

January 1995

Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process

P. Kenneth Kiplagat

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

P. Kenneth Kiplagat, Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process, 23 Denv. J. Int'l L. & Pol'y 259 (1995).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.

Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process

Keywords

Obligations, Treaties, International Law: History, Maritime Law, Commercial Law, Investment

Legal Status of Integration Treaties and the Enforcement of Treaty Obligations: A Look at the COMESA Process

P. KENNETH KIPLAGAT*

I. INTRODUCTION

Integration treaties are international treaties that bring together different countries as equals. Such integration treaties necessarily impact the domestic jurisdictions of the Member States and interfere with their sovereignty. It is important, therefore, that those States be equipped to handle the interference caused by this impact through legislative and judicial developments adopted by the Member States.

The key theme of this paper is the role of law in the management and consolidation of regional integration in developing countries. It examines the general attitudes of developing countries towards treaties, in general, and the resulting domestic legislation, in particular. To do this, Section II discusses State relations as a function of treaty law. Section III explores the observance of treaties by developing countries. Section IV describes the specific impact of integration treaties on domestic jurisdiction. Section V analyzes the impact of treaty law on domestic law. Section VI describes the methods through which developing countries have harmonized their domestic law to comply with the treaties. Section VII concludes the article.

II. STATE RELATIONS AS A FUNCTION OF TREATY LAW

Interaction between states is made possible by the existence of international law which is primarily¹ the product of customary inter-

* J.S.D. Candidate, Yale Law School; LL.M. Yale Law School, 1992; LL.B. University of Nairobi; Lecturer, University of Nairobi.

1. Article 38(1) of the STATUTE OF THE INTERNATIONAL COURT OF JUSTICE is traditionally taken as the archetypal proclamation of the sources of international law and mandates the International Court to apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The above is the traditional view, but it is no longer accepted by some scholars who are persuaded that international law is a constitutive process of authoritative pre-

national law and treaty² law. In participating in this interaction, States exercise the highest measure of their sovereignty. The Permanent Court of International Justice determined that though "any convention creating an obligation . . . places a restriction upon the exercise of the sovereign rights of the state . . . the right of entering into international engagements is an attribute of State sovereignty."³ To the extent that participation in treaty-making presupposes the exercise of recognized sovereign authority, a criteria to evaluate such participation is imperative. This criteria has evolved and discarded most of its obsolete traits.⁴ Two such traits, that only "christian"⁵ or "civilized"⁶ States could claim the right to be *bona fide* subjects⁷ of international

scriptions of fundamental community policy. See, Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959). See *infra* notes 30-32; and W. MICHAEL REISMAN, NULLITY AND REVISION 555 (1971).

Prof. Reisman in his contribution to this area of study states that:

[t]he root problem of enumerated sources such as are found in article 38 is that of priorities. In point of fact, the problem of priorities is artificial, since authoritative international policy does not present itself for application with a convenient label affixed, specifying its sources. International prescription is an ongoing process. The purport of a convention cannot be grasped without consideration of prior and subsequent customary developments, their consonance with general principles, and the response of quasi-authoritative doctrine.

2. The International Law Commission provisional draft on the law of treaties defined a "treaty" as:

any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

Draft Articles on the Law of Treaties, 2 Y.B. INT'L L. COMM'N 161, U.N. Doc. A/CN.4/SER.A/1962/Add.1 (1962).

3. S.S. Wimbledon (U.K. et al v. Germany), 1923 P.C.I.J. (ser. A) No. 1, at 25.

4. See generally David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT'L L.J. 1 (1986) (providing a historical analysis).

5. B.V.A. ROLING, INTERNATIONAL LAW IN AN EXPANDED WORLD 21 (1960).

This divine imploration in the overall context of European imperialism of the time was used as:

the justification of, or the legal title to, the domination of non-Christian peoples. The quality of Christian Nation conferred the legal title to the domination of the 'barbarian' 'heathen' world. The biblical 'Go and instruct all peoples' the '*compelle intrare*,' was the justification of subjection and domination. It provided that inner certainty and self-confidence are essential for a ruling position.

6. *Id.* at 27. Whereas the criteria of "civilization" may have been intended to embody a shared cultural and social facsimile, the whole notion was sufficiently nebulous to permit a Japanese diplomat, following his country's admission to the "civilized" world, to quip, in not very whimsical savour: "We show ourselves at least your equals in scientific butchery and at once we are admitted to your council tables as civilized men."

7. As opposed to "objects" of international law, which comprised all "heathen"

law, survived until the nineteenth century. A measure of objectivity⁸ has now been ingrained into the process with the adoption of a new set of standards⁹ for the determination of statehood and, consequently, participation in international state relations.

As international customary law has failed to keep pace with the growing sophistication of international interactions, treaties have progressively assumed dominance as sources of international law.¹⁰ An attendant corollary to this new prestige has been the naturing, through consent and often times through subtle duress, of a higher degree of fidelity to treaties.¹¹ Without diminishing the economic efficiency that treaties have precipitated in international relations, it is legitimate to conclude that the previously self-styled "civilized" states spotted an opportunity to conveniently perpetuate their privileged position in treaties¹² and to this extent have influenced other states to assign the same measure of fidelity to treaties. This perception has influenced the attitude of developing countries towards treaties.¹³

and "uncivilized" States, it would of course, be a contradiction of terms to label such entities as States using the same criteria.

8. BIERLY JAMES LESLIE, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* (1958) (Objectivity in this sense does not relate to the material and substantive evaluation of the subject, but rather reflects a move to a non-whimsical evaluative criteria).

9. The Montevideo Convention on the Rights and Duties of States is widely acknowledged as having coalesced competing criteria into a definite set of rules and provides at Article 1 that:

The State as a person of international law should possess the following qualifications:

- (a) a permanent population;
- (b) a defined territory;
- (c) government; and
- (d) capacity to enter into relations with the other States.

Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 1925. The United Nations Charter provides:

Membership in the United Nations is open to all other peace loving States which accept the obligations contained in the present Charter and, in the judgement of the Organization, are able and willing to carry out these obligations. U.N. CHARTER art. 4.

10. A.J.G.M. SANDERS, *INTERNATIONAL JURISPRUDENCE IN AFRICAN CONTEXT* 177 (1979). According to Sanders, "it may well be that the relative importance of treaty law as a manifestation of international law is increasing rapidly."

11. Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2358-59 (1991) (The Allied victory in World War II contributed to this development).

12. See generally Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 HAGUE RECUEIL 137 (1953).

13. *Id.* (This does not suggest that it is an illegitimate way of creating international law. Acquiring and maintaining a privileged position is consistent with the power and policy understanding of international law).

III. DEVELOPING COUNTRIES AND TREATY OBSERVANCE

The decline in esteem which developing countries¹⁴ accorded international treaties was produced by two experiences. The first relates to the succession of new states to international treaties and the second to the frustrations of developing countries resulting from their inability to effect material remodelling of international law. Speaking to the former experience, developing countries emerging from colonial subjugation found it onerous to yield to an international regime whose essence derived from a set of "principles by which the Western Powers agreed to live and to conduct their business."¹⁵ In concrete terms, these countries had¹⁶ two options: (1) succumbing to the conservative view¹⁷ which held that new States were born into an already preexisting legal system, upon which they depended for their creation and existence,¹⁸

14. In the discussion that follows, note that Latin American countries do not fit perfectly into the picture sought to be created because these countries had both a long history and a different colonial experience.

15. S. PRAKASH SINHA, *NEW NATIONS AND THE LAW OF NATIONS* 23 (1967).

16. Past tense is utilized here, and in the following discussion, because in material terms the debate is no longer considered useful, and when it is revived, as is oft to happen, it assumes a more sophisticated tenor.

17. The literature on the subject sometimes refers to this view as the "positivist" view. This school of thought concludes that for new States to legally join the international community they:

must formally enter into the circle of law-governed countries . . . [and] do something with the acquiescence of the latter ["civilized" States], or some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconstruction.

WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* 47 (1924).

