁴⁰

Although there is no single definition of what constitutes legal harmonisation, in practice, it can be understood to be the removal of discord, and the reconciliation of contradictory elements between the rules and effects of two legal systems, often by

³⁶ Preamble to the United Nations General Assembly Resolution 2102 (XX) of 20 December 1965 *United Nations Commission on International Trade Law Yearbook Volume 1: 1968-70* (1971) 18.

³⁷ This was “a body of truly international customary rules governing the cosmopolitan community of international merchants who travelled through the civilised world from port to port and fair to fair.” See Schmitthoff CM “The unification of the law of international trade” (1968) *Journal of Business Law* 105 at 105.

³⁸ For a similar conclusion, see also Ndulo M “The need for the harmonisation of trade laws in the Southern African Development Community (SADC)” (1996) 4 *African Yearbook of International Law* 195 at 196.

³⁹ Ndulo (1996) at 195-196.

⁴⁰ Coetzee J & De Gama M “Harmonisation of sales law: an international and regional perspective” (2006) 10(1) *Vindobona Journal of International Commercial Law and Arbitration* 15 at 15. “Unified law promotes greater legal predictability as well as legal certainty, both essential for the investment climate and economic development in general.” Ruppel OC & Bangamwabo FX “The SADC Tribunal: a legal analysis of its mandate and role in regional integration” in Bösl A, Breytenbach W, Hartzenberg T, McCarthy C & Schade K (eds) *Monitoring regional integration in Southern Africa yearbook volume 8 2008* (Stellenbosch: Trade Law Centre in Southern Africa 2008) at 207.

eliminating major differences.⁴¹ The main essence of this harmonisation process in the context of international sales laws is that “... the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries.”⁴²

A community trade law that harmonises the different national laws of the 15 SADC Member States would provide traders with a single law applicable to transactions in the region. It would not only assist intra-regional trade but also trade with parties from other regions, obviating the need for establishing the applicable law by means of conflict of laws rules, which are often difficult to apply and create the opportunity for forum shopping.⁴³ Moreover, it could address the issue of access to the law which is often a problem in the African context, increase legal clarity, certainty and predictability, and at the same time provide neutral and modern law. The harmonisation of laws in the SADC region will reduce the need for specialist legal services that often come at a huge cost. This effectively would reduce the transaction costs associated with doing business in the region. In turn, that would enhance the opportunities for Small and Medium-Sized Enterprises (SMEs) to access markets and promote competition. Reduction in transaction costs and an increase in competition could contribute to economic development and attract foreign direct investment, which are key factors for poverty alleviation through economic growth.

However, on the other hand, it must be noted that others have also argued that the importance of legal harmony within the new global era could be overstated. It has been suggested that, in a free market economy, the law is in itself a major tool for competitiveness. Traders and investors must have the freedom to choose where to conduct their trade depending on the favourability of the jurisdictional laws. If a single applicable law is enacted for different countries, that choice is eliminated.⁴⁴ Secondly, harmonisation projects are generally established on the assumption that traders rank legal diversity as a real barrier to international trade.⁴⁵ It can be argued that the

⁴¹ Kamba WJ “Comparative law: a theoretical framework” (1974) 23(3) *International and Comparative Law Quarterly* 485 at 501; Mancuso (2007) at 159.

⁴² Goldring J “Unification and the harmonisation of the rules of laws” (1978) 9(3) *Federal Law Review* 284 at 289.

⁴³ Mistelis I “Is harmonisation a necessary evil? the future of harmonisation and new sources of international trade law” in Fletcher I, Mistelis L & Cremona M (eds) *Foundations and perspectives of international trade law* (London: Sweet & Maxwell 2001) at 21. Forum shopping refers to the notion of “unfairly exploiting jurisdictional or venue rules to affect the outcome of a lawsuit”. See Juenger FK “Forum shopping, domestic and international” (1989) 63(3) *Tulane Law Review* 523 at 553; Maloy R “Forum shopping? What’s wrong with that?” (2005) 24(1) *Quinnipiac Law Review* 25 at 28. Some believe there is nothing wrong with forum shopping; see Juenger FK “What’s wrong with forum shopping?” (1994) 16(1) *Sydney Law Review* 5.

