

**HARNESSING THE BENEFITS OF REGIONAL INTEGRATION
SCHEMES IN ECOWAS: THE PLACE OF INDIVIDUALS IN THE 21ST
CENTURY**

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ABSTRACT

The ECOWAS integration schemes envisaged that the place of individuals will require an in-depth consideration of the role individuals play, both as beneficiaries of integration (particularly as it relates to trade liberalisation, free movement, residence and establishment) and also, as potential victims of the rough side of integration, which will necessarily require the examination of how individuals may enforce their rights under the integrative instruments. Although several attempts at creating effective regional integrative arrangements in ECOWAS have been made, it is disheartening to state that economic activities involving individuals within the ECOWAS sub-region remain at its lowest ebb. This study reiterates that despite the efforts made to ensure that the ECOWAS integration agenda is realisable, it is in doubt whether citizens of the Community have actually felt free to move in, live and establish in any part of the sub-region of their choice without any attack either on their persons or their investments. This study reveals that attacks on foreigners and their businesses in the ECOWAS region have become legendary and remain a hindrance to the realisation of the ECOWAS objectives envisaged in its legal instruments. In view of the above, this study therefore, recommends that until these identifiable challenges are curtailed, member States may lean towards adopting a protectionist approach to its economic and citizenry affairs and thus, may not be favourably disposed to ensuring full implementation of the ECOWAS Protocols on the right of movement, residence and establishment.

Keywords: ECOWAS, Establishment, Liberalisation, Movement, Residence, Trade

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INTRODUCTION

The Economic Community of West African States (ECOWAS) aims to promote cooperation and integration that would lead to the establishment of an economic union in West Africa. This is done by raising the living standards of its people, maintaining and enhancing economic stability, fostering relations among member States and contributing to the progress and development of the African Continent.² ECOWAS is indeed endowed with an abundance of human and natural resources, a coastal location coupled with an impressive and huge potential for economic growth. Yet, it has realised very little of its potential, as a result of the combined effects of political instability, infrastructural deficits and trade insecurity. Given these challenges, the ECOWAS Commission took a new dimension to development by initiating the formulation of Community Development Programmes (CDP), which seek to put greater emphasis on the participatory and inclusive approach to development through the active involvement of both States and non-State actors.³ With the formulation of the CDP, the ECOWAS Commission aims at turning the current “ECOWAS of States into an ECOWAS of people,” which was part of its Vision 2020 that was adopted by the Authority of Heads of State and Governments in June, 2007. Moreso, ECOWAS member States accept to integrate their economics in order to establish a common market and be competitive in the global market.⁴ This led to the establishment of the ECOWAS Trade Liberalisation Scheme which aims at promoting cooperation and integration, leading to the establishment of economic union. Unfortunately, the free trade area has not been comprehensively attained within its member States.

Adopting the doctrinal approach, this study interrogates the apparently restricted jurisdiction of the ECOWAS Court where it appears the individuals are completely

² The Revised Treaty of ECOWAS, 1993, art. 3.

³ The CDP is the outcome of a multi-stakeholder process. It started in 2010, following consultations with Member States, IGOs of the region and non-State actors of the civil society, private sector and the research sector. The CDP adopted a formulation methodology structured around four phases, which includes: (i) sensitisation and capacity building, (ii) inventory of projects and programmes of IGOs and Member States, (iii) prioritisation and impact analysis, and (iv) financing round table.

⁴ *Ibid*, 6.

shut out of the ECOWAS integration policies as regards the protection of their rights of movement, residence and establishment, with a view to exposing the gaps thus created and the consequences thereof. In the same vein, this study aims at providing an overview of the different concepts of international law, particularly, as it relates to the protection of rights of the individuals in ECOWAS. Also, the study looked at the overview of regional integration and disputes arising from the activities of the individuals, who may enter, reside and/or establish in member States territories of the ECOWAS sub-region. The study further provides a brief analysis on the concept of integration (particularly economic and legal integration), where a few existing ECOWAS integration schemes were also considered. Under this ambit, it is further reiterated that integration cannot successfully be discussed without understanding the role played by sovereignty in the creation of integration schemes and their successes and that, sovereignty invariably forms part of the ambit of this discourse. The study further discusses the place of the individuals in ECOWAS integration schemes which requires an in-depth consideration of the role individuals play, both as beneficiaries of integration (particularly as it relates to trade liberalisation, free movement, residence and establishment) and as potentially victims of the rough side of integration, which will necessarily require the examination of the means by which individuals may enforce their rights under the integrative instruments. This will either lie in the right of individuals to directly seized relevant international court or tribunal, having jurisdiction or rely on their States of nationality to espouse their cases – diplomatic protection. There is also the aspect of the theories around the interplay of municipal law and international law. By way of concluding remarks, the paper equally addresses some of the ill-conceived fears in the ECOWAS integration policies among member States and/or Community citizens and therefore, proffers some policy recommendations.

Concept of Integration

The term “integration” is a modern process of amalgamation, fusion or bringing together two or more sovereign entities within a given global or continental geo-political zone into one unit for the greater or enhanced protection and promotion

of their economic, political, social, cultural or legal priorities or interests.⁵ Integration, though usually economic and political, could also be legal, and in some cases, a combination of some or all of the above. It must be added that integration may not be attainable without some form of supranationalism. Thus, although the ECOWAS experience is not perfect, it confirms that unless member States willfully give up some parts of their national sovereignty and empower sub-regional integration institutions to make binding decisions and to implement them, little progress can be made.⁶ It is axiomatic to state that people come together to form communities on the basis of parameters such as common language and culture due to the need for security and self-preservation.⁷ This need for security and self-preservation make communities to integrate and nations to emerge.⁸ The current global trend is for groups of neighboring nations to pull their resources together to form a regional cooperation for the well-being of their citizens. Generally, this is what is referred to as integration.

Accordingly, Charmely opines that integration relates to any process leading to the formation of a political and economic whole or organised unit.⁹ In effect, integration involves the process whereby States seek to delegate the decision-making process to a supranational organ on matters concerning trade, custom, tariffs, immigration, etc., as against the idea of making individual decisions on such issues. In the same vein, integration serves to promote the advancement of economies of member States and to promote the total development of its members.

⁵ M.T. Ladan, *Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and Security* (Zaria: Amada Bello University Press, 2009), 10-11.

⁶ *Ibid*, 11.

⁷ A.W. Butu, "Impact of ECOWAS Protocols on political and Economic Integration of the West African Sub-region," *International Journal of Physical and Human Geography*, 1, No. 2 (2013), 47.

⁸ A.K. Thomas, "The Impact of ECOWAS for Political and Economic Integration of West Africa: A Critical Analysis," a Paper Presented at the Armed Forces Command and Staff College, Jaji, Nigeria, (2010).

⁹ P. Charmely, "A Note on the Concept of Integration on Paths and on the Advantages of Integration," in M. Samai and K. Garam (eds.), *Economic Integration, Concept, Theories and Problems* (Budapest: Academai Kiado, 1977).

