

**LEGAL CERTAINTY AND FOREIGN INVESTMENT IN AFRICA: LET'S CALL  
THE AFRICAN UNION**

**CERTEZA LEGAL E INVERSIÓN EXTRANJERA EN ÁFRICA: LLAMEMOS  
LA UNIÓN AFRICANA**

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**ABSTRACT**

This article studies the role of the African Union (AU) as an instrument for providing legal certainty to foreign investors in the African continent. Africa has failed to attract foreign investment since the business environment and market conditions do not even appeal to national investors. One of the biggest problems contributing to this situation is a low level of legal certainty which makes it too risky for foreign investors to invest in the region. Therefore, the development and adoption of policies and actions aimed at the provision of a higher level of legal certainty is necessary. This article precisely proposes the usage of the AU

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as an instrument to achieve this goal. This regional integrationist experience groups several elements that can positively contribute to the provision of legal certainty to foreign investors. For instance, it has an institutional structure that allows its institutions to work coordinately in the adoption of policies and laws, which makes possible the development and adoption of coherent and stable laws and policies. Likewise, the AU's structure allows the exchange of opinions, ideas, and experiences between African governments and foreign investors during the decision-making process by means of an institution such as ECOSOCC and the private sector Forum. This communication promotes transparency and predictability to foreign investors for the development of their economic activities. In addition, AU also has the power to create legal instruments that serve to regulate the activity of foreign investors, limiting the power of the host country to interfere in the investment, and promote the progress and respect of matters such as the rule of law, transparency and good governance in the continent. Moreover, the AU has its own judicial body that works to enforce the AU legal instruments and guarantees their fulfillment by member countries.

This article studies the role of the African Union (AU) as an instrument for providing legal certainty to foreign investors in the region. Africa is a region characterized by a low level of foreign investment. The continent has failed to attract foreign investors since the business environment and market conditions

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do not even appeal to national investors. This situation is a consequence of multiple reasons such as restricted defense of property rights, low levels of technical capacity and skill of management and employees,<sup>2</sup> existence of several barriers affecting access by foreign investors and increasing transaction costs,<sup>3</sup> insufficient infrastructure (in areas such as transport, telecommunications, power supply), corruption, and ineffective policies for promoting foreign investment in the continent.<sup>4</sup> However, one of the biggest problems affecting foreign investment in the region is a low level of legal certainty which makes it too risky for foreign investors to invest in the region.<sup>5</sup> Legal certainty is that principle that “expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their

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<sup>2</sup> WORLD BANK, AFRICA DEVELOPMENT INDICATORS 2006 7 (World Bank 2006).

<sup>3</sup> Miria A. Pigato, *The Foreign Direct Investment Environment in Africa*, 1-2, 10 (World Bank, African Region Working Paper Series No. 15, 2001).

<sup>4</sup> Several measures have been proposed: a) constructing a good image of the continent by increasing political and macroeconomic stability and the protection of property rights, b) improving the investment environment by developing infrastructure, services and modifying the legal framework, c) promoting investment opportunities through current investors and use of technology such as the internet, d) diversifying the economy, e) liberalizing trade, and f) privatizing inefficient state companies. Chantal Dupasquier & Patrick N. Osakwe, *Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities*, 17 J.OF ASIAN ECON. 241, 254-57 (2006).

<sup>5</sup> The uncertainty in the region is also the result of political instability, macroeconomic instability, lack of transparent policies and low level of policy coherence. Political instability is generated by the existence of wars, military intervention in politics, and conflicts of religious and ethnic character. Macroeconomic instability occurs as a result of currency crashes, high inflation, and large budget deficits. *Id.* at 250-53. Lack of transparency is expressed by circumstances such as the difficulty of obtaining access to government documents by the public and their lack of clarity where access is possible. ECONOMIC COMMISSION FOR AFRICA, AFRICAN GOVERNANCE REPORT 2005 145-46, 153-54 (Economic Commission for Africa 2005).

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actions accordingly".<sup>6</sup> Consequently, legal certainty exists when the law is public, clear, non-retroactive, stable, and respected by people and national authorities.<sup>7</sup>

This situation makes the development and adoption of policies and actions aimed at the improvement of the legal environment in the region necessary, particularly the provision of a higher level of legal certainty to foreign investors. As traditional mechanisms implemented to serve this goal, it is possible to identify several mechanisms such as Bilateral Investment Treaties – BIT's or agreements of legal stability. However, this article wants to propose a different alternative, which is the usage of the AU. This regional integrationist experience groups several elements that can positively contribute to the provision of legal certainty to foreign investors. Therefore, member parties of AU can use it as a mechanism for the attraction of foreign investment in their territories.

Under these considerations, the article is divided in two main parts. The first studies the role that AU's law has in the provision of legal certainty to foreign investors. The second, with the same objective as the first, studies the role of AU's institutional structure. Through the analysis of these elements, the article identifies the main elements of AU that contribute and make it possible to enhance the levels of legal certainty to foreign investors in the African continent.

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<sup>6</sup> TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EC LAW* 163 (Oxford University Press 1999).

<sup>7</sup> ANTONIO-ENRIQUE PEREZ LUÑO, *LA SEGURIDAD JURIDICA* 32-34 (Ariel 1994) (1991).

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**KEY WORDS:**

African Union, foreign investors, legal certainty and institutional structure of

**RESUMEN**

Este artículo estudia el papel de la Unión Africana (UA) como un instrumento para proveer certeza legal a inversionistas extranjeros en el continente africano. África ha fallado en atraer inversión extranjera ya que el ambiente de negocios y las condiciones del mercado ni siquiera atraen a los inversionistas nacionales. Uno de los problemas más grandes que contribuyen a esta situación es un bajo nivel de certeza legal que hace muy riesgoso para los inversionistas extranjeros el invertir en la región. Por ende, el desarrollo y la adopción de políticas y acciones apuntando a la provisión de un nivel más alto de certeza legal es necesario. Este artículo propone precisamente el uso de la UA como un instrumento para conseguir este objetivo. Esta experiencia integracionista regional agrupa varios elementos que pueden contribuir posiblemente a la provisión de certeza legal a los inversionistas extranjeros. Por ejemplo, tiene una estructura institucional que permite a sus instituciones trabajar coordinadamente en la adopción de políticas y leyes, que hacen posible el desarrollo y la adopción de leyes y políticas coherentes y estables. Del mismo modo, la estructura de la UA permite el intercambio de opiniones, ideas y experiencias entre los gobiernos africanos e inversionistas extranjeros durante el foro de decisión. Esta comunicación promueve la transparencia y

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previsibilidad a los inversionistas extranjeros para el desarrollo de sus actividades económicas. En adición, la UA también tiene el poder de crea instrumentos legales que sirvan para regular la actividad de los inversionistas extranjeros, limitando el poder del país huésped para interferir en la inversión, y promover el progreso y respeto de aspectos como la ley, la transparencia y la buena gobernanza en el continente. Aún más, la UA tiene su propia institución judicial que trabaja para hacer disponibles los instrumentos legales de la UA y garantizar su cumplimiento por los países miembros.

Este artículo estudia el papel de la Unión Africana (UA) como un instrumento para proveer certeza legal a los inversionistas extranjeros en la región. África es una región caracterizada por un bajo nivel de inversión extranjera. El continente ha fallado en atraer inversionistas extranjeros ya que el ambiente de negocios y las condiciones del mercado no atraen ni siquiera a los inversionistas nacionales. Esta situación es una consecuencia de múltiples razones como la baja defensa de los derechos de propiedad, bajos niveles de capacidad técnica y de habilidad de administración y empleados, la existencia de varias barreras afectando el acceso de los inversionistas extranjeros y costos de transacción crecientes, infraestructura insuficiente (en áreas como el transporte, las comunicaciones, suministro eléctrico), corrupción y políticas inefectivas para promover la inversión extranjera en el continente. De todas maneras, uno de los problemas más grandes que afectan la inversión extranjera en la región es un

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bajo nivel de certeza legal que hace muy riesgoso para los inversionistas extranjeros el invertir en la región. La certeza legal es un principio que “expresa la premisa fundamental que aquellos sujetos a la ley deben saber lo que la ley establece para ser capaces de planear sus acciones de acuerdo con ello”. Consecuentemente, la certeza legal existe cuando la ley es pública, clara, no-retroactiva, estable y respetada por la gente y las autoridades nacionales.

Esta situación hace el desarrollo y la adopción de las políticas y acciones apuntando al mejoramiento del ambiente legal necesario en la región, particularmente la provisión de un nivel más alto de certeza legal para los inversionistas extranjeros. Como los mecanismos tradicionales para implementar este objetivo, es posible identificar varios mecanismos como los Tratados de Inversión Bilateral o acuerdos de estabilidad legal. Sin embargo, este artículo quiere proponer una alternativa diferente, que es el uso de la UA. Esta experiencia integracionista regional agrupa varios elementos que pueden contribuir posiblemente a la provisión de certeza legal a los inversionistas extranjeros. Por ende, los partidos miembros de la UA pueden usarla como un mecanismo para la atracción de inversión extranjera en sus territorios.

Bajo estas consideraciones, este artículo se divide en dos partes principales. La primera estudia el papel que la ley de la UA tiene en la provisión de certeza legal a los inversionistas extranjeros. La segunda, con el mismo objetivo que la

primera, estudia el papel de la estructura institucional de la UA. A través del análisis de estos elementos, el artículo identifica los elementos principales de la UA que contribuyen y hacen posible el mejorar los niveles de certeza legal para los inversionistas extranjeros en el continente africano.

