

Sovereignty, Supra-nationality and Trade: THE CASE OF ECOWAS LAWS

1.0. Introduction



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Right from the formation of ECOWAS, regional integration was acknowledged as a development strategy upon which the West African states would conduct their relationship. The ECOWAS' economic integration agenda aims to liberalize trade among Member States: the elimination of tariff and non-tariff barriers, and ultimately achieve an economic and monetary union after successfully going through the process of a Free Trade Area (FTA), Custom Union and Common Market (Article 3, Revised ECOWAS Treaty 1993).

Central to the attainment of the regional integration objectives is the free movement of community citizens across national boundaries. ECOWAS recognized that when persons move from one Member State to another, they carry along with them, not just their skills or requisite know-how but also physical articles of trade. In other words, free movement of persons by necessary implication would connote free movement of goods and services, thus enhancing the economic integration agenda and wealth creation as well as redistribution of such wealth within the region.

Accordingly, efforts were made through legal instrumentation to create an enabling environment which would facilitate the free movement of persons within the region. No singular act of ECOWAS like the institution of community citizens' rights to free movement under the Free Movement Protocol underlies its commitment to regional integration. Notwithstanding, the regional integration efforts in ECOWAS have faced serious challenges in the last decades of the existence of ECOWAS. The most obvious of such challenges has been one of constitutional dimension. Defining a proper relationship between community laws and national laws has proven to be a task that has undermined efforts at integration. This has manifested more seriously on trade and economic issues.

The thorny question has been how to manage the limitation of sovereignty of member states to ensure that community law is recognized superior to national law and accordingly applied and interpreted by national courts at the instance of community citizens. The issue of access by community citizens to the community court in cases of breach of the former's rights guaranteed under a community law is the other side to the question. This borders on the applicability of community law by community institutions like the ECOWAS Court of Justice. Although outside the scope of this paper, it should be stated that this is a less controversial issue, notwithstanding that questions on the enforcement of decisions of the ECOWAS Court at national level are unsettled.

In making a contribution to the extant position, this paper focuses on reviewing the enforcement of ECOWAS laws (especially, trade and economic related laws) by the national courts of Member States, namely:

- Whether ECOWAS law which is part of international law and Nigerian law, for instance, which is part of municipal law are parts of a single universal legal order or constitute separate legal orders,
- To what extent ECOWAS law is applicable in national courts (Nigerian judicial system) and
- To what extent the ECOWAS Court can adjudicate or have jurisdiction over matters or disputes that are regional in nature (cross border related offences) or offences against ECOWAS Protocols and other legal instruments.

The foregoing is against the backdrop that the enforcement of ECOWAS laws in national courts would best facilitate the integration of regional policies into national legal systems and thus fast-track the realization of ECOWAS regional integration objectives.

2.0. The ECOWAS Integration Agenda



Experts discussing ECOWAS Trade policy and Integration matters.

As already indicated, the overriding objective of ECOWAS is socio-economic integration. This is evident in Article 2 of the ECOWAS Treaty which provides that the Community's aim is to promote cooperation and development in all fields of economic activity. To achieve this, the Community was to ensure the following, albeit, in stages:

- i. The elimination between member states of customs duties;
- ii. The abolition of quantitative and administrative restrictions;
- iii. The establishment of a common customs tariff and a common commercial policy towards third parties;
- iv. The abolition of obstacles to the free movement of persons, services and capital;
- v. The harmonization of agricultural policies; the implementation of schemes of joint development; and
- vi. The harmonization of the economic policies of member states.

The pattern and tilting of the above-listed objectives establishes the very fact that and indicate that the major chunk of ECOWAS integration process is underpinned by trade. ECOWAS Treaty envisioned a free trade area as a first step towards its economic integration agenda. In 1993, the ECOWAS Treaty was revised by Member States to basically help fast-track efforts at integration and to recognize, promote and protect a political and social dimension to its economic objectives. Article 3 of the Revised Treaty accordingly commits Member States to ultimately achieving an economic union.

Secondly, that the Revised Treaty forms an ECOWAS Legal system is evident from Article 88 of the Revised Treaty which states that the Community shall have an international legal personality. Furthermore the aims and objectives of ECOWAS envision a community legal system which is evident from the objectives which create rules or provide for the creation of rules by a number of bodies which represent a broad spectrum of executive, legislative and judicial organs. The requirement that: an enabling legal environment (Article 3.2(h) of the ECOWAS Treaty) should be established; that there is right of residence and establishment; that there should be the harmonisation of National Investment Codes leading to a single Community Investment Code and the harmonization of standards and measures point to the fact that work of community institutions was envisaged. It should also be pointed out that the ECOWAS Community legal system is a product of the limitation of the sovereignty of Member States¹.

The Revised Treaty accordingly provides that:

"...the integration of Member States into a viable regional community may demand the partial and

gradual pooling of national sovereignties to the Community within the context of a collective political will"².



An enabling legal environment ensures justice and development.

3.0. Examination of the Application and Enforcement of ECOWAS Laws in National Courts

Application and enforcement in national Courts refers to the ability of a citizen of an ECOWAS state to invoke ECOWAS law in a matter before that Court and for that Court to be bound to follow that law. This is the so called 'direct effect' of community law. The principle emerged from the case of Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) where the European Court of Justice (ECJ) established an important principle that provisions of the Treaty Establishing the European Economic Community were capable of creating legal rights which could be enforced by both natural and legal persons before the Courts of the Community's Member States.



Establishment of justice is through quick disposal of cases.

In that case the ECJ adopted the criteria for establishing direct effect of the Treaty: The provision must be sufficiently clear and precisely stated; it must be unconditional or non-dependant; and it must confer a specific right for the citizen to base his or her claim on. The concept of direct effect has been extended to legislation adopted pursuant to the Treaty in the form of directives and regulations from the European Commission. Thus, in the Commission v. France (1997), the ECJ ruled that Member States have to instruct their national Police Forces to enforce EU law.

In the French case, this meant using the Police to ensure the free movement of goods. Applying the principle of direct effect in the ECOWAS legal system would mean that

¹See Article 6, Revised ECOWAS Treaty for Organs of ECOWAS.