As rightly noted by Ciroma, countries opt for integration because they are unable to create suitable industrial structures separately, hence the destiny of the area is thus tied to international economic manipulations which unfortunately cannot be controlled without a concerted integrative formula.¹⁰ In other words, it is therefore argued that to struggle out of economic strangulation, there is the need to increase industrial production within the sub-region based on a unified formula that will broaden economic ties with other parts of the world.¹¹ Furthermore, it is necessary to create an integrated ‘whole’ of the sub-region with subsequent creation of common citizenship as a condition precedent to free movement within the ECOWAS sub-region.¹²

Legal aspects of regional integration

Legal integration is the unification of national (municipal) legal systems on the basis of common legal principles and standards. Inter-State legal integration is regarded as a synonym for the concept of “integration of national legal systems.”¹³ Undoubtedly, the effectiveness of political, economic and other inter-State integration in the modern civilised world is impossible without the respective legal formalisation and the creation of a unified legal foundation. Thus, without the integration of law, effective co-operation of States in other spheres of social life is impossible because divergence in fundamental legal questions consolidating methods, means, and forms of the realisation of national interests and basic values and priorities exclude the possibility of the normal interaction of States in the political, economic, and other spheres.¹⁴

¹⁰ A. Ciroma, “Opening Address, 1976 Conference on ECOWAS”, in A.B. Akinyemi, S.B. Falegan and I.A. Aluko (eds.), *Readings and Documents on ECOWAS* (Lagos: Nigerian Institute of International Affairs, 1983), xv.

¹¹ M.O.U. Gasiokwu, *ECOWAS: Problems of Citizenship and Free Movement*, (Enugu: Chenglo Ltd, 1998), 10. *Ibid.*

¹² *Ibid.*, 11.

¹³ E.G. Potapenko, “Methods and Means of Inter-State Legal Integration,” <[https://heinonline .org/HOL/LandingPage?handle=hein.journals/jrnatila10&div=14&id=&page=>](https://heinonline.org/HOL/LandingPage?handle=hein.journals/jrnatila10&div=14&id=&page=>) Accessed 10 September, 2020.

¹⁴ *Ibid.*

Potapenko¹⁵ highlights the significance of law in inter-State integration in the following aspects:

1. Law is an effective mechanism for the realization and regulation of integration processes, within the framework of which the protection and defence of the interests of participants of integration interaction is ensured;
2. Law formalised the results of integration and enables the degree thereof to be determined and the achievement of contemplated purposes;
3. Law creates a platform for elaborating a strategy of development of integration and;
4. Law forms the basis of the development of integration process and imparts stability and transparency to them.

From the above observations, it is pertinent to state that law represented the modern form of inter-State integration in determining integration processes in its general features. Similarly, despite certain circumstances, law acts as an instrument of a civilised inter-State community even though the role of law differs, depending on the model of inter-State integration. In the event of mutual integration, law ensures that interests of all participants are taken into account and creates the possibility for entering into and participating in integration processes on the principle of uniformity.¹⁶ However, despite the differences between models of integration, law is a form of the realisation of integration, and from the above point of view, any inter-State integration becomes legal when it has received its own legal formalisation.¹⁷

Another ambit of universal method of legal integration is unification. The term “unification” means “bringing into uniformity, a uniform norm and summing-up something under a uniform system”.¹⁸ However, in view of the divergence definitions of unification in the legal jurisprudence on the whole, unification is

¹⁵ *Ibid*, 144.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

¹⁸ *Ibid*, 146.

therefore a process of drafting and incorporating into various national legal systems, uniform legal prescriptions and rules to be applied to regulate corresponding relations on the territories of different States. In regional integration, the purpose of unification is to ensure uniformity in legal regulation of similar coincident social relations.¹⁹ According to Balassa, legal integration has been said to “denotes the bringing together of parts of a whole.”²⁰ It is legally significant to the extent that it implies at least four things which include: the existence of separate or autonomous participants (usually States); an objective (goal or utility); their coming together in closer relationship through a process (legal instrument) and; an outcome with some permanence (institutionalisation). The idea of regional integration presumes coexistence and co-operation among States. Thus, in a pioneering study on regional co-operation in Africa, Mutharika²¹ argues that:

there cannot be integration without co-operation..., they are two sides of the same coin..., if one proceeds from the promise that both economic integration and economic co-operation are means to an end and not ends in themselves, this distinction becomes merely academic. In practice, there is no clear line of demarcation between them.

In a similar vein, Cappelletti *et al* posit that legal integration is not a simple exercise in power sharing, but goes deeper and aims at a fundamental restructuring of society and of societal attitudes, and these changes are reflected in and promoted by law.²² Ojo *et al* perceived integration as the situation whereby two or more individuals or groups come in contact with each other to relate primarily for

¹⁹ *Ibid.*

²⁰ B. Balassa, *The Theory of Economic Integration* (London: Richard D. Irwin Incorporation, 1961), 1.

²¹ B.T.W. Mutharika, *Towards Multinational Economic Cooperation in Africa* (New York: Praeger Publishers, 1972), 14.

²² M. Cappelletti, M. Seccombe, and J. Weiler, “Integration through law: Europe and the American Federal Experience,” cited in G.A. Bermann, *Methods, Tools and Institutions* (New York: Walter de Gruyter and Co., 1986), 223-254.

cooperation, supportive of other positive reasons.²³ Doherty and Pfalzgraff referred to integration as a process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre whose instructions demand jurisdiction over the pre-existing national States.²⁴ Charmely observed that unilateralism and the attendant production of national sovereignty are incompatible with regional integration which requires consensus among member States in the decision making process and the surrendering of part of national sovereignty to the new Community in policy formulation.²⁵ It is distillable from the above that unilateralism guides national sovereignty, while regionalism requires all member States to make binding commitment for the promotion of free trade and provide adjudication for trade disputes arising from unilateral disregard for trade liberalisation.

Regional economic and political integration

Regional integration is a complex and specialised area of international law involving aspects of international economic and trade laws, as well as human rights, institutional law and, most especially, peace and security. Thus, regional economic integration is probably the most widely studied form of regionalism. According to Balassa,²⁶ regional economic integration is:

a process and a state of affairs. Regional as a process encompasses measures designed to abolish discrimination between economic units belonging to different national States, viewed as a state of affairs. It can be represented by the absence of various forms of discrimination between national economies.

²³ O. Ojo, D.K. Orwa and C.M.B. Utete, *African International Relations* (Michigan: Addison-Wesley Longman Limited, 1985).

²⁴ J. Doherty and R.L. Pfalzgraff, *Contending Theories of International Relation: A Comprehensive Survey*, 4th ed. (London: Addison-Wesley Publisher, 1997).

²⁵ P. Charmely, "A Note on the Concept of Integration on paths and on the Advantages", cited in Butu, "Impact of ECOWAS protocols on political and Economic Integration of the West Africa sub-region," 49.

²⁶ Balassa, "The Theory of Economic Integration," 1.

It is argued that economic integration denotes “a state of affairs or a process which involves the amalgamation of separate economies into larger free trading regions”.²⁷ Against the background however, the said amalgamation has consequences for the scope and traditional prerogatives of Statehood. It produces institutions, constrains sovereignty and creates new obligations. Regional integration also helps in the construction of communities and identities.²⁸ In addition, economic integration involves an arrangement among countries by which those countries seek to reduce, and eventually remove tariff²⁹ and non-tariff barriers³⁰ which may impede or hinder a free flow of goods, services, as well as factors of production, where individuals (Community citizens) can become the primary beneficiaries. Essentially, regional economic integration is the process in which two or more States in a broadly defined geographical area reduce or eliminate a range of trade barriers to advance or protect a set of economic goals.³¹

Economic integration in its political form is different from the broader idea of regionalism. Thus, although economic decisions go directly to the intrinsically political question of resource allocation, an economic region can be deployed as a technocratic tool by the participating governments to advance a clearly defined and limited economic agenda, without requiring more than a minimal political alignment or attrition of formal State sovereignty.³² Moreso, the unifying attribute in the different economic regionalism is thus the desire by the participating States

²⁷ A. El-Agraa, *Regional Integration: Experience, Theory and Measures* (London: Palgrave Macmillan, 1999), 1.