### **PALABRAS CLAVES:**

Unión Africana, Inversionistas extranjeros, certeza legal y estructura institucional de la Unión Africana

## **1. The Role of AU for the Provision of Legal Certainty to Foreign Investors**

The AU is a regional organization created by the Constituting African Union Act on July 11 of 2000.<sup>8</sup> It was established as an organization of political, economic and social character<sup>9</sup> whose creation was influenced by the conclusion of the Cold

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<sup>8</sup> The AU replaced the OAU. Some of the differences between the OAU and the AU are the following: 1) the authority of the OAU was concentrated in the Assembly of Heads of State and Government. By contrary, in the AU the authority is placed in not only an Assembly of Heads of State and Government but also in other institutions such as the Court and the Parliament. 2) The AU recognizes the possibility to intervene in the internal affairs of other members for grave circumstances. Also the AU recognizes the possibility to suspend governments with unconstitutional origins. In the case of the OAU, there is a full respect for the internal affairs of member parties. 3) The OAU was created with the purpose of fighting against imperialism and defending the national sovereignty of member parties. The AU pursues a different objective which is the improvement of the African position in the international economy and community. African Union Commission, *Strategic Plan of the African Union Commission Vision and Mission of the African Union*, at 23 (May, 2004).

<sup>9</sup> Nsongurua J. Udombana, *The Institutional Structure of the African Union: A Legal Analysis*, 33. CAL. W. INT'L L.J. 69, 73 (2002). The AU is guided by eight basic principles: 1) the motive to pursue an integration process is political integration, with the final goal of adopting a federation or confederation, 2) integration process should produce substantial economic development, 3) integration process must stimulate the role of state members, 4) integration process must be supported by a popular base, including private sector and civil society and all those with political legitimacy, 5) the decisions adopted must be for the benefit of men and women, 6) youth population must have an active role in the integration process, making it necessary to satisfy

War, the influence of globalization and neo-liberal economy movement, a stronger demand for the protection of human rights and transparency, a larger knowledge of liberal democratic principles and rivalry among some political leaders of the continent, specifically, Muammar Gaddafi (Lybia), Olusegun Obasanjo (Nigeria), and Thabo Mbeki (South Africa).<sup>10</sup>

From its Constitutive Act, it is possible to find grounds for the provision of legal certainty through the AU. Article 4 of the treaty, which states the principles of the Union, establishes: "The Union shall function in accordance with the following principles: (m) respect for democratic principles, human rights, the rule of law and good governance (...)." This is a significant element justifying the provision of legal certainty through the AU because it shows a clear commitment and obligation for the African authorities of respecting and obeying the law. These circumstances represent a message to foreign investors that their investments will be recognized and legally protected by the national authorities. An additional consequence of this provision is that its category of principle makes its application a mandatory guideline in all the acts derived from this regional integration agreement.

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their necessities regarding health, education and infrastructure, 7) the AU needs the participation of all sectors of the African population to reach the goals established in the Act, and 8) integration policies and strategies must be conceived as long term initiatives. African Union Commission, *supra* note 7, at 22-25. Moreover, the AU has a long list of objectives which involve social, political and economic areas. The Constituting treaty establishes as objectives of the Union the unity and solidarity among African States, defense of the sovereignty and independence of them, encouragement of the social and economic integration of the region, promotion of peace, security and stability, recognition of democratic principles and human rights, sustainable development of the economic, social and cultural level of the economies of the continent, amongst others. Constitutive Act of the African Union Art. 3, Jul. 11, 2000, 2158 U.N.T.S. 3 [Constitutive Act of the AU].

<sup>10</sup> SAMUEL M. MAKINDA & F. WAFULA OKUMU, THE AFRICAN UNION 31 (Routledge 2008).

The recognition for the respect for good governance and democratic principles is also pretty relevant for the provision of legal certainty. The concept of good governance involves the existence of elements such as participation, transparency, accountability and strategic vision. Participation makes reference to the fact that citizens by themselves or through institutions can participate in the decision-making process. Transparency means that not only processes but also institutions and information are available to the people and also easy to understand and supervise. Accountability consists in that the government, private sector and institutions are liable for their actions. Finally, strategic vision means that the public and citizens must “have a broad and long-term perspective on good governance and human development.”<sup>11</sup> All these elements bring security and certainty to foreign investors because they help towards the protection and predictability of investment by allowing the participation in the decision-making process and the transparent and open access to the information. However, the previous elements are not the only ones that contribute to the provision of legal certainty to foreign investors. The AU has a set of legal instruments and institutions that also serves in a very important way to achieve that objective. Let’s begin analyzing the role of AU law.

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<sup>11</sup> GITA WELCH & ZAHRA NURU, GOVERNANCE FOR THE FUTURE DEMOCRACY AND DEVELOPMENT IN THE LEAST DEVELOPED COUNTRIES 35 (United Nations Development Programme 2006).

### **1.1. The Role of the AU Law for the Provision of Legal Certainty**

The AU law is a fundamental element for the provision of legal certainty. The implementation and respect of AU law can give to the national legal system of each of the AU members a stronger feeling of stability, transparency, coherence and predictability, generating an environment of legal certainty. By using AU law to regulate aspects of interest for foreign investors, it can be possible to limit the power of AU member parties' national authorities to eliminate, modify or affect their rights. Also through AU law, African countries can adopt and harmonize policies, laws and commitments that are attractive for foreign investors.

AU law has different types. A first group is made by the law created by the AU Assembly, which can adopt several forms and be divided in three groups.<sup>12</sup> The first two groups are Regulations and Directives, and the third one Recommendations, Declarations, Resolutions and Opinions.<sup>13</sup> Regulations are

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<sup>12</sup> From the creation of the AU to the 9<sup>th</sup> Ordinary Session of the Assembly hold in July, 2007, the Assembly has issued 172 Decisions. The High Level Panel, *Audit of the African Union* 26 (Dec. 18, 2007).

<sup>13</sup> It should be important to note that from the reading of Article 33 of the Rule of Procedure of the Assembly of the Union is possible that AU organs adopt other kind of decisions. Specifically the Article states:

Categorisation of Decisions: 1. The Decisions of the Assembly shall be issued in the following forms:

a) Regulations: these are applicable in all member states which shall take all necessary measures to implement them; b) Directives: these are addressed to any or all member states, to undertakings or to individuals. They bind member states to the objectives to be achieved while leaving national authorities with power to determine the form and the means to be used for their implementation; c) Recommendations, Declarations, Resolutions, Opinions etc: These are not binding and are intended to guide and harmonise the viewpoints of member states. 2. The non-implementation of Regulations and Directives shall attract appropriate sanctions in accordance with Article 23 of the Constitutive Act. Rules of Procedure of the Assembly of the Union, Rule 33, July 2002, *available*

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mandatory for member countries of the Union and oblige them to carry out all the necessary actions for their implementation. Directives are mandatory for all or some of the member countries of the Union. This type of AU law is characterized by allowing member parties to establish their own procedures and mechanisms to apply the Directive in their respective territories. Finally, Recommendations, Declarations, Resolutions and Opinions lack binding character for member parties. Their purpose is to be a guide for member parties and serve as a harmonizing mechanism.<sup>14</sup> Despite the existence of this classification, the development of AU law has been reduced to the adoption of "Decisions" with binding character.<sup>15</sup>

In addition, the development of the AU has demonstrated that the regulation of issues influencing foreign investment has been carried out through traditional international law instruments such as treaties, protocols, and charters.<sup>16</sup> In the

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at [http://www.africa-union.org/rule\\_prot/rules\\_Assembly.pdf](http://www.africa-union.org/rule_prot/rules_Assembly.pdf) [hereinafter AU Assembly Rules of Procedure].

<sup>14</sup> *Id.* It is important to highlight that both Regulations and Directives are mandatory not only for the member states and organs of the Union but also for the different RECs. *Id.* Rule 34. On the other hand, African Union's legislation establishes the moment at which Regulations and Directives are enforceable. According with Rule 34 of the Rules of Procedure of the Executive Council, Regulations and Directives are "automatically enforceable" 30 days after the date they are published in the Official Journal of the African Union or when it is specifically established in the respective decision.

<sup>15</sup> The High Level Panel, *supra* note 11, at 27.

<sup>16</sup> A study of the Decisions issued by the AU Assembly shows that they do not establish detailed regulations in matters of influence for foreign investments. In general, Decisions have dealt with policy issues within the development of the AU and orders to the AU Commission to adopt specific measures or to establish a conduct to follow by the AU. The Decisions did not lay down specific commitments but created general policies to be adopted specifically in treaties, and protocols under the control of the AU Commission. Some of examples of the Decisions adopted by the Assembly are the following: Decision on the Proposed Amendments to Articles of the Constitutive Act of the African Union, Decision on the Situation in Madagascar, Decision on a Common African Defense and Security, Decision on the Vision and Mission of the African Union and Strategic Plan, Programme and Budget of the Commission, Decision on the Operationalization of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Decision on the African Standby Force (ASF) and the Military Staff Committee (MSC), Decision on the Draft Protocol to the

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development of these sources, the AU Commission has played a very significant role in drafting treaties, and adopting “common policy frameworks and positions.” By June, 2007 including the instruments adopted under the existence of OAU and the AU, 33 charters, protocols, conventions, treaties and agreements had been adopted. However, only 18 had been ratified and were in force. In the specific case of instruments approved under the existence of AU, 10 treaties had been adopted but only 3 of them were in force.<sup>17</sup> This lack of internationalization of treaties negatively impacts the effectiveness of these legal sources for the provision of legal certainty because as long as these treaties have not been internationalized, they are not enforceable. Therefore, their real effect in the provision of legal certainty is null. Nonetheless, being precisely aware of the lack of internationalization of the different AU treaties, the AU Assembly has taken advantage of several opportunities to ask member countries of the Union to sign and ratify those international instruments. The Assembly has even requested that national parliaments hold extraordinary sessions for this purpose.<sup>18</sup>

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OAU Convention on the Prevention and Combating of Terrorism, Decision on the Implementation of the New Partnership for Africa’s Development (NEPAD), Decision on the Interim Report on HIV/AIDS, Tuberculosis, Malaria and Polio, Decision on 17th Annual Activity Report of the African Commission on Human and Peoples’ rights (ACHPR), Decision on the Framework for the Organization of Future Summits, Decision on the Location of the Headquarters of AU Institutions in various AU Regions, Decision on Somalia, Decision on the Situation in the Democratic Republic of Congo (DRC), and the Relations Between the DRC and Rwanda, Decision on the Situation in Cote d’Ivoire, Decision on the Situation in the Darfur Region of the Sudan, Decision on the Proposals of the Libyan Arab Jamahiriya, Decision on the Report of Heads of State and Government Implementation on Committee on NEPAD.