²See Preamble to the Revised Treaty.

provisions of the ECOWAS Treaty, Protocols, Decisions and Regulations there-under would have direct effect in ECOWAS national courts. Whether this is the case is a matter entirely determined by the legal system of each Member State.

Direct effect is to be differentiated from direct applicability by which a country determines how its Treaties become part of the national legal system and therefore binding on the national courts. When a treaty is directly applicable it is enforced as a national law.

3.1. The Revised ECOWAS Treaty

It is interesting to note that the Revised Treaty of ECOWAS is not directly applicable in Member States, but depends on its applicability on the manner in which it is incorporated into national legislation of States. In this regard Article 5(2) of the Revised Treaty provides that:

“Each Member State shall, in accordance with its constitutional procedures, take all necessary measures to ensure the enactment and dissemination of such legislative and statutory texts as may be necessary for the implementation of the provisions of this Treaty.”

This provision deserves further evaluation. Noteworthy is that the English speaking countries of ECOWAS such as Nigeria³, Ghana⁴, Sierra Leone⁵, Gambia⁶ and Liberia⁷ are generally regarded as ‘dualist’. International law does not have force of law within the territories of these countries unless it has been promulgated as a national legislation (ratification and or domestication process). What it further connotes is that without such national legislation, the ECOWAS Treaty will not have the force of law in the country. Sadly, from all indications, it appears that these countries are not taking any tangible measures towards the enactment of such legislations at their national levels; therefore making the journey to full enforcement of ECOWAS laws still very far.

However, for the French speaking West African countries there is a difference in the manner in which international law is received because they are ‘monist’ in orientation. As soon as international law is made it becomes part of the national laws of that state subject to the reciprocal enforcement of international law by other States. Article 147 of the Constitution of the Republic of Benin (1990) for instance, provides that Treaties or Agreements lawfully

ratified shall have, upon their publication, an authority superior to that of laws, without prejudice for each agreement or treaty in its application by the other party. Thus subject to the requirement of reciprocal application, the ECOWAS Revised Treaty is directly applicable in Benin Republic.

3.2. ECOWAS Protocols

The Authority of Heads of States and Governments which is the supreme institution of ECOWAS was established by Article 7 of the Treaty and enabled by Article 9(1) to act by Decisions. Decisions of the Authority can be reached as a Protocol which has the same force as a Treaty⁸. Article 9(4) of the Revised Treaty provides that “Decisions of the Authority shall be binding on Member States and Institutions of the Community”. The combined provisions of Article 9(4) of the Revised Treaty and the analysis above on the manner of incorporation of Treatise (since the Protocols are equivalents of Treaties) can be read to the effect that the Protocols are directly applicable in Member States.



Heads of State and Government on the Consolidation of Customs Duties.

Article 10 of the Revised Treaty establishes the Council of Ministers and Article 12 provides that the Council of Ministers shall act by regulations. Regulations of the Council shall be binding on the institutions under its authority which will include staff of the ECOWAS Commission and some specialized organs. What this means is that if the regulations made by the Council of Ministers are approved by the authority, they automatically become binding on Member States. However, a literal reading of the provisions of Article 12 of the Revised Treaty indicates that regulations are not directly applicable or have direct effect until that have become Decisions of the Authority.

³See s. 12 of the 1999 Constitution of the Federal Republic of Nigeria.

⁴Section 75.(1) of the 1992 Ghana Constitution provides that the President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana. (2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by- (a) Act of Parliament; or (b) a resolution of Parliament supported by the votes of more than one-half of all the members of Parliament. See E.O Dankwa ‘Implementation of international human rights: Ghana as an Illustration’ (1991) 3 ASICL Proc. 57.

⁵See Article 40(4)ii of the 1991 Sierra Leone Constitution.

⁶Section 79(1)c of the 1997 Gambia Constitution.

⁷Section 57 of the Liberian Constitution.

⁸See Article 1 of the Revised Treaty.

3.4. Judgments of the ECOWAS Court of Justice

Given that ECOWAS regional integration is largely anchored on trade relations, and that disputes are almost inevitable between parties involved in trade, or between Member States, between individual businesses and Member States, or between Member States and the Community, etc., it becomes imperative to examine the role of the ECOWAS Court in the dispensation of justice and settlement of such trade related disputes.

The ECOWAS Court of Justice was created pursuant to the ECOWAS Revised Treaty of 1993. Article 15 of the Treaty establishes the Community Court of Justice. In addition to providing advisory opinions on the interpretation of Community law, the Court has jurisdiction to examine cases involving:

- i. an alleged failure by a Member State to comply with Community law;
- ii. a dispute relating to the interpretation and application of Community acts;
- iii. dispute between Community institutions and their officials;
- iv. Community liability
- v. human rights violations, and
- vi. the legality of Community laws and policies

Surprisingly, from the forgoing jurisdiction, it appears the framers of the law did not envisage the existence of any trade/commercial disputes along the implementation of the regional integration agenda, hence, the outright absence of any related role for the ECOWAS Court. Whereas paragraphs (i) and (ii) should naturally but indirectly presuppose and undertake trade related cases inclusively, nonetheless, the fact that these paragraphs limited interventions to Member States and disputes relating to interpretation/application of Community laws, obstructs citizens or business entities access and coverage within the jurisdiction.

3.4.1. Access to ECOWAS Court of Justice



ECOWAS: How accessible is the community court?

It is interesting to recall that the ECOWAS Court of Justice received its first case in 2004, many years after its

establishment in 1995. Trade and economic operators may also wish to note that this landmark first case (Olajide Afolabi v. Federal Republic of Nigeria) was filed by an individual businessman against the government of Nigeria for a violation of Community law in the closing of the border with Benin⁹. The Court ruled that under the Protocol only Member States could institute cases. The Court's ruling triggered the process of dialogue headed by the Judges themselves, over the need to amend the Protocol to allow for legal and natural persons to have standing before the Court, especially based on the fact that the Applicant is a Nigerian national and it is a legal impossibility for Nigeria to have sued itself on behalf of the citizen.