²⁸ *Ibid.*

²⁹ A tariff is a tax imposed upon imports in order to raise revenue and protect local industries. Several tariff types exist, including *ad valorem* tariffs, specific tariffs, and trade licenses. The effect of tariff barriers is to make imports more expensive than locally manufactured products.

³⁰ Non-tariff barriers are those barriers which hamper trade and which are caused by obstacles other than fiscal. They include quotas, embargos, sanctions, and levies, usually employed by countries to further political and economic goals.

³¹ C.C. Ohuruogu, “Economic Integration of the West African States within the ECOWAS Framework: Vision prospects and illusion,” being a Paper Presented at the International Conference, Organised by the ECOWAS Court of Justice in Accra, between 21 and 24 of October, 2019, 23

³² *Ibid.*

to use a wider and transnationalised sense of space to advance national economic interest.³³

On the political factor of regional integration, it is apposite to state that the connection between human rights and regional integration is both intrinsic and instrumental. Intrinsically, both integration and the regional protection of human rights involve varying degrees of diminution of sovereignty. States in regional integration arrangements agree to pool sovereignty. Thus, in political integration, the pooling evolves into a fusion of sovereignty across independent territories.³⁴ In a similar vein, a regional human rights regime institutes supranational values as limits on State conduct and establishes mechanisms for monitoring compliance within these limits.³⁵

Accordingly, the pursuit of economic integration can also present novel international challenges for participating States. For instance, developing States or less developed States engage in defensive regionalism to improve their collective bargaining power against predominant States in the global economy and can be faced with a divide and conquer strategy in interregional and multinational negotiations, which then places additional burdens on the State-actors to maintain solidarity of the region. According to Abbot and Kenton, the advantages of economic integration fall into three categories, namely: trade benefits, employment, and political cooperation.³⁶ It is argued that economic integration typically leads to a reduction in the cost of trade, improved availability of and wider selection of goods and services, efficiency and gains that lead to greater purchasing power.³⁷ Also, employment opportunities for Community citizens tend to improve under regional integration due to the fact that trade liberalisation leads

³³ *Ibid.*

³⁴ C.A. Odinkalu, "Economic Integration of West Africa: Challenges and Prospects," being a paper delivered at the International Conference, Organised by the ECOWAS Court of Justice in Accra, 8.

³⁵ *Ibid.*

³⁶ B. Abbot and W. Kenton, "Economic Integration" <<https://www.investopedia.com/terms/e/economic-integration.asp>> Accessed 4 November, 2020.

³⁷ *Ibid.*

to market expansion, technology sharing and cross boarder encouraging opportunities for individuals within the sub-region. Above all, political integration among countries tends to improve on the ground that stronger economic bonds can help to resolve conflicts peacefully, and may lead to greater regional cohesion and stability.

In the words of Asante, “regional integration in the African continent emphasises market integration, an approach that appears to be inappropriate to bring about growth in the region owing to the fact that African countries do not have what is required for successful economic integration to take place”.³⁸ It is further argued that the market approach is ideal for developed countries since there is required infrastructure present. To boost regionalism in Africa, Asante insisted on the need to strengthen national, institutional and managerial capacity and adopt production approach to integration, to strengthen national integration structures, as well as private sector (the individuals) involvement in the integration process.³⁹ Similarly, Abok observes that the most successful political and economic integration presently is the European Union (EU).⁴⁰ According to him, the EU has a Common Monetary Union, a Central Bank, a Single Currency, a Parliament and a Court of Justice. The EU Court of Justice hears some issues that affect member States and citizens of the Union. They have unified foreign policies and other relevant institutions and also, maintain diplomatic relations in its own right with over one hundred and seven countries and international organisations at ambassadorial level all over the world.⁴¹ From the above wordings, it suffices to state that nations benefit from regional integration in terms of development and as such, it is expected that the case of ECOWAS should not be seen differently, and it is

³⁸ S.K.B. Asante, *The Strategy of Regional Integration in Africa* (Accra: Friedrich Ebert Foundation, 1996), 6.

³⁹ *Ibid.*

⁴⁰ S.A. Abok, “The West African Sub-region, History and Limit of Collective Conflict Resolution,” being a Research Project Submitted to the National War College (NWC), Abuja, (1995).

⁴¹ *Ibid.*

expected that, the ECOWAS integration schemes should be harnessed to benefit Community citizens who are the prime movers of businesses in the Sub-region.

In a slight different approach, Argyeetey and Odura⁴² see the economic sizes of African States as a major impediment to their ability to industrialise with regards to import substitution.⁴³ According to the authors, the expected benefits of establishing regional arrangements will not materialise unless non-tariff barriers to integration, non-transparent forms of discrimination and the issue of how to distribute gains and costs of regional integration are adequately addressed.⁴⁴ It is further argued that, before a regional integration can become an effective development strategy, constraints to integration such as multi objectives, overlapping membership, poor private sector participation, absence of strong supra-national institutions, inadequate sanctioning authority, non-implementation of harmonisation provisions, lack of political commitment, unclear perception about gains, inequalities in the distribution of gains from integration, inadequate compensation mechanisms and stringent trade liberalisation schemes must be addressed.⁴⁵ However, with due respect to the authors, though the above constraints to effective development in regional integration strategy are imperative especially within the ECOWAS sub-region, “inequalities in the distribution of gains from integration” as stated by the authors cannot be used as condition precedent in achieving economic integration. The major reason for this assertion is that, a panoramic view at the economic myths and population of countries like Nigeria, Ghana and *Cote d’voire* and their contributions towards attaining regional integration within the West African Sub-region, gains and/or distribution arising from integration, though not shared equally, cannot be said to amount to inequalities as envisaged by the authors.

⁴² E. Argyeetey and A. Odura, “Regional Integration Efforts in Africa: An Overview,” in J.J. Teunissen (ed.), *Regionalism and Global Economy: The Case of Africa* (The Hague: FONDAD, 1996), 11.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

Against the backdrop, this study demonstrates that free movement of persons, goods and services, as well as individuals' rights of establishment constitute fundamental factors for sub-regional integration designed to turn ECOWAS into a sub-region of emergent economic strength and social progress, based on increased solidarity in the relations between the member States, and in particular, making individuals the driving force of the ECOWAS Court's jurisprudence whenever there is a violation to their rights of movement, residence and establishments.

A SURVEY OF SELECTED ECOWAS INTEGRATION SCHEMES

Following the discussions on the various aspects and components of regional integration, it is axiomatic that for integration to be fully manifested, certain structures or integration schemes have to be put in place through the instrumentality of the law. In other words, the drafters of the ECOWAS Treaty and the protocols annexed to it envisaged the achievement of the aims and objectives of regional integration in ECOWAS. Under this ambit, a few existing integration schemes of the ECOWAS shall be considered.