<sup>17</sup> The High Level Panel, *supra* note 11, at 28.

<sup>18</sup> The lack of internationalization of AU laws adopted through international agreements, protocols and charters is consequence of several factors. In effect, many of the instruments expressly state a set of necessary conditions for their enforcement such as the existence of a minimum number of states that ratify the agreement. Additionally, most African Constitutions establish that international treaties must be internationalized by the adoption of a national law issued by Congress or Parliament. This traditional

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Likewise, another inconvenience affecting legal certainty through these kinds of instruments is the lack of a system that allows verifying the incorporation of treaties in national laws.<sup>19</sup> However, as a solution to solve this situation, the adoption of a National Commission on AU Affairs made up by representatives of the government, Parliament, private sector, and civil society organizations has been proposed. The purpose of this Committee is to guarantee the national adoption and knowledge of the AU's decisions, supervise the fulfillment of AU decisions and carry out "gap analysis" reports between AU laws and national laws.<sup>20</sup>

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internationalization of international treaties constitutes a limitation for the effective application of AU law because that process will depend on the political will of member parties to submit the international instrument to the Congress or Parliament. Moreover, there is the risk that the national Congress or Parliament does not approve the international instrument. Decision claiming for the incorporation of the AU laws: Assembly Decision AU/Dec.108(VI) Decision on the Non-Submission of Decisions of the African Union Summits to the Ratification Mechanisms of AU member states, *available at* [http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th\\_ord\\_KHARTOUM\\_Jan2006.pdf](http://www.africa-union.org/root/au/Documents/Decisions/hog/AU6th_ord_KHARTOUM_Jan2006.pdf). The Executive Council has also claimed for the ratification of the treaties and conventions by the member countries. Executive Council Decision EX/CL/Dec.33(III) Decision on the Status of Signature and Ratification of AU Treaties, *available at*

[http://www.africa-union.org/News\\_Events/Calendar\\_of\\_%20Events/EXECUTIVE%20COUNCIL/DECISIONS%20Ex.CL%20-%2020-74.pdf](http://www.africa-union.org/News_Events/Calendar_of_%20Events/EXECUTIVE%20COUNCIL/DECISIONS%20Ex.CL%20-%2020-74.pdf), Executive Council Decision EX.CL/Dec.193 (VII) Decision on the Status of OAU/AU Treaties, *available at*

<http://www.africa-union.org/Summit/JULY%202005/Council%20Decisions%20%20final.pdf>, Executive Council Decision EX.CL/Dec.236 (VIII) Decision on the Status of OAU/AU Treaties, *available at* [http://www.africa-union.org/root/AU/Documents/Decisions/com/AU6th\\_ord\\_Council\\_Decisions\\_Jan2006\\_Khartoum.pdf](http://www.africa-union.org/root/AU/Documents/Decisions/com/AU6th_ord_Council_Decisions_Jan2006_Khartoum.pdf), Executive Council Decision EX.CL/Dec.380(XII) Decision on the Status of Signature and Ratification of OAU/AU Treaties, *available at*

[http://www.africa-union.org/root/AU/Conferences/2008/january/summit/docs/decisions/Executive\\_Decisions\\_378-414.pdf](http://www.africa-union.org/root/AU/Conferences/2008/january/summit/docs/decisions/Executive_Decisions_378-414.pdf).

<sup>19</sup> The High Level Panel, *supra* note 11, at 68.

<sup>20</sup> *Id.* at 69.

In consequence, the most effective and efficient means for providing legal certainty under the structure of AU law would be through Regulations and Decisions adopted by the Assembly considering that they have a binding character for member countries of the AU and it is not necessary to wait for their internationalization in each of the member countries of the Union to initiate their legal force. However, this position could be held only if it is considered that AU legal order is a communitarian legal order that recognizes the existence of the principles of direct and immediate application of Communitarian law as happens in integration processes such as the Andean Community and European Union. Nonetheless, the different AU law instruments do not recognize expressly these principles.<sup>21</sup> Therefore it is necessary that the Court of Justice of the AU, through its judgments determines their implementation in the structure of the AU. In addition, it is of fundamental importance that the Regulations and Decisions establish specific rules that provide certain rights and rules for the development of foreign investors activities.

On the other hand, an aspect to be considered regarding the possibility of implementing AU law for providing legal certainty is its relation with local or municipal law of AU's member countries.<sup>22</sup> Studying the legal position of AU law

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<sup>21</sup> Craig Jackson, *Constitutional Structure and Governance Strategies for Economic Integration in Africa and Europe*, 13 *TRANSNAT'L L. & CONTEMP. PROBS.* 158 (2003).

<sup>22</sup> The system used by African countries to incorporate international law in their legal systems has been influenced by the legal cultures and systems of countries that colonized Africa. For this reason, some countries follow the common law system and others follow the civil law system. TIYANJANA MALUWA, *INTERNATIONAL LAW IN POST-COLONIAL AFRICA* 36 (Kluwer Law International 1999).

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within the legal hierarchy of member countries of the Union is possible assessing the effectiveness of AU law in providing legal certainty to foreign investors. The recognition of supremacy of AU law over national laws is a fundamental aspect for guaranteeing its application, respect and non modification by national authorities. This has provided stability and certainty to the rights and obligations of foreign investors.

The analysis of AU law regarding the national law of AU member countries can be placed within two categories. The first one is the relationship between national Constitution and AU law. The second one is the relationship between the non-constitutional national laws and AU law. Regarding the first category, there is an important group of African Constitutions with similar provisions concerning the relationship between international law and national law. This group of countries is made up by Democratic Republic of Congo (Arts. 215 and 216), Côte D'Ivoire (Arts. 86 and 87), Djibouti (Art. 37), Guinea (Arts. 78 and 79), Mauritania (Arts. 79 and 80), Niger (Art. 131 and 132), Senegal (Arts. 97 and 98), Burkina Faso (Arts. 150 and 151), Central African Republic (Arts. 71 and 72), Chad (Arts. 221 and 222), Cameroon (Arts. 44 and 45), and Togo (Arts. 139 and 140).

The Constitutions of the previous countries have the following model clause:

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Lawfully concluded treaties and agreements have, when published, an authority superior to that of the law, subject for each treaty and agreement to the application by the other party.<sup>23</sup>

(...) If the Constitutional Court, as consulted by the President of the Republic, the Government, a tenth of the Deputies or Senators, declares that an international treaty or agreement includes a clause contrary to the Constitution, its ratification or approval may only take place after the revision of the Constitution.<sup>24</sup>

The reading of these clauses allows the relationship between AU law, specifically in the case of international treaties and the like, and national laws to be established. The first paragraph permits the conclusion that AU law is prevalent over non-constitutional national law. On the other hand, the second paragraph leads to recognition of the prevalence of national Constitutions over AU law. Additionally, the previous disposition is not the only source to conclude the supremacy of the national Constitution over AU law. Most of the African Constitutions clearly establish the prevalence of the national Constitutions in the national legal systems.<sup>25</sup>

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<sup>23</sup> CONST. DEM. REP. CONGO. Art. 215.

<sup>24</sup> *Id.* Art. 216.

<sup>25</sup> This is the case of Algeria (preamble), Benin (preamble), , Liberia (Art. 2), Mauritania (Art. 2), Malawi (Art. 10), Namibia (Art.1), Nigeria (Art. 1), Papua New Guinea (Art. 11), Rwanda (Preamble), Somalia (Art. 11), Sudan (Preamble), Tanzania (Art. 64), Togo (Art. 159), Uganda (Art.2), Zambia (Art. 1), Eritrea (Art. 2), Gambia (Art. 4), Ghana (Art. 1), Guinea-Bissau (Art. 8), Lesotho (Art. 2), Mauritius (Art. 2), Swaziland (Art.

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Taking into consideration this situation, the prevalence of the national Constitutions over AU laws at a national level is clear. However, as a consequence of principles such as the one of "pacta sunt servanda", the prevalence would not eliminate the international liability of the AU member for the violation of AU law, even if they use as defense the fulfillment of national Constitution. This circumstance, although it does not guarantee the absolute prevalence of AU law within the national legal system of AU members, does act as a deterrent for African countries to breach AU law.

It is also necessary to establish the relationship between AU laws and national non-constitutional laws. As already stated, there is a group of African countries with a similar provision expressly stating the prevalence of national laws approving international treaties over other ordinary national laws. Likewise, there are other countries whose national Constitutions also establish that prevalence.<sup>26</sup> This situation would lead to AU law prevailing over the national laws of these AU member countries.

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2), Seychelles (Art. 5), Angola (Art. 153), Chad (Preamble), Ethiopia (Art. 9), Guinea (Preamble), Kenya (Art. 3), Mali (Art. 90), Mozambique (Art. 200), Niger (Preamble), Sao Tome and Principe (Art. 111), South Africa (Art. 2), Zimbabwe (Art. 3). Likewise national Constitutions of countries such as Burundi (Art. 168), Cape Verde (Art. 11), Equatorial Guinea (Art. 94), Gabon (Art. 87), Madagascar (Art. 82c), Sierra Leone (Art. 127), Egypt (Art. 175), and Comoros (Art. 10) also establish the supremacy of the Constitution, although not as expressly as the other Constitutions.

<sup>26</sup> That is the case with the Tunisian Constitution which states that international treaties have prevalence over national laws (Art. 32). The same idea is contained in the Constitutions of Algeria (Art. 132), Benin (Art. 147), Cape Verde (Art. 11), Comoros (Art. 18), and Rwanda (Art. 190).

However, other national African Constitutions do not expressly regulate the hierarchical position of international law within their national legal systems.<sup>27</sup> In this case, it would be necessary to apply constructive principles such as the newest law prevailing over an older one ("lex posteriori derogat priori"), or that specific law prevails over general law. This situation, from the national perspective, would put the AU law at the same level as national laws and so it could be modified or superseded by national laws. Therefore, legal certainty would be gravely affected by its possible lack of stability. Nonetheless, as a consequence of the principle of *pacta sunt servanda*, the international liability of the African country at the level of the AU would be intact because of the impossibility of alleging as a defense the application of national law to deny the existence of the international obligations undertaken in the AU.