In January 2005, the Community adopted the Additional Protocol to permit persons to bring suits against Member States. Beyond this monumental change, the Council took the opportunity to revise the jurisdiction of the Court to include review of violations of human rights in all Member States. This language made clear that the sources of law to be applied by the Court under its original Protocol would include not only general principles of international law, but also those in relation to human rights. Additional Protocol A/SP.1/01/05 also adds jurisdiction over any disputes arising under agreements, other than the Treaty, between Member States that so provide.

The Additional Protocol also gave national courts of Member States the right to seize the ECOWAS Court for a ruling on the interpretation of Community law. Previously, the language in the Protocol was unclear as to whether a Member State court could only seize the Community Court of a matter through the auspices of the national government.

Therefore, contrary to the insinuations that access to the ECOWAS Court is limited to Member States, corporations and individuals can today submit complaints alleging human rights violations by the Community or Member State actors. These complaints are however strictly limited to human rights issues. There is no domestic exhaustion of remedies requirement limiting the Court's jurisdiction, meaning individuals do not need to pursue national judicial remedies before bringing a claim to the ECOWAS Court of Justice. Rather, the principal requirements are that the application must not be anonymous and that the matter is not pending before another international court. See *Hadijatou Mani Koraou v. Niger*, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008.

For the sake of emphasis, the ECOWAS Court has heard cases involving: (1) education brought before it by corporate bodies¹⁰; (2) freedom of movement (Femi Falana

⁹This case was however a strictly from a human right perspective and not a commercial dispute.

¹⁰See *SERAP v. Nigeria*, Judgment, ECW/CCJ/APP/0808, Oct. 27, 2009, finding that education is a legal and human right)

& Anor V. Republic of Benin & 2 Ors), (3) due process¹¹; (4) the rights of women and children¹² and (5) slavery¹³.

List of Cases (2004-2012) handled by the ECOWAS Community Court of Justice

S/N	Case	Subject of Determination	Year
1	ECW/CCJ/APP/01/03 OLAJIDE AFOLABI v. FEDERAL REPUBLIC OF NIGERIA	Free Movement	2004
2	ECW/CCJ/ADV:OPN/01/05 Request for Advisory Opinion on Community Parliament (2005)	Advisory opinion on the Community Parliament	2005
3	ECW/CCJ/APP/01/04 Chief Ukor v Laleye (2005)		
4	ECW/CCJ/APP/02/05 HON. DR. JERRY UGOKWE v. FEDERAL REPUBLIC OF NIGERIA		
5	ECW/CCJ/APP/03/05 ECOWAS PARLIAMENT v. COUNCIL OF MINISTERS, ECOWAS		2006
6	ECW/CCJ/APP/01/05 MRS. TOKUNBO LIJADU-OYEMADE v. EXECUTIVE SECRETARY, ECOWAS & 2 ORS		
7	ECW/CCJ/APP/04/06 EXECUTIVE SECRETARY, ECOWAS v. MRS. TOKUNBO LIJADU-OYEMADE		2007
8	ECW/CCJ/APP/05/05 - Prof Etim Moses Essien v The Republic of The Gambia and Another (2007)	AHRLR 131 (ECOWAS 2007) Preliminary objection in labour dispute dealing with the jurisdiction of the ECOWAS Community Court of Justice	
9	ECW/CCJ/APP/06/06 MRS. ALICE R. CHUKWUDOLUE & 7 ORS Chukwudolue v Senegal (2007)		
10	ECW/CCJ/APP/05/06 Moussa Leo Keita v Mali (2007)		
11	ECW/CCJ/APP/04/05 Ukor v Laleye (2007)		
12	ECW/CCJ/APP/01/06 Alh. Hammani Tidjani v. Fed Rep of Nig & 4 ORS		
13	Koraou v Niger (2008) AHRLR 182 (ECOWAS 2008)	Woman held in slavery for nine years	
14	ECW/CCJ/APP/04/07 Chief Ebrimah Manneh v The Gambia (2008) AHRLR 171 (ECOWAS 2008)	Arbitrary detention of journalist; calculation of damages	
15	ECW/CCJ/APP/01/07 Emmanuel Akpo v G77 South South Health Care (2008)	Healthcare Delivery Programme & Anor	

16	ECW/CCJ/APP/02/06 Qudus Gbolahan Folami v Community Parliament - Summary (2008)		
17	Folami v Community Parliament (2008)		
18	ECW/CCJ/APP/02/07 Mrs. Tokunbo Lijadu-Oyemade v. Council of Ministers & 4 ORS		
19	ECW/CCJ/APP/08/07 Dame Hadijatou Mani Koraou v. Rep of Niger		
20	ECW/CCJ/ADV:OPN/01/08 Request for Advisory Opinion by ECOWAS Commission	Request for Advisory Opinion by ECOWAS Commission	
21	ECW/CCJ/APP/05/07 Odafe Oserada v. Council of Ministers & 2 ORS		
22	ECW/CCJ/APP/07/07 Mohammed Kamel Wansa v. Rep of Sierra Leone & ANOR		
23	SERAP v The Federal Republic of Nigeria and Another, ECW/CCJ/APP/0808, 27 October 2009	Ruling on preliminary objection in case dealing with the right to education	
24	Amouzou Henri v Cote d'Ivoire (2009)	Summary	
25	CNDD v Cote d'Ivoire (2009)	Summary of Registry	
26	ECW/CCJ/APP/10/06 Djotbayi Talbia & 14 ORS v. Fed Rep of Nig & 4 ORS		
27	ECW/CCJ/APP/09/07 LINAS Int'l Nig. Ltd v. The Ambassador of Mali & 2 ORS		
28	ECW/CCJ/APP/02/08 Adediji Benjamin Adeleke v. Executive Sec. RECTAS & 3 ORS		
29	ECW/CCJ/APP/04/08 Chief F. O. Offia v. ECOWAS Parliament & 3 ORS		
30	ECW/CCJ/APP/06/08 Hon. Tony Anyanwu v. Fed. Rep. Of Nig. & ANOR		
31	ECW/CCJ/APP/10/08 Nuhu Ribadu v. Fed. Rep. Of Nig		
32	ECW/CCJ/APP/01/09 Amouzou Henri & 5 ORS v. Rep. Of Cote D'Ivoire		
33	ECW/CCJ/APP/02/09 Nat. Coordination Of Dept. Delegates Of the Coffee & Cocoa Sector v. Rep. Of Cote D'Ivoire		
34	SERAP v President of the Federal Republic of Nigeria & ORS, Suit No: ECW/CCJ/APP/08/09 Ruling (Preliminary Objections), 10 December 2010	Ruling that the ECOWAS Court has no jurisdiction with regard to alleged human rights violations committed by corporations	
35	SERAP v The Federal Republic of Nigeria and Another, ECW/CCJ/APP/12/07, 30 November 2010	Judgment on resource allocation for primary education	
36	Hissein Habré c. République du Sénégal, ECW/CCJ/APP/07/08, 18 November 2010	The Court finds that the former President of Chad may not be tried by a Senegalese court for international crimes committed in	