⁴⁴ See Also DiMatteo LA “A curious case of transborder sales law: A comparative analysis of the CESL, CISG and the UCC” in Magnus U (ed) *CISG vs. Regional sales law unification: With a focus on the Common European Sales Law* Munich: Sellier European Law Publishers (2012) 25 at 52.

⁴⁵ See General Assembly Resolution 2205 (XXI) of 17 December 1966 section I, United Nations Commission on International Trade Law Yearbook Volume I: 1968-70 (1971) 65 on the establishment of

assumption that uncertainty and unpredictability are issues of concern for traders has not been adequately tested. There is a school of thought suggesting that cross-border flows are affected by other measures rather than by diverse trade laws; that is, traders do not rank legal diversity as a key determinant in choosing with whom to trade with.⁴⁶ Thirdly, the principle of party autonomy in contract laws makes harmonisation of trade laws somewhat illogical and unnecessary. Harmonisation instruments simply add to diversity through proliferation.⁴⁷ Fourthly, even if legal certainty and predictability are proved to be such important elements of international trade, it could be contended that harmonisation is not the only way, and also not the best way, to achieve it. Legal certainty and predictability could be achieved through creating awareness of the laws in the relevant investment destinations, for example, through scholarship and the adaptation of university curricula.⁴⁸ Fifth, it could be argued that diversity in itself is good and promotes competition because it affords investors an opportunity to choose the best amongst a host of competing legal regimes, and eventually the market will determine the best law.⁴⁹ Traders are not bound to trade with partners from legally unfavourable jurisdictions and can therefore factor the applicable law into their decision making process on which partners to trade with. Harmonised law thus dispenses with legal competition and can be regarded as a form of anti-competitive behaviour.⁵⁰

Despite arguments against legal harmonisation, various regions have found it an attractive option. SADC has many other issues on which to focus, such as, political development, peace and security in the region, as well as other serious concerns, such as, HIV and AIDS, high infant mortality rates, wars, political instabilities, and other factors which are major contributors to poverty and regional isolation. Should the region at this point in time be focussing on legal harmonisation, or rather concentrate on other pillars of regional integration? This article submits that there is no simple answer to this question. However, it is important to realise that the role of legal harmonisation is to facilitate trade. The increasing role of trade as a cornerstone of economic development which contributes towards poverty alleviation makes trade law

the UNCITRAL. See also Faria JAE "Future directions of legal harmonisation and law reform: Stormy seas or prosperous voyage?" (2009) 14 *Uniform Law Review* 5 at 10.

⁴⁶ See Goode R "Reflections on the harmonization of commercial law" in Cranston R & Goode R (eds) *Commercial and consumer law: National and international dimensions* Oxford: Clarendon Press (1993) 3 at 24-27.

⁴⁷ This criticism has also been levelled against the recent Common European Sales Law proposal. See Kornet N "The Common European Sales Law and the CISG - Complicating or simplifying the legal environment?" (2012) 18 *M-EPLI Maastricht European Private Law Institute Working Paper No. 2012/4* available at <<http://www.ssrn.com/abstracts=2012310>> (accessed 10 September 2013).

⁴⁸ See Ndulo (1996) at 221.

⁴⁹ See Hobhouse JS "International conventions and commercial law: The pursuit of uniformity" (1990) 106 *Law Quarterly Review* 530 at 534-535 and also DiMatteo (2012) at 52.

⁵⁰ See also Hobhouse (1990) at 535.

reform indispensable. The benefits of a harmonised law of international trade outweigh the challenges that could arise.⁵¹

In this respect, although legal harmonisation in SADC still faces certain challenges, the need for harmonised law is compelling. Apart from the diversity of legal cultures and traditions and the challenge posed by the diversity of languages and overlapping or multiple memberships of RECs, other challenges, such as, the significant absence of well-developed and efficient institutional arrangements to co-ordinate and facilitate the harmonisation of laws in SADC and the lack of resources and capacity to carry out and sustain the harmonisation process also pose significant challenges. However, the broader and long term needs of the region require some form of harmonisation of laws to be applied in the different Member States.⁵² As Rabel has said in the context of international harmonisation:

To avoid these complications and to substitute a reasonably concise body of clear and simple written rules could not be a loss, and still less would it be a loss to have to consult only one law commented on by the courts and scholars of the world instead of innumerable different foreign legislations.⁵³

It is therefore a conclusion of this article that the point has been reached where the issue is no longer *whether* the harmonisation of laws should be achieved, but rather *how* it can be achieved.⁵⁴ Many of the challenges facing legal harmonisation can be counteracted by choosing an appropriate technique for the harmonisation of laws.⁵⁵ However, it is important that the method or technique used should always be determined by the prevailing circumstances in a region because the nature and level of harmonisation required in a particular area depend entirely upon its specific circumstances.⁵⁶ At this stage the question still remains: despite the compelling need for legal harmonisation in SADC, why has such harmonisation not been undertaken under the SADC Treaty framework?

⁵¹ See Goode (1993) at 24-25 where he lists the numerous advantages of harmonisation and suggests that the criticisms of harmonisation are not persuasive.

⁵² Allott AN "Towards the unification of laws in Africa" (1965) 14(2) *International and Comparative Law Quarterly* 366; Allott A "The unification of laws in Africa" (1968) 16(1-2) *American Journal of Comparative Law* 51; Bamodu (1994) at 125-143.

⁵³ Rabel E "Draft of an international law of sales" (1938) 5(4) *The University of Chicago Law Review* 543 at 546.

⁵⁴ Harmonisation is generally inevitable. See David R "The methods of unification" (1968) 16(1-2) *American Journal of Comparative Law* 13 at 14. In the SADC, this article has also shown that there is great benefit in harmonising national sales laws.

⁵⁵ For legal harmonisation techniques see generally, Mistelis (2001) at 16-17; Rosett A "Unification, harmonization, restatement, codification, and reform in international commercial law" (1992) 40(3) *American Journal of Comparative Law* 683; David (1968) at 13-27; Hobhouse (1990) at 535. Evans MD "Uniform law: a bridge too far?" (1995) 3(1) *Tulane Journal of International and Comparative Law* 145 at 157-160 also offers some suggestions for making harmonisation more efficient.

⁵⁶ Cuming RCC "Harmonization of law in Canada: an overview" in Cuming RCC (ed) *Perspectives on the harmonization of law in Canada* (Toronto: University of Toronto 1985) at 3-4.

The SADC Treaty empowers various institutions to carry out certain mandates for the attainment of its objectives. In order to achieve its objectives, among other things, SADC endeavours to “harmonise political and socio-economic policies and plans of Member States”.⁵⁷ Article 6(1) also clearly states that “Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.” Article 21(1), furthermore, requires that all SADC Member States should “cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit” and Article 21(2) requires that Members States to “coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects in the areas of co-operation” through the appropriate institutions. Whereas this sounds permissive and appears to allow SADC to take “all necessary measures”, including legal harmonisation in trade matters, as one of the areas of co-operation, there does not seem to be any institution competent to make directly binding regional laws. Although instruments, such as, protocols can be adopted at regional level, these remain subject to acceptance at national level by responsible authorities. The current SADC legal and institutional framework does not vest, at least, any explicit authority in the Organisation to adopt binding legal instruments for direct application in the individual SADC Member States.

Article 10 of the Treaty provides that the SADC Summit as the supreme policy making body of SADC is responsible for the overall policy direction and control of the functions of SADC.⁵⁸ It empowers the Summit to adopt legal instruments to implement and attain the objectives of the Treaty. The Summit can also delegate this authority to the Council of Ministers or any other institution of SADC as it may deem appropriate. The Council of Ministers, under Article 11, has power to make recommendations to the Summit on any action aimed at attaining the objectives of the Community.⁵⁹ It has powers to define and add to the sectors of co-operation and allocate, to Member States, responsibility for co-ordinating sectorial activities, or re-allocate such responsibilities. Considering the fact that SADC is an “international organisation”,⁶⁰ whose Members act in accordance with the principles of “sovereign equality”,⁶¹ and not a supranational organisation which would, to some extent, be inherently vested with some measure of authority over member countries, it cannot be argued that these powers and procedural mechanisms can be utilised in SADC to introduce a binding community law.⁶² In an

⁵⁷ Article 5 (2)(a) of the SADC Treaty.

⁵⁸ Art 10 of the SADC Treaty.