In addition, it must be noticed that these rules apply in the case of AU legal instruments materialized in international treaties. Therefore, for those AU legal instruments other than international treaties such as Regulations or Decisions, it will be necessary that the national law or case law clarify their hierarchical position within the national legal system. From the perspective of the AU institutions, the position is very likely to be that the AU legal instruments prevail over national laws,

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<sup>27</sup> For example, the Ethiopian Constitution only states that all international agreements ratified by Ethiopia are part of the law of the country (Art. 9). The same rule is adopted in Namibia's Constitution (Art. 144). In the case of South Africa, Article 233 establishes the following: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

otherwise it would not be possible to guarantee the stability and effectiveness of the integration process if the member parties could modify by a national law the decisions adopted at the regional level. Therefore, it is of fundamental importance that AU law or its case law clearly states the existence and implementation of the principle of supremacy of AU, as happens in other regional experiences such as the European Union and Andean Community.

Next, particular AU legal instruments and programs that help to generate a more legal certain environment in the continent will be presented.

#### **1.1.1. The Role of the African Charter on Democracy, Elections and Governance**

The African Charter on Democracy, Elections and Governance adopted by AU members constitutes an important tool for the provision of legal certainty to foreign investors in Africa. Its importance lies in the promotion of the respect and recognition of the rule of law by member countries of AU, which contributes to existence of legal certainty in the African continent. This pursuit for the respect and application of the rule of law is found in the motivations themselves for the adoption of the charter. There is clearly stated an interest in adopting an instrument that helps to deepen and consolidate “the rule of law, peace, security, and development” in African countries. As an expression of those motivations, the

charter establishes objectives such as the promotion of the rule of law, the supremacy of the Constitution and constitutional order, the independence of the judiciary branch, the effective coordination and harmonization of the policies by the member parties of the AU with the purpose of fostering regional and continental integration, the adoption of conditions for the participation of citizens, transparency, and access to information.<sup>28</sup> Likewise, the charter states among its principles that member parties will access and exercise state power according to the Constitution and the rule of law and make use of transparency and fairness for the management of public affairs.<sup>29</sup>

As can be noticed, all those principles and objectives are directly related to the existence of legal certainty for foreign investment. For foreign investors in Africa, it is of fundamental importance that the host countries of their investment respect the rule of law, have independent courts, promote schemes for the participation of citizens, exercise transparency in the adoption of policies and management of public matters and provide access to information. These elements make it possible for stable, transparent and coherent policies and laws to exist.

As a development of the objectives and principles that help the provision of legal certainty, Articles 4 and 10 of the chapter expressly establish the respect for

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<sup>28</sup> African Charter on Democracy, Elections and Governance, Art. 2 Jan. 30, 2007, *available at* <http://www.africa-union.org/root/AU/Documents/Treaties/text/Charter%20on%20Democracy.pdf>.

<sup>29</sup> *Id.* Art. 3.

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the rule of law and order member parties to support the Constitution. The charter also points out that the member parties must adopt measures to guarantee “political and social dialogue, as well as public trust and transparency” between the political sector and citizens. These Articles promote the creation of public, transparent and coherent laws and policies, and the participation of foreign investors in their adoption. Furthermore, they encourage the respect of the law by the authorities.

Moreover, the charter also aims to help the improvement of the political, economic and social governance of Africa. In this sense, regarding the provision of legal certainty, the charter orders member countries to enhance the capacity of parliaments and political parties, promote the participation of civil society and organizations, carry out regular reforms of their legal and justice systems, enhance the management, efficiency and effectiveness of the public sector, attack corruption, promote the use of information and communication technologies and encourage the development of the private sector through “enabling legislative and regulatory framework.”<sup>30</sup> These objectives look to be reached by measures such as the establishment and support of partnerships and dialogues between national governments with not only civil society but also the private sector.<sup>31</sup> Likewise, with the specific purpose of improving the political governance of member parties, the charter points out, amongst other things: a) an accountable, efficient and effective

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<sup>30</sup> *Id.* Art. 9.

<sup>31</sup> *Id.* Art. 28.

public administration, b) a stronger functioning and effectiveness of national parliaments, c) an independent judiciary branch, and d) a stronger and more respected rule of law.<sup>32</sup>

Additionally, with the intention of developing good economic and corporate governance, the charter establishes measures such as: a) “enabling legislative and regulatory framework” for the development of private sector activities, b) the adoption of tax policies which help to attract investments, c) the creation of economic development policies that include “private-public sector partnerships,” and d) a tax system with transparency and accountability.<sup>33</sup>

All these measures are beneficial for the existence of a certain legal environment for foreign investments because they contribute to the adoption of clearer, more stable and coherent laws and policies and the participation of foreign investors.

### **1.1.2. The Role of the New Partnership for Africa’s Development – NEPAD - for the Provision of Legal Certainty.**

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<sup>32</sup> *Id.* Art. 32.

<sup>33</sup> *Id.* Art. 33.

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The New Partnership for Africa's Development (NEPAD) is another instrument for the provision of legal certainty to foreign investors.<sup>34</sup> It is included as an instrument for the provision of legal certainty through the AU because it works under the structure of the Union.<sup>35</sup> NEPAD is a program adopted by African leaders with the purpose of eliminating poverty in Africa, developing economies of the continent, promoting the role of woman and making African countries participants

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<sup>34</sup> It was established in 2001 by the Heads of State and Government of the OAU at the 37<sup>th</sup> Session of the Assembly of Heads of State and Government in Lusaka, Zambia. Declaration on the New Common Initiative (MAP and OMEGA), AHG/Decl. 1 (XXXVII), *available at* <http://www.africa-union.org/root/AU/Documents/Decisions/hog/11HoGAssembly2001.pdf>. It is the result of the consolidation of the Millennium Partnership for the Africa Recovery Program (this program had as a purpose the development of initiatives for preservation of peace, security, and governance. Likewise it looked for diversification of exports and production in the African continent, development of investment in infrastructure and the establishment of financial mechanisms) and the Omega Plan for Action (Another program working in sectors such as infrastructure, education, health and agriculture). Those two programs were joined in one program called "A new African Initiative: Merger of the Millennium Partnership for the African Recovery Program and the Omega Plan for Action". Later this was renamed New Partnership for Africa's Development. Renee Ngamau, *The Role of Nepad in African Economic Regulation and Integration*, 10 LAW & BUS. REV. AM. 515, 517-18 (2004). See also Assembly Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD), Assembly/AU/Decl. 8 (II), *available at* [http://www.africa-union.org/Official\\_documents/Decisions\\_Declarations/Assembly%20final/Decl%20on%20the%20implementation%20of%20NEPAD%20Maputo%202003.pdf](http://www.africa-union.org/Official_documents/Decisions_Declarations/Assembly%20final/Decl%20on%20the%20implementation%20of%20NEPAD%20Maputo%202003.pdf).

<sup>35</sup> As an expression of this idea, the Assembly ordered the development of the integration of NEPAD with the structures and processes of the AU and Heads of State and Government of member states of the OAU, at the 38<sup>th</sup> session of the Assembly ordered the adoption of a Special Committee for the integration of NEPAD within the structure of the AU. This resulted in the creation of the "Heads of State and Government Implementation Committee" (HSIC). The Committee is made of 20 members who represent the different regions of Sub-Africa (3 per each subregion: North, East, West, South and Central). *Id.* Assembly Declaration on the Implementation of the New Partnership for Africa's Development (NEPAD). In 2007, the Committee issued a set of conclusions about the integration process of NEPAD with the AU. The Committee concluded that NEPAD is a program of the AU whose characteristic is being a "philosophical framework" and a "vision and mission" for the African continent. Therefore, NEPAD is not an "implementing institution". The implementation of the program should be developed by the countries, REC, development institutions and bilateral and multilateral organizations. The Committee also concluded that NEPAD's philosophy, principles and values are an "integral part" of the AU. Conclusions and Recommendations of the Nepad Heads of State and Government Implementation Committee (Hsgic) Meeting and Brainstorming n Nepad (Mar. 21, 2007), *available at* [http://www.iss.co.za/dynamic/administration/file\\_manager/file\\_links/HSGICALGERIA.PDF?link\\_id=3893&slink\\_id=4233&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.iss.co.za/dynamic/administration/file_manager/file_links/HSGICALGERIA.PDF?link_id=3893&slink_id=4233&link_type=12&slink_type=13&tmpl_id=3). Assembly Decision Assembly/AU/Dec.191(X) Decision on the Report of Heads of State and Government Implementation Committee on NEPAD, *available at* [http://www.africa-union.org/root/au/Conferences/2008/january/summit/docs/decisions/Assembly\\_Decisions\\_171-191.pdf](http://www.africa-union.org/root/au/Conferences/2008/january/summit/docs/decisions/Assembly_Decisions_171-191.pdf).

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in the world economy.<sup>36</sup> With the purpose of obtaining the objectives pursued, African leaders committed themselves to carrying out different type of actions, which help directly and indirectly for the provision of legal certainty. These actions include: the promotion and protection of democracy and human rights through the establishment of standards such as “accountability, transparency, and participatory governance,” the adoption of “transparent legal and regulatory frameworks for financial markets” and the enhancing of the capacity of African countries to “set and enforce” their laws and maintain law and order.<sup>37</sup>

The objectives and purposes of NEPAD are reached by different initiatives. Some of them develop activities that promote the existence of legal certainty for foreign investors. One of them is the initiative of “Democracy and Political Governance” which includes the necessity of carrying out reforms on administrative and civil services, enlargement of parliamentary oversight, promotion for participatory decision-making, measures to cope with corruption and judicial reforms.<sup>38</sup>

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<sup>36</sup> *The New Partnership for Africa's Development (NEPAD)*, at 1, 13-14 (Oct. 2001), NEPAD Official Web Site, <http://www.nepad.org/2005/files/home.php> (last visited Apr. 21, 2009) [hereinafter NEPAD Framework]. This program is different from previous development programs for Africa. In effect, NEPAD is a program “Developed, owned and managed” by African people. Likewise, NEPAD is based on a relationship of “partnership” where there are common obligations, commitments, interest and benefits. A third major difference, NEPAD has the African Peer Review Mechanism (APRM). A final fourth difference is that NEPAD is aware of the different levels of development in Africa. Victor Mosoti, *The New Partnership for Africa's Development: Institutional and Legal Challenges of Investment Promotion*, 5 SAN DIEGO INT'L L.J. 145, 153-54 (2004).

