Regional Trade Courts and Trade Disputes Settlement: A Call for Reform of the ECOWAS Court of Justice

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Abstract

Dispute settlement rules and procedures are an important component of regional trade agreements. In the 21st century business and trading environment, it is presupposed that whenever there are conflicts between states or its institution with citizens and non-state actors, which they are unable to resolve amongst themselves, there shall be an established and lawfully constituted judicial body to which they may present their grievances for fair hearing, amicable resolution and compliance. However, the lack of legal recourse for violations of trade and free movement protocols in ECOWAS by the private sector gives room for concerns. More so, with the expansion of international trade and regional integration in Africa, it would seem reasonable to provide some courts, supranational in character and composition, to which opposing litigants could submit their causes for independent determination. It is our view in this paper, that in anticipation of unavoidable trade disputes between member states and between member states and its citizens, the ECOWAS Court was established and designed for resolving disputes between subjects of international law relating to regional economic integration. But the critical questions are, how did a regional court originally created to adjudicate on economic integration matters suddenly got redeployed or conferred with a different function for human rights matters in contrast to the founding principles of the ECOWAS? Why did the ECOWAS Court allow direct access for human rights complaints but not same for suits brought by traders and business owners alleging violations of ECOWAS economic and trade rules? We aim to systematically review dispute settlement provisions and practical experiences in using Trade disputes settlement in ECOWAS by clinically re-examining the role of ECOWAS regional court and the challenges confronting or hindering the court from exercising jurisdiction over economic matters and the need for reform and coherence in policy formulations in resolving trade disputes in ECOWAS.

Keywords: Regional, Trade, Court, Disputes, Settlement, Reform, ECOWAS.

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1. Introduction

The principal objective of Economic Community of West African States (ECOWAS) is to build an economic community. The 1975 Treaty creating the ECOWAS called for the establishment of a regional court.[1] Thus the ECOWAS Community Court of Justice is an organ of the Economic Community of West African States, created pursuant to the provisions of Articles 6 and 15 of the ECOWAS Revised Treaty. At inception, ECOWAS was envisaged as a purely economic organization, and the proposed court was not intended to have any human rights jurisdiction. Even the economic rights and freedoms associated with the economic integration that ECOWAS aimed to achieve were not framed in terms of the rights of citizens, in order to avoid any link with human rights.[2] It was not until 1991 that a protocol for the proposed court was drawn up. The protocol only allowed for inter-state disputes and disputes involving the institutions of ECOWAS and member states regarding the interpretation of community rules. In July 1993, the ECOWAS Authority signed a Revised Treaty, which officially introduced human rights into the ECOWAS mandate, in line with the African Charter.

From this point on, there was no doubt that ECOWAS mandate encompassed more than the initial economic mandate and that the purpose of the court has been abandoned and the call for the reform of the mandates and jurisdiction of the ECOWAS Court of Justice as a regional trade court is timely and urgent, especially now that countries in Africa have just signed a new trade deal[3] and consequent upon the increase in protectionism and economic nationalism across policies countries in the world. It is also an accepted fact that fair trade and free movement of goods and services through competitive advantage, would enable countries share the benefits of the abundance of other nation's economic potentials and help chart the way forward in the quest for solutions to address existing and future challenges to global and regional trade. Thus it is the view of this paper that international trade transactions under regional trade agreements should involve laws with a predictable means of enforcement and consequences for non-compliance to those rules.

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1 Article 6 (e) ECOWAS Revised Treaty, 1993

2 Ebobrah, Solomon Tamarabrakemi. 2010. "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice." Journal of African Law 54 (1): 1–25.

3 54 member of the African Union has signed the African Continental Free Trade (AfCFTA) Agreement.

Again, as earlier stated, the ECOWAS primary goals, as defined by the treaty, were to promote cooperation and development including commerce, agriculture, natural resources, monetary and financial policy, security, and social and cultural matters.[4] The cardinal intent included removing intra-regional trade barriers and Non-Tariff measures, reflecting the conventional view that open markets attract foreign investment and encourage market development and integration.

Also, there were principal Community institutions[5] and initiatives that, on paper, committed governments to phase out quantitative and other restrictions on intra-regional trade, create a customs union, establish a common commercial policy, and permit the free movement of goods and persons.[6] Again, the legal framework required to carry out these policies was lacking. The institutions created "left national sovereignty intact."[7] The decisions of the Authority and the Council of Ministers were binding only on ECOWAS institutions. They had no legal force for member states, which had merely agreed to "make every effort to plan and direct their policies with a view to creating favourable conditions for the achievement of" the Community's aims.[8] In the absence of delegated supranational decision-making powers, ECOWAS policies were formulated using a standard tool of public international law - a series of protocols adopted unanimously that accorded each government discretion with respect to ratification and implementation, and that entered into force only after a majority of countries had ratified. This cumbersome and politicized decision-making process was a "slow and inadequate" mechanism for community law-making.[9]

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4 Treaty of the Economic Community of West African States, May 28, 1975

5 Article 6 (1) (2) like the Authority of Heads of State and Government (Authority), the highest ECOWAS decision-making body; a Council of Ministers, which served in an advisory capacity to the Authority; and an Executive Secretariat responsible for the day-to-day administration of ECOWAS policies.

6 Charles D. Jebuni, Role of ECOWAS in Trade Liberalization, in Trade Reform and Regional Integration in Africa 489, 493 (Zubair Iqbal & Mohsin S. Khan eds., 1998).

7 Committee of Eminent Persons for the Review of the ECOWAS Treaty, Final Report 16, June 1992

8 Article 3 ECOWAS Revised Treaty

9 S. K. B. Asante, The political Economy of Regionalism in Africa – A decade of the Economic Community Of West African States (ECOWAS) 70 (1986); See Also Muhammed Tawfiq Ladan, Introduction To ECOWAS Community Law And Practice: Integration, Migration, Human Rights, Access To Justice, Peace And security (2009) (explaining that "most often, Community texts adopted in the so-called areas of sovereignty were in the form of protocols, and there was considerable delay in their application owing to the slow pace of protocol ratification").

Nevertheless, building a common market in West Africa was attractive for a different reason. The ECOWAS Treaty signaled to its poorer neighbors that Nigeria - the "big brother"[10] of West Africa, which then accounted for nearly 70 percent of the region's total GDP - favored regional cooperation. ECOWAS helped Nigeria to consolidate its status as regional hegemon by indicating to neighboring countries that they would benefit from Nigeria's oil wealth and from access to its large and lucrative market.[11] For example, the Community's goal of promoting the free movement of workers could enable desperately poor West Africans to move to a country where jobs and resources were more plentiful.[12] Nigeria's financial backing was also important. In 1975, import and export taxes ranged from 15 to 50 percent of national revenues. Governments envisioned that ECOWAS would replace these tax proceeds with a Fund for Cooperation, Compensation and Development. All member states were required to contribute to the fund, but in proportion to each country's gross domestic product and per capita income. Nigerian largesse thus provided the bulk of the Community revenue to replace domestic trade taxes.[13] It also provided extra funds to support the activities of Community institutions. Notwithstanding this planned reduction in trade taxes, ECOWAS did not endorse a free market philosophy.

Thus, to the contrary, its policies reflected the then widely held view that industrialized countries preyed on the economic weaknesses of the developing world. The remedy for this dependency, according to this view, was to build local industrial capacity and an export sector to replace reliance on foreign imports.[14] Nigeria, in particular, favored a region-wide effort to build indigenous industries. The Francophone countries, however, were heavily dependent on investment from France, and foreign investors were primarily interested in gaining access to regional markets. Voting as a bloc, the Francophone members of ECOWAS prevented the adoption of Community rules of origin. Anglophone

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10 Olayiwola Abegunrin, Africa in Global Politics in the Twenty-First Century: A Pan-African Perspective 42 (2009) (explaining that "Nigeria has become the big brother (Super power) of West Africa").