The Free Trade Area within the ECOWAS

A Free Trade Area (FTA) as it connotes is the grouping of countries within which tariff and non-tariff trade barriers between the member States are generally abolished but with no common trade policy with non-members. Thus, considering the ECOWAS as a Free Trade Area entails a discussion on the legal framework for the establishment of FTA among member States as contained in the Revised Treaty. In article 3(2)(i) of the Revised Treaty, reference is made to achieving trade liberalisation by the abolition, among member States, of Customs duties, levied on the imports and exports, and the abolition among member States, of non-tariff barriers in order to establish a FTA at the Community level, among the aims of the ECOWAS. Article 35 of the Treaty envisaged an elaboration of the trade liberalisation policy to clearly establish FTA among member States of the Community. Discharging its mandate on free trade, ECOWAS objectives of the Trade Liberalisation Scheme is to progressively establish a Customs Union (CU) among member States of the Community over a period of 15 years, starting from 1st January, 1990, the date of entry into force of the Scheme.

In addition, article 36 of the Revised Treaty provided *inter alia* that member States shall reduce and ultimately eliminate customs duties and any other charges with equivalent effect imposed on or in connection with the importation of goods which are eligible for Community tariff.⁴⁶ It provided further that Community originating unprocessed goods and traditional handicraft products shall circulate within the region, free of all import duties and quantitative restrictions. It further provides that, there shall be no compensation from loss of revenue from importation of these products within the Community.⁴⁷ Also, subject to the regime of Free Trade Area (FTA) are import duties on industries goods. Under this ambit, the Treaty provides that member States shall undertake to eliminate import duties on industrial goods which are eligible in accordance with the decisions of the Authority and Council relating to the liberalisation of intra-Community trade in industrial products.⁴⁸

Theoretically, it is self-evident that in ECOWAS, there is a desire to establish and actualise a Free Trade Area within the sub-region. Also, the elimination of all trade obstacles, whether tariff or non-tariff, existing among member States of the sub-region ought to have been clearly seen to be operational, but in reality the said integration scheme as envisaged by the ECOWAS legal instrument still appears to be a “dream in process.”

The ECOWAS as a Customs Union

As stated in the preceding section, the emphasis is on the removal of obstacles of trade carried on by member States. In other words, there is no concern for trade with non-member States. But under the Customs Union (CU) of economic integration, member States are at liberty to negotiate and trade with third-State actors as mutually agreed. Consequently, member States of the FTA are expected to establish a Common External Tariff (CET) with trading partners of member States. The aim is to arrive at a treatment uniformly applied, and this is the stage of the Customs Union.

⁴⁶ *Ibid*, article 36(1).

⁴⁷ *Ibid*, article 36(2).

⁴⁸ *Ibid*, article 36(3).

Thus, article 35 of the Revised Treaty provides that a common external tariff in respect of all goods imported into the member States from third countries shall be established and maintained. This has clearly set the direction for the establishment of a Customs Union within the ECOWAS Sub-region. It is also pertinent to state that the ECOWAS aims and objectives as provided in article 3(2)(d)(ii) of the Treaty emphasise the “adoption of a common external tariff” and a “common trade policy” towards non-member countries. The legal framework establishing a Customs Union is set out in article 37 of the Treaty which established a Common External Tariff (CET) for the Community. It provides that member States agree to the gradual establishment of a common external tariff in respect of all goods imported into the member States from third countries in accordance with a schedule to be recommended by the Trade, Customs, Taxation, Statistics, money, and payments commission.⁴⁹ The Treaty further provides that member States shall in accordance with a schedule to be recommended by the Trade, Customs, Taxation, Statistics, money and payments commission, abolish existing differences in their external customs tariffs,⁵⁰ and that member States undertake to apply the common customs nomenclature and customs statistical nomenclature adopted by Council.⁵¹

In addition, an ECOWAS supplementary measure was also adopted by the Council of Ministers in which the decision was reached in order to implement the ECOWAS Common External Tariff (CET) in all member States from 1st January, 2015.⁵² Subsequently, this was however followed by the adoption of the content of the ECOWAS CET by the Council of Ministers.⁵³ This ensued by the Declaration of the Authority of Heads of State and Government of the ECOWAS on the implementation of the CET from 1st January, 2015, and directing the President of the ECOWAS Commission to “take all necessary measures to accompany member States to ensure a smooth application of this important

⁴⁹ *Ibid*, article 37(1).

⁵⁰ *Ibid*, article 37(2).

⁵¹ *Ibid*, article 37(3).

⁵² It was held in Abidjan, *Cote D’Ivoire* in September, 2003.

⁵³ At the 70th Ordinary Session held in Abidjan, Cote D’Ivoire in June 2013.

regional instrument.” In pursuit of the Customs Union agenda, the ECOWAS Community further in 2015, adopted a plan for the implementation of a CET with the European Union (EU), forming a new economic partnership with the EU,⁵⁴ under a policy which was to be executed in phases.

ECOWAS as a Common Market

Generally, a common market is achieved when, in addition to having a Free Trade Area (FTA), there is relative free movement of capital and services among members of the Union. In a common market, all quotas and tariffs on imported goods from trade within the region are eliminated. A common market is a condition precedent for the creation of a single market.⁵⁵ Thus, it is argued that a common market is achieved when the following conditions exist: tariffs quotas and all barriers to trade in goods and services among members are eliminated; common trade restrictions, such as tariffs on other countries (non-members) are adopted by all members of the Community and production factors such as labour and capital are able to move freely without restriction among member States.⁵⁶

Accordingly, among the aims of the ECOWAS is the elimination of obstacles to the free movement of persons, goods, services and capital between member States, as well as the right of residence and establishment.⁵⁷ One of the factors of production envisaged above is the increase of intra-regional and external investments, and improving the competitiveness of existing private sector/corporate entities to benefit from the common market economy on investment in ECOWAS Sub-region. The legal basis for the envisioned Common

⁵⁴ The Economic Partnership Agreement remains the singular most known attempt to institute a common external tariff with ECOWAS as a sub-region.

⁵⁵ The concept involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market. It is expedient to note that not only commerce but also private persons who happen to be conducting economic transaction across national frontiers should be able to enjoy the benefits of that market. See also, *Gaston Schul Douance Expeditur BV v. Inspecteur der Invoerrechten en Accijnzen*, Judgement of the European Court of Justice of 5 May, 1982.

⁵⁶ There has to be free movement of goods, labour, services and capital among Members of the Community for there to exist a common market.

⁵⁷ Article 3(d) (iii) of the Revised Treaty.

Investment Market⁵⁸ is the provisions of article 3(2) of the Revised Treaty. In specific terms, there are two provisions relating to investment. First, the provisions of article 3(2) (f) of the Treaty envisaged:

The promotion of Joint Ventures by private sector enterprises and other economic operators, in particular, through the adoption of a regional agreement on cross-border investments.” The second ambit as provided under article 3(2)(i) of the Treaty encouraged the “harmonisation of national investment codes leading to the adoption of a single Community Investment Code”.⁵⁹

More so, with the adoption of three major Supplementary Acts by the ECOWAS Authority of Heads of State and Government on 19th December, 2008, it is believed that the ECOWAS Commission is making progress with the implementation of the sub-regional Common Investment Market agenda⁶⁰ which include: (1) the Supplementary Act A/SA.1/12/08 Adopting Community Competition Rules and the Modalities for their Application within ECOWAS;⁶¹ (2) the Supplementary Act A/SA.2/12/08 on the Establishment, Functions and Operation of the Regional Competition Authority for ECOWAS⁶² and; (3) the Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation within ECOWAS.⁶³

In furtherance of strengthening the full realisation of the common market, a travel Certificate for ECOWAS member States was established by the Authority of

⁵⁸ See ECOWAS Commission: Common Investment Market Vision, Abuja, (2009), 1-95.