⁵⁹ Arts 11 (2) and (3) of the SADC Treaty.

⁶⁰ Art 3 (1) of the SADC Treaty.

⁶¹ Article 4 (a) of the SADC treaty. The term “probably means sovereignty and equality, two generally recognized characteristics of the States as subjects of international law”, see Kelsen H “The principle of sovereign equality of states as a basis for international organization” (1944) 53 *Yale Law Journal* 207 at 207.

⁶² However, Ndulo believes “these are important powers which can be used to further the harmonisation of law and trade practices within the Community.” See Ndulo (1996) at 215. Wandrag R “Unification of

international organisation, measures that have a bearing on member countries cannot simply be assumed since in these kinds of arrangements States retain a fair measure of independence and sovereignty. The other institutions find themselves in even less authoritative positions. The Secretariat comes only as close as “the co-ordination and harmonisation of the policies and strategies of Member States” and “submission of harmonised policies and programmes to the Council for consideration and approval.”⁶³

The only form of binding legislative instrument provided for under the SADC Treaty is a protocol in terms of Article 22. In theory it would thus be possible to adopt a harmonised SADC law using the protocols route. At first glance this would seem to be the answer. However, the procedure for the adoption of protocols does not appear to vest superseding legislation making authority to the Summit. Moreover, this process does not seem to have been created for such a purpose. Protocols are not community law *per se* that is to apply directly to all Member States but rather function similarly to international agreements between contracting States. SADC Member States conclude such protocols as may be necessary in each area of co-operation, which spell out the objectives and scope of, and institutional mechanisms for, co-operation and integration.

Protocols are approved by the Summit on the recommendation of the Council and opened for signature and ratification. The effectiveness of the harmonisation instrument will therefore depend on the ease and speed with which it can be introduced and implemented both at the organisational level and in the Member States. A protocol only comes into operation upon ratification by two-thirds of the Member States, which is equal to ten SADC Member States at the moment. Protocols are only binding on the Member States that have ratified them and decisions on protocols are reserved only for those who are party thereto. Reservations are not allowed. Currently, this is the only way in which a binding instrument can be concluded under the SADC Treaty, which seems to be an unconvincing route for the harmonisation of trade laws. The fact that a protocol can come into effect when ratified by ten of the 15 States is further evidence that it cannot be used as a mechanism for creating harmony. Worse still, states that are not interested in the protocol can simply shy away from it. Although adoption by the Summit creates the expectation that the protocol will be ratified and come into force at some stage, this is not guaranteed. In fact, the ratification of SADC protocols is slow and takes time to come into effect but, most importantly, protocols generally do not receive ratification from all 15 Member States.⁶⁴

Southern African contract law” (2011) 13(3-4) *European Journal of Law Reform* 451 at 461 also concurs and submits that SADC institutions are sufficiently empowered by the SADC Treaty to successfully complete the process of the unification of contract laws. This conclusion is disputed. The manner in which SADC protocols are adopted and operationalised does not seem to have legal harmonisation in mind. It is also argued that SADC would not endeavour to further the harmonisation of laws simply by implication in this manner. Harmonisation of laws is therefore not, at least, a stated objective of SADC.

⁶³ Article 14 of the SADC Treaty.

⁶⁴ As at 13 August 2010, a compilation done by TRALAC available at http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/SADC_LEGAL_INSTRUMENTS_INFORCE_23_JUNE_2010_-

With due regard not only to the wording of the SADC Treaty but also considering the respect accorded the principle of state sovereignty under the SADC framework, it is argued that the current SADC framework does not, at least, make it an objective of SADC or impose an obligation on Member States to pursue the harmonisation of laws. In short, it is not possible to pursue effective binding approaches to legal harmonisation under SADC Treaty simply because the Treaty does not create an adequate framework for such harmonisation. For legal harmonisation to take place within a regional community there needs to be an adequate framework thereof. The objective to “harmonise policies and programmes” viewed in the context of other regional approaches, such as, the EAC and COMESA, can hardly be regarded as including legal harmonisation. This is logically correct considering that the SADC Treaty does not provide for specific mechanisms, such as, institutions and programmes, for such harmonisation. Institutions are not simply the names attached to them. For instance, most of the SADC institutions mirror those of the EAC, COMESA, OHADA and the European Union (EU) in name. However, as is often said, the devil is in the detail. Whereas institutions in these other regional organisations are empowered and capacitated by the founding treaties to enact and adopt regional laws that apply directly in member countries without the need for ratification, SADC institutions do not have the same authority. SADC institutions cannot attempt to enact community laws without at the same time acting *ultra vires*. There is therefore need to amend the SADC Treaty and create an enabling framework.