11 Olatunde Ojo, Nigeria and the Formation of ECOWAS, 34 INT'LORG. 571, 584 (1980).

12 Okolo, Julius Emeka. "Free movement of persons in ECOWAS and Nigeria's expulsion of illegal aliens." The World Today 40, no. 10 (1984): 428-436

13 Ibid

14 S.K.B. Asante, Economic Community of West African States in The Oxford Companion To Politics Of The World 233, 234 (Joël Krieger 2d Ed. 2001)

members reacted, in turn, by opposing free-trade rules that would have given French producers open access to their markets. The net result of these intra-regional tensions was a stalemate within ECOWAS and rampant noncompliance with Community rules.[15]

2. Institutions and Regional Integration in West Africa

West African States have worked to address their institutional deficits and promote economic growth and development. One of the ways they have done this is through regional integration. Although concrete discussions about regional integration in Africa began at the start of the 20th century, the real returns were not realized until about half a century later.[16] The next half century saw a proliferation of regional and sub-regional institutions on the continent, and today, there are more regional institutions in Africa than any other region in the world. The continent is a 'spaghetti bowl' of regional organizations[17], many of which have overlapping membership and obligations.[18] In this regard, West Africa is a microcosm of the African condition, with several intergovernmental organizations in a region with fewer than twenty countries.[19]

The foremost intergovernmental organization in West Africa is the Economic Community of West African States (ECOWAS), which was established in 1975 with the adoption of the Lagos Treaty by the leaders of fifteen West African countries.[20] Under the 1975 Treaty, integration was expected "to promote cooperation in all fields of economic activity--- for the purpose of raising the

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15 Charles D. Jebuni, The Role of ECOWAS in Trade Liberalization in Trade Reform And Regional Integration In Africa 489, 493 (Zubair Iqbal and Mohsin S. Khan, eds. 1998)

16 Ajala, A 'Background to the Establishment, Nature and Structure of the Organisation of African Unity', 14 Nigerian Journal of International Affairs (1988), 35–63; J.C. Senghor et al., Going Public: How Africa's Integration can work for the Poor (African Research Institute, London, 2009), p. 22

17 Ojomo, Edefe. "Competing Competences in Adjudication: Reviewing the Relationship between the ECOWAS Court and National Courts." African Journal of Legal Studies 7, no. 1 (2014): 87-122

18 Chacha, Mwita. (2014). Regional integration and the challenge of overlapping memberships on trade. Journal of International Relations and Development. 17. 10.1057/jird.2013.13.

19 See Ojomo supra

20 The original members of the Community were the Republic of Benin, Burkina Faso, Cote d'Ivoire, the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo. Cape Verde was admitted in 1978, bringing the membership to 16, but Mauritania withdrew its membership in 2000, bringing the membership back to 15.

standard of living of . . . people, of increasing and maintaining economic stability, of fostering closer relations among . . . members and of contributing to the progress and development of the African continent."[21] In furtherance of this broad development objective, Article 2(2) of the 1975 Treaty set out [mainly economic] principles geared towards achieving the goals of integration.[22] Interestingly, some of the Community objectives and functions were targeted at 'citizens' of the Community, revealing a focus on peoples or individuals. For instance, the Lagos Treaty makes reference to the Community Citizen,[23] as does the 1979 Protocol Relating to Free Movement of Persons, Residence and Establishment.[24] In 1982, a Protocol was adopted, which defined the term "Community Citizen". That Protocol provides a detailed overview of who constitutes a Community Citizen, and how citizenship is acquired and lost. Despite these provisions, however, the position of the individual in the integration process has remained weak[25].

3. The ECOWAS Community Court of Justice

As earlier mentioned, one of the institutions established under the 1975 ECOWAS Treaty was the Tribunal of the Community. The Tribunal was charged with the responsibility of ensuring the 'observance of law and justice in the interpretation of the Treaty' and settling disputes amongst Member States of the Community.[26] While the Treaty in Article 11(1) provided for the establishment of the Tribunal, Article 11(2) empowered the Authority of Heads of

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21 Article 2(1), ECOWAS Treaty, 1975

22 There were 10 paragraphs in this subsection, nine of which covered specific economic and trade goals and policies necessary for economic advancement, and the tenth was an omnibus clause that empowered the Community to undertake "such other activities calculated to further the aims of the Community as the Member States may from time to time undertake."

23 Article 27 provides that "Citizens of Member States shall be regarded as Community Citizens."

24 Protocol A/P 1/5/79

25 Onwuka, R. I. "The ECOWAS Protocol on the Free Movement of Persons: A threat to Nigerian security?" African Affairs 81, no. 323 (1982): 193-206

26 Article 11(1), 1975 ECOWAS Treaty, states the function of the Tribunal, and refers to Article 56 for the jurisdiction of the Tribunal with regard to the settlement of disputes. Article 56 provides that '[a]ny dispute that may arise among the Member States regarding the interpretation or application of this Treaty shall be amicably settled by direct agreement. In the event of failure to settle such disputes, the matter may be referred to the Tribunal of the Community by a party to such disputes and the decision of the Tribunal shall be final.'

State and Government to determine the operational elements of the Tribunal.[27] This meant that the Tribunal would only become operational upon the exercise by the Authority of its power under Article 11(2). The Authority never exercised this power in relation to the operation of a 'Tribunal of the Community', but in 1991, it adopted Protocol A/P.1/A1/1991 on the 'Community Court of Justice'.[28] In Article 1 of the Protocol, 'Court' is defined as 'the Community Court of Justice established by Article 11 of the Treaty', even though Article 11 makes reference to a 'Tribunal of the Community'. Although it would be nice to think that the change in nomenclature from a 'Tribunal', as contained in the 1975 Treaty, to a 'Court of Justice', could be attributed to an attempt to implement a substantive modification of the relevant provisions of the 1975 Treaty, particularly those relating to the functions of the Tribunal, the language of the Protocol seems to ignore the modification and treat it as though there had been no change whatsoever.[29]

The functions of the Court under the 1991 Protocol are similar to the functions of the Tribunal under the 1975 Treaty, referring to Article 56 of the Treaty, restricting the competence of the Court to cases involving the interpretation of the Treaty and the resolution of disputes between Member States *inter se* and between Member States and institutions of the Community.[30] The Court was

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27 Article 11(2), 1975 ECOWAS Treaty provides that 'The composition, competence, statutes and other matters relating to the Tribunal shall be prescribed by the Authority'

28 The Preamble of the Protocol makes reference to Article 5 of the 1975 Treaty (on the establishment, composition and functions of the Authority), Article 4(e) of the 1975 Treaty (the accurate Article listing the Tribunal as one of the institutions of the Community was Article 4(d), so this was an error) and Article 11 of the 1975 Treaty (on the establishment of the Tribunal) as the basis for the establishment of the Community Court of Justice, evincing an intention of the Authority to establish a Court rather than a Tribunal.

29 Article 11 of the Protocol refers to 'Applications to the Tribunal'. This is the only place in the Protocol where the institution is referred to as a tribunal.

30 Although Article 56 only refers to disputes between Member States, the Protocol includes institutions of the Community as competent parties before the Court. The Preamble of the Protocol states that: "the essential role of the Community Court of Justice is to ensure the observance of law and justice in the interpretation and application of the Treaty and the Protocols and Conventions annexed thereto, and to be seized with responsibility for settling such disputes as may be referred to it in accordance with the provisions of Article 56 of the Treaty and *disputes between States and the Institutions of the Community"*

therefore established as an international tribunal for the settlement of disputes between States and intergovernmental organizations[31].

The 1993 Revised Treaty was adopted shortly after the 1991 Protocol on the Court came into force. This Treaty provides for the establishment of a Community Court of Justice in Articles 6 and 15. The functions and competence of the Court remained the same during the first decade of the Protocol coming into force. However, in the 2001 Supplementary Protocol on Democracy and Good Governance,[32] a provision reviewing the 1991 Protocol extended the competence of the Court to cover actions involving the violation of human rights[33] and the exhaustion of local remedies rule was introduced for such actions brought before the Court.[34] Therefore, Article 39 of the 2001 Supplementary Protocol on Democracy and Good Governance modified the functions and competence of the Court to include the power to determine cases involving the violation of human rights. When read in line with the provisions of Article 9 on the competence of the Court, this additional power of the Court can be interpreted to cover only those human rights actions brought by member States on behalf of their citizens. The introduction of this modification could be attributed to the inclusion of Article 4(g) of the 1993 Revised Treaty, which provides that Member States affirm and declare their adherence to the principle of "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights", a provision that was not present in the 1975 Treaty.