⁵⁹ Between 2012 and 2014, ECOWAS Technical Experts drafted, reviewed and finalised on the Draft Investment Policy and Draft Investment Code for ECOWAS. The two drafters are meant to be adopted by the Community by June, 2015.

⁶⁰ Having developed and published the Regional Investment Policy Framework in 2007, the Common Investment Market Vision in 2009; and the Operational Guidelines for the Harmonisation of National Investment Laws in ECOWAS Sub-region, 2010.

⁶¹ Done at Abuja on 19th December, 2008.

⁶² *Ibid.*

⁶³ *Ibid.*

Heads of State and Government in 2014,⁶⁴ by which the National Biometric Identity Card was established as a travel document within the ECOWAS Sub-region. This was propelled by the need to establish a uniform travel document to facilitate and simplify the movement of Community citizens at border crossings of member States. Similarly, some other Decisions had also been reached, and Protocols executed in efforts to remove obstacles to intra-Community movement of goods, labour, persons and capital, essential in the establishment of a common market. These include: Decision A/Dec.2/7/85 which established a Travel Certificate for ECOWAS States (as amended);⁶⁵ Supplementary Protocol A/SP2/7/85 on the Code of Conduct of the Implementation of the Protocol on the Free Movement of Persons, the Right of Residence and Establishment; Supplementary Act A/SA.2/07/14 which amended the code of Conduct for Implementation of the Protocol on the Free Movement of Persons, Right of Residence and Establishment, “to ensure that a citizen who is a national of one member State and resides in a member State other than his State of origin is granted equality of rights with the citizens of the member State where he resides.”⁶⁶

It is distillable to state that in spite of the aforementioned provisions, as well as its efforts in actualising the ECOWAS integration agenda, it is in doubt whether citizens of the Community have actually felt free to move in, live and establish in any part of the sub-region of their choice without any attack either on their persons or their investments. In other words, attacks on foreigners and their businesses still remain in part if not all of the sub-region among citizens of member States.

⁶⁴ By Decision A/DEC.1/07/14 Adopted at the Forty-Fifth Ordinary Session held in Accra, Ghana, 10-11 July 2014.

⁶⁵ This established the National Biometric Identity Card and its implementation modalities.

⁶⁶ The Supplementary Protocol provisions were made to establish a valid travel document which includes: a valid passport, official biometric national identity card issued by a Member State or an ECOWAS institution; provision was also made granting the right of entry to private vehicles registered in the territory of a Member State to another Member State upon the presentation of a valid license; certificate of registration; insurance policy recognized by Member States or the emergency travel certificate from customs. The same right was granted to commercial vehicles.

ECOWAS Trade Liberalisation Scheme

According to Ukaoha and Ukpe, regional economic integration is a pan-African development agenda for the attainment of an eventual continental Community.⁶⁷ The ECOWAS Revised Treaty of 1993 established the African Economic Community (AEC), which is the most recent legal framework that set-out the strategy for the attainment of the AEC. The main objectives of the ECOWAS is the liberalisation of trade among member States; the elimination of tariff barriers, and ultimately achieving an economic and monetary union after successfully going through the process of a free trade area, customs union and common market.⁶⁸ The ECOWAS Treaty also aimed at the elimination of all tariff and non-tariff restrictions on intra-ECOWAS trade, establishment of a Common external Tariff (CET),⁶⁹ and commercial policy against non-ECOWAS countries,⁷⁰ the abolition of all obstacles to the movement of all factors of production, and harmonisation of domestic policies across its member States.⁷¹

Essentially, the ECOWAS envisaged a comprehensive Trade Liberalisation Scheme (TLS) quite early in its establishment. Implementation ought to have started in 1979, but it had to be postponed in three consecutive times before it was finally launched in 1990.⁷² The implementation of the programme is designed to occur in the following stages:

- i. an immediate and full liberalisation of trade in unprocessed goods and traditional handicrafts;

⁶⁷ Ken Ukaoha and Aniekon Ukpe, "The ECOWAS Trade Liberalisation Scheme: Genesis, Conditions and Appraisal," *ECOWAS Vanguard*, 2, Issue 3 (2013), 1.

⁶⁸ Article 3(2) (d) ECOWAS Revised Treaty.

⁶⁹ *Ibid*, article 3(2) (d) (ii).

⁷⁰ *Ibid*.

⁷¹ *Ibid*, article 3(2) (d) (iii).

⁷² There shall be progressively established in the course of a period of ten (10) years effective from 1 January, 1990 as stipulated in Article 54, a custom Union among the Member States. Within this union, customs duties or other charges with equivalent effect on Community originating imports shall be eliminated. See Article 35 of the Revised Treaty.

- ii. liberalisation of trade in industrial products, with the phasing reflecting the differences in the levels of development of three categories of ECOWAS member States⁷³ and;
- iii. gradual establishment of a Common External Tariff (CET).

Thus, the trade liberalisation scheme of ECOWAS was conceived as a progressive reduction culminating in the elimination of all tariff and non-tariff barriers against intra-ECOWAS trade.⁷⁴ The annual tariff reduction rates varied among the said three categories of countries; for the most advanced countries,⁷⁵ the schedule was expected to be in six (6) years, and completion period was set at eight (8) years for the middle group of the countries;⁷⁶ while the third group was given up to ten (10) years.⁷⁷ Although, by the agreed implementation schedule, total elimination of all trade barriers was expected to occur by the end of 1991, but this in reality, did not happen. Reviewing the situation in the late 1999, the Authority of Heads of State and Government of ECOWAS resolved to adopt a fast-track approach to achieving the sub-region's economic integration objectives. However, this led to the proclamation of the sub-region as a Free Trade Area (FTA) in the year 2000, and a 1st January 2001 date was set for its transformation into a custom union.⁷⁸ Despite the declaration of ECOWAS Free Trade Area (FTA) and the schedule for a unified customs union, implementation remains a major challenge on the part of ECOWAS.

⁷³ Decision of the ECOWAS Authority of Heads of States and Governments, Decision A/DEC.1/5/83 which classes and Member States into three groups for the implementation of the ETLs: Group 1 – Cape Verde, Guinea Bissau, the Gambia, Upper Volta, Mali, and Nigeria, Group 2 – Benin Republic, Guinea, Liberia, Sierra Leone and Togo, and Group 3- Ivory Coast, Ghana, Nigeria and Senegal. See www.ecowas.int/sec/index.php.

⁷⁴ These are barriers to trade that restrict imports but are not in the usual form of a tariff. Examples include: anti-dumping measures and countervailing duties.

⁷⁵ Ivory-Coast, Ghana, Nigeria and Senegal.

⁷⁶ Benin Republic Guinea, Liberia, Sierra Leone and Togo.

⁷⁷ Cape Verde, Guinea-Bissau, Gambia, Upper Volta, Mali and Niger.

⁷⁸ A customs Union is a form of economic integration whereby member Countries charge a common set of tariffs to the rest of the world while eliminating tariffs among themselves.