Some adherents refused admittance of new States to the international community claiming that "[a]n undignified compulsion to admit these entities as full-blown members of the international society upon achieving independence has impeded, not advanced, the emergence of a mature code of conduct." A.V. Freeman, *Professor McDougal's 'Law and Minimum World Public Order'*, 58 AM. J. INT'L L., 711, 712 (1958). L. C. Green warns that wanton recognition and grant of equal status to new States would result in "a breakdown of rules and the reassertion of anarchy". L.C. Green, *The Impact of New States on International Law*, 4 ISRAEL L. REV. 27, 31 (1969).

Thus, law is intrinsically objective and the binding force of legal rules is unrelated to the attitudes of states toward these rules. Georges Abi-Saab, *The Newly Independent States and the Rules of International Law*, 8 HOW. L. J. 95 (1962). See also MORTON KAPLAN & B. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961); and W. FRIEDMAN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

18. The philosophical justification being that:

[T]he sovereign State is an intellectual artifact; its character, its form, and its qualities derive from a theoretical exposition of political organization which is nothing if not Western and has its roots in the Age of Reason as much as has international law. New States can hardly claim the privileges and faculties of States and yet repudiate the system from which these derive; yet this is precisely what the argument involves. It overlooks that a State, when it commences to exist as a State, does so

or (2) embracing the naturalist¹⁹ view which proclaims that for any rules of international law to be accepted *erga omnes*, they must obtain the consensus of the great majority of States, including the new States.²⁰ Although it would be fallacious to pretend that developing countries had an unvarying response,²¹ it is nevertheless true that, by and large, the latter view represented the majority opinion.²² The Nyerere Doctrine²³ best elucidates this majority view and embraces the *tabula rasa* or clean-slate argument.²⁴ The argument adopts the presumption that new States come into existence without assuming the obligations of their predecessors.²⁵ Obligations that predecessor States owed lapse upon the declaration of independence and the new States have an absolute right of election as to which rules of interna-

in a structural context which gains its form from law, just as a child when born into society becomes subjected to it by virtue of the order of being in which it is integrated.

D.P.O. O'Connell, *The Role of International Law*, 95 DAEDALUS 636 (1966).

19. M. Mushkat, *Some Remarks on the Factors Influencing the Emergence and Evolution of International Law*, 7 NETHERLANDS INT'L L. REV. 341 (1961) (Cited also as the sociological view).

20. BIERLY JAMES LESLIE, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 9 (1958).

21. OKON UDOKANG, *SUCCESSION OF NEW STATES TO INTERNATIONAL TREATIES* 10 (1972) (There have been many instances which display a vacillation towards traditional norms of international law by developing countries).

22. Herbert Kraus, *Systèmes et Fonctions des Traités Internationaux*, 50 RECUEIL DES COURS 311, 322 (1934). Attitudes of many new States are best understood by analyzing the definitional character of treaties. A majority of these States preferred the following definition:

treaties in international law are unions of wills, in solving obligations between members of the community governed by international law.

From this premise, new States argue that during colonialism they were not able to express their will and were, therefore, incapable of executing treaties. Paradoxically, colonial powers regarded indigenous people as incompetent to enter into treaties but insisted that they be bound by treaties executed by these powers when independence was finally granted. See, e.g., *Ole Njogo and Others v. Attorney General and Others* [1914] 5 E.A.P.L.R. 90. The court after describing the Maasai as "... a large nomad tribe of pastoralists and warriors who have in the past proved a terror and scourge to the surrounding peoples" concludes that:

... it would seem that an agreement between a civilized State and uncivilized community is not governed by International Law. It must however, I think, be taken to be governed by some rules analogous to International Law and to have similar force to that held by a treaty, and must be regarded by Municipal Courts in a similar manner

Id. at 98.

23. See, *Materials on Succession of States, United Nations Legislative Series*, 1967, at 177, United Nations, Secretariat, U.N. Doc. ST/LEG/SER.B/14 (1967); *Joseph Salli Poonyane Molefi v. The Government of Lesotho* [1967-1970] LESOTHO L.R. 237, 254-259 (Derived from a declaration deposited with the Secretary-General of the United Nations on December 9, 1961 and signed by Prime Minister Nyerere of Tanzania).

24. See generally YILMA MAKONNEN, *THE NYERERE DOCTRINE OF STATE SUCCESSION* (1984).

25. *Id.* at 54.

tional law they wish to recognize as binding upon them.²⁶

The second experience relates to the post-independence woes that the majority of developing countries have endured. The political grant of independence bestowed little more than formal equality with old States. Because these new States comprised a majority of the world's most impoverished countries, both in political as well as economic terms,²⁷ momentum was generated towards the infusion of material essence into this formal equality.²⁸ This led new States to question the legitimacy of international treaties which perpetuated what they perceived to be an inequitable and biased international regime. In another posture, this logic evolved into the New International Economic Order (NIEO)²⁹ crusade.

This article does not adopt or approve the above arguments as they relate to the conceptualization of international law. In fact, the stance taken by new States respecting international law is misguided. The world is an arena in which States, albeit very important players, accept policies on the basis of enlightened self-interest.³⁰ Within this framework, international law evolves as a fusion of authoritative power and effective control, informed by a flow of decisions resulting in the formulation, invocation and application of policies for the promotion of predetermined community goals.³¹ Under this framework, international law closely approximates the minimum power that international elites are ready to cede for the sake of attaining a minimum, and workable, world communion. These elites are constantly engaged in the preservation of their interests and owe very little fidelity to ab-

26. *Id.* See also MUDIMURANWA MUTITI, STATE SUCCESSION TO TREATIES IN RESPECT OF NEWLY INDEPENDENT AFRICAN STATES (1976); THE INTERNATIONAL LAW ASSOCIATION, THE EFFECT OF INDEPENDENCE ON TREATIES (1965).

27. B.H. SIMAMBA, AN AFRICAN PREFERENTIAL TRADE AREA 123 (1993) (Simamba, commenting on the relevance of poverty on the practice of international law among members of the PTA, concludes that "[a] young and large economic grouping comprising basically poor, economically insecure countries, cannot be expected to easily accept a superior international order.").

28. SANDERS, *supra* note 10, at 125. (The argument sought to create some relevance to the numerical superiority of new States in international legislative fora).

29. The NIEO is a concept strongly supported by developing countries which seeks to introduce equitable principles in trade and economic relations between developed and developing countries. The origin of this concept, at least in its popular form, is credited to the Bandung Conference of Asian-African States of 1955. See Asian-African Conference Communique, Bandung, 24 April, 1955, A NEW INTERNATIONAL ECONOMIC ORDER: SELECTED DOCUMENTS 1945-75 1:2-3 (1975). See generally T. FRANK & M. MANUANSANGU, THE NEW INTERNATIONAL ECONOMIC ORDER: INTERNATIONAL LAW IN THE MAKING? (1982); Karl P. Sauvant, *The NIEO Program: Reasons, Proposals, and Progress*, CHANGING PRIORITIES ON THE INTERNATIONAL AGENDA: THE NEW INTERNATIONAL ECONOMIC ORDER 78-138 (1981).

30. See generally McDougal, *supra* note 12, at 9. (This may also be expressed as the "syndrome of parochialism."). See also Freeman, *supra* note 17, at 715.

31. *Id.* at 181.

strict notions of international law that fail to take into account this dynamic.³² Given that international elites are not motivated by altruism, unless of course such altruism simultaneously perpetuates their interests, it is unrealistic for new States to presume that their numerical superiority, and nothing more, can compel the old states to compromise their interests.

It is, however, critical to make a distinction between the objective evaluation of the character of international law and the subjective understanding of international law. Whereas the former forms the basis for proper theoretical analysis, the latter, even in its erroneous articulation, informs decisions of many new states.³³ In order to understand the way new States treat and practice international law it is critical to appreciate these attitudes.³⁴ This should not be taken to mean that there exists a general animosity among the new states toward international law but rather that new states disapprove of order that they perceive to be unjust. The above discussion illuminates one crucial point: the attitude of new States towards international law has generally eroded the fidelity that these states accord regional treaties, which are a genre of international law. One consequence of this attitude is evident in the treatment of treaties by national courts.