Again, in 2005, a Supplementary Protocol to the 1991 Protocol[35] was adopted, and it contained provisions that extended the competence of the Court as well as the rules relating to access to the

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31 Ojomo op cit

32 The ECOWAS Protocol on Democracy and Good Governance was adopted in December 2001 by the Heads of State and Government as supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999)

33 Article 39 Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security

34 Article 39 –states that "Protocol A/P.1/7/91 adopted in Abuja on 6 July 1991 relating to the Community Court of Justice, shall be reviewed so as to give the Court the power to hear, inter-alia, cases relating to violations of human rights, after all attempts to resolve the matter at the national level have failed".

35 Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the community court of justice and article 4 paragraph 1 of the English version of the said Protocol

Court. Article 3 substituted the old Article 9 with a new one that deals with the 'Jurisdiction of the Court', which, inter alia, extends the jurisdiction of the Court to "determine cases of violation of human rights that occur in any Member State"[36]

Article 4 inserts a new Article 10 on Access to the Court, which extends access beyond member states and the Authority, to include individuals and corporate bodies. The new Article 10(d) provides that, Access to the Court is open to…. Individuals on application for relief for violation of their human rights; the submission of application for which shall:

i. Not be anonymous; nor
ii. Be made whilst the same matter has been instituted before another International Court for adjudication.

The 2005 Supplementary Protocol thus creates a new kind of Court that provides access to different subjects of international law, including corporate bodies and individuals. The Protocol introduced a Court that would become the regional institution through which the rights of Community citizens could be protected. By expanding the scope of the Court's jurisdiction, however, questions relating to the relationship between the Court and national courts and institutions become pertinent, especially as the Protocol does not make

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[36] Article 3 provides for the expansion of the jurisdiction of the Court to include: "[t]he interpretation and application of the Treaty, Convention and Protocols of the Community; the interpretation and application of the regulations, directives, decisions, and other subsidiary legal instruments adopted by ECOWAS; the legality of regulations, directives, decisions and legal instruments adopted by ECOWAS; the failure by Member States to honor their obligations under the Treaty, Convention and Protocols, regulations, directives, or decisions of ECOWAS; the provisions of the Treaty, Convention and Protocols, regulations, directives, or decisions of ECOWAS Member States; the Community and its officials; the action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions; . . . the power to determine any contractual liability of the Community and . . . order the Community to pay damages or make reparation for any acts or omissions of any Community institution or Community officials in the performance of official duties or functions; . . . the jurisdiction to determine cases of violations of human rights that occur in any Member State; . . . the power to act as arbitrator for the purpose of Article 16 of the Treaty; jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement; . . . the powers conferred upon it by the provisions of this Protocol as well as any other powers that may be conferred by subsequent Protocols and Decisions of the Community"
The new Article 9(8) grants the Authority of Heads of State and Government "the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in this Article"

expansive reference to such a relationship, not even with regard to the exhaustion of local remedies.[37]

3.1. Redeployment: Why Human Rights Outdistanced Economic Issues in the ECOWAS Court

These changes in the regional integration goals and practices of ECOWAS also touched on the 'judicial system' of the Community Court as well as the amended role in 2005 to, inter alia, directly address the needs of Community citizens. The expansion of the ECOWAS Court's jurisdiction to include human rights did not supplant the Court's original mandate to interpret and apply Community economic rules. Viewed from this perspective, the 2005 Protocol is an example of "layering" - the addition of a new goal or priority to an existing institution that also retains its original mandate. In practice, however, the ECOWAS Court functions primarily as an international human rights tribunal, and its docket is bereft of cases challenging violations of Community economic rules. Thus the Court's transformation is more accurately viewed an example of "redeployment" or "conversion," a change that allows a new set of actors to fundamentally reorient an institution in a new direction. The absence of a practical role for the Court in enforcing regional economic rules does not mean that member states have abandoned cooperation in that area. ECOWAS continues to advertise its one-sentence mission as "promoting economic integration in all fields of economic activity,"[38] and the Community has made meaningful policy steps toward this goal. For example, the 2005 Protocol enhanced the Court's role in overseeing compliance with ECOWAS economic rules by permitting preliminary references from national courts and authorizing enforcement actions by the ECOWAS Commission.[39]

But significant barriers to enforcing economic rules persist. As a formal matter, although ECOWAS protocols are directly applicable, the member states have not created "legislative provisions that 'speak to' the relations between [Community and

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37 The Court is silent on the question of exhaustion of local remedies, which is recognized in most international human rights instruments that grant individuals access to international courts and tribunals.

38 ECOWAS In Brief https://au.int/en/recs/ecowas

39 See the sub-subsection in part II entitled "A broad authority for human rights suits, but a narrower mandate for economic cases" (explaining these provisions of the 2005 Protocol).

domestic] legal systems."[40] In addition, national judges and lawyers have little knowledge of how the ECOWAS legal system is designed to function. Without formal rules or habituated practices, national judges are disinclined to invalidate conflicting national laws or to refer cases to the ECOWAS Court. Member states might have reduced these barriers had the 2005 Protocol given private traders direct access to the ECOWAS Court. The absence of such access from the 2005 reforms is one of the most puzzling aspects of the Court's transformation. It is especially so in the wake of the *Afolabi case*, which directly raised the issue of economic actors not having standing before the Court.[41] The court's first case, *Afolabi vs. Nigeria*, was lodged in 2003. It was brought by a private trader against the government of Nigeria, who alleged that Nigeria had violated ECOWAS rules on the free movement of goods and people by allowing the collection of illegal tolls by government officials at border posts.

Olajide Afolabi was a Nigerian trader who had entered into a contract to purchase certain goods in the Benin Republic, which he intended to transport to Nigeria. Afolabi was unable to complete the transaction when Nigeria unilaterally closed the border between the two countries. Afolabi argued that Nigeria's action was an unambiguous violation of the 1993 Treaty,[42] an ECOWAS Protocol guaranteeing the right to free movement of persons and goods,[43] and Article 12 the African Charter on Human and Peoples' Rights.[44] He asked the ECOWAS Court of Justice to order Nigeria to refrain from future border closures and to compensate him for his financial losses and litigation costs. Nigeria responded by challenging the Court's jurisdiction and Afolabi's standing to bring the suit. The government argued that 1991 Protocol authorizes only

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40 Ebobrah, Solomon Tamarabrakemi. 2010. "Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice." Journal of African Law 54 (1): 1–25.

41 The Afolabi Case: Denied Access for Private Sector."

42 1993 ECOWAS Revised Treaty, Article 3(2)(d)(iii) (identifying the ―aims and objectives‖ of ECOWAS as including ―the removal, between Member States, of obstacles to the free movement of persons, goods, service and capital, and to the right of residence and establishment‖); id. Article 4(g) (including among the Community's ―fundamental principles‖ the ―recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights).

43 1979 Free Movement Protocol, Article 2 (granting Community citizens a ―right of entry‖ to other ECOWAS member states)

44 African Charter, Article 12(1) (- Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.)

member states and ECOWAS institutions, not private parties, to file complaints with the Court. Afolabi countered by invoking a provision in the 1991 Protocol that authorized governments to initiate proceedings on behalf of their nationals. The provision stated that - [a] member State may, on behalf of its nationals, institute proceedings against another member State.[45] Afolabi asserted that the word - *may* permits states to raise such cases but did not preclude the court from receiving applications from individuals.[46] Afolabi also argued that ECOWAS Court of Justice review of complaints from private actors was especially appropriate ―where a party is instituting action against his Country. In such cases, Afolabi claimed, - the Member state cannot represent the party because the Member State cannot be both the plaintiff and the defender.[47] Lastly, Afolabi invoked―the principles of equity[48] in the 1991 Protocol to support an expansive interpretation of the Court's jurisdictional rules to allow individual access.[49] The Nigerian government challenged the court's jurisdiction in the matter, on the grounds that existing Protocols did not allow for individual access to the court.