THE SOVEREIGNTY ELEMENT

Under customary public international law, sovereignty denotes the basic international legal status of a State that is not subject, within its territorial jurisdiction, to the governmental, executive, legislative, or judicial jurisdiction of a foreign State or to foreign law other than public international law.⁷⁹ In other words, sovereignty is the ultimate power, authority and/or jurisdiction over a people and a territory.⁸⁰ Thus, no other person, group, tribe or State can tell a sovereign entity what to do with its subjects. When used in relation to a territory, it connotes a portion of the globe over which a State has independence of action to the exclusion of every other State.⁸¹ It is argued that the independence of action within a State's territorial sovereignty is protected by international law. In that, it is indeed, the very essence of international law.⁸² During the era of traditional international law of coexistence as against the era of interdependence that now prevails under modern international law, the rule of sovereign integrity was absolute. Thus, States were at liberty to exercise their sovereign powers over persons and in respect of anything within their territorial boundaries in the manner of their pleasing, subject, and as such to the law regulating the treatment of the aliens and the rules governing sovereign immunity.⁸³ Sovereignty is the attribute of the State that allows it to independently establish its form of government, the relationship between the executive branch and the legislative one, the social order

⁷⁹ H. Steinberger, "Sovereignty", in Max Planck Institute for Comparative Public Law and International Law, *Encyclopedia for Public International Law*, 10 (Amsterdam: North-Holland, 1987), 414.

⁸⁰ *Ibid.*

⁸¹ See Separate Anzilotti in *Customs Regime between Germany and Austria* (1931) PCIJ Series A/B No. 41, 57. "The State has over it no other authority than that of international law". See, A. Enabulele and B. Bazuaye, *Basic Topics in Public International Law*, (Lagos: Malthouse Press Limited, 2019), 583.

⁸² Enabulele and Bazuaye, *Basic Topics in Public International Law*, 583.

⁸³ *Ibid.*

and the legal system which are considered to be the most appropriate to support the political survival and the economic development.⁸⁴

The concept of sovereignty entails the fundamental organising principle of inter-State relations, anchored on the acceptance of mutually recognised independence of States, common co-existence, formal equality in such interconnectedness, with non-interference in the internal affairs of States being a necessary correlate. Sovereignty as a major attribute of the modern State system emerged following the Treaty of Westphalia of 1648 ending the devastating Thirty-Year War among the major European powers of the period. The idea of Sovereignty of States has however been variously and variedly interpreted, albeit in the course of its continuous evolution through the ages.

Sovereignty in the Context of International Relations or Organisations

Sovereignty as the supreme power of a State over its internal and external affairs is a distinguishing factor separating the States from other entities. In fact, as Oppenheim posits:

Sovereignty is the supreme authority, which on the international plane means legal authority, which is not in law dependent on any other earthly authority. Sovereignty in the strict sense and narrowest sense of the term implies, therefore, independence of all round within and without the borders of the country.⁸⁵

Sovereignty serves to provide the defining characteristic of Statehood accepted by the international community, indicating that the State has fulfilled the requirements that would allow it be bestowed with the legal personality and the capacity to possess rights and duties in international law.⁸⁶

⁸⁴ A. Dinicu, "Sovereignty, a Swinging Concept between International Law and Political Reality", *Land Forces Academy Review*, XXIII, No 3(91) (2018), 181.

⁸⁵ R. Jennings and R.A. Watts (eds.), in Oppenheim's *International Law*, 9th ed. (London and New York: Longman, 1997), 122.

⁸⁶ *Ibid*, 330.

According to Lauterpacht,⁸⁷ international law recognises the sovereignty of States in two aspects, which include: the internal aspect in which a State can be recognised as a subject of international law “if it is independent of other States and possesses a sovereign government...,” and in the external sphere, sovereignty implies independence from other States.⁸⁸ In the same vein, the writer subjected the sovereignty of States to the subordination of international law, and maintains that sovereignty under international law confers upon the State the right to determine the future content of international law by which it will be bound, and at the same time, determine the present norms of international law.⁸⁹

Anand, a major proponent of the idea of relative sovereignty, sees sovereignty as an idea that is inconsistent with a system of international law which is itself based on the principle of reciprocal rights and obligations.⁹⁰ It is argued that, “... apart from the absence of a supranational executive authority, a State does not recognise a legislator above itself.”⁹¹ Brownlie on his part, draws an analogy between sovereignty and equality of States within the context of international law, thus:

Jurisdiction of State, *prima facie* exclusive over a territory and the permanent population living there; a duty of non-intervention in the area of exclusive jurisdiction of other States and; the dependence of obligations arising from customary law and treaties on the consent of the obligor.⁹²

⁸⁷ E. Lauterpacht (ed.), “International Law”, Collected Papers of H. Lauterpacht, the Law of Peace, II-VI (Cambridge: Cambridge University Press, 1997), 6.

⁸⁸ *Ibid*, 7 (noting that, “Sovereignty in international law is a legal right transcending that of independence in relation to other States.”).

⁸⁹ *Ibid*, 8 (noting further that, “in relation to international law, they are not sovereign... they (States) admit the existence and binding force of international law, States acknowledge that they are not sovereign”).

⁹⁰ R. P. Anand, “Sovereign Equality of States in International Law,” *R.D.C.*, 197, No. II (1986), 26.

⁹¹ *Ibid*, 29.

⁹² I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 1990), 287. See in particular, the General Assembly, Declaration principles of International Law

In this light, it could be asserted that the jurisdiction of international tribunals over erring States depends on the consent of the parties vis-à-vis that membership of an international organisation and therefore not obligatory. Accordingly, it is also argued that the organisations have powers to determine their own competence to take decisions by majority vote, and that the enforcement of decisions depends on the consent of the member States.⁹³

Bhalla and Chowla on their part explain the correlation between international law and the principle of sovereignty. According to the learned authors, sovereignty is the most important if not the only structural principle of international law that shapes the content of nearly all rules of international law; that the international legal order is merely an expression of the uniform principle of external sovereignty.⁹⁴ It was further posited that sovereignty is the criterion for membership in the international society, and that sovereignty in sum is the ‘cornerstone of international law’ and the ‘controlling principle’ of world order.⁹⁵ A more acceptable as well as the modern approach to the idea of sovereignty is presented by Enabulele.⁹⁶ He posits that sovereignty is the attribute that allows an entity to express itself as a State on the international sphere (political independence, which includes the right to enter into international agreements), and gives it exclusive dominance over an area of the globe (territorial integrity, which acknowledges the absolute right of the sovereign to affect persons and events over an area of the globe).⁹⁷

Concerning friendly Relations and co-operation among States in accordance with the charter of the United Nations, GA Res. 2625 (XXV), UN GAOR, Supp. No. (28), UN Doc. A/8028(1978), 123.

⁹³ Brownlie, *Principles of Public International Law*, 287-288.

⁹⁴ Girik Bhalla and Sameeksha Chowla, “Sovereignty in the Modern Context: How far have we come?” *Journal of International Relations and Foreign Policy*, 2(2) (2014), 147-165.

⁹⁵ *Ibid.*

⁹⁶ A.O. Enabulele, “Supranationality of ECOWAS and the Community Legal Order: Examining Obligations and Consequences of Non-Compliance thereof,” Being a paper delivered at the International Conference organized by the ECOWAS Court of Justice in Accra, Ghana, between 21 and 24 of October, 2019.

⁹⁷ *Ibid.* (stating that, “the absolute nature of the said right lies on the fact that only the sovereign over the territory can make laws over the territory in the absence of an international agreement to the contrary”).