¹¹See Manneh v. Gambia, Judgment No. ECW/CCJ/JUD/03/08, 5 June 2008);

¹²See Amouzou Henry v. Cote D'Ivoire, Judgment No. ECW/CCJ/JUG/04/09, 17 December 2009);

¹³See Hadijatou Mani Koraou v. Niger, Judgment No. ECW/CCJ/JUD/06/08, 27 October 2008). See also Habre v. Senegal, Judgment No. ECW/CCJ/JUD/06/10, 18 November 2010, which concluded that the former President of Chad could not be tried by a Senegalese court for international crimes committed in Chad because it would violate the prohibition of non-retroactive penal law.

		Chad as this would violate the prohibition of non-retroactive penal law	
37	Garba v Benin (2010)		
38	Saidykhan v Gambia (2010) Saidykhan v Gambia (2010)		
39	ECW/CCJ/APP/05/10 Mamadou Tandja v Gen. Djibo and Niger (2010)		
40	ECW/CCJ/APP/10/06 Federal Republic Of Nigeria & 3 Ors V. 1. Djotbayi Talbia & 14 Ors 2. Chief Of Naval Staff	Application For Review	
41	ECW/CCJ/APP/11/07 Musa Saidykhan V. Republic Of The Gambia		
42	ECW/CCJ/APP/07/08 Hissein Habre V. Republic Of Senegal		
43	ECW/CCJ/APP/11/08 Dr. Mahamat Seid Abazene Seid V. Republic Of Mali & 2 Ors		
44	ECW/CCJ/APP/05/09 Edoh Kokou V. ECOWAS Commission		
45	ECW/CCJ/APP/01/08 Starcrest Investment Limited V. The President Of ECOWAS Commission & 3 Ors		
46	ECW/CCJ/APP/05/08 Ocean King Nigeria Limited V. Republic Of Senegal		
47	ECW/CCJ/APP/08/08 Petrostar Nigeria Limited V. Blackberry Nigeria Limited & Anor		
48	ECW/CCJ/APP/03/09 Private Alimu Akeem V. Federal Republic Of Nigeria		
49	ECW/CCJ/APP/06/09 Peter David V. Ambassador Raph Uwechue	Application For Revision	
50	ECW/CCJ/APP/07/09 Centre For Democracy And Development & Anor V. President Mamadou Tandja & Anor		
51	ECW/CCJ/APP/09/09 Bakary Sarre & 28 Ors V. Ministry Of Justice Of Mali & Republic Of Mali		
52	ECW/CCJ/APP/12/09 Sidi Amar Ibrahim & Anor V. Republic Of Niger		
53	ECW/CCJ/APP/13/09 El-Hadj Tidjani Aboubacar V. BCEAO – Central Bank Of West Africa & Anor		
54	ECW/CCJ/APP/01/10 Sidi Lami Ould Mohammed Lagoif V. Republic Of Mali		
55	ECW/CCJ/APP/04/10 Osahon Asemota V. Attorney-General Of The Federal Republic Of Nigeria		
56	ECW/CCJ/APP/08/10 Cheik Abdoulaye Isabelle Manavi V. Republic Of Mali		
57	ECW/CCJ/APP/09/10 Dr. Emmanuel Nnaji V. Republic Of The Gambia		
58	ECW/CCJ/APP/12/10 Madame Ameganvi Isabelle Manavi V. Republic Of Togo		
59	ECW/CCJ/APP/17/10 Mr. Godswill Mrakpor & 5 Ors V. The Authority Of Heads Of State Of Ecowas & Anor		
60	ECW/CCJ/APP/10/07 Femi Falana & Anor V. Republic Of Benin & 2 Ors	Freedom of Movement	

61	ECW/CCJ/APP/11/07 Musa Saidykhan V. Republic Of The Gambia	Application For Revision	
62	ECW/CCJ/APP/01/08 Starcrest Investment Limited V. President Of ECOWAS Commission & 3 Ors	Application For Revision	
63	ECW/CCJ/APP/14/09 Jibril Yusuf V. Rep. Of Benin		
64	ECW/CCJ/APP/03/10 Alhaji Mohammed Ibrahim Hassan V. Government Of Gombe State Of Nigeria		
65	ECW/CCJ/APP/07/10 Kemi Pinheiro (San) V. Republic Of Ghana		
66	ECW/CCJ/APP/11/10 Oluwatosin Rinu Adewole V. President Of Ecowas Commission & 3 Ors		
67	ECW/CCJ/APP/12/10 Madame Amengavi Isabelle Manavi V. Republic Of Togo	Application For Revision	
68	ECW/CCJ/APP/05/11 Sikiru Alade V. Fed. Rep. Of Nigeria		
69	ECW/CCJ/APP/07/11 Valentine Ayika V. Republic Of Liberia		
70	ECW/CCJ/APP/08/11 Messieurs Aziabevi Yovo & 31 Ors V. Societe Togo Telecom & Anor		
71	ECW/CCJ/APP/10/11 Haruna Warkani & 3 Ors V. President Of ECOWAS Commission & Anor		
72	ECW/CCJ/APP/16/11 Groupe Raceco V. ECOWAS Commission		
73	ECW/CCJ/APP/28/11 El Hadj Abdou Gaye V. Republic Of Senegal		
74	ECW/CCJ/APP/01/12 Monsieur Barthelemy Toye Dias V. Republic Of Senegal		
75	ECW/CCJ/JUD/17/12 Case Sa'adatu Umar V. Federal Republic Of Nigeria		
76	ECW/CCJ/JUD/18/12 Case Serap V. Federal Republic Of Nigeria		