IV. INTEGRATION TREATIES IN DOMESTIC JURISPRUDENCE

Before delving into the precise investigation of integration treaties in municipal law, an understanding of the theoretical background of this subject is essential.³⁵ Analysis of how existing theories on the subject, and the judicial interpretations they have spawned, have affected and influenced the treatment of integration treaties in developing countries remains important. The question has traditionally been framed as one involving a conflict between monist and dualist theo-

32. H. Laski, *Morris Cohen's Approach to Legal Philosophy*, 15 U. CHI. L. REV. 575 (1947-48). Addressing this general dissatisfaction with traditional notions of international law, Laski notes that:

[w]hat has done most damage of all is the effort to think of law and the law maker as something abstracted from life and living, a quasi independent existence of its own.

33. C. Wilfred Jenks, *State Succession in Respect of Law-Making Treaties*, 29 BRIT. Y.B. INT'L L. 105, 108 (1952) (Jenks notes that "[t]he psychology of newly won independence is a formidable reality, and juristic speculation on state succession which ignored it would be an altogether unprofitable exercise.").

34. UDONKANG, *supra* note 21, at 9. See also W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 318 (1964). Relating these attitudes to economic factors, Friedmann concludes that:

[i]n the present as it has done in the past and will do in the future, a status of economic underdevelopment will produce certain attitudes and approaches toward international law, which will change or even be reversed as the underlying conditions change.

35. Koh, *supra* note 11, at 2351-52.

ries.³⁶ Taken to its logical conclusion, the inquiry addresses the difference between international law on the one hand and municipal law on the other. It is not difficult to see why this difference between international law and municipal law forms part of the inquiry. Loosely defined, and acknowledging that numerous exceptions exist, international law is a law that regulates the relations between sovereigns whereas municipal law, generally speaking, regulates the power structure and relations operating within a state. Because often times the two systems of law purport to apply to the same set of facts at the same time, a tension arises which necessitates the establishment of rules to delimit the jurisdictions of the two regimes.

According to the dualist school, international law and municipal law compete on a horizontal plane, each with its own sphere of influence.³⁷ When the issue is so posited, the controversy ceases to exist because no possibility of conflict can arise when each regime has its own exclusive area of competence. Because of this difference:

. . . the Law of Nations can neither as a body nor in parts be *per se* a part of Municipal Law. Just as Municipal Law lacks the power of altering or creating rules of International Law, so the latter lacks absolutely the power of altering or creating rules of Municipal Law. If, according to the Municipal Law of an individual State, the Law of Nations as a body or in parts is considered to be part of the law of the land, this can only be so either by municipal custom or by statute, and then the respective rules of the Law of Nations have by adoption become at the same time rules of Municipal Law.³⁸

The monist school sees international law as intrinsically superior to municipal law and any dispute between the two, even within the municipal sphere, ought to be resolved in favor of the former.³⁹ This school asserts that international and municipal law are "manifesta-

36. Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2292-94 (1991).

37. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 37 (1967). Oppenheim lists three determinative differences between municipal law and international law as being:

(i) that in respect of sources, municipal law evolves from municipal customs and statutes enacted by the local sovereign; (ii) that whereas municipal regulates relations between individuals *inter se* and between individuals and the State, international law is concerned with the relations between States; (iii) that "whereas Municipal Law is a law of a sovereign over individuals subjected to his sway, the Law of Nations is a law not above, but between, sovereign States, and is therefore a weaker law."

38. *Id.*

39. H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950). (The main thrust of Prof. Lauterpacht's thesis is the elevation of the individual to a lawful subject of international law and thereby elimination of the need to relate international law to sovereigns).

tions of a single conception of law."⁴⁰ "It is only by reference to a higher legal rule in relation to which they are all equal, that the equality and independence of a number of sovereign States can be conceived".⁴¹

Several scholars have criticized Borchard's misgivings stemming from the fact that both schools fail to acknowledge that the two regimes are linked and that an interdependence between the two exist.⁴² McDougal, in line with his theory of international law,⁴³ warns of the futility of regarding the inquiry as one needing hierarchical rules for its resolution. Rather, the proper approach should be to look at the entire social and power processes in which powers of national and international elites coalesce to produce certain desired common interests.⁴⁴ McDougal's view best explains the inconsistencies that the application of the monist and dualist theories have produced when analyzing the same fact patterns.

Switching to practice, international treaty law⁴⁵ and international tribunals⁴⁶ have consistently pronounced that international obligations are not negated by contrary domestic law when the issue is before an international tribunal. However, no such certainty can be found when the issue relates to the place and competence of international law in domestic adjudication. Aside from those countries that expressly acknowledge the supremacy of international law in their constitutions,⁴⁷ most countries require that a qualitative step be taken to transform international law into binding domestic law. In the absence of such transformation, municipal courts refuse to acknowledge the existence of such law within their domestic jurisdictions. The practice

40. *Id.* at 38.

41. *Id.* After laying the foundation for his basic norm theory, Kelsen concludes that:

Since the basic norms of the national legal orders are determined by a norm of international law, they are basic norms only in a relative sense. It is the basic norm of the international legal order which is the ultimate reason of validity of the national legal order, too.

HANS KELSEN, *GENERAL THEORY OF LAW AND THE STATE* 367-8 (1945).

42. Borchard, *The Relation Between International Law and Municipal Law*, 27 VA. L. REV. 137, 140 (1940).

43. See generally McDougal, *supra* note 12.

44. Myres S. McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S. L. REV. 25, 37-38 (1959).

45. Article 27 of the Vienna Convention on the Law of Treaties, adopted May 22, 1969, opened for signature May 23, 1969, reprinted in 8 I.L.M. 679 (1969) states that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

46. See Greco-Bulgarian Communities, 1930 P.C.I.J. (ser. B) No. 17, at 32 (the Permanent Court of International Justice, in an advisory opinion, stated that:

it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty).

47. *E.g.*, FRENCH CONST. art. 55; STATUUT. NED. [Constitution] art. 66.

of the United Kingdom and the United States will help focus on the two philosophical approaches that predominate in this area.

A. *The United Kingdom's Experience*

The United Kingdom, with its unique character of not having a constitution, makes a distinction between customary international law and treaty law. So far as customary international law is concerned, English law (the common law position) regards international law as automatically forming part of the law of England.⁴⁸ Sir William Blackstone is credited with the refinement of this approach and the following passage is said to capture its modern exposition:

In arbitrary states this law [of nations], wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since, in England, no royal power can introduce new law, or suspend the execution of the old, therefore the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be part of the law of the land.⁴⁹

In so far as treaties are concerned, English law mandates that these have to undergo "transformation" by an act of parliament to imbue them with efficacy within the domestic arena. The justification for this rule is that while the conduct of foreign affairs falls solely within the executive's prerogative, the executive may not legislatively effectuate this power since parliament is the only body vested with legislative power.⁵⁰

B. *The United States' Experience*

In the United States the preeminence given to the Constitution means that no treaty can stand if it offends a constitutional provision. As will be shown below⁵¹, this constitutional focus is stronger than that exhibited by most EEC countries and partly explains some of the dispute resolution mechanisms that the United States has adopted when entering into regional integration.⁵² Justice Sutherland's state-

48. *Triquet v. Bath*, 97 ENG. REP. 936, 938 (K.B. 1764); *Heathfield v. Chilton*, 98 ENG. REP. 50, 51 (K.B. 1767). (The central figure in the articulation of this approach, as the two cases indicate, was Lord Mansfield).

49. 4 WILLIAM BLACKSTONE, COMMENTARIES 5:67. (This is the general preposition and, like most such prepositions in law, has several exceptions: e.g., a rule of international law will not be applied if it is contrary to a statute). *Mortensen v. Peters* 8 F. (J.C.) 93 (1906). See also, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 45-50 (1978).

50. See, *The Parlement Belge*, 4 PD 129 (1879); *Attorney-General v. De Keyser's Royal Hotel Ltd.*, 1920 App. Cas. 508; *Regina v. Kent Justices, ex parte Lye and Others*, 2 QB 153 (1967).