Consequently, the ideological structure of the United Nations (UN) Charter for instance is predicated on basic democratic tenets⁹⁸ and the notion of establishing and maintaining international peace, which was seen as a common international value when the Charter was formed.⁹⁹ Thus, one of its basic principles of the UN Charter is based on the principle of the sovereign equality of all its member States (article 2(1)). Similarly, article 2(4) of the UN Charter “protects the territorial integrity and political independence of member States or in any other manner inconsistent with the purposes of the United Nations.” The provisions highlight the relationship between member States and the UN, thus a determinant of the character of the UN as an international organisation, as distinct from a supranational organisation. Article 78 of the UN Charter on the other hand, extends the scope of the principle of sovereign equality to the relations among the member States of the UN in general, and constitutes the basis of the entire legal system of the UN.¹⁰⁰ It notes that:

The trusteeship system shall not apply to territories which have become members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.¹⁰¹

Accordingly, the right of a State to conduct its external affairs, which involves the right to enter into treaties obligations, is also a function of sovereignty. Thus, it suffices that the sovereign power of a State can be exercised to reserve to the State, and contain domain of competences.¹⁰² This has however been recognised under the general principles of international law as was statutorily affirmed in article 8(15) of the Covenant of the League of Nations and retained in article 2(7) of the

⁹⁸ These include, among others, the principles of the sovereign equality of States, the right of peoples to self-determination, non-intervention in the internal affairs of other States etc.

⁹⁹ This is called the “solidarist philosophy.” See generally, J. Robinson, “Metamorphosis of the United Nations,” in D. Nincic (ed.), *Problem of Sovereignty in the Charter and in the Practice of the United Nations* (The Hague: Martinus Nijhoff, 1970), 33.

¹⁰⁰ See Nincic, “Problem of Sovereignty in the Charter,” 36-37.

¹⁰¹ Article 78 of the UN Charter.

¹⁰² Enabulele, “Supranationality of ECOWAS,” 4.

UN Charter.¹⁰³ However, it is pertinent to note that ECOWAS, as a sub-regional organisation is founded on the principle of Supranationality which envisages a situation in international law where an authority created by an association of States voluntarily exercise (at least in theory) powers within its area of jurisdiction, notwithstanding the provisions of the States' national law.¹⁰⁴ It is further argued that Supranationality does not just involve cession of competences but also the power to regulate those competences through directly applicable rules made outside the municipal legal framework of law making, which implies the restraint of powers upon the sovereign¹⁰⁵ and creates an exception to the attributes of sovereignty in operation but not in formation¹⁰⁶ and duration.¹⁰⁷ Undoubtedly, Enabulele¹⁰⁸ quoting Efron¹⁰⁹ posits that:

A supranational organisation represents a legal entity in which the member States surrender their sovereignty in certain areas, but retain it fully in others. There is thus credited a form of organisation which stands between the rather loose conception of traditional international organisation and the broad surrender of sovereignty implied in a federation.

Apparently, it was further stated that supranational provisions in treaties “provide for the most extensive delegation of sovereign powers and competences to

¹⁰³ *Ibid.* See also A. O. Enabulele, “The Reserved Domain: Brierly’s Shortcomings of International Law Revisited,” *University of Benin Law Journal*, 13(1) (2010-2012), 25.

¹⁰⁴ F.C. Nwoke, “The Role of the ECOWAS Court of Justice in the Integration process,” Being a Paper Delivered at the International Conference organized by the ECOWAS Court of Justice in Accra, Ghana, between 21 and 24 of October, 2019.

¹⁰⁵ Enabulele, “Supranationality of ECOWAS,” 4. See generally, F. Rosenstiel, “Reflections on the Notion of Supranationality,” *Journal of Common Market Studies*, 2 (1963), 127 at 129.

¹⁰⁶ Enabulele, “Supranationality of ECOWAS,” 4. – His emphasis is that, “it is a product of the voluntary will of the State to consent to treaties containing supranational provisions.”

¹⁰⁷ *Ibid.* He posited further that, “a State may decide to terminate the treaty obligation and withdraw from the supranational arrangement. See for instance, Article 95 of the ECOWAS Revised Treaty.

¹⁰⁸ *Ibid.*

¹⁰⁹ R. Efron and A. S. Nanes, “Emerging concept of supranationality in Recent International Agreements”, *Kentucky Law Journal*, 44(2) (1995), 202-203.

international or supranational organs.”¹¹⁰ In addition, it sets a limit and only to itself, and never making decisions other than itself.¹¹¹ It is therefore argued that any concept that stands in opposition to sovereignty must be seen as deviating from the force of sovereignty.¹¹²

Also, the major features of supranationality under public international law include but not limited to the following: the existence of a treaty to which a member State is a party; the legal authority of institution created by the treaty supersedes municipal law within the ambit of its authority, power and jurisdiction; decisions usually come by way of consensus of its member States and; becoming a member of such organisation is either by signature, ratification of accession to the treaty establishing it, which is tantamount to giving up part of the member State’s sovereignty.¹¹³ Where State parties to a treaty have voluntarily surrendered their competence to deal with certain subject matter to a supranational in that treaty, it cannot complain that its sovereignty is violated. Reaffirming the above position, the ECOWAS Court in a plethora of decisions have held that ECOWAS is a supranational institution with regard to its areas of competence.¹¹⁴ In the same vein, the Court has equally maintained under its Revised Treaty¹¹⁵ and its protocols that it is not constrained by any contrary provisions in the domestic laws of the member States.¹¹⁶ Thus, in *Saidykhan v. the Republic of Gambia*,¹¹⁷ the Court stated that:

¹¹⁰ Enabulele, “Supranationality of ECOWAS.” See also, G. Naonm “Sovereignty and Regionalism,” *Law and Policy in International Business*, 27 (1955-1956), 1073, at 1079.

¹¹¹ Rosenstiel, “Reflections on the Motion of Supranationality,” 129.

¹¹² Enabulele, “Supranationality of ECOWAS,” 4.

¹¹³ Nwoke, “The Role of ECOWAS Court of Justice,” 5.

¹¹⁴ *Aminu v. Government of Jigawa State and Others*; Suit No. ECW/CCJ/APP/02/11.

¹¹⁵ Article 4(g) of the Revised Treaty.

¹¹⁶ Article 77 of the Revised Treaty empowers the Authority of Heads of State and Government of ECOWAS to impose certain sanctions on any member State who fails to fulfil its obligations to the Community through suspension of new Community loans and assistance, suspension of disbursement of on-going Community projects or assistance programmes, exclusion from presenting candidates for statutory and professional posts and suspension from participating in the activities of the Community.

¹¹⁷ Suit No: ECW/CCJ/APP/11/07, ECW/CCJ/JUD/08/10.

ECOWAS is a supranational authority created by the member States wherein they expressly ceded some of their sovereign powers to ECOWAS to act in their common interest. Therefore, in respect of those areas where the member States have ceded part of their sovereign powers to ECOWAS, the rules made by ECOWAS supersede rules made by individual member States if they are inconsistent.