6 CREATING AN ENABLING LEGISLATIVE FRAMEWORK - AMENDING THE SADC TREATY

The SADC Summit has to date adopted binding and non-binding legal instruments in the form of protocols, declarations and guidelines using the powers vested in it by the SADC Treaty. An example relevant to legal harmonisation is that of the SADC Model Law on Electronic Transactions and Electronic Commerce⁶⁵ recently adopted by the SADC Ministers of Telecommunication, Post and ICT, which seeks to enhance electronic commerce in the region by improving and modernising national laws. This is an example of a soft law effort towards the harmonisation of laws, which shows that precedents for the harmonisation and facilitation of commerce already exist in SADC. However, such instruments lack any force. The ICT Model Law is a product of the International Trade Union (ITU) created for the SADC. The ITU claims that the Draft Model Law was “reviewed, discussed and validated by broad consensus by participants of the workshop organised in collaboration with CRASA and SADC

_REVISED_13-08-2010.pdf (accessed 26 June 2014) shows that SADC Member States are reluctant to ratify Protocols.

⁶⁵ The Model Law that was prepared by the International Telecommunication Union under the auspices of the project on the harmonisation of policies in Sub-Saharan Africa is available at: http://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf (accessed 16 June 2014).

Secretariats held in Gaborone, Botswana from 27 February to 3 March 2012” and “further adopted by the SADC Ministers responsible for Telecommunications, Postal and ICT at their meeting in Mauritius in November 2012”.⁶⁶ This process and its role players who are mostly non-State actors show why there is no obligation on SADC states to adopt the principles of the Model Law. In any case, the Model Law itself does not impose any obligations. In reality, it was made for SADC, but not by SADC, though with some input from SADC actors, perhaps for legitimacy. It is simply available for those States that care to look at it in developing their national laws. Of course, in a new and emerging subject, such as, ICT law, some countries that are still lagging behind in this area will find the Model Law useful in developing their national laws, but that is not to say they will follow it, yet that is the crux of harmonisation. Thus, the usefulness of this approach, like any model laws drafted and adopted by non-state actors, is negligible. It is not binding and, worse still, not a community law created under the auspices of SADC. An amendment to the Treaty that would explicitly provide for legal harmonisation, the procedure for creating harmonised community laws, and the implementation mechanisms for that would provide greater legitimacy, clarity and urgency to the whole process. The OHADA, COMESA and EAC Treaties may present guiding examples in this regard. The Treaties explicitly make legal harmonisation an objective of these organisations. They provide for the process of adopting such laws and stipulate the overriding status of those laws vis-à-vis national laws. Thus, without an enabling supreme law, there can hardly be any meaningful legal harmonisation. The SADC Summit can effect these amendments in terms of Article 36 of the SADC Treaty.⁶⁷

Interestingly, the amendment of the SADC Treaty appears to be the easier decision that the Summit can make. Although Summit decisions are generally made by consensus, the Treaty can be amended by a three-quarters majority.⁶⁸ It seems therefore that the best route to address the issue once and for all is by amending the Treaty, which is the supreme law of SADC, so that the process of legal harmonisation can become one of the overall objectives of SADC, rather than attempting piecemeal harmonisation through protocols, which were arguably not designed for this purpose.

Of course the suggestion to amend the Treaty to create a binding system of legal harmonisation sounds impossible to reconcile with the experience of the SADC

⁶⁶ See ITU acknowledgements attached to the Model Law available at: http://www.itu.int/en/ITU-D/Projects/ITU-EC-ACP/HIPSSA/Documents/FINAL%20DOCUMENTS/FINAL%20DOCS%20ENGLISH/sadc_model_law_e-transactions.pdf (accessed 16 June 2014).