The Court gained “jurisdiction to determine case[s] of violation[s] of human rights that occur in any Member State” in 2005 with the implementation of Supplementary Protocol A/SP.1/01/5, which followed the adoption of Protocol A/SP.1/12/01 on Democracy and Good Governance, requiring that the Court be given “the power to hear, inter alia, cases relating to violations of human rights...” The Court’s decisions on human rights matters interpret the African Charter on Human and Peoples’ Rights, considered by Article 1(h) of Protocol A/SP.1/12/01 to contain “constitutional principles shared by all Member States” as legally binding on ECOWAS Member States.

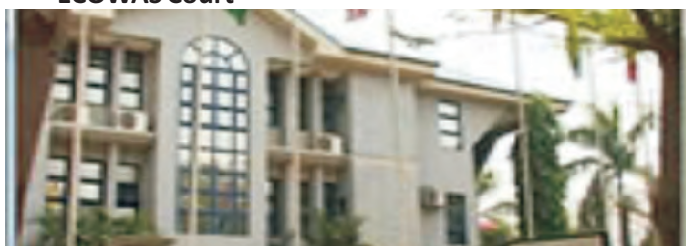
Another cursory examination of all the cases cited (including the table above) shows that none is directly related to trade and economic integration agenda of the ECOWAS region which was the primary objective behind the formation of ECOWAS in the first place, and for which many Protocols were signed and many policies currently being harmonized by Member States. Sadly, these are the same Protocols which the Court was ab-initio also established to interpret. Following this track of logic, it can

be concluded that the Member States did not desire the Court to be an engine for realizing the economic integration objective. In this way also, the private sector has been denied the pro-activeness of taking advantage of Community laws and the Community Court to address integration issues and promote trade among Member States. Little wonder that despite the fact that the Revised Treaty entered into force in 1995, the judges of the ECOWAS Court of Justice were not appointed until January 30, 2001. Yet, the Court was deliberately limited to a very narrow field of access- namely; that only the Authority of Heads of State and Government (the executive of the Community comprised of all the Member States) and the Member States acting individually were permitted to initiate a contentious case in the Court. The power to request advisory opinions on the Treaty was until the adoption of Additional Protocol A/SP.1/01/05, limited to the Authority, the Council of Ministers, Member States, the Executive Secretary and other institutions of the Community. The effect of this limited standing in the Court was that until 2003, the Court was inoperative.

3.4.2. Hierarchy: ECOWAS Court and the National Courts

The ECOWAS Court as the judicial organ of the Community has a significant part in the enforcement of ECOWAS law in national courts through the enforcement of its judgments in these Courts. In particular, Article 15(4) states that the judgments of the Court shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies. "Member States" could be read to include the Courts in these States. What this provision consequently raises is the question of hierarchical relationship between the ECOWAS Court and national court. It is submitted that where the Revised Treaty is directly applicable in a State as in the French speaking countries, the judgment of the ECOWAS Court is superior to and binding on the National Courts. In English speaking countries like Nigeria where the Revised Treaty is not directly applicable, the National Courts are not bound by the decisions of the ECOWAS Court. In this scenario therefore, it is difficult to assume that the ECOWAS Court can be useful or instrumental to the integration process of the region. It is yet to be seen what the role of the Attorney General of Member States in pushing for adherence to ECOWAS Court is regarding regional matters.

3.5. Regional Commercial Disputes and the Powers of ECOWAS Court



ECOWAS Court of Justice – Abuja

It is worth repeating that the principal objective of ECOWAS is the formation of an economic union and a common market. The ECOWAS Trade liberalization Scheme (ETLS) is an important programme for the realization of the common market. The Common External Tariff (CET) currently being harmonized by Member States is a key instrument for advancing a Customs Union and a Free Trade Area as intended by the founders of ECOWAS. The Common Competition Policy, Common Investment Code and other trade related policies for which huge resources have been invested are key posts for promoting intra regional trade. It should however be noted that all of these frameworks and the intended benefits cannot be realized, unless individuals, consumers, manufacturers and corporate bodies that are the prime movers in commercial transactions within the region have direct access to the ECOWAS Court of Justice not only in case of violation of the human, but also their commercial rights guaranteed by ECOWAS law.

Furthermore, one of the essential objectives/jurisdictional powers of the ECOWAS Court is the interpretation of Community laws (Treaty and Protocols), majority of which are trade focused. Some of these Protocols include:

- 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)
- ii. 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.
- iii. Protocol A/P1/5/79 relating to free movement of persons, residence and establishment
- iv. Protocol A/P3/5/82 relating to the definition of Community Citizen
- v. Supplementary Protocol A/SP2/7/85 on the code of conduct for the implementation of the Protocol on free movement of persons, the right of residence and establishment.
- vi. 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.
- vii. 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.

So, the fundamental argument is, what is the essence of the several trade related Protocols and policies signed unto by Member States and which are deemed to have come into effect if trade/commercial oriented disputes are not included in the jurisdiction of the Court. As long as this continues to remain the situation, intra-regional trade volumes in West Africa may not foster because commercial parties and business operators would remain fearful of the non-existent mechanism for confident settlement of transaction misunderstandings or disputes. More so, ECOWAS may be losing investments as foreign investors that are regional in their operation may be concerned that

their cross border transactions may not have the benefit of sufficient and reliable settlement in the event of disputes.