51. See *infra* notes 80-82 and accompanying text.

52. William Graham, addressing the issue in the context of the GATT, Uruguay

ment in *U.S. v. Curtiss-Wright Export Corporation*⁵³ that the United States' treaty power "must be exercised in subordination to the applicable provisions of the Constitution" represents the United States' position.⁵⁴ Ratification by Congress is, therefore, mandatory. However, the internal effects of a treaty may not be repealed by an ordinary statute on the doctrine of *lex posterior* since ratification infuses constitutional status into these treaties.⁵⁵ The fidelity that the United States accords international treaties has recently been questioned following a series of controversial Supreme Court decisions culminating in the *Mexican Abduction* case.⁵⁶

Having analyzed the general attitudes of various countries towards treaty law and having presented a picture of the domestic treatment of treaties, the next task is to investigate the extent to which these attitudes and practices have had an impact on the formulation and implementation of regional integration treaties. A comparative analysis of the EEC, the ANDEAN Group, and the East African Community experiences shows how these attitudes have affected practice. Close attention must be paid to the divergent opinions that very similar treaty provisions have produced in the different regions.

C. The EEC's Experience

The EEC Member States' attitudes towards integration treaties has been greatly influenced by past experiences under provisions of the ECSC days when the High Authority, the Community's main auton-

Talks has stated that,

The United States, at least until then, had always resisted the notion of a dispute resolution. The U.S. Senate had indicated clearly in the *Nicaragua* case that it was not in the tradition of the United States to accept the surrender of sovereign power where a multilateral body would determine binding rules, interpret them, and say: 'United States, you must do this, or you must do that.' The Europeans were even less willing to accept that.

William Graham, Remarks, *Economic Development in the Third World: What Can be Expected from the GATT Uruguay Round?* 81 AM. SOC'Y INT'L L. PROC. 578, 590-91 (1987). See also art. 2003-2022 of the North American Free Trade Agreement, December 17, 1992, U.S.-Can.-Mex., art. 2003-2022.

53. *U.S. v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319-320 (1936).

54. ERIC STEIN *ET AL*, EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVES: TEXT, CASES AND READINGS 103 (1976). (Caution should be exercised in this regard as the United States Constitution does not specifically provide that treaties concluded must conform to the provisions of the Constitution).

55. ANDREW GREEN, POLITICAL INTEGRATION BY JURISPRUDENCE 481 (1969).

56. *U.S. v. Alvarez-Machain*, 112 S. Ct. 2188 (1992). See also, David Almroth, *Extradition Treaty-Treaty Interpretation-Abduction of a Defendant from Mexico at the Behest of the United States' Government Does Not Defeat a Court's Jurisdiction Despite the Extradition Treaty Between the Two Nations*, 23 SETON HALL L.R. 1128 (1993). See also Robert Bork, *Kidnapping Foreign Nationals*, 29 NAT'L INTEREST 3 (1992).

mous institution, was vested with "power to adopt self-executing⁵⁷ measures which were directly binding on individuals."⁵⁸ The ratification of the Treaty of Rome⁵⁹ meant that this power could be executed notwithstanding the monist or dualist make up of the national legal order of the constituent Members.⁶⁰ This apparently simple provision held tremendous import since the EEC, as we know it today, would be a totally different creature without the exercise of this power. Therefore, the infusion of a federal structure into the community had been laid well before the Treaty of Rome was signed.

What has been the nature of this federalism and what are its main tenets? Briefly, the EEC has originated, in the absence of political union, a very unique system of federalism.⁶¹ This has been made possible by the coalescence of three basic principles: constitutionalism, supremacy and preemption. This article will focus on two⁶² of these principles, constitutionalism and supremacy.

57. The foundation of the theory of self-executing treaties is generally regarded to have been created by the United States Supreme Court in *Foster v. Nelson*, 27 U.S. 253, 314 (1829). Chief Justice Marshall stated in that case that:

In the United States a different principal is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not to the Judicial department; and the legislature must execute the contract before it can become a rule for the Court.

See also Claudy, *The Treaty Power and Human Rights*, 36 CORNELL L.Q. 699, 720 (1950) (criticizing this decision).

58. Joseph Weilee, *Community, Member States and European Integration: Is the Law Relevant*, 21 J. COMMON MKT. STUD. 39, 42 (1982).

59. Treaty Establishing the European Atomic Energy Community, done at Rome, March 25, 1957, 298 U.N.T.S. 167 as amended by the Single European Act, done at the Hague, February 17 and 28, reproduced in 25 I.L.M. 507 as amended by the Treaty on European Union and Final Act, done at Maastricht, February 7, 1992, reproduced in 31 I.L.M. 247 (1992) [hereinafter Treaty of Rome].

60. Weilee, *supra* note 58.

61. The EEC "is not a State, nor is it a Federal State. It is a Community of a special kind in a state of progressive integration, an 'inter-State institution' . . ." PIERRE PESCATORE, *THE LAW OF INTEGRATION: EMERGENCE OF A NEW PHENOMENON IN INTERNATIONAL RELATIONS, BASED ON THE EXPERIENCES OF THE EUROPEAN COMMUNITIES* 35 (1974). See also William Wallace, *Less Than a Federation, More Than a Regime: The Community as a Political System*, in *POLICY-MAKING IN THE EUROPEAN COMMUNITY* 403 (1977) (Wallace rhetorically wonders:

what sort of animal is the Community: a federation in the making, an unusually well-developed framework for the management among governments of complex interdependence, or some sort of hybrid the like of which cannot easily be identified either in the contemporary international system or in earlier times?).

62. For judicial articulation of the preemption doctrine see Case 22/70 ERTA [1971] ECR 263. See also Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 224-30 (1990).

1. Constitutionalism

To speak of constitutionalism within the context of the Treaty of Rome, in the absence of political union within the EEC, often times suggests a contradiction of terms. This is because constitutionalism is popularly understood as the study of the distribution and balancing of political power and to this extent the term has been catapulted to an esoteric status.⁶³ However, the Treaty of Rome, unlike other treaties, utilizes constitutional law and administrative law concepts in such a manner that national public law becomes the preferable tool of interpretation over public international law.⁶⁴ To this extent, the Treaty of Rome is a treaty *sui generis* in that it has, through the process of constitutionalization, originated a structure having little in common with a traditional international organization, while at the same time not exhibiting qualities traditionally associated with a federal structure.⁶⁵ The Treaty of Rome has become "the basic constitutional charter"⁶⁶ of the Community without the negation of the State.⁶⁷ A peculiar aspect of this development is that it was not prompted by express provisions of the Treaty of Rome. Rather, it was the product of what

63. GREEN, *supra* note 55, at 22 n. 16. Andrew Green in attempting to demystify the term has stated that:

. . . doubts about this usage of the word constitution persist. Part of the difficulty is that of conceiving of constitutions and constitutional law as esoteric things, and somehow as different in an ineffable way from ordinary law. Such a conception is not valid. Constitutional law differs from ordinary law only with respect to the subject matter it deals with. No one is surprised these days to hear it stated that treaties can make law. Consequently, no one should be surprised to hear it stated treaties can make constitutional law and that treaties can thus be constitutions. In fact, the American Constitution may be considered a treaty, for even if the delegates did not officially represent the states, the Constitution was ratified by three-quarters of the states. What makes a treaty into a Constitution is the fact that it deals with the manner in which political institutions shall be constituted, and with the powers which such institutions shall have. Any mystery about treaties as constitutions is dispelled by a little common sense.

64. JOHN T. LANG, *THE COMMON MARKET AND COMMON LAW* 34-35 (1966).

65. See generally Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406 (1989) (providing a theoretical analysis of the conflict between constitutionalism, democracy and treaty-making).

66. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2407 (1991).

67. *Id.* at 2480. (Weiler notes that the EEC, is neither state nor community. The idea of community seeks to dictate a different type of intercourse among the actors belonging to it, a type of self-limitation in their self-perception, a redefined self-interest, and, hence, redefined policy goals. To the interest of the state must be added the interest of the community. But crucially, it does not extinguish the separate actors who are fated to live in an uneasy tension with two competing senses of the polity's self, the autonomous self and the self as part of a larger community, and committed to an elusive search for an optimal balance of goals and behavior between the community and its actors.)

some regard as judicial activism⁶⁸ on the part of the European Court of Justice, with the help of national courts, which extended deference to it.⁶⁹ The development is peculiar because ordinarily national courts tend to exhibit great hostility to external laws and bodies which present an affront to national constitutions and other national laws. Yet national courts within the community have been willing to allow clear cases of constitutional incompatibility⁷⁰ to stand for the sake of a wider goal: European integration. Here lies one of the most prominent features that distinguishes the EEC from other integration processes.