⁶⁷ Art 36 of the SADC Treaty provides that “an amendment of this Treaty shall be adopted by a decision of three-quarters of all the Members of the Summit and further that a proposal for the amendment of [the] Treaty may be made to the Executive Secretary by any Member State for preliminary consideration by the Council, provided, however, that the proposed amendment shall not be submitted to the Council for preliminary consideration until all Member States have been duly notified of it, and a period of three months has elapsed after such notification.”

⁶⁸ Article 10 (9) of the SADC Treaty requires Summit decisions to be taken by consensus whilst Art 36 (1) provides that a decision to amend the Treaty shall be adopted by three-quarters of all Members of the Summit.

Tribunal. The *Campbell* case⁶⁹ and the debacle around the SADC Tribunal portray SADC States as not willing to assume binding obligations. It creates an impression that SADC Member States are prepared to willy-nilly violate the obligations imposed on them under the SADC Treaty and other binding instruments. The demise of the SADC Tribunal also creates a further impression that there is consensus in SADC that agreements and State obligations are not important and can be disregarded at will. In that context, admittedly, it sounds absurd to create more rules in a rules-based system⁷⁰ that has failed.⁷¹

However, perhaps the issues around the SADC Tribunal have also clouded scholarly judgement. Looking at how SADC has intervened in countries, such as, Zimbabwe, Lesotho and the DRC, to resolve conflicts, and the steps it took to restore order in Madagascar, including suspending the country's membership of the SADC, show that SADC also has another reputation that is less talked about.⁷² Even in the context of the SADC Tribunal, Zimbabwe could not wantonly claim to be disregarding the Tribunal and SADC. Judging from the way SADC has been able to tackle some contentious issues, mainly around peace and security, there is reason to believe that such an attitude on the part of Zimbabwe would invite some form of sanctions by the regional body. Fortunately for Zimbabwe and unfortunately for those who do not agree with arguments raised against both the judgements and legitimacy of the SADC Tribunal, Zimbabwe found support from other Member States, for example former Tanzanian President, Mr Jakaya Kikwete, who pointed out that SADC had unknowingly created "a monster".⁷³

In this context, it must be observed that SADC Member States, and perhaps many sovereign States for that matter, would always want to limit the obligations they can undertake at international level where possible. However, where those obligations are clear and raise legitimate expectations, States generally want to maintain a reputation

⁶⁹ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) Case No. 2/2007.

⁷⁰ The SADC system should be treated as a rules-based system. Erasmus G "Is the SADC trade regime a rules-based system?" (2011) 1 *SADC Law Journal* 17 at 32.

⁷¹ Saurombe A "Towards a new paradigm for SADC regional integration: has the rules-based system failed?" *Inaugural Lecture, Senate Hall, UNISA*, 17 March 2015 CD on author's file. In this inaugural lecture, Prof Saurombe asks the question whether the rules-based system has failed in SADC and calls for the tightening of the rules.

⁷² The SADC Extraordinary Summit "suspended Madagascar from all the Community's institutions and organs until the return of the Country to constitutional normalcy" following the unconstitutional takeover of power in that country. See Communiqué: Extraordinary Summit of SADC Heads of State and Government Lozitha Royal Palace, Kingdom of Swaziland, 30 March 2009 point 16. The suspension was lifted in 2014. See Communiqué of the Extraordinary Summit of SADC Heads of State and Government Addis Ababa, Ethiopia, 30 January 2014 point 16.

⁷³ London DG "SADC summit: Beheading the monster" (2012) available at <http://www.economist.com/blogs/baobab/2012/08/sadc-summit> (accessed 2 August 2015). See also "Killing the 'monster'" (2011) *NewsAfrica* available at <http://www.newsafrika.net/en/news/1565/killing-the-monster.html> (accessed 02 August 2015).

of compliance.⁷⁴ Therefore, limiting obligations or not creating them is not the best way to get around what appears to be the undermining of the rules-based system in SADC. A commendable approach would be to create clearly defined obligations under the Treaty that are enforceable by SADC itself. It should not be forgotten that SADC Member States are also parties to other binding international agreements, including harmonising projects, which means the argument that SADC Member States are reluctant to be bound by regional agreements might not be accurate.