This paper therefore seriously advocates for the expansion of scope of the jurisdiction of the ECOWAS Court of Justice to cover matters not only related to human rights violation, but more importantly matters related to trade and commercial disputes within Member States. Some school of thought have even opined that as long as the situation in countries like Nigeria is that ECOWAS Court rulings do not have direct effect, or no other provision are made so that executive and judiciary are obliged to follow its rulings, direct access of citizens to the Court (in trade matters) may really remain an ineffective remedy. Others have also considered that though it might be easier or faster to get a ruling – but what comes next is what actually matters.

While considering all of these, it is also important to explore the inclusion of Alternative Dispute Resolution in ECOWAS laws as a way of building confidence on the private sector business operators where Courts are jurisdictionally handicapped.

Indeed, for the private sector, the most practical way of demonstrating the ECOWAS Vision 2020 of transforming from ECOWAS of Member States to ECOWAS of Peoples is to see an ECOWAS Community Court of Justice that recognises and provides access to citizens in all matters and whose powers and jurisdiction covers the trials on cross border related offences in the sub-region, including the violation of ECOWAS trade related Conventions and Protocols as well as issues relating to sea piracy on West African waters, cross border money laundering, drug and human trafficking offences, etc., committed along the border lines within the sub-region.

4.0. Practical Examination of Enforceability Issues

4.1. Applicability of the Free Movement Protocol in Nigeria



How free are ECOWAS citizens to move across borders?

The Free Movement Protocol is essentially a contraption aimed at the realization of the economic integration agenda of the region as set out in Article 3 of the ECOWAS Treaty. It is the principal legislation of the ECOWAS integration agenda¹⁴.

Article 27 of the ECOWAS Treaty provides that:

- (1) Citizens of Member States shall be regarded as Community citizens, and accordingly Member States undertake to abolish all obstacles to their freedom of movement and residence within the Community.
- (2) Member States shall by agreements with each other exempt Community citizens from holding visitor's visas and residence permits and allow them to work and undertake commercial and industrial activities within their territories.

Article 59 of the Revised Treaty provides that:

- (1) Citizens of the Community shall have the right of entry, residence and establishment and Member States undertake to recognize these rights of Community Citizens in their territories in accordance with the provisions of Protocols relating thereto.
- (2) Member States undertake to adopt all appropriate measures to ensure that Community citizens enjoy fully the rights referred to in paragraph 1 of this Article.
- (3) Member States undertake to adopt, at national level, all measures necessary for the effective implementation of the provisions of this Article.

A combined effect of the two provisions led to the enactment of the Protocol Relating to the Free Movement of Persons Residence and Establishment in 1979. Article 2 of the Protocol provides that:

- (1) The Community citizens have the right to enter, reside and establish in the territory of Member States.
- (2) The right of entry, residence and establishment referred to in paragraph 1 above shall be progressively established in the course of a maximum transitional period of fifteen (15) years from the definitive entry into force of this Protocol by abolishing all other obstacles to free movement of persons and the right of residence and establishment.
- (3) The right of entry, residence and establishment which shall be established in the course of a transitional period shall be accomplished in three phases, namely: Phase I - Right of Entry and Abolition of Visa Phase II - Right of Residence Phase II - Right of Establishment.

Article 3 of the Protocol is intended to implement the first phase while the second and third phases are implemented by Supplementary Protocols¹⁵.

The implementation of the Protocol has been honoured in breach than compliance over the years. Agyei & Clottey described the situation as follows:

"...several border checks continue to exist. This

¹⁴All other integration Schemes like the ECOWAS Trade Liberalisation Scheme and all the Common Policies of the region are rooted in this Treaty.

¹⁵Supplementary Protocol A/SP.17/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right to Residence and Establishment, and Supplementary Protocol A7SP.2/5/90 on the Implementation of the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons Right of Residence and Establishment; Hereafter Right of Establishment Protocol.

has resulted in severe harassment and extortion of money from travelers by security personnel at the numerous checkpoints. Free movement is also hampered by different official languages at border posts. There are reports of torture and killings by security personnel in countries like Senegal and Gambia. The killing of 44 Ghanaians in The Gambia by security agencies in 2005 constitutes an example of harassments and difficulties faced by citizens of Member States in exercising their right to free movement within the sub-region."



Harmonized rules of migration will increase trade.

For the purpose of clarity and for the practical understanding among the private sector, it is important to note that the primary purpose of migration is the movement of goods and services where capital is also involved. This recognition of the freedom of movement, otherwise called the Free Movement Protocol is however laced with some conditions or provisos. Despite the guarantee of rights under this Protocol, a Citizen can be denied the right of entry, residence or establishment if he/she is an inadmissible person, i.e. if he/she:

- i. has health-related problems, especially communicable disease/sickness,
- ii. is a drug peddler,
- iii. is trafficking in human beings,
- iv. is having criminal records or multiple convictions,
- v. is into money launderer,
- vi. is a Fraudster,
- vii. is a Prostitute/commercial sex worker,
- viii. belongs to a terrorist organization, etc.

In effect Community Citizens have alleged that their rights of free movement (including the right to move their article of trade across national borders), entry residence and establishment have been breached and of course that Member States have breached obligations which were undertaken under the Free Movement, the Right of Residence and Right of Establishment Protocols. The question is whether these citizens can proceed to the appropriate national court to lodge a complaint and whether the Free Movement Protocols are enforceable in these courts. While Community citizens may be able to claim the rights under the Protocol, the extent of enforceability of these rights in national courts will be dependent on the attitude of the host Member State to the application of international law.

For instance, in English speaking Member States like Nigeria where the direct applicability principle does not apply, the rights of a citizen will be enforceable by the Courts only when Nigeria has taken necessary steps to incorporate the rights guaranteed under the Protocol into its national laws. On the other hand, the right will be enforceable in the national courts of the francophone Member States who adopt the principle of direct applicability. It is thus clear that the extent to which national Courts of Member States will afford protection to rights under the Free Movement Protocol would depend on the Member States commitment to incorporating ECOWAS laws into its national laws. It should however be emphasized that this does not rob the citizen of pursuing his right before the ECOWAS Court.