According to legal experts, the judges could have made an expansive reading of the relevant protocols to expand their jurisdiction and rule on the matter[50]. However, they opted for a cautious approach and strict reading of the existing provisions, eventually dismissing the case. Subsequently, the President of the court called for the court's jurisdiction to be expanded to enable individual access.[51] Accordingly, in November 2004, the ECOWAS Authority considered draft amendments to the Court Protocol, and as a result, a Supplementary Protocol was adopted three months later. The Supplementary Protocol allowed for individual access and an explicit human rights mandate. Surprisingly, the 2005 reform of the court did not allow individual access for private traders. Notably Nigeria raised no objection to the inclusion of a

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45 1991 Protocol, Article 9(3)

46 Afolabi op cit

47 id

48 1991 Protocol, Article 9(1) (The Court shall ensure the observance of law and of the principles of equity in the interpretation and application of the provisions of the Treaty.)

49 Afolabi, supra

50 Ebobrah, Solomon 2010: Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice, in: Journal of African Law 54/1, 1–25.

51 Banjo, Adewale 2007: The ECOWAS Court and the Politics of Access to Justice in West Africa, in: Africa Development XXXII/1, 69–87.

human rights jurisdiction for the court, but the fact that "states declined to extend private litigant access to economic cases suggests a careful choice about which types of suits private litigants would be permitted to file."[52] The decision means that private traders have no legal recourse to challenge their government's failure to implement the ECOWAS Trade Liberalization Scheme (ETLS), and that patronage networks that benefit from cross-border corruption remain intact. Although there are now some emerging Business membership organizations (BMOs) knowledgeable about the ECOWAS legal system like the Federation of West African Chambers of Commerce and Industries (FEWACCI), the National Chambers of Commerce, Traders Associations, Private Sector Alliances[53], and Etcetera. They are inundated and confronted with specific practices especially in Ghana and Nigeria where they violate Community economic rules, including border closure and impediments to rights to establishing a business. A more disturbing case is the unending fights between the Ghana Union of Traders (GUTA) and Nigeria Union of Traders in Ghana (NUTAG)[54]. The Ghana traders had always relied on a policy targeted at Nigerian traders based on Section 27(1a) of the GIPC Act 865, 2013[55], which states that: 'A person who is not a citizen or an enterprise, which is not wholly owned by citizen shall not invest or participate in (c) the sale of goods or provision of services in a market, petty trading or hawking or selling of goods in a stall at any place."[56] The non-review of this piece of legislation in Ghana has brought about a lot of unanswered question among citizens and business operators. For instance, is a Nigerian a foreigner in Ghana or vice versa in the context of the *ECOWAS Protocol on Free Movement, Residence and Establishment of West African Citizens? When* Community citizens are conferred with the right to enter and reside in the territory of any member state, provided they possessed a valid travel document and international health certificate.

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52 Alter, Karen/Helfer, Laurence/McAllister, Jacqueline 2013: A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice, in: American Journal of International Law 107/4, 737–779.

53 There are now multi stakeholder platforms with trade policy capacity e.g Nigeria Private Sector Alliance (NiPSA)

54 https://www.independent.ng/nants-protests-over-closure-of-nigerian-businesses-in-ghana/

55 Ghana Investment Promotion Centre Act https://www.gipcghana.com/press-and-media/downloads/promotional-material/3-gipc-act-2013-act-865/file.html

56 http://www.gipcghana.com/press-and-media/706-what-is-the-position-of-the-gipc-law-in-relation-to-retail-trade-in-ghana.html

3.2. ECOWAS Court as an Arbitration Court

Based on the provision of Article 9 (5) of the Supplementary Protocol of the Court, the Court has been vested with the mandate to act as Arbitrator pending the establishment of the Arbitration Tribunal for the Community. The Draft Arbitration Rules has been submitted to the Council of Ministers for its consideration and approval[57]. It is expected that the actualization of this mandate will create the enabling legal environment for the achievement of ECOWAS Vision 2020.

The primary mandate of the Community Court is prescribed in the Revised Treaty and the Initial Protocol on the Court. The expanded mandate of the Court on the other hand, is a paradigm shift by virtue of the adoption of the 2005 Supplementary Protocol, which amended the initial Protocol on the Court. The Protocol expanded the jurisdiction and invariably the mandate of the Court into four broad categorizations, namely as Community Court, Public Service Court, Human Rights Court, and Arbitration Court. First, as regards the mandate of the Court as a Community Court, this function is mainly achieved through the interpretation and application of ECOWAS Community texts[58]. The Court has delivered a catalogue of judgments in the exercise of its jurisdiction of interpreting and applying ECOWAS Community texts[59].

Secondly, the ECOWAS Court is empowered under its Protocol to function as a Community Court by virtue of its mandate to adjudicate on any dispute between the Community and its officials[60]. It is worth mentioning that the right of staff of any Community institution to the Court is not automatic, but subject to conditions. As such, all other available channels and appeal processes as provided under the ECOWAS Staff Regulations must have been exhausted before resort can be had to the Court. It specifically provides that in all circumstances, the final Court of Appeal shall be the Community Court of Justice. In the exercise of

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57 http://prod.courtecowas.org/mandate-and-jurisdiction-2/

58 Namely, the Revised Treaty, Conventions, Protocols, Supplementary Acts, Regulations, Directives and Decisions and other subsidiary legal instruments adopted by ECOWAS.

59 For example, see the cases of Afolabi Olajide v. Nigeria (2004-2009) CCJ ELR 1, Chief Frank Ukor v. Rachad Laleye (2004-2009) CCJ ELR 19, Hon. Jerry Ugokwe v. Nigeria (2004 - 2009) CCJ ELR 37, Alhaji Hammani Tidjani v. Nigeria (2004 - 2009) CCJ ELR 77, Prof Etim Moses Essien v. The Gambia (2004 - 2009) CCJ ELR 95, Linas International Nig. Ltd v. Mali (2004 - 2009) CCJ ELR 271, Starcrest Investment Ltd v. President, ECOWAS Commission (2010) CCJ LR (PT. 3) 99.

60 Article 73 of the 2005 Staff Regulations

its jurisdiction as an ECOWAS Public Service Court, the Court has resolved many disputes between aggrieved staff members and Institutions of the Community[61]

The third mandate of the Community Court is its designation as a human rights Court. This jurisdiction of the ECOWAS Court of Justice has featured prominently as the center piece of its judicial activities. This was made possible by the adoption of the Supplementary Protocol which granted individuals unfettered access to the Court in respect of certain causes of action including human rights[62]. There is no mincing word that the vast majority of cases decided by the Court in recent times revolve around human rights violations of ECOWAS citizens[63].

Lastly, the Community Court plays a pivotal role as an Arbitration Tribunal by virtue of Article 16 (1) of Revised Treaty. The Treaty further provides for the status, composition, powers, procedure and other issues concerning the Arbitration Tribunal to be set out in a Protocol relating thereto[64]. It remains to be speculated as to whether the Protocol to set up the Arbitration Tribunal as envisaged above has yet been adopted. Further investigation by the authors revealed that the Court has concluded work on its Rules of Arbitration and submitted same for the approval of the ECOWAS Council of Ministers. The Court will start to exercise its Arbitration jurisdiction after the Council approves its Rules of Arbitration.