The constitutionalization of the Treaty of Rome was cemented in 1963 by the European Court of Justice in the *Van Gend* case.⁷¹ In that case the court made its famous pronouncement that:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens.

Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.⁷²

This pronouncement conferred upon individuals, uncertain subjects

68. *Id.*

69. See GREEN, *supra* note 55; and Professor Simitis, Address before the Forum for the Practice of International Law, at the Yale Law School (Apr. 7, 1993).

70. *Id.* (Italy and Germany are good examples).

71. *Van Gend en Loos v. Nederlandse Administratie Der Belastingen*, Case 26/62, [1963] ECR 1, [1962] CMLR 105, [1961-1966] Common Mkt. Rep.

72. *Id.* at 12.

under international law, the power to sue their national governments for breach of treaty provisions. Member states could no longer hide behind the labyrinth of national law and traditional international law norms. A treaty that had been created by independent states ceased, through the *Van Gend* jurisprudence, to be an artificial international instrument. Instead it generated a life of its own, independent from that of the originating parties.⁷³ The evolution of this doctrine made it possible for the Community to escape the hazard of being completely at the mercy of the Member States regarding both the formulation and implementation of policies under the Treaty of Rome.⁷⁴

2. Supremacy

The second doctrine that the Community evolved was that of supremacy which established a hierarchical system of norms within the Community. Here again, the European Court tests the tensile strength of the Treaty of Rome by groping around for more implements to effectuate the spirit of the Treaty. In the *Costa* case,⁷⁵ the court in enunciating this doctrine, stated that:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with the legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives

73. Roger Clark, *Legal Principles of Non-Socialist Economic Integration as Exemplified by the European Economic Community*, 8 SYRACUSE J. INT'L L. & COM. 1, 19-20 (1980) (providing a discussion of the impact of *Van Gend* case on European integration).

74. Weilee, *supra* note 58, at 45 (asserting that without the evolution of the doctrine of constitutionalism the Community would "resemble a small GATT" in its operations).

75. *Flamino Costa v. Enel*, Case 6/64 [1964] ECR 585.

of the Treaty The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.⁷⁶

By virtue of this decision, national legislation, even if enacted subsequent to the Treaty of Rome and even if constitutional in nature, is subordinate to Community law. National courts may enforce contrary national law, but the Member State concerned would have committed a breach of the Treaty of Rome and would be liable to proceedings before the European Court.⁷⁷

The net effect of the above doctrines has been to remove the administration of European integration from the sole discretion of political elites and the empowerment of individual persons and corporations within the Community. These individuals and corporations keep the Community moving and guarantee its stability, because the called upon parties ensure the success of the Community and have a direct impact on its the direction. While it would be an exaggeration to state that Member States have been reduced to a state of irrelevance,⁷⁸ it is impossible to ignore the power of non-governmental parties within the Community.

So far, national courts have acquiesced in the above process, but doubts abound about how long this will continue. It does seem that national courts went along with judicial activism⁷⁹ by the European

76. *Id.* at 593-94.

77. Treaty of Rome, *supra* note 59, at art. 170.

78. Weilee, *supra* note 58, at 46. Some scholars attribute the disintegration or weakening of the Community's decisional process to the judicial process of constitutionalization. This process has led to,

[t]he insistence of the Member States in controlling every phase in the process of Community decision-making must have been influenced, consciously or unconsciously, by the knowledge that in many spheres decisions are "for real"; that they will have the force of law, will override national law and will be enforceable by virtue of direct effect in the courts.

See also Weiler, *supra* note 66, at 2407. (Weiler argues that the process of change within the Community especially in respect of constitutionalization of the Treaty of Rome has received flawed analysis by the elevation of law above everything else. He concludes that "[l]egal and constitutional structural change have been crucial, but only in their interaction with the Community political process.")

79. HJALIE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE POLICY-MAKING: A COMPARATIVE STUDY IN JUDICIAL POLICY-MAKING 602 (1986). (There has been a sustained attack on judicial activism by the European Court. The most vocal of these critics has undoubtedly been Prof. Rasmussen who has character-

court, because they thought it was a temporary measure which would be validated through the Community political process⁸⁰. However, because the European court has not been granted express powers by the Community, the legitimacy of the Court has been questioned. National courts which have hitherto been willing to allow their national constitutions to be subordinated to Community law, as exemplified by Italy⁸¹ and Germany,⁸² are showing increasing signs of irritation at the lack of express powers being granted to the European Court which may cause them to retract their deference.⁸³

In the overall context of European integration, the European Court of Justice has played an important role in the consolidation of European integration and in the attainment of the goals of the Treaty of Rome. Integration has been pushed forward, particularly where express political will was lacking.

D. *The ANDEAN Experience*

Because of the transient existence of most regional processes in developing countries, no enduring judicial jurisprudence has emerged. However, intermittent judicial opinions shed light on the attitudes and practices of these countries. The most important case to have emerged from the Andean process, in regards to the interpretation of the Andean Agreement,⁸⁴ is the 1972 Colombian Supreme Court decision on the Andean Foreign Investment Code.⁸⁵ In that case, the court was called upon to try the issue of whether the President of Colombia had the constitutional power, in the absence of express legislative sanction, to implement the Andean Foreign Investment Code.⁸⁶ The plaintiff

ized the decision in *Costa v. Enel*, "as an example of judicial activism 'running wild'" and the decision in *Van Gend* as a case of 'revolting judicial behaviour'.".

80. Weiler, *supra* note 66, at 2417-18. As Weiler has noted:

National courts were likely to accept direct effect and implied-powers, but found it difficult to swallow the notion that Community law must prevail even in the face of an explicitly later-in-time provision of a national legislature to whom, psychologically, if not in fact constitutionally, Member State courts owed allegiance. Accepting this supreme law without some guarantee that this supreme law would not violate rights fundamental to the legal patrimony of an individual Member State would be virtually impossible.

81. GREEN, *supra* note 55, at 348-88 (discussing the constitutionality of Community law under Italian Law).

82. *Id.* at 35 (discussing of the constitutionality of Community law in Germany).

83. Simitis Address, *supra* note 69.

84. Agreement on Andean Sub-regional Integration, *done at Bogotá*, May 26, 1969, reproduced in 8 I.L.M. 910 (1969).

85. Judgement of Jan. 20, 1972, Sup. Ct. of Justice, Colombia, 144 GACETA JUDICIAL 10 (1972), 10 DERECHIO DE LA INTEGRACION 155 (1972), translated in 11 I.L.M. 576 (1972). See also, Comment, *The Colombian Supreme Court Decision on the Andean Foreign Investment Code and its Implications for the Law of Treaties*, 8 J. INT'L L. ECON. 113 (1973) (providing an analysis of the case).

86. Common Regime of Treatment of Foreign Capital and Trademarks, Patents,

claimed that the Presidential decree,⁸⁷ seeking to implement the Common Regime, offended article 76-18 of the Colombian Constitution and⁸⁸ that the President exceeded his constitutional powers when he proclaimed the said decree, relying on art. 120-20 of the Constitution.⁸⁹

The government's response was that the President was merely bringing Colombia in line with its prior treaty commitments, which had already received Congressional approval. The Supreme Court rejected this argument and, in its opinion, read the Cartagena Accord⁹⁰ as mandating national legislative approval. The Supreme Court refused to internationalize the dispute and chose to view the conflict as being "purely a matter of internal public law".⁹¹ Because the Presidential decree failed to meet constitutional requirements, it could not stand and the Cartagena Accord⁹² could not be read to supersede "internal rules of law without previously clarifying and transferring to the international entities the jurisdiction reserved to the States, except in situations of the utmost urgency."⁹³

Clearly the Colombian Supreme Court did not see itself as a participant in the regional integration process, obliged to give a favorable interpretation to legislation that furthered the regional process. On the contrary, the Court exhibited some hostility to the notion of an inter-

Licenses, and Royalties, Decree No. 24 of Dec. 31, 1970, Commission of the Cartagena Agreement, *as amended by*, Decree No. 37 of Jun. 24, 1971, *and by* Decree No. 37-A of July 17, 1971, *reprinted in* 11 I.L.M. 126 (1972).