The existing system of protocols fails in so far as it leaves Member States with an option of whether to ratify or not. The problem therefore is not one of disregarding obligations, but rather avoiding obligations. Once obligations have been assumed, in other words, once protocols are ratified, there have not been reports of wanton disregard of obligations that stem from them. An automatically binding system of legal harmonisation deriving its authority from the SADC Treaty, once established, creates unavoidable obligations.⁷⁵ This is where a directly binding community law beats optional protocols in as far as SADC is concerned.

Such a supranational community law should be directly binding on all Member States without the option of reservations and declarations in order to achieve maximum harmony.⁷⁶ The law making process should therefore follow the style of the EAC, COMESA or OHADA Uniform Acts which are adopted at regional level to automatically apply directly in Contracting States superseding any national law to the contrary.⁷⁷ Otherwise, national authorities delaying the adoption of the instrument could diminish the effectiveness of the community law. To address linguistic issues that might arise, the law must be drafted in all the official and working languages of SADC, namely, English, French and Portuguese. To emphasise: there should not be translations but rather, the instruments should be *co-drafted* in the different languages to ensure maximum conformity of the different texts in the various languages. The law must provide procedures for its regular review and possible revision or amendment so that it does not become a “static monument” as it loses touch with realities of the ever-changing trading environment.

Institutions also play a pivotal role in the creation and sustaining of a harmonised community law. Because a community law cannot be managed by one Member State alone, it needs some form of supranational institution to drive and monitor the process. Most of the relevant institutions are available within the current

⁷⁴ “A list of factors that influences the reputational impact of a violation, therefore, should include the severity of the violation, the reasons for the violation, the extent to which other states know of the violation, and the clarity of the commitment.” Guzman AT “A compliance based theory of international law” (2002) 90 *California Law Review* 1823 at 1861 and 1863.

⁷⁵ Saruombe (2015) makes a similar suggestion.

⁷⁶ Declarations allowed under the (CISG) have weakened the Convention and have been criticised for causing disharmony.

⁷⁷ OHADA Uniform Acts apply automatically 90 days after publication in the Official Journal of OHADA. See Art 9 of the Treaty on the Harmonisation of Business Law in Africa.

SADC institutional set up, albeit needing some degree of transformation. Transformation will thus target mainly the SADC Parliamentary Forum and the SADC Tribunal. At this stage the SADC Parliamentary Forum is “something of a talking shop”,⁷⁸ with neither oversight of nor influence in the legislative processes in the SADC. The efforts to transform the SADC Parliamentary Forum should be accelerated.⁷⁹ The SADC Parliamentary Forum should be given legislative authority to deal with regional legislative matters, particularly community laws. The current pace of protocols and their lack of ratification show that there is a need for a regional parliament that enacts directly applicable community legislation from a regional level.

The current situation regarding the SADC Tribunal is somewhat disturbing, to say the least. The Tribunal is an integral part of SADC and should be strengthened to discharge its mandate rather than being elbowed aside by politicians. The current transformation of the Tribunal should take into consideration the role that it can play in the harmonisation of laws in SADC. Certainly, the fact that the Tribunal’s jurisdiction will be streamlined to deal with disputes amongst States only⁸⁰ is a further cause for concern in this context. Traders in the private sector who use a harmonised community law are the ones that long for certainty. The Tribunal should be empowered to deal with disputes emanating both from State agreements and also uniform private law. The fear that citizens will drag their governments to the Tribunal as in the *Campbell* case⁸¹ could be dispelled by giving the Tribunal jurisdiction for two distinct categories of disputes, namely State versus State disputes as already envisaged, and private person versus private person disputes dealing with harmonised private law.

Importantly, legal harmonisation can only properly be achieved in a system that respects the rule of law. SADC Member States should commit themselves to the rules they have agreed on and treat them as binding on them. They should, in other words, maintain and sustain the current rules-based system. The tendency to renege on regional obligations in the guise of preserving state sovereignty should end. SADC Member States should understand that regional intergovernmental organisations do not take away their national State sovereignty. Instead, by joining regional organisations, States relinquish part of that sovereignty to the supranational organisation in order to facilitate the achievement of regional goals. It has been noted in the Sutherland Report that:

⁷⁸ Christiansen T “The European Commission: The European Executive between continuity and change” in Richardson J (ed) *European Union: power and policy making* (London: Routledge 2001) at 116.