3.3. ECOWAS Disputes Settlement

The ECOWAS Revised Treaty also provided for the jurisdiction of the Court by stating that disputes regarding the interpretation or application of the Treaty shall be amicably resolved through direct agreement[65]. Where such settlement fails, either party may refer the matter to the Community Court. The decision of the Court shall be final and cannot be appealed against[66]. The fact that the Court was inaccessible to individuals and corporate bodies had the effect of

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61 See the cases of Executive Secretary ECOWAS v. Oyemade (2008) CCJ LR (Pt.1) 116, Tokunbo Lijadu-Oyemade v. ECOWAS Commission (2008) CCJ LR (Pt.1) 50, Folzmi & Anor v. ECOWAS Parliament (2010) CCJ LR (Pt.3) 50

62 Article 9 (1) (f) of the 1991 Protocol as amended by the 2005 Supplementary Protocol on the ECOWAS Court of Justice.

63 For example, *Olajide Afolabi v. Federal Republic of Nigeria* (2004-2009) CCJ LR 1.

64 Article 16 (2) Supplementary Protocol to ECOWAS Treaty.

65 Article 76(1) Revised ECOWAS Treaty

66 Ibid, Article 76(2)

rendering the court redundant. Paradoxically, while individuals and corporate organizations were barred from having direct access to the Court, no Member State or institution of ECOWAS approached the Court on any issue, even sought for an advisory opinion, or filed any case before the Court between 2001/2005[67]. This ugly state of affairs was of great concern to the Court since it had an adverse effect on its operations. This restriction amounted to a denial of a fundamental right to the Community citizens to the extent that they could not approach the Court to enforce their fundamental rights as guaranteed by the African Charter on Human People's Rights. Although, the foregoing restriction was not the only defect inherent in the initial Protocol.[68] Other defects were also observed. For instance, the Protocol was silent on the procedure for the execution or enforcement of the decisions of the Court. This omission was such a fundamental flaw. Besides the need to widen the jurisdiction, it also became necessary to provide a procedure for the execution of the decisions of the Court in order to make them effective. Furthermore, the Protocol pre-dated the Revised Treaty and contained references to Articles which were inconsistent with the Articles in the Revised Treaty. Finally, and most importantly, the Protocol did not give the Community Court adequate powers to enable it contribute effectively to the integration process of the sub-region. These catalogues of issues informed the clamor by stakeholders for the amendment of the Protocol on the Community Court.

In recognition of the avalanche of challenges, the Supplementary Protocol as adopted in 2005, expanded the jurisdiction of the Court and thus granted direct access to individuals and corporate bodies in respect of certain causes of action. By virtue of this reform, the Court's jurisdiction was upgraded. It therefore has the competence to adjudicate on any dispute relating to the following subject matter[69]:

(i) Interpretation and application of the principal Community principal texts (Treaty, Conventions, and Protocols);
(ii) Interpretation and application of the Community's subsidiary legal instruments (regulations, directives, decisions etcetera) adopted by the ECOWAS;

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67 Tony Anene-Maidoh**,** Access to ECOWAS Court of Justice and the Impact of the Supplementary Protocol A/SP.1/01/05, **(**presented at the commonwealth conference held between 2nd and 13th July 2007).

68 Protocol A/P1/7/91

69 Jurisdiction of the Court under Supplementary Protocol (A/SP.1/01/05), Article 9 (1) (a) – (f) of the Amended Protocol

(iii) The legality of the Community's subsidiary legal instruments (regulations, directives, decisions etcetera) adopted by the ECOWAS;
(iv) The failure of member States to honour their obligations under the Community principal texts (Treaty, Conventions, and Protocols);
(v) The provisions of the principal texts (Treaty, Conventions, and Protocols) and subsidiary legal instruments (regulations, directives, decisions etcetera) of Community Member States;
(vi) The Community and its officials; and
(vii) Action for damages against a Community Institution or an official of the Community for any action or omission in the exercise of official functions.

In addition to the foregoing subject matters, the Court also has powers to determine non-contractual liability in respect of damages or reparation with respect to the Community, its institutions and officials[70]. The Court also has jurisdiction to determine cases of violation of human rights that occur in any Member State[71], as well as issues pertaining to arbitration in the interim, pending the establishment of an Arbitration Tribunal by the Community[72]. The Court also has jurisdiction to settle dispute of a contractual nature between parties[73]. It is also worth mentioning that the ECOWAS leadership may confer additional power on the court to adjudicate on any specific dispute other than those specified in the protocol.[74] Thus, between 2015 – March 2020, over 120 cases were decided. Interestingly, virtually all these cases were instituted by individuals against their respective states[75]. The vast majority of these suits are also human rights related.[76] The judicial reform introduced to the ECOWAS has brought about transformation of the community. By expanding the Court's jurisdiction, individuals and corporate bodies now have direct access to the Court. Apart from guaranteeing human rights and social justice, this feat has the potentiality of boosting the economic base of the sub-region while promoting the cardinal goal of economic integration. The above submission is premised on the

70 Ibid, Article 9 (2).
71 Ibid, Article 9 (4)
72 Ibid, Article 9 (5)
73 Ibid, Article 9 (6)
74 Ibid, Article 9 (8)
75 Available at http://prod.courtecowas.org/decisions-3/ retrieved 06/04/2020.
76 Ibid

fact that investment cannot thrive in an atmosphere of an ineffective or non-existent dispute resolution mechanisms.

4. Issues on Regional International Trade Court

Some questions may be raised in respect to the establishment of international trade courts on a regional basis. Ideally it would be desirable to have one acceptable international trade court system applicable to all nations, with an organizational structure to provide complete unification. A perfected judicial organization would be one in which all the nations of the world functioned under one acceptable system of commerce, with agreement to accept the decisions of the international trade courts as final and binding. The problem arises out of the practical impossibility of obtaining treaties with all nations embracing this concept[77].

In the state of affairs of the world today, to await the accomplishment of this objective would be hopeless. There must be some beginning, and the regional trade court affords this possibility. It has the advantage of location in the regional area in which the transactions ordinarily occur. This would reduce the expense of litigation which would be almost prohibitive with one central court located at Hague or at any other selected place. The regional court would be located within the region, or at several places, operating within a circuit.

Also, the countries which would participate in the treaties establishing the court, would be those in which there was a large interchange of commerce creating a need. Within the region, the trade problems would naturally have considerable similarity, and the law could be adapted to fit the functional business and industrial operation of transactions among nationals of the different states of the region[78]. A unified law developed through the regional courts would create a common understanding by people at both ends of a commercial transaction. This would facilitate commerce by removing the ambiguity and uncertainty from international business engagements. A new safety through reasonable prediction of the consequences of a contemplated transaction would engender confidence in international business affairs.

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[77] Roberts, B. K. "International Regional Trade Courts—Need and Feasibility." The International Lawyer 3, no. 1 (1968): 75-91. Accessed April 8, 2020. www.jstor.org/stable/40704528

The too often, existing fear of an unhappy ending and ultimate loss which causes reluctance to enter into an international negotiation would be reduced if it were known that questions arising thereunder could be adjudicated through a court composed of judges selected from the different countries of the region whose sole function was to administer justice independently, free from the conflicting precedents of the law of the countries of the nationals. Until a precedent was established, the parties would know that their litigation would be resolved through the regional court with authority to take a fresh look at the problem and with the objection of solving the issues fairly in their process of reaching conclusions having present and future significance in international business affairs. The position of the litigants would be no more precarious than at present, when they do not know which side of a fixed conflict of existing law will be applied in a national court into which their cause may fall.

5. Role of Community Court in Trade Disputes

The plethora of Community legal instruments considered in this paper has emphasized the cardinal role of the Court, which is the interpretation and application of the ECOWAS Revised Treaty and other Community Texts. These laws envisage the possibility of failure by a Member State to fulfil their Community obligations. As such, it has clothed Member States, certain Community Institutions, individuals and corporate organizations with the *locus standi* to approach the Court in the event of dispute arising from any breach. With particular reference to trade disputes, where a Member State violates the provisions of the Revised Treaty in relation to trade and commercial transaction, a Member State or Community Institution is vested with the *locus standi* to institute an action before the ECOWAS Court against the defaulting Member State.

It is however observed that no Member State or Community Institution has so far instituted any action with respect to a trade dispute. This is in spite of the recent closure of the border by the Nigerian Government[79] which is alleged to have caused economic hemorrhage to her neighbours. This ordinarily would have raised a cause of action at the community court by any of the affected member states of the ECOWAS. But none of the affected Member States has instituted an action against Nigeria before the Court with

[79] Nigeria's border closure has implications for Africa's economic integration https://theconversation.com/nigerias-border-closure-has-implications-for-africas-economic-integration-125592

respect to Nigeria's breach of the provisions of the ECOWAS Revised Treaty.

However, some views have contended that the land borders closure by Nigeria does not violate the relevant provisions of the ECOWAS Revised Treaty[80] and related international legal instruments to the extent that the closure was made for security reasons including the menace of banditry and for the protection of the domestic markets. Nigeria's land borders are reported to have been used as thoroughfare for smugglers and the government has repeatedly noted that there is a need to checkmate illegal activities and importation of contraband goods. As such, the land borders had to be closed to develop a strategy on how to curtail these illegalities. These reasons are envisaged and provided for in the relevant trade agreements. States retain their sovereignty and are permitted to apply protective measures as it relates to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials taking place either directly or indirectly for the purpose of supplying a military establishment[81].