87. *Id.* at Decree No. 1299 of June 30, 1971.

88. CONSTITUTION POLITICA DE COLOMBIA, art. 76-78 (Columbia) 886, (amended 1944), providing that:

Congress is vested with the power of making the laws. By means of the laws it exercises the following functions:

To approve or reject treaties and conventions entered into with either states or with entities that function according to international law, the state may assume obligations, through treaties or agreements approved by the Congress, in order that, on a basis of equity and reciprocity, supranational institutions may be created for the purpose of promoting or consolidating economic integration with other states.

89. *Id.* at art. 120-20. The powers of and duties of the President of the Republic as the chief of state and chief administrative authority are:

To direct diplomatic and commercial relations with other states and entities recognized under international law; to appoint diplomatic agents; to receive the respective agents; to conclude treaties and conventions with other states and entities recognized under international law which shall be submitted to the Congress for approval.

90. Common Regime of Treatment of Foreign Capital and Trademarks, Patents, Licenses, and Royalties, *supra* note 86, at Decree No. 24.

91. *The Colombian Supreme Court Decision on the Andean Foreign Investment Code, supra* note 85, at 581.

92. *Id.*

93. *Id.* at 582.

national obligation contradicting domestic law.⁹⁴ This response has been typical of most judicial entities in developing countries when interpreting regional treaties. It may be argued that the absence of an Andean regional court,⁹⁵ which could have been the proper entity to rule on the interpretation of the Cartagena Accord,⁹⁶ was to blame. Rather, the Supreme Court's judgment leaves little doubt that, in its view, national law is qualitatively superior to regional law. This decision markedly contrasts to the response of national courts within the European Community which have shown a more regional bias.⁹⁷

E. *The East African Community Experience*

The East African Community, while it lasted, was certainly the most advanced integration process that existed in the developing world. The three Member States of Kenya, Uganda and Tanzania had convertible currencies, unitary services, and common educational and economic policies. Most important, the East African Court of Appeal served as the highest court for the three countries. In more than one way, the East African Community exhibited a higher level of integration than even that of the EEC. It is, therefore, surprising to note that this level and intensity of integration did not filter into the operation of national courts.

A good example of the seemingly parochial attitude that national courts have had of regional integration treaties may be found in the case of *Okunda and Another v. Republic*.⁹⁸ In this case, two prosecutions were brought by the Attorney-General of Kenya against two persons under the Official Secrets Act of the East African Community.⁹⁹ Section 8(1) of the Act states that "[a] prosecution for an offense under this Act shall not be instituted except with the written consent of the Counsel to the Community." No such consent was sought. The accused persons raised an objection questioning the validity of the prosecution in the absence of consent. The Attorney-General responded that section 8(1) of the Act was in conflict with section 26(3)(a) of the Kenyan Constitution which provides that:

The Attorney-General shall have power in any case in which he considers it desirable so to do—
(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of

94. *Infra* notes 114-120 and accompanying text.

95. In fact, the confusion generated by this decision resulted in the setting up of an ANCOM Court of Justice. Treaty Creating the Court of Justice of the Cartagena Agreement, done May 28, 1979, translated in 18 I.L.M. 1203 (1979).

96. *The Colombian Supreme Court Decision on the Andean Foreign Investment Code*, *supra* note 85.

97. RASMUSSEN, *supra* note 79.

98. *Okunda and Another v. Republic*, 1970 E. AFR. L. REP. 453 (Kenya).

99. LAWS OF THE EAST AFRICAN COMMUNITY, Ch. 4 (1970).

any offence alleged to have been committed by that person.

The Attorney-General submitted that section 8(1) operated as a clog to his constitutional powers, and, to that extent, the section was rendered null and void by the Supremacy Clause of the Constitution.¹⁰⁰

Counsel for the East African Community made a three-pronged presentation with the aim of showing that the two apparently conflicting provisions of law could be harmonized. First, he argued that the Treaty for East African Co-operation (TEAC)¹⁰¹ at article 95 requires each Member State "to take all steps within its power" to pass legislation to give effect to the treaty and, in particular, "to confer upon Acts of the Community the force of law within its territory." The court rejected this argument claiming that it was satisfied that Kenya had "carried out its obligations under this article."¹⁰²

Second, counsel for the Community made reference to article 4 of the Treaty for East African Co-operation which mandates, *inter alia*, that Member States "shall make every effort to plan and direct their policies with a view to creating conditions favorable for the development of the Common Market and the achievement of the aims of the Community." The court yet again rejected this argument stating that there was no conflict between the Treaty and the Kenyan Constitution but rather a conflict between the Constitution and a piece of legislation passed by the Community.¹⁰³ The Court was making a distinction between the Treaty for East African Co-operation and legislation made under the Treaty. This is a surprising distinction, particularly because no suggestion was made that the legislation was *ultra vires*. If the Community was competent to pass on the legislation, that legislation must surely become part of the Treaty for East African Co-operation. Yet, on appeal the Court of Appeal for East Africa refused to acknowledge the existence of such a distinction.¹⁰⁴

100. CONSTITUTION OF KENYA, chapter 1, section 3, provides that:

This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and . . . if any other law is inconsistent with this constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

101. TREATY FOR EAST AFRICAN CO-OPERATION, signed at Kampala, Uganda, June 6, 1967 entered into force December 1, 1967, reprinted in 6 I.L.M. 932 (1967).

102. *Okunda and Anor v. Republics*, supra note 98, at 455.

103. Referring to the concepts of direct applicability and supremacy of regional law, even if all the COMESA Member States were to incorporate the Treaty into their domestic law, this would not create a regional body of law as "its internal applicability will be subject to domestic legislation". SIMAMBA, supra note 27, at 112. Supremacy is understood as a concept that provides that once a positive regional measure already exists any conflicting national norm becomes inapplicable. See Weilee, supra note 58, at 48.

104. East African Community v. Republic, 1970 E. Afr. L. Rep. 457, 460 (appeal taken from Kenya).

Third, counsel for the Community invoked international law, in particular two cases decided by the old Permanent Court of International Justice: *The Greco-Bulgarian Communities case*¹⁰⁵ and *German Interests in Polish Upper Silesia case (Merits)*.¹⁰⁶ The two cases pronounce the supremacy of international treaties over municipal laws. Echoing its previous reasoning the court held that there was no conflict between the Treaty for East African Co-operation and the Kenyan Constitution or any other Kenyan law. The court stated that:

A State signs a treaty in the full knowledge of its contents and in the full knowledge of its own laws and legal policy. An international tribunal would be doing the right thing by saying that a State must stand by its treaties. This cannot, however, be said of laws passed by a body established under the treaty. The contents of such laws (which might cover a wide field) could not have been within the contemplation of the parties at the time of signing the treaty.¹⁰⁷

The court again returned to the distinction between the treaty and legislation promulgated under the treaty and concluded that the two are materially different. The court did not attempt to read the treaty and the Constitution as complementary regimes, but rather regarded the Constitution as infinitely superior to any other law with "its influence and power . . . all-pervading."¹⁰⁸ The court continued that "if a constitutional lawyer were to write about Kenya in the same strain as Dicey did about England, he would, to be accurate, have to emphasize the supremacy of the Constitution rather than of any one organ of Government."¹⁰⁹

On appeal, the Court of Appeal for East Africa dismissed the case on a technical procedural ground.¹¹⁰ However, the surprising aspect of the appellate court's decision is that, although it touched on the merits of the case in *obiter dictum*, it did not demonstrate any movement towards establishing a jurisprudence that would have given more deference to East African Community law when there was a conflict between that law and domestic law. This is surprising because the Court of Appeal for East Africa was established under Chapter Seven of the Laws of the East African Community.¹¹¹ Being an organ of the East African Community it would have been expected that it would have read domestic law in such a manner as to avoid the invalidation

105. *The Greco-Bulgarian Communities*, 1930 P.C.I.J. (Ser. B) No. 17, at 32.

106. *German Interests in Polish Upper Silesia*, 1925 P.C.I.J. (Ser. A) No. 7, at 19.

107. *Okunda and Another v. Republic*, *supra* note 98, at 456.

108. *Id.* at 457.