Where a Community citizen is of the opinion that a Member State has failed to protect his right which is derived from ECOWAS legislation, such a Community citizen may seek recourse in the ECOWAS Court (See *Hadijatou Mani Koraou v The Republic of Niger* and *SERAP v. the Federal government of Nigeria*). Where a citizen obtains a judgment against a Member State at the ECOWAS Court, the challenge would however remain the enforcement of such judgment within the territory of the said Member State. This is against the backdrop that national Courts which are tasked with the enforcement of foreign judgments are not bound to enforce such judgments¹⁶.

4.2. The Ghana Investment Promotion Council Case

The GIPC Act confers the sole right of trading in the market places on Ghanaians. The law also bars non-Ghanaians from operating taxi and car hire service unless they have a minimum fleet of 10 new vehicles. Foreigners are also restricted from business of pool betting and lotteries, beauty salons and barbershops. The law enjoins all non-Ghanaians, including ECOWAS citizens, who wish to engage in trading, to:

1. Set up businesses outside places designated as markets;
2. Invest a minimum of USD300,000 in cash or kind;
3. Register with the GIPC;
4. Obtain immigration quota;
5. Employ at least 10 Ghanaians in the business.

The GIPC Act which fails to distinguish between investments owned by ECOWAS Citizens and that owned by the rest of the world, in its definition of 'foreign investor', is something that is currently threatening regional integration in West Africa. Resulting discrimination against mainly Nigerian investors is a sordid case that is tasking on both Governments in the region, on the ECOWAS Commission and the cohesion that is strongly sought after. Scores of Nigerian businesses have been forcefully closed and their owners suffered serious harassment over the last two years, all in blatant contravention of the ECOWAS Treaty and the Free Movement Protocol.

¹⁶This is very much the case in "dualist" Member States like Nigeria.

The question that arises is whether those Community Citizens (particularly Nigerian) whose rights under these instruments have been violated can approach the Ghanaian court to seek enforcement of their rights and whether these instruments are enforceable in the Ghanaian court.

As already shown by earlier analysis, to the extent that the direct applicability principle does not apply in Ghana and Ghana is yet to incorporate the ECOWAS Treaty or the Protocol into its laws, the national court of Ghana is not bound to enforce such rights. Again, this is without prejudice to the citizen's right to seek redress at the ECOWAS court on the ground that Ghana has failed to protect his right which is derived from ECOWAS legislation.

5.0. Conclusion: Bridging the Gap



Business Round table on ECOWAS and border trade facilitation.

From the foregoing analysis, ECOWAS instruments regulate relationship between Member States at the regional level while national law (Nigerian law, in this case) regulates the relationship within the country, including the country's judicial system. The treatise and the Nigerian law thus have their different spheres of operation and can only interact where the norms of the treaties are realized within the national territory, where the municipal law has jurisdiction. Therefore, the enforceability of ECOWAS laws within the Nigerian legal system is determined by Nigerian law. The Nigerian constitution prescribes the incorporation of international treaties into local laws before they can have local application. Once done, they become part of the law of the land.

In furtherance of the regional integration objectives of the ECOWAS region and against the backdrop that several of the integration legislations and Schemes are observed more in breached even by agents of the Nigerian government, it is a prerequisite that the government takes step to ratify the important ECOWAS instruments and transform them to local laws. This would help institute security and predictability in the business environment and thus give investors greater confidence to invest in the region.

The private sector on its part, especially the Business Membership Organizations should therefore embark on massive advocacy campaigns targeted at national legislators on the need to have these ECOWAS instruments ratified and duly incorporated into local laws; as well as to push Nigerian authorities to adhere to rulings of the ECOWAS Court which found that their practices are in

breach of ECOWAS law. There may also be need for the entire ECOWAS private sector to advocate for the harmonization of trade laws into a common trade policy for the region in such a way as to grant expression to regional supra-nationality in dealing with trade laws and making Member countries to adhere with such supremacy of laws.

A third and critical dimension is that any review of the ECOWAS Treaty must consider that the absence of sanction mechanisms in the ECOWAS Community laws is the bedrock of defiance and violations of the procedures. A situation where ECOWAS laws and virtually all Protocols lack appropriate penalty for offences and offenders, particularly erring Member States, they become too loose and unserious for action or compliance. It is the private sector in the region that continues to bear the brunt of the entire loose process.

Fourthly, a quick transformation of the ECOWAS Parliament to a complete law making organ of the Community which also makes the institution as representative of the voice of the people as possible is very critical. Confining the ECOWAS Parliament as a mere 'advisory' body has rather compounded matters in the region, and in fact has contributed to the poor implementation and overall poor performance of ECOWAS laws as well as the entire integration process.



Private sector and Customs chatting on impediments to ECOWAS trade

Finally, in amending the extant laws of ECOWAS, it is important to take into account that a major chunk of businesses in ECOWAS is driven by the informal sector. To this end therefore, there is need to consider the role, significance and commitment of these small businesses with a view to providing them with due legal protection, and this can only be guaranteed through the formulation or review of relevant laws and policies seeking the expansion of ECOWAS Court and other institutions of integration.

REFERENCES:

1. Center for Human Rights, University of Pretoria—South Africa—African RECS and Institutions
2. ECOWAS Secretariat (1975) Economic Community of West African States Treaty, ECOWAS, Lagos
3. ECOWAS, Secretariat (1993). "Revised Treaty", ECOWAS Secretariat, Abuja, Nigeria.
4. UNHCR-www.unhcr.org/refworld/publisher/ECOWAS
5. ECOWAS Court: www.court.ecowas.org/site
6. ECOWAS Court: www.comm.ecowas.int/sec/en/protocols
7. Aniekan Ukpe - Bridging the Gap between Regional and National Level Trade Policy: The Issue of Enforceability of ECOWAS Law in National Courts; discussion paper, with the author

RECENT KEY TRADE NEWS

President of the ECOWAS Commission, Kadre Desire Ouedraogo will lead ECOWAS private sector to the FITUR 2013 to promote development of tourism projects in Africa towards boosting trade, investment and technical cooperation between China and the region. For more information, contact: ECOWAS, China meet on trade, investment, technical cooperation ...