⁷⁹ The SADC Parliamentary Forum has taken upon itself to draft a Protocol on a SADC Parliament with legislative and oversight authority. This move is unprecedented because SADC protocols are generally prepared through the Secretariat, forwarded to the Council and then recommended to the Summit by the Council. It is not clear yet whether the Summit will adopt this Protocol.

⁸⁰ See Final Communiqué of the 32nd Summit of SADC Heads of State and Government Maputo, Mozambique 17-18 August 2012 point 24. See also Final Communiqué of the 34th Summit of SADC Heads of State and Government, Victoria Falls, Zimbabwe August 18, 2014 points 18 and 23(i).

⁸¹ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* SADC (T) Case No. 2/2007.

Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally this is exactly why “sovereign nations” agree to such treaties. They realise that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise.⁸²

7 CONCLUSION

In the end, it is important to note that business laws, and in particular trade laws, need to be harmonised to facilitate trade. To achieve that, SADC must create an enabling framework by amending the SADC Treaty to address a number of key issues. First, the amendment to the Treaty must make the harmonisation of laws one of the objectives of SADC. Secondly, it must provide for the procedures and mechanisms to adopt harmonised community laws that are directly applicable in Member States. Thirdly, it must reform the SADC Parliamentary Forum into a regional legislative body, which can enact laws that are directly applicable in Member States. Fourthly, other available institutions, such as, the SADC Tribunal,⁸³ must be adequately capacitated to ensure effective application and implementation of the harmonised law. However, all of this can only take place if the leadership in the region has the adequate political will to achieve harmonisation. As Ruppel points out, “without political will and good faith on the part of ... states to meet and comply with their obligations as spelt out in ratified treaties and conventions, economic regional integration is likely to remain a concept on paper.”⁸⁴

It must be mentioned that the recommendations to amend the SADC Treaty and make further institutional reforms may sound far-fetched and unrealistic considering the knowledge of and arguments on the lack of political will in SADC. However, that is also, to some extent, half the story of the SADC and probably the aspect for which the SADC leadership is remembered the most. It must not, however, be forgotten that issues of transformation, institutional reform and Treaty amendment are not new for SADC. The Organisation has now transformed itself more than three times, from the Frontline States through SADCC to SADC, which was also comprehensively reformed at the turn of

⁸² Sutherland P *The future of the WTO: addressing institutional challenges in the new millennium* (Geneva: WTO 2004) at 29.

⁸³ The critical role of the Tribunal in the context of legal harmonisation should not be understated. The 34th SADC Summit in August 2014 at Victoria Falls, Zimbabwe, adopted and signed a new Draft Protocol on the Tribunal thereby opening it up for ratification by Member States. See Final Communiqué of the 34th Summit of SADC Heads of State and Government, Victoria Falls, Zimbabwe, 18 August 2014 point 18 and 23(i). However, it is disappointing that the signed Draft Protocol on the Tribunal gives the Tribunal jurisdiction over inter-State disputes only. Furthermore, there is no guarantee that the Tribunal’s rulings will finally be respected. It remains the case that “the question whether SADC will be advanced enough to apply lessons from sophisticated and well developed systems such as the EU and to give effect to the rulings of its judicial organ remains open for the time being.” See Ruppel OC “The SADC Tribunal, regional integration and human rights: major challenges, legal dimensions and some comparative aspects from the European legal order” (2009) 2 *Recht in Afrika* 203 at 228.

⁸⁴ See Ruppel OC “ECAS 2011 – 4th European Conference on African Studies Uppsala 15-18 June 2011” quoted by Ngaundje LD “Regionalism: lessons the SADC may learn from OHADA” (2012) 75 *THRHR* 256 at 364.

the millennium. Over the past 30 years, once every decade, SADC has, at least on paper, held some self-introspection to try and “meet the challenges of globalization.”⁸⁵ Therefore, to the extent that they assist SADC to fully participate in the new globalised economy through facilitating international trade for economic growth, development and poverty alleviation, the recommendations to amend the SADC Treaty are realistic and may, within the wisdom of the SADC leadership, be considered for implementation where possible.

⁸⁵ See Preamble to the SADC Treaty.