<sup>37</sup> NEPAD Framework, *supra* note 35, at 11.

<sup>38</sup> *Id.* at 18.

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An additional NEPAD initiative is the "Market Access Initiative." It has several objectives such as the interest of African countries to guarantee a "sound and conducive" environment for the development of private sector activities and the promotion of foreign investment and trade. To reach them, a set of actions has been established. For example, with relation to the provision of legal certainty, the initiative aims to establish dialogue mechanisms between government and the private sector to develop a common strategy of economic development and to remove restraints to the development of the private sector.<sup>39</sup> Moreover, NEPAD's framework expressly establishes the participation process of the people in the adoption of plans to be carried out within the development of NEPAD's program.<sup>40</sup> Therefore, this can provide a good environment for foreign investors to make contacts with African leaders for the adoption of policies in favor of legal certainty to foreign investment in the continent.

Finally, despite NEPAD's benefits, there are some problems affecting the program. For example, NEPAD has been criticized for the fact that it is only an "aspirational pledge" made by African leaders. It does not have a "binding legal"

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<sup>39</sup> *Id.*

<sup>40</sup> The New Partnership for Africa's Development centers on African ownership and management. Through this programme, African leaders are setting an agenda for the renewal of the continent. The agenda is based on national and regional priorities and development plans that must be prepared through participatory processes involving the people. We believe that while African leaders derive their mandates from their people, it is their role to articulate these plans and lead the processes of implementation on behalf of their people. *Id.* at 10.

character.<sup>41</sup> Similarly, NEPAD's effectiveness is impaired by the failure of many African countries to adopt the program. In effect, although NEPAD is closely related to the AU and therefore member countries of the Union should support the structure, work and goals of NEPAD, only some of them have actively participated in the program.<sup>42</sup>

## **1.2. The Role of AU Institutions for the Provision of Legal Certainty**

The institutions composing the structure of the AU are a key element in the provision of legal certainty to foreign investors. It is through these institutions that the laws and policies of the AU are conceived, discussed, adopted and enforced. Therefore, AU institutions contribute to the provision of legal certainty through their capacity to adopt stable laws and policies that generate an environment of legal certainty for foreign investors. Likewise AU institutions help the provision of legal certainty by allowing participation of the civil society, specifically the private sector, in the decision-making process of laws and policies. This creates a fundamental opportunity for the exchange of ideas and opinions between African governments and foreign investors in the creation of new laws or policies or the modification of them. Moreover this participation gives foreign investors not only the possibility to know about future modification in the laws regulating their investment but also to

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<sup>41</sup> Curtis F.J. Doebbler, *A complex ambiguity: the Relationship Between the African Commission on Human's and Peoples' Rights and other African Union Initiatives Affecting Respect for Human Rights*, 13 *TRANSNATL L. & CONTEMP. PROBS.* 7, 19-22 (2003).

<sup>42</sup> Mosoti, *supra* note 35.

avoid non-consulted changes in the laws, which generates better conditions of predictability for the regulation of investment. Additionally, AU institutions also help to look after the respect and fulfillment of AU law. This way, the rights and obligations contained in the different AU legal sources are realized. Under this perspective, the following section will present the particular contribution of each of AU institutions to the provision of legal certainty.<sup>43</sup>

### **1.2.1. The Assembly of the Union**

The Assembly of the Union<sup>44</sup> is considered the political<sup>45</sup> and supreme organ<sup>46</sup> of the AU. This special characteristic renders this institution a key one for the provision of legal certainty. For example, the Assembly is in charge of establishing the common policies of the Union. This duty is of fundamental importance for the provision of legal certainty because it gives the legal and political power to the Assembly to undertake from its own initiative the adoption of policies and decisions creating and promoting legal certainty for foreign investors. This political initiative for the provision of legal certainty can be observed in several

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<sup>43</sup> Regarding the power of the institutions, it has been stated that the powers of organs of the African Union are limited to those expressly established in the Constitutive Act of the Union in addition to those necessary for the “effective performance” of their duties. Udombana, *supra* note 8, at 83.

<sup>44</sup> The Assembly of the African Union is made up of the Heads of the States and Governments of the member countries of the Union. It adopts its decisions by consensus. However, if there is no consensus, by a two-thirds majority of the member states. Nonetheless, when the issue to be discussed has a procedural character, a decision is made by a simple majority. Likewise, the necessary quorum to make a decision is two-thirds of the “total membership of the Union”. Constitutive Act of the AU, *supra* note 8, Art. 7.

<sup>45</sup> Udombana, *supra* note 8, at 87.

<sup>46</sup> Constitutive Act of the AU, *supra* note 8, Art.6.

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of the statements and decisions issued by the Assembly. In those statements and decisions, the Assembly makes reference to issues such as the rule of law, the participation of the civil society and the private sector and the role of regional integration for the economic development of the continent, all of them fundamental factors for the existence of proper levels of legal certainty to foreign investors.

For instance, in the Durban Declaration the Assembly highlighted the importance of the OAU Charter on Human and People's Rights, the Grand Bay Declaration and Plan of Action on Human Rights as instruments for the observation, promotion and protection not only of the human rights but also the rule of law. Likewise, in the same statement, the Assembly commented on the necessity that member countries of the AU take the needed actions to support the policies of the Union devoted to encouraging, amongst other things, the stability, security and sustainable development in the Region. Additionally, the Assembly also committed to the establishment of several organs of the Union such as the Pan-African Parliament and the Economic, Social and Cultural Council, taking into consideration their importance for the participation of citizens and civil organizations in the integration process. Finally, the Assembly stated the importance of the participation of the people, including the business community, in the programs of the AU.

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Another political expression of the possibility to use the AU for the provision of legal certainty is the Declaration on the Review of the Millennium declaration and the millennium development goals made in 2005. In this statement, the importance of encouraging the existence of peace and security as necessary elements for the increase in investment and development was noted. Likewise, in the AU Summit Declaration on Africa's Industrial Development, African government heads stated the importance of developing "public-private sector partnership" and establishing and improving "legal and institutional frameworks" with the purpose of supporting African industrial enterprises at national and international levels.<sup>47</sup> Moreover African leaders reiterated their commitment to the principles of good governance, democracy, rule of law, and accountability. They highlighted the importance of these principles for the development of countries in the African continent.

Finally, in 2007 in the ACCRA Declaration, the Heads of State and Government of the member countries of the AU stated the importance of the involvement of the African people to make of this process not a "Union of states and governments" but a "Union of peoples."<sup>48</sup> As can be seen, this group of statements and decisions adopted by the Assembly reflects a political will to carry

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<sup>47</sup> Assembly/AU/Decl.1 (X) AU Summit Declaration on Africa's Industrial Development, *available at* [http://www.africa-union.org/root/au/Conferences/2008/january/summit/docs/decisions/Assembly\\_Decisions\\_171-191.pdf](http://www.africa-union.org/root/au/Conferences/2008/january/summit/docs/decisions/Assembly_Decisions_171-191.pdf).

<sup>48</sup> ACCRA Declaration, 2007, 9<sup>th</sup> Meeting of the Heads of State and Government of the African Union, July 3<sup>th</sup>, 2007, *available at* [www.africa-union.org/root/ua/Conferences/2007/juin/Sommet\\_Accra/Doc/Decisions/Accra\\_Declaration.doc](http://www.africa-union.org/root/ua/Conferences/2007/juin/Sommet_Accra/Doc/Decisions/Accra_Declaration.doc).

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out measures for the promotion of investment, the respect of the rule of law and the participation of the civil society in the AU integration process. All these elements are fundamental for justifying, promoting, and developing policies aimed at the existence of legal certainty.

The political initiative of the Assembly is not its only power related to the provision of legal certainty. Another responsibility of the Assembly is receiving, studying and adopting decisions on reports and recommendations from other AU organisms. This duty makes it possible to carry out a coordinated and harmonized work among the different institutions of the AU. This situation helps the provision of legal certainty because if the different institutions of the AU work toward the same objectives and goals and participate in the decision-making process, the AU law and policies are likely to be more coherent and applied by the organs of the AU and the member countries of the integration process.

An additional and very important duty of the Assembly that promotes the provision of legal certainty is overseeing the application and fulfillment of the policies and decisions of the Union. This is a key responsibility of the Assembly for ensuring that the policies, decisions and laws of the AU are applied by each of its member countries. This way is promoted and guaranteed the effectiveness of AU legal instruments as instruments to enhance the conditions of legal certainty in the countries.

### **1.2.2. The Executive Council**

The Executive Council is considered a political and economic organ whose members follow the instructions of the governments that they represent.<sup>49</sup> The Executive Council of the AU is made up of the Ministers of Foreign Affairs or any other minister or authority appointed by the governments of each of the member states.<sup>50</sup> The Council has duties and powers that might help the provision of legal certainty for foreign investors. In this sense, one must note the power of the Council to coordinate and adopt decisions on policies regarding issues such as foreign trade, energy, industry and mineral resources, environmental protection, transport, communications, and insurance.<sup>51</sup> All those sectors are of fundamental importance for foreign investors and the existence of legal certainty is especially sensitive taking into consideration the large amount of money that is usually invested there and the length of time on which the investment is developed. This context makes necessary the existence of clear, transparent and stable rules and policies regulating the development of investment. Accordingly, the Executive Council can be a very significant institution for the provision of legal certainty

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<sup>49</sup> Udombana, *supra* note 8, at 94.