Borderless Conference 2013 will be the second transport and trade annual event to discuss why it costs so much in West Africa to move goods and people. For more information, contact: Transport Infrastructure | USAID West Africa Trade Hub

ECOWAS Vice President says the region's Code to Regulate Regional Trade has been completed. For more information: ECOWAS Completes Code to Regulate Regional Trade, Articles ...

Candidates from nine countries vie to become WTO head

The WTO's 158 member countries had until Monday 31st December 2012 nominated candidates for DG position, and the trade body is to make its decision known by May 31. When Lamy, who is French, was first chosen in 2005, three other candidates from Brazil, Mauritius and Uruguay also threw their hats in the ring, but the Frenchman was unopposed to succeed himself in 2009.

This time, nine countries had presented candidates to succeed Pascal Lamy as head of the World Trade Organisation ahead of the deadline Monday, 31st December 2012. Brazil nominated Roberto Azevedo, her envoy to the WTO, who has been with the world's trade oversight body since 2008. Mexico nominated Herminio Blanco Mendoza, an economist and former minister who led that country's negotiations on the North American Free Trade Agreement. Mendoza also led Mexico's participation in the Uruguay round of talks that preceded the creation of the WTO in 1995. Costa Rica proposed her foreign trade minister, Anabel Gonzalez. South Korea and New Zealand also nominated their trade Ministers, Taeho Bark and Tim Groser, respectively. From Jordan, the name of ex-minister Ahmad Nindawi was put forward, while Indonesia is going with Mari Pangestu, current Tourism Minister and also a former Trade Minister. Ghana nominated its former Trade Minister Alan John Kwadwo Kyerematen, while Kenya nominated its WTO Ambassador Amina Mohamed.

<http://economictimes.indiatimes.com/news/news-by-industry/et-cetera/candidates-from-nine-countries-vie-to-become-wto-head/articleshow/17834734.cms>

UPCOMING TRADE FAIRS AND EXHIBITIONS

Heli Expo- Orlando 2013 is one of the Leading Events on Transportation And Logistics, Dedicated Information and All Types Of Engine Manufacturing, Components holds on 04 – 07 Mar 2013.

Venue: Orange County Convention Center, in Orlando, United States. Heli Expo Orlando 2013 » Click here for Details

The 7th ECOWAS TRADE FAIR shall be held in Ghana in October 2013 • The Regional Committee has agreed on the Parameters. For more info:

ECOWAS PRESS RELEASES

2013 International Trade and Customs Conference holds on March 17, 2013 at Galveston, Texas. View Program and Registration. 2013 International Trade and Customs Conference

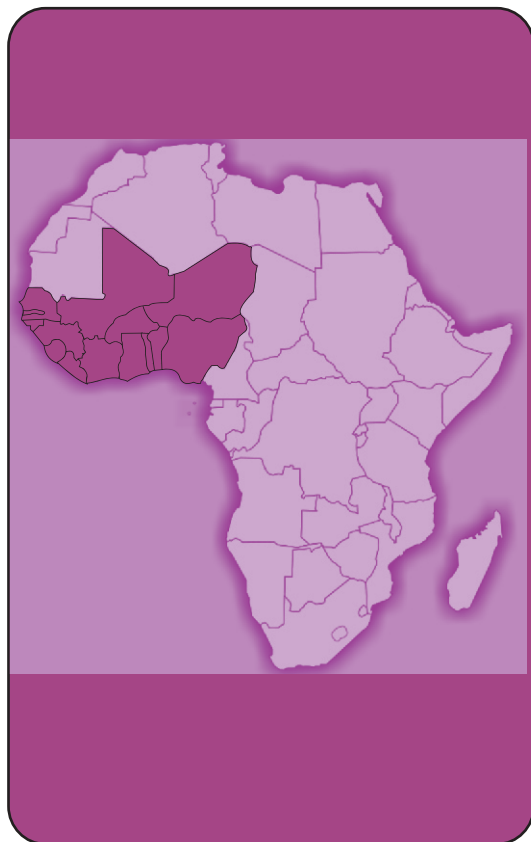
CeBIT - the world's largest trade fair showcasing digital IT and telecommunications solutions holds from 5 to 9 March, 2013 in Hanover, Germany. The IT industry's most international trade fair - CeBIT

IFSEC West Africa 2013, will be held in Lagos, Nigeria (Eko Exhibition Centre, Mar 5 - Mar 6 2013). IFSEC is an International business services industry and electronics and electricals trade fair. IFSEC West Africa (05-06 March 2013), Lagos, Nigeria - Trade Shows

TRENDSET MESSE holds in Munchen, Germany (New Munich Trade Fair Centre, 03 Jan 2013 to 05 Jan 2013). Contact: Trendset Messe Munchen 2013

37th Medic West Africa (Eko Hotel, Lagos, 15 – 17 October 2013): A West Africa fair that focuses on Medical, Pharma, Surgical & Healthcare Products. The fair provides the perfect platform for new entrants to the market, as well as a unique showcase to network with potential dealers and distributors and meet potential agents. Trade Show Details...

The 17th edition of Offshore West Africa will be held in Accra, Ghana on 19-21 March 2013, and as a truly West African event. Offshore West Africa 2013



ECOWAS Vanguard is published by the National Association of Nigerian Traders as a policy advocacy tool to sensitize and bring about the desired change in the current attitude to regional Integration in the ECOWAS sub region by raising awareness, stimulating discussions and debate on the multiple issues that relate to the Regional integration process.

Views and comments are welcome and should be directed to:

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ABOUT NANTS

The National Association of Nigerian Traders (NANTS) is the umbrella organization of traders in raw materials, industrial and finished goods (locally made and imported) in Nigeria. However, to encourage the interlink between market access and production of goods, NANTS' membership has recently been expanded to include local manufacturers of consumer goods, local raw materials providers as well as local farmers' networks. Women constitute about 65% of NANTS membership.

The vision of NANTS is to *"advance trade beyond buying and selling to a vehicle for social justice, human rights, sustainable development and poverty reduction"*.

The mission of NANTS is *"promoting trade and economic advancement, uniting and championing the rights of and cause of the Entrepreneur through strategic programmes and policy interventions."*



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