109. *Id.*

110. The case ostensibly was dismissed because the appellant, the East African Community, was found not to have had *locus standi* to institute the appeal or in any other way to be a party to a criminal prosecution.

111. LAWS OF THE EAST AFRICAN COMMUNITY, Ch. 4 (1970).

of East African Community law. Instead, the court went out of its way to reiterate the supremacy of national constitutions and articulates a philosophy that diminishes the force of East African Community law.¹¹²

V. ANALYSIS OF TREATY LAW AND ITS IMPACT ON DOMESTIC LAW

The above experiences illustrate a marked difference between the attitudes and practices of developed¹¹³ and developing nations when engaging in integration processes. Courts in developed nations seem ready to allow their constitutions to be subordinated to regional treaties if such subordination would further the objectives of integration. On the other hand, courts in developing countries do not generally identify themselves as articulators of regional policy, but instead view their role as that of guarantors of domestic law against infringement by international law. In other words, when courts in developing countries are presented with a situation in which there is an apparent conflict between domestic law and a treaty provision to which these countries are parties, they overwhelmingly uphold the former over the latter.

There are several factors that influence this attitude. First, the degree of maturity and sophistication of the domestic legal system affects the flexibility of that system. Stable democratic nations do not expose their legal systems to tumultuous phenomena when they allow their constitutions to be, so to speak, trampled upon by regional treaties. Their stability guarantees this result. On the other hand, developing nations, because of their relative constitutional and political fragility, are frequently not in a position to compromise the stature of national constitutions when a conflict arises between it and some international treaty. As a result, regional law fails to develop which in turn contributes to the disintegration of regional processes¹¹⁴.

112. *East African Community v. Republic*, *supra* note 104, at 460. In a sweeping statement the court declares that:

the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the Community or of any other country which has been applied in Kenya, which is conflict with the Constitution is void to the extent of the conflict If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the Constitution, then to the extent of such conflict such provisions are void.

113. Koh, *supra* note 11 and accompanying text. (It may be an unripe conclusion given the fact that it is based on the experience and attitude of only one process in the developed world. The US/Canada Free Trade Agreement, for example, does not exhibit this tendency. Nevertheless, it is true to state that developed countries honor treaty obligations more than developing countries.)

114. See the *Costa* case, *supra* note 75, at 593 (As seen above recognition and enforcement of regional law depends on the existence of a regional legal system. It means that the most efficient regional arrangement is that which makes no distinction between regional law and domestic law.)

Second, courts in developing countries neither view themselves as international players nor consider their decisions as having international repercussions. This self-disdain produces two results. On the one hand, it creates a subversive psychological attitude towards international law in that courts seem to be in a perpetual belligerent state of affairs with respect to international law.¹¹⁵ It is as if these courts are constantly reiterating their authority over international law, a regime they regard as an undeviating menace to their eminence. On the other hand, courts in developing countries seldom consider extra-territorial factors because they have determined *ab initio* that they cannot possibly make an impact outside their domestic jurisdictions.

Third, with respect to regional treaties in developing countries, no matter how sympathetic to regionalism a judge may be, these treaties are so imperfect in declaring enforceable legal norms¹¹⁶ and so inarticulate in substance, that they can permissively be regarded as *nudum pactum*.¹¹⁷ For an international treaty to be enforceable, it must provide for an elaborate legal regime that courts can subsequently create a jurisprudence around.¹¹⁸ At present, most regional treaties

115. This is in marked contrast to the manner in which the European Court and the United States Supreme Court have approached the subject. In these two jurisdictions:

In interpreting the reach of a Treaty provision defining the power of the Community, the Court of Justice looks to "the spirit, general scheme and the wording" (*esprit, économie, texte*), or, in other terms, to "the objects and purposes." The formula bears considerable resemblance to the approach adopted by Chief Justice Marshall in the important early case of *McCulloch v. Maryland*. The question whether the Constitution conferred one or another power, Marshall wrote, depends upon "a fair construction of the whole instrument". A constitution, he suggested, should not be interpreted with the literalness appropriate to a statute. Reference must be made to "its great outlines" and "its important objects".

ERIC STEIN & TERRANCE SANDALOW, *On the Two Systems: An Overview*, COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 3, 16-7 (1982).

116. See generally Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178 (1958) (When considering whether to hold a treaty self-executing, the crucial criterion is that it contains rules susceptible to judicial application without prior legislative implementation.).

117. An over-simplified example would be the comparison of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA) done November 30, 1993, at Kampala, Uganda, to the Treaty Establishing the North American Free Trade Area (NAFTA) done December 17, 1992 at Washington/Ottawa/Mexico City.

118. It can also be argued that courts in developing countries have not tried to prop up these otherwise imperfect treaties through constitutionalizing these treaties as the EEC courts have done. The result is that regional processes in the developing world resemble in their "operational structure a small GATT," an extremely unflattering comparison. Weilee, *supra* note 58, at 45. With reference to the European Court and the concept of constitutionalism, Weilee concludes that

[a]t the strict legal level the Court was merely applying the principal of effectiveness. Moving from the premise that the obligations contained in

in developing countries espouse political ambitions and consequently aggrieved parties can only seek political remedies.¹¹⁹

Fourth, the jurisprudence of many courts in developing countries seem to exhibit both an unsophisticated appreciation of their powers and a lack of institutional constraints. These courts fail to understand that an important precept for the exercise of judicial power is judicial restraint or moderation. There is a tendency to exercise power for its own sake merely because it is available, not because it will achieve some positive end. For reasons of prudence, courts should not always exercise their formal authority to the fullest extent. Such power "exists to be used at the right times, not lost in atrophy" as a court "can be destroyed by the weakness as well as the recklessness of its members."¹²⁰ The common sense import of this exercise of power means that courts must ordinarily temper reason by experience, and the application of rules and principles by their effects in order for a balanced institutional operation to emerge. Courts in developing countries have yet to understand this concept.

VI. HARMONIZATION OF LAWS AND TREATY COMPLIANCE

The foregoing analysis demonstrates the urgency of enlisting a system that will bring national laws in line with regional treaties, particularly in developing countries. A clear demarcation between the competence of national law and regional law must be firmly established.¹²¹ Conflicts, and the attendant transaction costs that they engender, seem to be primarily caused by the uncertainty¹²² that exists

the Treaty and in legislation enacted by Community organs (in which the Member States have crucial say) were undertaken in a *bona fide* fashion with an underlying intention to be bound, the Court's revolution was no more than an instrumental mechanism to give effectiveness to these obligations.

119. Gerhard Bebr, *Directly Applicable Provisions of Community Law: The Development of a Common Concept*, 19 INT'L & COMP. L.Q. 257, 268-78 (1970) (The essential requirements necessary for the direct applicability of Treaty provisions have been listed as: 1. clear treaty provisions, 2. unconditional obligations, 3. no further measures required and 4. no discretion in taking necessary measures.).

120. EUGENE ROSTOW, *THE SOVEREIGN PREROGATIVE* 177 (1962).

121. It can be argued that the rule of *pacta sunt servanda* already compels national courts to give effect to the intention captured in international treaties. While the rule was conceived at a time when states were the only proper subjects of international law, subsequent development of international law and the demands of the modern world import a rationale that has legal force allowing for the interpretation of the rule in such a way that it can give effect to the intention of treaties. The maxim itself does not generate the problem but rather it is the unwillingness of states to submit their internal law to regulation by treaties. See also GREEN, *supra* note 55, at 373.

122. See, *The Canada-U.S. Free Trade Agreement: New Directions in Dispute Settlement*, 83 AM. SOC'Y INT'L L. PROC. 251, 263-67 (panel discussion) (1989) (not only is actual conflict the source of uncertainty but even the perceived conflict between

between the two bodies of law. Harmonization¹²³ of these laws will remove a significant dynamic of disintegration.

Harmonization,¹²⁴ or integration of laws, is a task that stands on a higher plane than domestic constitutional considerations.¹²⁵ Member countries which have deeply entrenched constitutional provisions, which cannot easily be changed, should not be allowed to join the union unless they are able to bring their constitutions in line with the treaty establishing the organization. Integration treaties must, therefore, be seen as instruments that are not constitution-friendly, and countries seeking to enter into such an arrangement must realize that, for a workable system to be established, the two regimes, domestic and international, must be rid of all contradictions and inconsistencies. It is for precisely this reason, that most regional treaties require member states to bring their national laws into conformity with their international obligations.¹²⁶ The Treaty of Rome, for example, requires that in the admission of new members, the potential member must first bring its national law into compliance with EEC laws before it may be admitted.