<sup>50</sup> Constitutive Act of the AU, *supra* note 8, Art. 10. Constitutive Act. Like the Assembly, the decisions on the Executive Council are adopted by consensus, or if this is not possible, by the two-thirds majority of members of the Union. Also, in the case of procedural issues, the decision can be adopted by a simple majority. The quorum is two-thirds of the total membership. *Id.* Art. 11.

<sup>51</sup> *Id.* Art. 13.

because it can promote the adoption of policies that contribute to the existence of legal certainty in each of the sectors.

The possibility of promoting the development of policies in favor of foreign investment and legal certainty can be seen in Council's decisions. For example, in the Decision on Trade and Investment in Africa, the Council recognized the lack of attractiveness of Africa as a receptor of foreign direct investment. As a consequence of this concern, it requested that members of the AU and AU Commission evaluate their investment promotion policies to overcome factors limiting the levels of foreign direct investment. The Decision also calls for the help of developed countries in encouraging multinational companies to invest in African countries. Finally, it requested the help of international organizations such as UNCTAD to review and establish investment promotion strategies.<sup>52</sup>

The Council also helps the provision of legal certainty by participating in the coordinated work among the different AU institutions. This is developed through the duty of the Council to consider matters that are sent to it by the Assembly of the AU. Likewise, the Council has the duty of overseeing the execution of the policies established by the Assembly. This responsibility develops not only the teamwork of AU organs but also guarantees the effective application and respect

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<sup>52</sup> Executive Council Decision EX.CL/Dec. 205 (VII) Decision on Trade and Investment in Africa, *available at* <http://www.africa-union.org/Summit/JULY%202005/Council%20Decisions%20%20final.pdf>.

of AU policies, decisions and laws by all of those in charge of applying and following it.<sup>53</sup>

Finally, the Rules of Procedure of the Executive Council establishes other duties which help toward the provision of legal certainty. In this sense, the Council is in charge of coordinating and harmonizing policies, activities and initiatives for areas of interest for member countries of the Union. Moreover, the Council can also adopt policies for cooperation between the AU and “Africa’s partners.”<sup>54</sup> These powers would allow the establishment of harmonized laws and policies, which are a substantial tool for providing legal certainty, and the creation of mechanisms and “partnerships” with the countries of origin of the foreign investors in Africa in order to develop policies promoting legal certainty.

### **1.2.3. The Specialized Technical Committees**

The AU has established several Specialized Technical Committees. They are under the supervision of the Executive Council and are comprised of the ministers or senior government officials of the corresponding area. Specifically, the Committees that might help in the development of a policy for the provision of legal certainty for foreign investors are the Committee on Trade, Customs and

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<sup>53</sup> *Id.*

<sup>54</sup> Rules of Procedure of the Executive Council, Rule 5, July 2002, available at [http://www.africa-union.org/rule\\_prot/exec-council.pdf](http://www.africa-union.org/rule_prot/exec-council.pdf).

Immigration Matters, the Committee on Transport, Communications and Tourism; the Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; and the Committee on Health, Labour and Social Affairs.<sup>55</sup> However, it is important to emphasize that the structure of the AU does not establish a Committee on foreign investment. The existence of a Committee of this type would be a substantial step toward the promotion of foreign investment in Africa because it would send a message to the international community that the African continent works at a regional level on issues of interest for foreign investors. Moreover, this Committee would be a perfect context to study, promote and develop an African policy of legal certainty to foreign investments.

The duties of the Committees regarding the provision of legal certainty for foreign investment are to prepare projects for the Union to submit to the Executive Council, “ensure the supervision, follow-up and evaluation of the implementation of decisions taken by the organs of the Union.” and “ensure the coordination and harmonization of projects and programs of the Union.”<sup>56</sup> These duties reflect a coordinated and harmonized work among AU institutions and makes possible that the Committees propose and develop policies that promote the provision of legal certainty.

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<sup>55</sup> The other Committees are the Committee on Rural Economy and Agricultural Matters, the Committee on Monetary and Financial Affairs, and the Committee on Education, Culture and Human Resources. Constitutive Act of the AU, *supra* note 8, Art. 14.

<sup>56</sup> *Id.* Art. 15.

#### **1.2.4. The Pan-African Parliament**

The Pan-African Parliament is considered another political organ of the AU.<sup>57</sup> The objective of the Parliament is to be an organism where the people and organizations of the continent can actively participate in the discussions and decision-making process about African problems.<sup>58</sup> In this sense, the final purpose of this institution is to be an institution with full legislative powers made up of members elected by universal suffrage. However, while this goal is reached, the Parliament only has a consulting and advisory role.<sup>59</sup> This advisory character was adopted because the leaders of the AU did not want to be subordinated to another organ of political character for the purpose of formulating policy and adoption of binding decisions.<sup>60</sup>

The Parliament has several objectives and duties related to the provision of legal certainty. For instance, it should be an instrument assisting in the application of AU policies and the existence of good governance, transparency, accountability, peace, security and stability in member countries of the Union.<sup>61</sup> Moreover, the

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<sup>57</sup> Udombana, *supra* note 8, at 97.

<sup>58</sup> MAKINDA & OKUMU, *supra* note 9, at 44.

<sup>59</sup> Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, Mar. 2, 2001, Art. 2, African Union Official Website, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/protocol-panafrican-parliament.pdf>. Those representatives are appointed by the national parliament or deliberative organs of the Union.

<sup>60</sup> Udombana, *supra* note 8, at 98.

<sup>61</sup> Rules of Procedure of the Pan-African Parliament, Rule 4, Oct. 2004, *available at* [http://www.iss.co.za/Af/RegOrg/unity\\_to\\_union/pdfs/pap/rop.pdf](http://www.iss.co.za/Af/RegOrg/unity_to_union/pdfs/pap/rop.pdf) [hereinafter Pan-African Parliament Rules of Procedure].

Parliament helps in the process of harmonization and coordination among the laws of member states.<sup>62</sup> In order to carry out this process, the Parliament gives special consideration to the participation of the civil society in the knowledge and discussions about principles, policies and programs within the regional integration process.<sup>63</sup>

### **1.2.5. The AU Commission**

The AU Commission is the secretariat of the AU<sup>64</sup> and is made up of a Chairman, his or her deputies and the group of Commissioners. The AU Commission contributes to the provision of legal certainty by exercising a duty of coordination among the different organs of the AU and supervision of the application of the decisions adopted by other AU organisms. Additionally, the Commission “collect and disseminate” AU information. Therefore, it improves public knowledge of AU law and other legal instruments.<sup>65</sup>

The work of the AU Commission is not absent of inconvenient situations affecting its role as provider of legal certainty. For instance, Government officials

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<sup>62</sup> *Id.*

<sup>63</sup> Pan African Parliament *Strategic Plan 2006-2010 One Africa, One Voice*, at 14 (Nov. 2005), available at [http://www.issafrica.org/AF/RegOrg/unity\\_to\\_union/pdfs/pap/stratplan.pdf](http://www.issafrica.org/AF/RegOrg/unity_to_union/pdfs/pap/stratplan.pdf) [hereinafter *Strategic Plan 2006-2010*].

<sup>64</sup> The Commission, [http://www.africa-union.org/root/au/organs/The\\_Commission\\_en.htm](http://www.africa-union.org/root/au/organs/The_Commission_en.htm) (last visited Apr. 8<sup>th</sup>, 2009).

<sup>65</sup> Statutes of the Commission of the African Union, Art. 3, Jul. 2002, available at [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/pdf\\_eng/oau/StatCommission.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/pdf_eng/oau/StatCommission.pdf) [hereinafter *AU Commission Statutes*].

interviewed about issues regarding the job of the AU Commission, identified as one of the Commission's problems the late delivery of documents. This circumstance affected to a large extent their participation in meetings of AU organs. Likewise, this concern is even more problematic for civil society organizations. As solutions to overcome the problems affecting the work of the AU Commission, the following measures have been proposed: 1) adopting a policy for the release and access of information which includes access to official documents except in cases where the documents have a confidential nature, 2) adopting the usage of technologies for the distribution and translation of documents, 3) improving the AU web page regarding search options and updating of information, and 4) establishing transparent requirements for the recognition of civil organizations within the AU.<sup>66</sup> All these proposals would help to improve the levels of legal certainty within AU because they would make easier, public and transparent the access and knowledge of AU documents. Therefore, the publicity of AU law and documents is enhanced for all people, including foreign investors. Moreover, the communication between the Commission and African people would be more efficient.

#### **1.2.6. The Permanent Representatives Committee**

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<sup>66</sup> TOWARDS A PEOPLE-DRIVEN AFRICAN UNION CURRENT OBSTACLES NEW OPPORTUNITIES, 4-5 (African Network on Debt and Development, the Open Society Institute African Governance Monitoring and Advocacy Project, & Oxfam GB 2007).

The Permanent Representatives Committee is made by permanent and plenipotentiary representatives of member states of the AU. Regarding the provision of legal certainty, the Committee has the authority to recommend issues of interest for member countries.<sup>67</sup> Therefore, it has a potential power to propose the adoption of policies in favor of the provision of legal certainty.

### **1.2.7. The Economic, Social and Cultural Council (ECOSOCC)**

The Council constitutes the institution representing the AU society.<sup>68</sup> From its own statutes' preamble, it is possible to find an interest for integrating civil society and private sector with the development of the AU through this Council.<sup>69</sup> ECOSOCC<sup>70</sup> helps the provision of legal certainty by constituting an institution where foreign investors can discuss policies and measures for the provision of legal certainty at a regional level.<sup>71</sup> The Council can help to this objective because

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<sup>67</sup> Constitutive Act of the AU, *supra* note 8, Art. 21.

<sup>68</sup> It is made up by social and professional groups of the member states of this integration agreement. *Id.* at art. 22.