To this end, it is imperative for the Court to be repositioned towards its primary mandate, which is that of interpreting and applying the ECOWAS Revised Treaty and other Community Texts and more particularly, on the economic agenda of the Community. The Court rightly emphasized this point in *Mousa Leo Keita v. Mali*[82]. It is submitted that this ideal can be fully realized if the Court takes an introspective look beyond the material competence granted to it under Protocol[83]. It must also fully embrace other community texts that give it jurisdiction in respect of the economic objective of the community. The access granted to individuals and corporate bodies must be expanded not only in terms of material competence but also to include access to the Court where Member States fail to

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80 The Legality Of The Nigerian Land Borders Closure In Light Of The ECOWAS Revised Treaty, The WTO's GATT And The AFCFTA Agreement https://cc.bingj.com/cache.aspx?q=land+borders+closure+by+Nigeria+does+not+violate+the+relevant+provisions+of+the+ECOWAS+Revised+Treaty&d=4823862657680823&mkt=en-WW&setlang=en-US&w=ogyJ8bBdsL2Ro83-ZJgu8ouv2zDGKk35.

81 Soji Awogbade, et al. 'Nigeria: The Legality of the Nigerian Land Borders Closure In Light of the ECOWAS Revised Treaty, WTO's GATT and The AfCFTA Agreement'. <https://www.mondaq.com/Nigeria/International Law/868378/The-Legality-Of-The-Nigerian-Land-Borders-Closure-In-Light-Of-The-ECOWAS-Revised-Treaty-The-WTO39s-Gatt-And-The-AFCFTA-Agreement> 28 November, 2019. Accessed 12 January, 2020.

82 (2004-2009) CCJELR, 63

83 Article 9 of the Protocol on the Court as amended

fulfil their community obligations. Individuals and corporate bodies must be fully sensitized in order to fully take advantage of the above provisions in order to drive the development of the case law of the Court in respect of economic integration.

6. Regional Trade Disputes and the Powers of ECOWAS Court

There is no gainsaying that the vision of ECOWAS is to promote cooperation and integration, leading to the establishment of an Economic Union in West Africa in order to raise the living standards of its peoples, to maintain and enhance economic stability, foster relations among member States as well as to contribute to the progress and development of the African Continent among other objectives as contained in the Revised Treaty of ECOWAS. It also includes inter alia, the harmonization and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, legal matters.

From the objectives above, it is crystal clear that the foundational intendment of the ECOWAS and it legal frameworks is to promote business and private sector development. Thus it only become natural that individuals, consumers, manufacturers and corporate bodies and business operators that are the drivers of regional integration especially in commercial transactions within the region should have or be granted unfettered access to seek redress in the ECOWAS Court of Justice not only in matters of human rights violations, but also their corporate rights of doing business within the region as guaranteed by ECOWAS law. This goes further to buttress the jurisdictional powers of the ECOWAS Court in the interpretation of Community laws (Treaty and Protocols[84]), majority of which are trade related and trade focused.

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[84] Some of these Protocols includes:

i. Protocol A/PI/01/03 relating to the Definition of the concept of Product originating from Member States of the Economic Community of West African States (ECOWAS) Protocol A/P2/01/03 relating to the application of Compensation Procedures for loss of revenue incurred by ECOWAS Member States as a result of the Trade Liberalization Scheme.
ii. Protocol A/P1/5/79 relating to free movement of persons, residence and establishment
iii. Protocol A/P3/5/82 relating to the definition of Community Citizen
iv. Supplementary Protocol A/SP2/7/85 on the code of conduct for the

It is important to consider the persons with access the Court under Articles 10 (C) and 10 (D) of the 1991 Protocol. In *Dexter Oil Limited v Republic of Liberia*[8586] It was stated that in considering the jurisdiction of the Court, it is imperative that if the court finds that the subject matter is an alleged Human Rights violation, it must also consider whether the parties are proper parties before it. The Supplementary Protocol 2005 has made provision for both individual and legal persons, for example corporate bodies to access the court, as well as the circumstances under which they can so do. The Court will be guided by Article 10 (C) and 10 (d) of the Supplementary Protocol 2005 of the Court, under which the applicant brought the action wherein it proffered strong arguments that, it is entitled to access the Court against the Respondent who it claims is a proper party under those provisions. Article 10(C) of the 1991 Protocol on the Court as amended by the Supplementary Protocol 2005 provides: *"Access to the Court is open to individuals and corporate bodies in Proceedings for the determination of an act or inaction of a community official which violates the rights of the individuals or corporate bodies."*

It follows from Article 10(C) above that the proper party should either be an individual or a corporate body bringing an action against a Community official for an act or omission which violates their rights. From the available record before the Court, Dexter Oil Limited is a corporate body duly registered under the extant law of the Republic of Liberia to operate as a Company with interest in the Oil sector and therefore has a right to bring an action against a community official under this provision. The question to be resolved is whether the Respondent is a community official.

6.1. Community Official

The 7th Edition of Black's Law Dictionary, published by Bryan A. Garner defines the term "Official" as: *"A person holding or*

implementation of the Protocol on free movement of persons, the right of residence and establishment.

v. Supplementary Protocol A/SP1/7/86 on the second phase (right of residence) of the Protocol on free movement of persons the right of residence and establishment.

vi. Supplementary Protocol A/SP2/5/90 on the implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, Right of Residence and Establishment.

85 *ECW/CCJ/JUD/ 03/19*

86 http://prod.courtecowas.org/wp-content/uploads/2020/03/JUD-ECW-CCJ-JUD-03-19.pdf accessed 09/04/2020

saddled with the responsibilities of public office or a person authorized to act on behalf of a corporation or organization, especially in the capacity of a subordinate." Article 9 (2) of the 1991 Protocol on the Court as amended by the Supplementary Protocol 2005 of the ECOWAS Court reads as follows: *"The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for the official acts or omissions of any Community institution or Community officials in the performance of official duties or functions."*

Thus in the absence of any statute defining a Community Official, it can be described as an employee of any ECOWAS Institution who occupies a position of responsibility, whose actions or omissions in the exercise of official functions on behalf of the Institution may attract vicarious liability. The above description of a Community Official is consistent with the decision of the Court in the case of *Peter David v Ambassador Ralph Uwechue*[87], where the court held that:

> The instant action can also be considered as an action for extra-contractual liability against an official of the Community, who at the time of the incident was the Special Representative of the Executive Secretary of the ECOWAS in Cote d'Ivoire.

It follows that a Community Official can amongst others either be the head or officer of any ECOWAS institution. A member state is definitely not contemplated in Article 10 (C) as cited above. Supporting the above interpretation is the decision of the Court in the case of *Linas International Nig. Ltd v Ambassador of Mali, Embassy of Mali & the Republic of Mali*[88] which is on all side falls with the instant matter. In that case, the Plaintiff, a corporate body brought an action against the above stated Defendants which includes a Member State under Article 10 (C) of the 1991 Protocol on the Court as amended by the Supplementary Protocol 2005. The Court held that:

> The third Defendant is the State of Mali who is a Member of the Community. It is not a corporate body and is neither invested with any public office of the community. It cannot therefore be likened to an official

87 ECW/CCJ/RUL/03/10 @ 55
88 *EWC/CCJ/JUD/02/09 @ 19*

> of the Community. It appears clearly from the foregoing that the three Defendants are not officials of the community.

The Court after a careful analysis of the Provisions of the Protocol relied upon by the Applicant comes to the conclusion that an action cannot be sustained against the Respondent; Member State based on Article 10 (c) on the 1991 Protocol of the Court as amended by the Supplementary Protocol 2005 on the Community Court of Justice, ECOWAS. The Republic of Liberia, is not a Community Official and therefore, not a proper party before this Court against whom an action can be instituted against under Article 10 (C) of the 1991 Protocol on the Court as amended by the Supplementary Protocol 2005 and the Court so holds.