An even more imperative inquiry relates to the practicality of achieving harmonization between countries that have different judicial systems and traditions. The Common Market for Eastern and South-

the two can generate anxiety.)

123. Harmonization as a term of art which refers to "a set of principles derived from some economic model that would enable all reasonable men to agree that such a subject should be regulated at federal or community level while another should be regulated at State level." RICHARD BUXBAUM *ET AL.*, EUROPEAN BUSINESS LAW: LEGAL AND ECONOMIC ANALYSIS ON INTEGRATION AND HARMONIZATION 1 (1991).

124. See Wallace, *supra* note 61, at 181. A distinction must be made between unification and harmonization. Whereas a law that is fashioned to apply automatically within the member countries of the organization is said to be an instrument for the unification of laws within the region, a law that merely specifies the legal objectives to be attained but which leaves matters of form and methods to effectuate the objective to the member countries is said to be an instrument for the harmonization of laws within the region.

125. This is particularly true if one were to adopt a strict meaning of supranationalism with reference to regional entities to mean "... over and above national individual states." A. H. Robertson, *Legal Problems of European Integration*, 1957 RECUEIL DES COURS 105, 143. However, regional structures and processes involve "bits and pieces of the national governments . . ." A. SHONFIELD, EUROPE: JOURNEY TO AN UNKNOWN DESTINATION 17 (1972).

126. Treaty of Rome, *supra* note 60, at art. 39(h) (mandates the Community to move towards "the approximation of the laws of member States to the extent required for the proper functioning of the Common Market." Other provisions in the Treaty that compel harmonization include arts. 27, 43, 54(3)(g), 56(2), 57(2) and (3), 70, 75, 99, 100, 117, and 235.)

The COMESA Treaty, *supra* note 117, at art. 4(6)(b) (provides that Member States undertake to "harmonize or approximate their laws to the extent required for the proper functioning of the Common Market." At art. 5(2) the Treaty states that "each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty . . .").

ern Africa (COMESA) exhibits a labyrinth of judicial systems and traditions: common law, Anglo-Dutch, civil law, Islamic law and Amharic law systems, all represented within the arrangement. In such a situation, both the substance of the law and procedural differences¹²⁷ tend to stultify attempts at harmonization.¹²⁸ Linguistic diversity poses an additional problem within the union.¹²⁹ The task of harmonization, especially when harmonization is defined to include a political dimension,¹³⁰ becomes a daunting task. Yet economic integration can only be meaningful if harmonization of laws exists.

Included in the general understanding of harmonization is the establishment of regional conflict of law rules.¹³¹ Whether one views conflict of law as a subject touching on procedural aspects of law, or as one that speaks also to the substance of the law, whenever there is intercourse between two or more systems of law there are bound to be

127. Eighty percent of the Member States of the COMESA are common law jurisdictions and, as such, procedural complications do not affect these countries substantially. Author's interview with Dan Ameyo, Senior State Council at The Attorney-General's Chambers, in Nairobi, Kenya (Oct. 20, 1993).

128. *Id.* There is a general consensus among the drafters of the COMESA Treaty that diversity of legal systems does not pose serious problems in as far as substance of the law is concerned, because general law and commercial law are fairly uniform across these different systems. Diversity is considered an issue in relation to procedural aspects. To resolve this difficulty, the drafters envisaged the enactment of an elaborate statute to govern procedures in the COMESA Court. However, sufficient evidence supports the view that there is little value in attempting to create a material distinction between substance and procedure in international commercial litigation.

129. COMESA, *supra* note 117, at art. 185 recognizes only English, French and Portuguese as the official languages of the Common Market. However, English, French, Portuguese, Arabic, Amharic and Kiswahili are the various official languages of the member states.

130. GREEN, *supra* note 55, at 21. It is difficult to speak of harmonization without considering its political manifestation for ". . . political integration really means legal integration. It means legal integration not only in the sense that political integration can be effected only by means of legal integration, but also in the sense that legal integration, or an integration of laws, is, of itself, political integration."

See also Scott Horton, *Peru and ANCOM: A Study in the Disintegration of a Common Market*, 17 TEX. INT'L L.J. 39 (1982). Indeed it has been stated that "[t]he study of a common market requires the simultaneous awareness of three different levels of development: political, economic and legal".

131. Treaty of Rome, *supra* note 59. (Within the EEC there exists a regional treaty governing conflict of laws. By virtue of art. 220(4) of the Treaty of Rome, Member States undertook to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition of, and enforcement of judgments of courts or tribunals, and of arbitral awards.); See also D. LASOK & P.A. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 149 (1987) (Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, done at Brussels on 27th September, 1968, was adopted. To effectuate this undertaking a Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, done at Brussels on 27th September, 1968, was adopted.).

queries and legal anxieties to which substantive and/or procedural law will apply. Just as there is a paucity of domestic judicial decisions on treaties within the COMESA, there is a deficiency of domestic judicial decisions on conflict of law. When domestic rules have not been clearly settled, it becomes even more difficult to generate regional rules. During the drafting of the COMESA Treaty, the issue of conflict of laws was discussed but not incorporated into the treaty.¹³² Opponents argued against incorporation to avoid crystallizing or codifying current international conflict of law rules.¹³³ It is likely, however, that Member States really wanted to be given time to develop their own domestic rules before agreeing on regional rules. Dispute resolution within the COMESA is bound to be complicated by the above *lacunae*.

The characteristic instrument of harmonization in the COMESA is the Directive,¹³⁴ while the regulations¹³⁵ are instruments of unification, since they seek to force compliance on Member States without giving them an option in the formulation or implementation of the law. Issuance of Council Directives¹³⁶ must both state the reasons¹³⁷ on which they are based and notify those affected¹³⁸.

VII. CONCLUSION

As the survey shows, COMESA Member States do not appear ready to accord the COMESA Treaty¹³⁹ the necessary domestic competence that will allow it to operate as envisioned. This coupled with the traditional hostility of domestic courts in the region towards international law is sure to lessen the impact and efficacy of the Common Market.

Whether there is a new attitude towards regional integration within COMESA will, to large extent, depend on the COMESA Court and how it articulates the competence of regional law in relation to municipal law and how national courts react to this delimitation. Similarly, whether the COMESA Court will assert a regional jurisprudence that elevates treaty observance above municipal considerations, especially in view of the conduct of the former East African Court of Appeal with respect to the defunct East African Community, depends on the

132. Ameyo, *supra* note 127.

133. *Id.*

134. COMESA Treaty, *supra* note 117, at art. 10(3), (with reference to directives art. 10(3) states that: "[a] directive shall be binding as to the result to be achieved upon each Member State to which it is addressed but not as to the means of achieving it.").

135. *Id.* at art. 10(2). (This article states that: "[a] regulation shall be binding on all the Member States in its entirety.").

136. *Id.* at art. 10(1).

137. *Id.* at art. 11.

138. *Id.* at art. 12(2).

139. *Id.*

supreme political organs of Member States of COMESA. If these political organs acquiesce to the new philosophical thinking that, for successful integration real power must be given to regional organs, then there is a realistic chance that municipal law will not intrude into spheres reserved for regional law.

However, as discussed in this article, COMESA Member States have traditionally viewed treaties as foreign instruments with a nuisance value and in the same vein with an accent on dualism.¹⁴⁰ Difficulties in reorienting this thinking towards a more positive predisposition arise precisely because by their very nature, integration processes require a lot of giving in the initial stages before any benefits can be reaped. Because the returns are slow in coming, there will be a tendency to give priority to these regional instruments early, followed by a period in which a negative development asserts itself to re-establish municipal dominance. However, if Member States are able to beat back this fatalistic tendency, not only will the regional process prosper, but developing countries may adopt a benevolent attitude towards international law in general, and treaties in particular.

140. See, Brilmayer, *supra* note 36, at 2292-94 (some scholars indeed regard dualism as the dominant paradigm of international law.).