<sup>69</sup> Guided by the common vision of a united and strong Africa and by the need to build a partnership between governments and all segments of civil society, in particular women, youth and the private sector, in order to strengthen solidarity and cohesion among our peoples; Recalling the decision of the Assembly to invite and encourage the full participation of the African Diaspora as an important part of the Continent, in the building of the African Union. Statutes of the Economic, Social And Cultural Council of the African Union, Preamble, *available at* [http://www.africa-union.org/root/AU/AUC/Departments/BCP/CIDO/Meetings/february/docs/ECOSOCC\\_STATUTES.pdf](http://www.africa-union.org/root/AU/AUC/Departments/BCP/CIDO/Meetings/february/docs/ECOSOCC_STATUTES.pdf). [hereinafter ECOSOCC Statutes].

<sup>70</sup> The Council has an advisory role. Each member state of the AU is entitled to two CSOs. *Id.* Art. 3.

<sup>71</sup> The involvement of the private sector in regional integration in Africa is very important. One of the principal contributions of the private sector would be in the field of the conception and adoption of policies. The private sector can exert an advisory role in the establishment of policies in the regional integration. The second way how the private sector can contribute to regional integration is by the application of programs of the region. In this sense, the private sector has the capacity to contribute financial and human resources to

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it is an institution that allows the dialogue between African governments and civil society, including private sector. For example, within its objectives, the Council looks to encourage the dialogue between African people about African issues, the building of partnerships between the AU's governments and sectors of civil society, including private sector and professional groups, and the promotion of the involvement of the African civil society in the adoption of AU policies and programs.

The Council also helps to enhancement of legal certainty in the region by encouraging the peace, security and stability in the African region and promoting good governance, democratic principles and institutions.<sup>72</sup> Furthermore, it helps the promotion of the rule of law and good governance and submit recommendations and studies to the organs of the AU.<sup>73</sup> Therefore, it can recommend the adoption of policies in favor of legal certainty to foreign investment.

Within the structure of the Committee, it is important to highlight the existence of "Sectoral Cluster Committees" which can also aid the provision of

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carry out the programs adopted within the integration scheme. ECONOMIC COMMISSION FOR AFRICA, ASSESSING REGIONAL INTEGRATION IN AFRICA 221-22, (Economic Commission for Africa 2004). In general, the private sector within the integration process contributes to it by helping economic development, creation of jobs, business innovation and technological upgrading. Meanwhile the job of the government should be the role of a facilitator. Nsonguruna J. Udombana, *A Harmony or a Cacohony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development*, 13 IND. INT'L & COMP. L. REV. 185, 222 (2002). However it has been stated that the participation of the private sector in the African regional integration process has been more an aspiration than a reality. Alieu Hgum, Opening Statement By Hon. Aieu Hgum Secretary of State For Trade and Industry and Employment on the Occasion of African Union Private Sector Forum Banjul, The Gambia (Jun. 23, 2006), <http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/AU-PRIVATE-SECTOR.htm> (last visited Apr. 30, 2009).

<sup>72</sup> ECOSOCC Statutes, *supra* note 68, Art. 2.

<sup>73</sup> *Id.*, Art. 7.

legal certainty. The Committees draft advisory opinions and reports for the ECOSOCC. Those Committees give advice regarding the establishment of policies and programs of the Union. Specifically, the Committees of Political Affairs are in charge, amongst other things, of subjects such as rule of law and good governance and the handling of subjects such as private sector development, economic integration and monetary and financial affairs.<sup>74</sup>

Despite the advantages of the existence of ECOSOCC, the Council faces some problems with its development. An initial group of problems is related to participation itself in ECOSOCC meetings. As to this situation, it has been alleged that, although spaces for the participation of civil society exist within the African integration process, the effective participation of citizens is still a pending task. Among the reasons explaining this situation are an insufficient infrastructure and lack of proper policies and procedures. For instance, some of the concerns faced by representatives of civil society within the integration process are the existence of difficulties in obtaining visas for traveling to countries hosting meetings, accreditation to be present at meetings, and physical venues to carry out discussions by representatives. In addition, civil society in the AU has alleged that

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<sup>74</sup> *Id.* Art. 11.

access to policies and discussions in AU is difficult. This limits the participation of the African people in the adoption of policies at AU level.<sup>75</sup>

Another set of problems is related to ECOSOCC's infrastructure. It has been claimed that the system to elect ECOSOCC's representatives excludes civil society organizations which could contribute to the organization. Likewise, another concern is the lack of public knowledge of the organism. This can be explained by the non-functioning of many of the national chapters or their poor development. Additionally, ECOSOCC's structure has been also criticized because of its advisory character.<sup>76</sup> This last criticism affects negatively the effectiveness of ECOSOCC to provide legal certainty because there is no guarantee that the observations of the group be taken into consideration by the Assembly. However, its role in the exchange of opinions and experiences between civil society and African governments is not affected.

#### **1.2.8. AU-Private Sector Forum**

Although this is not an organism within the structure of the AU, this Forum is an important channel through which foreign investors, as members of the private sector, can communicate with African Governments. In participating in this forum,

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<sup>75</sup> TOWARDS A PEOPLE-DRIVEN AFRICAN UNION CURRENT OBSTACLES NEW OPPORTUNITIES, 1, 39-42 (African Network on Debt and Development, the Open Society Institute African Governance Monitoring and Advocacy Project, & Oxfam GB 2007).

<sup>76</sup> *Id.* at 6.

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the private sector has the opportunity to express its concerns and desires to African leaders. This is the role of the Forum in the provision of legal certainty in the AU.

The AU-Private Forum is an annual meeting organized by the AU Commission whose purpose is to give the private sector the opportunity to participate in the decision-making process in the AU.<sup>77</sup> The Forum is seen as an instrument of “interface and partnership” between the AU and the private sector.<sup>78</sup> Representatives of the African private sector have emphasized the existence of this forum as a core element in the development of the relationship between the AU and the private sector. Likewise, they have also emphasized their importance for the economic growth of the continent.<sup>79</sup>

The importance of the forum in the provision of legal certainty can be observed in many of their public statements. For instance, in the final statement of the forum in 2004, the private sector requested from the AU the creation of an

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<sup>77</sup> The Executive Council recognized the importance of the private sector for the development of the African continent. For this reason, the Council supported the creation of the African Private Sector Forum and requested its creation from the Commission. Executive Council Decision EX.CL/Dec. 183 (VI) Decision on the Institutionalization of the African Private Sector Forum, *available at* <http://www.africa-union.org/summit/jan2005/Executive%20Council/Executive%20Council%20%20Decisions.pdf>.

<sup>78</sup> Presentation African Union Private Sector Forum, Banjul, the Gambia: (Jun. 22-23, 2006), *available at* <http://www.africa-union.org/root/UA/Conferences/Juin/Sommet/EA/The%20Banjul%20Private%20sector%20Mtg.pdf>. *See also* 2008 African Private Sector Forum, [http://www.unglobalcompact.org/NewsAndEvents/event\\_archives/2008\\_AU\\_summit/index.html](http://www.unglobalcompact.org/NewsAndEvents/event_archives/2008_AU_summit/index.html).

<sup>79</sup> The cooperative work between African governments and the private sector has been important in countries such as Ghana, Senegal and Tanzania where government and private sector have worked together to eliminate inefficient customs and inconsistent tax enforcement. WORLD BANK, AFRICA DEVELOPMENT INDICATORS 2006 8 (World Bank 2006).

adequate environment for trade, investment and industrialization.<sup>80</sup> Similarly in 2006, besides claiming larger participation in policy-making and implementation, the private sector requested that a harmonization of investment codes be carried out.<sup>81</sup> Additionally, the Forum recommended that African governments value and harmonize business laws in Africa with the purpose of decreasing the cost of doing business there, creating the African Investment Guarantee Agency to reduce the risk of investments made in the continent, and harmonizing banking and securities laws as well as “cross border trade.”

At the forum held in 2008 in Addis Ababa, Ethiopia, the private sector made several recommendations to member countries of the AU. Among the recommendations directly or indirectly related to the provision of legal certainty, the following should be mentioned: a) AU should make the participation of the private sector within the AU’s organs deeper and wider. This can be done by presenting the recommendations of the private sector to the Assembly, implementing them at regional, subregional and national level, adopting a mechanism for a “full and transparent feed-back/communication with all stakeholders,” b) the AU must make available a “conducive, regulatory and enabling environment” mainly in areas such as trade, peace and security, and good governance, and c) the AU should

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<sup>80</sup> Declaration of the AU-Private Sector Forum, Addis Ababa, June 27, 2004, *available at* <http://www.africa-union.org/AU%20summit%202004/AU%20CSO/privateforumDecla.pdf>.

<sup>81</sup> AU-Private Sector Forum, Report of the African Union Private Sector Forum, at 4 (June 23, 2006), <http://www.africa-union.org/root/au/Conferences/Past/2006/July/summit/summit.htm>.

guarantee the protection of brands and copyrights and also “smooth and lawful competitions among business.”<sup>82</sup>

As can be demonstrated, the Forum can be seen as place for communication between African governments and foreign investors. From this perspective, foreign investors can promote the adoption of policies and laws affecting the legal development of their investments in the continent. Moreover, it is possible for them to know and understand the position of African government in legal issues affecting their investment.

### **1.2.9. The Court of Justice of the AU for the Provision of Legal Certainty**

The Court of Justice of the AU was established by Article 18 of the Constitutive Act of the Union, although it is not functioning yet.<sup>83</sup> With the purpose

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<sup>82</sup> Declaration the African Private Sector Forum, Addis Ababa, January 22-23, 2008, *available at* [http://www.unglobalcompact.org/NewsAndEvents/event\\_archives/2008\\_AU\\_summit/outcome\\_statement\\_apf\\_2008.pdf](http://www.unglobalcompact.org/NewsAndEvents/event_archives/2008_AU_summit/outcome_statement_apf_2008.pdf).