The second provision under which the Applicant instituted this action is Article 10 (d) of the 1991 Protocol on the Court as amended by the Supplementary Protocol 2005 which reads as follows:

> Access is open to individuals on application for relief for violation of their human rights; the submission of application for which shall: 1. not be anonymous; 2. nor be made whilst the same matter has been instituted before another International Court for adjudication.

On the Provision of Article 10 (d) which must also be read in context as prescribed in the text that, individuals can maintain action on violations of human rights if the application is not anonymous and not before another International Court. *Dexter Oil limited* is not an individual within the context of this Article but a corporate body and duly registered under the laws of Liberia to operate a business concern. It follows on a strict interpretation of the English text of Article 10 (d) that Applicant not being an individual has no capacity to institute action against the Respondent (a member state) for violation of Human Rights.

The above strict interpretation of Article 10 (d) of the English text continues to reflect the opinion of the Court in the majority of cases that have been decided. However, in very few cases, the Court has ruled that Article 10 (d) of the French text accommodates both individuals and legal persons. Therefore, in applying article 10(d) of the Protocol as amended, the Court has arrived at divergent decisions in respect of who can access the Court. This may be attributable to the slight difference between English and French texts of the Article.

The English texts provide that access to the Court is open to the following:

> Individuals on application for relief for violation of their human rights; the submission of application for which shall: not be anonymous; nor be made whilst the same matter has been instituted before another International Court for Adjudication.

On the other hand, the French text of the same Article provides as follows:

> "Peuvent saisir la Cour: d) **toute personne victim** de violations des droits de I' homme; l demande soumise a cet effet: 1. ne sera pas anonyme; 2. ne sera pas portee devant la Cour de Jutice de la Communuate lorsqu' elle adeja ete portee devant une autre Cour international competente."

The English text of Article 10(d) of the Protocol on the Court as amended clearly gives access to individuals for human rights violations cases. Whilst, the French texts gives access to **toute personne victime**. They do not exactly mean the same thing. Whereas individual means natural persons, **toute personne victime**, means every person that is a victim, which has been interpreted as natural or legal persons in the French version of the text. In interpreting these provisions, the Court has come to divergent decisions. In 2009, the ECOWAS Court of Justice in its judgment in *The National Coordinating Group of Departmental Representatives of the Cocoa-Coffee Sector v Republic Of Cote D'ivoire*[89] held that: *"Legal persons be it associations or limited liability companies, can institute actions for human right violations."*

It relied on Article 10(d) (the French version) of the 1991 Protocol of the Court as amended by the Supplementary Protocol 2005 and very heavily on the decisions of other Regional Courts. It cited cases of other regional courts, where associations and limited liability companies have successfully maintained actions for human rights violations in respect of rights guaranteed by instruments relating to human rights. The Court has also held that an individual or a corporate body can be a Plaintiff in a Human rights case but

89 (2004 –2009) CCJELR,311

must be a victim of Human Rights abuse. The Court's emphasis is on being a **"Victim"** an essential requirement.

In *Center for Democracy and Development (CDD) And Anor v Mamoudu Tandja & Anor*[90], the Court held as follows:

> In the exercise of its jurisdiction on human rights protection, the Court shall ensure that all the conditions for bringing the case before it are fulfilled. In such circumstances, the Court shall entertain cases filed by "individuals on application for relief for violation of their human rights", as stipulated in paragraph (d) of the new Article 10 of the Protocol on the Community Court of Justice as amended by Protocol A/SP.1/01/05 of 19th January 2005, which provides that "Access to the Court is open to.....Individuals on application for relief for violation of their human rights". Pursuant to this article, cases shall be brought before the Court by natural or legal persons endowed, within the framework of their national laws, with the required legal capacity and who, in addition, shall justify their condition of being a victim"

In *Alhaji Muhammed Ibrahim Hassan v Governor of Gombe State*[91], the Court held as follows;

> "Paragraph (d) of new Article 10 of the Protocol on the Community Court of Justice as amended by Protocol A/SP.1/01/05 of 19 January 2005 provides: "Access to the Court is open to individuals on application for relief for violation of their human rights". By virtue of this Article, for every action relating to human rights protection, cases before the Court must be filed by an individual or a corporate body who fulfils the requirement of **being a victim.**[92]

In contrast to the above decisions, in 2010, 2011, 2012, 2013, 2014 and 2015, the Court gave decisions in which it held that, **"individual"** in Article 10(d) refers only to natural persons to the exclusion of other legal persons and that no corporate body can bring

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90 (2011) CCJELR, 103

91 (2012) CCJELR, 81

92 (See Judgment No. ECW/CCJ/JUD/05/11 of May 2011 in Suit No. ECW/CCJ/APP/07/09, CDD and CDHRD v. Mamadou Tandja v. Niger, paragraphs 27 and 28).

a human rights case as a Plaintiff, as an alleged victim of human rights abuse. In other words, that Article 10(d) of the Protocol on the Court as amended is not open to corporate bodies as victims of human rights abuse since it is only open to human beings.

The above is the crux of the authors' call for reforms in the jurisdictional powers and practice of the ECOWAS Court. With due respect to the court, it is smack of inconsistency and unpredictability for a court to use different rules of interpretation on same matter especially on the guise of language. The court must find a way of harmonizing it legal texts for the purposes of uniformity, coherence and confidence from the community citizens and users of the court systems.

6.2. Private Sector and Use of the Court

There is a glaring apathy by the business operators and private sector actors to approach the court to seek remedy when the need arises. This is partly premised on the fact that, their matter or cause of action must be laced in the clothes and attire of human rights even when the day to day activities across the region are purely commercial and trade transactions.

It is also becoming worrisome that a regional court or supranational institution created on the crest of economic integration could divest itself of jurisdiction and competence when matters of trade and economic injustices are brought before it. It is therefore not surprising why large businesses in West Africa rarely seek judicial redress against governments in the countries where they operate. Reason being that Governments are important clients for these businesses. This is in part because in many developing countries, including in the ECOWAS, governments have large procurement budgets[93]. Large businesses make large profits when they win these procurement contracts. Suing the government, particularly in a regional court[94], is likely to jeopardize a business's relationship with the government. Businesses want long-term, strategic relationships-they avoid legalistic and adversarial relationships that might undermine building a relationship of trust with governments. Placing a call to a high-ranking governmental official is more likely to expeditiously resolve problems that a business is encountering with

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93 See Dinfin Mulupi, Are Kenyan Companies Ignoring Government Work at their Own Peril?

94 Gathii, James Thuo. "Variation in the use of Subregional Integration Courts between Business and Human Rights Actors: the case of the East African Court of Justice." Law & Contemp. Probs. 79 (2016): 37.

the government or in the marketplace than a court order is likely to resolve them[95]. This in turn fester corruption and unethical practices in business thereby weakening the disputes settlement mechanism provided for in regional integration instruments.

The business operators in ECOWAS prefer an informal strategy that emphasizes administrative action over judicial review because such action is arguably more effective than judicial review. This preference must be seen in light of the low levels of legalization of ECOWAS Trade Liberalization Scheme (ETLS). Regions or regimes with high legalization are accompanied by heightened obligations, greater precision in rules, and delegation of rule interpretation to third parties[96]. That is not the case in ECOWAS. One of the critical challenges in the ETLS implementation is the lack of recognition of the ECOWAS Court's role as a dispute resolution organ at the core of the integration process.

Just recently the President of the ECOWAS Court, Justice Edward Asante said that the lack of political will on the part of member states to enforce its judgment was limiting its effectiveness. According to him, the aspect of enforcing judgments of the court does not rest with the Court but with member states. And that the member states were yet to play their part enshrined in the protocol, noting that even those who have met the requirements still disregard judgments of the court when they are served.[97] He further lamented that the enforceability aspect of judgments has not been given to the court, it has been given to member states and member states have to have the political will to be able to enforce the judgments. He recommended that the way out is for ECOWAS member states to amend the protocols and rules of the court such that a judgment creditor can enforce it in the country by filing the judgment in the court system of his/her country and then proceed to enforce it. Again, the rules enshrined in ECOWAS treaties seeking for the elimination and removal of NTBs are rather generic and do not go into detail, for example, by listing the consequences of noncompliance.