<sup>83</sup> It is made up of eleven judges who must be citizens of member countries of the Union. Protocol of the Court of Justice of the African Union. Art. 3, Jul. 2003, *available at* <http://www.africa-union.org/root/AU/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf> [hereinafter Protocol of the Court of Justice of the African Union]. On the other hand, it must be clarified that the Court of Justice of the African Union is different from the African Court of Human and People’s Rights. In this sense, the Executive Council stated that the Court of Justice must be a different entity from the African Court of Human and People’s Rights. Executive Council Decision EX/CL/Dec.58(III) Decision on the Draft Protocol of the Court of Justice, *available at* [http://www.africa-union.org/Official\\_documents/council%20of%20ministers%20meetings/Maputo/EX\\_CL\\_Dec%2058.pdf](http://www.africa-union.org/Official_documents/council%20of%20ministers%20meetings/Maputo/EX_CL_Dec%2058.pdf).

However, their unification has been proposed. This purpose was adopted in a Decision of the Assembly (Assembly/AU/Dec. 45 (III)). However, this option has been criticized for several reasons: 1) each Court has a different jurisdictional function. In effect, the Human Rights Court, as its own name states, has jurisdiction to decide cases related with the interpretation of the African human rights Charter. In the case of the Court of Justice, its jurisdiction relies on treaties and convention of the AU and issues of international law, 2) the

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of regulating the structure and functioning of the Court, the AU adopted the Protocol of the Court of Justice of the AU. Although this protocol is not in force yet either, its study is necessary to determine the Courts' role with regard to the provision of legal certainty. About this subject, the AU Court will have the task to decide cases where there is a breach of AU law by any of the AU member countries and will be in charge of determining and developing a common understanding of AU law. This second power will provide a common and homogeneous knowledge of AU law which renders possible a predictable and coherent understanding and application of AU law in all the member countries of the Union.

In effect, the protocol of the Court of Justice establishes that the AU Court has competence to know disputes over the interpretation and application of the Constitutive Act of the Union, interpretation, application and validity of treaties and other legal sources adopted by the AU, international law's questions, acts, decisions, regulations and directives issued by the organs of the Union and any other issue especially established in other agreements adopted among AU member parties themselves or between member parties and AU, where jurisdiction

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Courts are in different level of development (while Human Rights Protocol is already in force, the Court of Justice Protocol is not), and 3) the composition of each Court and expertise of their members is different. By contrary, there are also arguments in favor of unifying the Courts. Those arguments are the following: 1) more efficient usage of human and financial resources, 2) a single court produces simplicity, 3) it would help to see the job of a Court in dealing with the interaction between human rights and economic issues, 4) one court would help to develop a uniform African jurisprudence, and 5) it would make possible the synchronization of the judicial system of Africa. Kithure Kindiki, *The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits*, 15 AFR. J. OF INT'L AND COMP. L. 138, 140-45 (2007).

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to the Court is granted. Likewise, the Court has the power to determine the existence of a breach of obligations of member parties owed to the AU and the nature and extent of remedies owed by this violation.<sup>84</sup> The Court's role of protecting AU law is a fundamental role for the provision of legal certainty because AU law needs an independent court that enforces the legal binding instruments adopted within the development of the regional agreement. Without this body, the effectiveness of the AU is deeply affected because the application and respect of AU law is not guaranteed or cannot be enforced.

An important aspect with regard to the Court's role in the enhancement of levels of legal certainty is the issue of legitimacy to bring a suit before the Court. The Protocol grant it to member states, the Assembly, the Parliament and other AU organs authorized by the Assembly, the Commission, and a member of its staff regarding a conflict between them. Third parties can also have access to the Court if they have the consent of the "State Party concerned" and under the conditions that the Assembly establishes.<sup>85</sup> The regulation on the legitimacy to access to the Court constitutes a threat to the provision of legal certainty to foreign investors. The

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<sup>84</sup> Protocol of the Court of Justice of the African Union. Art. 19, Jul. 2003, *available at* <http://www.africa-union.org/root/AU/Documents/Treaties/Text/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf> [hereinafter Protocol of the Court of Justice of the African Union]. Regarding legal sources, the Court should solve disputes according to the International law and must consider some specific legal sources. These sources are: 1) the constituting treaty of the Union, 2) international treaties that establish "rules expressly recognized by the contesting states," 3) International custom law, 4) general principles of law recognized universally or by African states, and 5) the judgments and "writings of the most highly qualified publicist of various nations", and the regulations, directives and decisions of the Union as subsidiary sources. Likewise, the Court can decide a conflict *ex aequo et bono* if the parties agree upon that system. *Id.* Art. 20.

<sup>85</sup> *Id.* Art. 18.

fact that investors do not have autonomy to access the Court prejudices the possibility of defending their rights at the level of the AU. Furthermore, it is very unlikely that if a foreign investor wants to sue an African state for the violation of AU law, the country will authorize the use of the Court by the foreign investor. The fact that access to the Court is so limited for investors is a high obstacle for the effective recognition of AU laws regulating the conduct of foreign investors. It limits the possibility of foreign investors accessing a more impartial Court and also a more specialized court in the knowledge of AU law.

Another important aspect of the Court for the provision of legal certainty is the binding character of decisions. The Protocol itself establishes that the decision is binding on the parties for the particular case.<sup>86</sup> Nonetheless, Article 38 of the Protocol specifically establishes that a judgment interpreting the Constitutive Act will be binding for all member states and organs of the Union. This decision contributes to the provision of legal certainty because it creates a uniform interpretation of the Constitutive Act binding for all member countries of the Union.

Moreover, the Court's Protocol expressly establishes also the obligation to member parties to comply with and guarantee the execution of a judgment issued by the Court<sup>87</sup> and the consequences if there is noncompliance with it. Article 52 states that by request of any of the parties, the AU Assembly can adopt measures

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<sup>86</sup> *Id.* Art. 37.

<sup>87</sup> *Id.* Art. 51.

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to give effect to the Court's decision and decide sanctions for the non-fulfillment pursuant to Article 23 of the Constituting Act. This provision establishes the sanctions to be imposed by the Assembly by the nonpayment of contributions,<sup>88</sup> noncompliance with decisions and policies<sup>89</sup> and changes of government made against the Constitution.<sup>90</sup> In the case of lack of contributions, a member state can be subjected to different sanctions such as the loss of the right to speak at meetings, vote, propose candidates for a position within AU institutions, or receive any benefit derived from activities or commitments adopted within the Union. In the case of noncompliance with decisions and policies established by the Union, member countries can also be sanctioned with other measures such as the rejection of transport and communications links with other member countries of the Union, and any other political and economic measure that Assembly considers to adopt.<sup>91</sup> The existence of sanctions is essential for the Court's role in the provision of legal certainty because it gives "teeth" to the judgments of the Court and forces member states to accept and apply the Court's decisions. Moreover, it helps to restrain member countries from committing violations of AU law.<sup>92</sup>

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<sup>88</sup> Until June, 2007 were sanctioned for not paying AU contributions Cape Verde, Democratic Republic of Congo, Eritrea, Mauritania, Sao Tome and Principe and Seychelles. However by December of the same year, 21 members of the Union were in arrears of one year or more equaling to an amount of \$106,812.035.48. The High Level Panel, *supra* note 11, at 30.

<sup>89</sup> By December 2007, No AU member had been sanctioned by the noncompliance with the Decisions and Policies. *Id.*

<sup>90</sup> AU Assembly Rules of Procedure, *supra* note 12, Rule 36. By December 2007, Togo, Mauritania, Cote D'Ivoire, and Sao Tome and Principe had been sanctioned by the establishment of governments against the Constitution.

<sup>91</sup> Constitutive Act of the AU, *supra* note 8, Art.23.

<sup>92</sup> However, there have been stated reasons to decide not to comply with the decisions of the Court of Justice. For example, these include national sovereignty, weak economic interdependence among the African countries, a major interest in solving conflicts by negotiation instead of adjudication, and the nonexistence of

Finally, another important power of the Court of Justice for the provision of legal certainty is its advisory opinion. The Assembly, the Parliament, the Executive Council, the Peace and Security Council, the ECOSOC, any of the Financial Institutions, a REC or any other AU organ authorized by the Assembly can request the Court to issue an advisory opinion on a legal question.<sup>93</sup> This duty of the Court contributes to the provision of legal certainty because it helps to build and develop a uniform interpretation of AU law. However, this opportunity is limited because of the impossibility of member countries requesting that advisory opinion. This would be a useful option because the countries and their authorities would be in charge of the application of AU law.

## **2. Conclusion**

After analyzing the AU's structure, it is possible to conclude that this integration experience has elements that help the provision of legal certainty. For instance, it has an institutional structure that allows its institutions to work coordinately in the adoption of policies and laws, which contributes to the development and adoption of coherent and stable laws and policies. Likewise, it allows the exchange of opinions, ideas, and experiences between African

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private right of action to obtain access to the Tribunal. Richard Frimpong Opong, *Observing the Legal System of the Community: The Relationship Between Community and National Legal Systems Under the African Economic Community Treaty*, 15 TUL. J. INT'L & COMP. L. 41, 75 (2006).

<sup>93</sup> Protocol of the Court of Justice of the African Union, *supra* note 83, Art. 44.

governments and foreign investors during the decision-making process by means of an institution such as ECOSOCC and the private sector Forum. This communication promotes transparency and predictability to foreign investors for the development of their economic activities.

In addition, AU also has the power to create legal instruments that serve to regulate the activity of foreign investors, limiting the power of the host country to interfere in the investment, and promote the progress and respect of matters such as the rule of law, transparency and good governance in the continent. So far this task has been achieved mainly through the adoption of traditional international treaties which prevent AU member countries from unilaterally modifying the commitments assumed in the AU instruments, unless they assume the international liability for their action. Moreover, the AU has its own judicial body that works to enforce the AU legal instruments and guarantees their fulfillment by member countries.

Despite of the existence of different elements that help the AU to serve as an instrument for providing legal certainty, it suffers from several obstacles to exercising this role. One of the biggest flaws of the AU is the lack of recognition of the principles of direct and immediate effect of its legal instruments. This situation affects the implementation and enforcement of the rights recognized by the AU laws and the loss of the benefits arising from them. Therefore, it is necessary for the effective provision of legal certainty that the AU Court begins to work and

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enforce the AU legal instruments and guarantee their respect by member countries.