The absence of precision makes the rules more amenable to monitoring than to litigation. That necessitated the ECOWAS commission in 2016 to establish the ETLS Task Force to monitor compliance and facilitate implementation of Community texts by

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95 ibid

96 Ibid

97 ECOWAS Court President flays disregard for verdicts, Jun 24, 2020 - Legal News by Source:- https://www.miyettilaw.com/blog/ecowas-court-president-flays-disregard-for-verdicts/ Accessed 24/06/2020 5:44pm

Member States.[98] Despite the existence of the high level committee on ETLS, non-compliance by some Member States with the ETLS Protocol is persistent. And the absence of institutional framework and private sector participation in resolving trade conflicts remains a challenge.

6.3. Addressing NTMs under the West African Institutional Framework

The regional integration process in West Africa is driven by ECOWAS and WAEMU. The elimination of tariff- and non-tariff barriers to trade is at the core of their respective programs with the aim of fostering freer trade and the free movement of the factors of production. However, as for most of Africa's regional integration arrangements, the focus of ECOWAS and WAEMU has primarily been on border measures and tariffs. Originally, more concern was given to the prominence of tariff barriers which dramatically hindered all integration efforts. While tariffs were undeniably an important barrier, economic analysis indicates that tariffs have gone down[99]. NTMs, including behind-the-border measures, are more important than tariffs in inhibiting intraregional trade as they substantially raise the costs of doing business. Thus Intra-ECOWAS trade is further undermined by the persistence of non-tariff barriers (NTBs), particularly quantitative restrictions. NTMs are neutrally defined as policy measures, other than ordinary customs tariffs, that can have an economic effect on international trade[100]. NTMs thus include a wide array of policies. On the one hand, they comprise traditional instruments of trade policy, such as quotas or price controls, which are often termed NTBs.

On the other hand, NTMs also comprise Sanitary and Phyto-sanitary (SPS) measures and Technical Barriers to Trade (TBT) that stem from important non-trade objectives related to health and environmental protection. Due to their increasing number and importance, provisions on NTMs and NTBs have become a mainstay in many "deeper" regional trade agreements (RTAs). Therefore, addressing NTMs is fundamental for all regional trade agreements, and all the more for ECOWAS which is gradually evolving from its current status as a free trade area (FTA) towards the status of a customs union since the entry into force on 1 January 2015 of the

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98 Annual Report "Ecowas Common External Tariff (Cet): Achievements, Challenges And Prospects" Abuja, Nov. 2016

99 https://unctad.org/en/PublicationsLibrary/ditctab2018d1_en.pdf

100 UNCTAD Report 2013

ECOWAS Common External Tariff (CET). In addition, ECOWAS has grappled with the challenges of coordination of national non-tariff policy regimes as well as SPS and TBT measures in the region.

In resolving some of the problems above, Article 76 of the Treaty stipulate the dispute resolution mechanism which subordinates adjudication to diplomatic and other pacific means of settlement.[101] And recourse to the ECOWAS Court remains only a measure of last resort, after all the other diplomatic means of dispute settlement have exhausted. Thus cases filed before the Court were found to be mostly cases relating to violations of human rights and fundamental freedoms. Only very few cases relate directly to regional integration through control of Community acts or enforcement actions against the member States. This is not because there were no cases that should be brought to the Court, but the enforcement framework as provided under the 2005 Supplementary Protocol is considered inadequate because it depends on the goodwill of the member States, including their national courts. Thus the Court would depend on the support of the political leadership (as lamented by the Court President) and the national courts for the enforcement of its decisions discouraging potential private litigants to file a complaint before the court.[102]

The authors strongly submit that a strengthened judicial enforcement mechanism could contribute more effectively to the regional integration process in ECOWAS because besides the Court of Justice, there are no other official penalties or enforcement mechanisms existing under ECOWAS and WAEMU to deal specifically with NTMs/NTBs. And continued resort to diplomatic channels for dispute settlement without corresponding enforcement mechanism was making member States to renege from fulfilling their commitments.

6.4. Alternative Mechanisms

There is no doubt about the weaknesses of the regional judicial enforcement mechanism, but other alternative solutions have been found to ensure implementation of NTMs provisions. However,

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101 Article 76 of ECOWAS Treaty: "1. Any dispute regarding the interpretation or-the application of the provisions of this Treaty shall be amicably settled through direct agreement without prejudice to the provisions of this Treaty and relevant Protocols. 2. Failing this, either party or any other member States or the Authority may refer the matter to the Court of the Community whose decision shall be final and shall not be subject to appeal"

102 https://guardian.ng/features/ecowas-court-laments-poor-enforcement-of-judgments/ Accessed 29/06/2020

ECOWAS and WAEMU have resorted to mediation and conciliation mechanisms to informally resolve disputes between member States. The solution so far has proved to be partially effective.

Another solution used by the ECOWAS Commission is to informally send a letter to a Member State involved in the infringement of a Community provision. The idea behind it is to sensitize the Member State on the importance of implementing the provision. According to the Commission, this approach has proved to have a deterring effect on certain policies or practices. This partial and weak integration process attracted the disappointment of the Authority of Heads of State and Government ('AHSG') at the ECOWAS Summit in July 2013[103] with the limited progress of ETLS on intraregional trade, and called for fast-tracking the implementation of integration policies (especially ETLS) in the sub-region.[104] This led to several initiatives carried out by the ECOWAS Commission including the roadmap on the free movement of persons and goods. This initiative entails *inter alia*, the establishment of a mechanism for arbitration and sanctions of offenders (for member States, legal and natural persons) and a Task Force on the ECOWAS. In line with this, a regulation on the establishment and composition of the Task Force has been adopted by the Council of Ministers in 2015 and the Task Force has been established.[105]

A further mechanism which contributes to better implementation of the Community acquis is the WAEMU annual policy review on the integration process. This review consists of monitoring the state of implementation of community legislation in domestic law for all eight member States. A delegation of the commission is sent to the country and meetings with the main stakeholders are organized. The main goal of this process is to foster the acceleration of the implementation of community policies and project reform programs within WAEMU in the context of deepening regional integration. This review mechanism entered into force in 2013,[106] and positive results have since been observed between 2014 and 2015 according to the last commission statistics in terms of transposition and application of common market reforms. While the level of

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103 https://old.ecowas.int/publications/en/communique_final/43eme/comfinal.pdf Accessed 29/06/2020

104 ECOWAS Vanguard, NANTS Publication 182, 2015 https://nants.org/category/ecowas-vanguard/page/3/

105 ECOWAS, draft implementing regulation on the establishment and composition of the Task Force, 2015

106 More information available at: https://mali-web.org/economie/revue-annuelle-de-luemoa-comment-tirer-le-meilleur-parti-des-reformes

implementation was at 48 per cent for the eight member States in 2014, it has risen to 61 per cent in 2015. However, it has to be recognized that the above mentioned alternative mechanisms - formal and informal - have a limited impact on the monitoring of compliance with NTMs/NTBs obligations by member States for the time being. Hence, there are limited options for economic operators affected by the non-application of community regulations.

7. Conclusion

There is no gainsaying that there is a need to strengthen the judicial and other political institutions in ECOWAS. One of the ways to enhance this process of institution-building is through reform of the regional Court of Justice. This position is not without its challenges and must be done in order to address operational challenges that businesses and community citizens are confronted with on a daily basis as they engage in cross border trade and free movements across the region. This reform will, hopefully, build confidence among Member State to respect its obligations and provide for more effective and efficient delivery of justice as a public good to their citizens through the principal legal/judicial organs empowered to enforce the provisions outlined in the treaties as well as in the associated Protocols, regulations, directives, decisions and other subsidiary legal instruments.

Again, even though the Preamble of the 2005 Supplementary Protocol stresses the leading role that the Court of Justice "can play in eliminating obstacles to the realization of Community objectives and accelerating the integration process," the reality remains different from the spirit of the Protocol because the Court of Justice continues to have a very minor role in the regional integration process in West Africa. This is typified by the still partial implementation of the ECOWAS ETLS by the member States (with persistence and in some cases proliferation of NTBs) since its launch in 1990. This has to stop, even as efforts are being intensified to make ECOWAS work for the good and betterment of its citizens and businesses.