The Court further reiterated that:

the Revised Treaty of ECOWAS was ratified by all the member States of ECOWAS... this Court is the offspring of the Revised Treaty; and this Court is empowered by the Supplementary Protocol on the Court of Justice, which is part of the instruments of implementation of the Treaty and has the same legal force as the Treaty, to adjudicate on issues of human rights arising out of the member States of ECOWAS. Therefore, it is untenable for a member State of ECOWAS to claim that a matter is essentially within its domestic jurisdiction when it had expressly or by necessary implication granted ECOWAS powers to act solely or concurrently with national jurisdiction in respect of that matter.¹¹⁸

More so, it is apt to state that the acceptance of the doctrine of supranationality as a fundamental objective of ECOWAS is a clear indication that the legal instruments of the Community are no longer treaties that require to be ratified by member States, but by Acts and Decisions that have direct application within member States.¹¹⁹ Accordingly, it is pertinent to state that the law and practice of ECOWAS seems to support the theory of monism in international law, where international law forms part of municipal law as opposed to dualism which posits that for international law to be part of municipal law, it needs to be incorporated into it by an Act of Parliament. It is also not overemphasised that while

¹¹⁸ *Ibid.* See also *Valentine Ayika v Republic of Liberia*, Suit. No: ECW/CCJ/APP/11/07.

¹¹⁹ See Nwoke, "The Role of ECOWAS Court of Justice," 6.

Francophone member States of ECOWAS embrace the system of monism, the Anglophone member States on the other hand still stick to the principle of dualism which makes it difficult for Community laws to have direct application in their States without domestication.¹²⁰

Against this backdrop, for the effective actualisation of the sovereignty element, it must go beyond the mere “pulling together of sovereignties,” and must be accompanied by the desire to entrust the organisation with the political will to exercise the ceded competences and direct them towards the actualisation of the common goals for which the sovereigns have pulled sovereignty together.¹²¹ The States must therefore exercise caution for the interest of the values embodied in a community of States as part of the collective good of its citizens.¹²² Therefore, it is contended that the principle of sovereignty, if truly held to be cherished and non-dirigible in ECOWAS must be such that makes it impossible for the existence of any other power or authority above a State and indeed, contradictory to the concept of supranationality.¹²³

INDIVIDUALS IN THE INTEGRATION PROCESS OF ECOWAS

In ECOWAS, the Authority of Heads of State and Government (AHS) on 29 May, 1979 execute a far-reaching Protocol on Free Movement of Persons, Rights of Residence and Establishment.¹²⁴ This Protocol lucidly outlined the express rights of Community citizens to enter, reside and establish businesses or economic

¹²⁰ See for instance, section 12(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Article 75(2) of the Constitution of the Republic of Ghana, 1992; Article 2(1) and (2) of the Liberian Constitution, 1986, etc.

¹²¹ Enabulele, “Supranationality of ECOWAS,” 5.

¹²² *Ibid.* See also A. Somek, “On supranationality, *Florida Coastal Law Journal*, 3 (2001-2002), 23-39.

¹²³ See Enabulele, “Supranationality of ECOWAS,” 5.

¹²⁴ ECOWAS Protocol A/P.1/5/79 Relating to the Free Movement of Persons, Residence and Establishment of 1979, <<http://documentation.ecowas.int/download/en/legal-documents/protocols>> Accessed 20 September, 2020.

activities in the territory of other member States.¹²⁵ Under this Protocol, it was firmly believed that the free movement of Community citizens, their skills and resources would not only constitute the fundamental basis for enhancing and consolidating the dividends of economic integration in the ECOWAS but also, it was believed to be capable of influencing positively the harmonious development of social, economic and cultural activities within the sub-region. In the Protocol, it was further envisaged that the right to free movement, residence and establishment within the sub-region can increase income, reduce poverty, promote skills acquisition and improve the general wellbeing of the individuals in the ECOWAS.

Thus, article 59 of the Revised Treaty enjoins ECOWAS member States to ensure that Community citizens are granted the rights of entry, residence and establishment and shall undertake to recognise these rights of Community citizens in their territories in accordance with the provisions of the Free Movement Protocols. In effect, member States are enjoined to adopt all appropriate measures to ensure that Community citizens enjoy fully the rights granted them under the ECOWAS legal instruments.¹²⁶ However, it is sad to state that there are serious burdens in the implementation of the ECOWAS instruments that granted these rights (movement, residence and establishments) to Community citizens. For instance, article 4(1) of the EECOWAS Protocol on the Implementation of the Third Phase (right of establishment) prohibits member States from any form of discrimination against foreign nationals and companies belonging to other member States. Despite the existence of this prohibiting provision on non-discrimination of Community citizens in the ECOWAS legal frameworks, nationals of ECOWAS member States are most times exposed to some forms of discrimination in member States territories. It is also not in contention that some privileges and rights are reserved for nationals and to which foreign nationals (including ECOWAS citizens) are not entitled to partake in. Above all, whenever any of the aforementioned rights are in violation, most especially by host member States,

¹²⁵ J. Akande, "International Legal Treaties and Instruments Relating to Migration in Sub-Saharan Africa," in R. Appleyard (ed.), *Emigration Dynamics in Developing Countries: Sub-Saharan Africa* (Aldershot: Ashgate, 1998).

¹²⁶ Article 59(2) of the Revised Treaty.

Community citizens have no means of redress before the ECOWAS Court on lack of jurisdiction and these are major challenges affecting the integration policies envisaged by ECOWAS.¹²⁷

Benefit or Burdens for Individuals?

One of the genuine intendments for the establishment of ECOWAS was to upgrade the living standards of its people; that is, for the benefit of individuals. It was recognised by the Authority of Heads of State and Government (AHSG) that the individuals must not be neglected if genuine integration and grassroots inter-State growth and development would be achieved.¹²⁸ To achieve this, the Revised Treaty further provides for the adoption of measures for the integration of private sectors, through the creation of an enabling environment to promote small and medium scale enterprises.¹²⁹

The most important part of this arrangement is, arguably, the establishment of the right of ECOWAS citizens to enter, reside and establish in any member State. There is also the corresponding member States' obligation to recognise these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto.¹³⁰ Fundamentally, ECOWAS citizens have rights to enter the territory of any member State without visa requirements, provided that such entering citizens possess their passports or ECOWAS travel documents.¹³¹

¹²⁷ See *Kemi Pinheiro (SAN) v The Republic of Ghana*, ECW/CCJ/JUD/11/12.

¹²⁸ Article 3 of the ECOWAS Revised Treaty of 1993.

¹²⁹ *Ibid*, Article 3(2)(g)

¹³⁰ Article 3(2)(g). See Protocol A/P 1/5/79 Relating to the Free Movement of Persons, Residence Establishment; Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment and; Supplementary Protocol A/SP 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.

¹³¹ Protocol A/P 1/5/79 Relating to the Free Movement of Persons, Residence and Establishment. Article 3 provides that any citizen of the Community who wishes to enter the territory of any other Member State shall be required to possess a valid travel document and an international health certificate. A citizen of the Community visiting any Member State for a period not exceeding ninety (90) days shall enter the territory of that Member State through the official entry point free of visa requirements. Such citizen shall, however, be required to obtain permission for an extension of stay

Thus, upon residence and employment, ECOWAS citizens shall enjoy equal treatment as nationals of member States in matters encapsulated under article 23 of the Protocol.¹³² Accordingly, in order to involve more closely the citizens of the Community in the regional integration process, member States further agree to create cooperation in the area of information.¹³³ They, thus, undertook to “ensure respect for the rights of journalists; and to take measures to encourage investment capital, both public and private, in the communication industries in member States.”¹³⁴

Although, it is axiomatic to state that the declared reason(s) for the establishment of the ECOWAS as a sub-regional body is for individuals’ benefits. However, it cannot be overemphasised that the burdens and challenges with regards to individuals’ participations in the integration processes are enormous in the sense that, the rights granted individuals under the ECOWAS legal texts for individuals’

from the appropriate authority if after such entry that citizen has cause to stay for more than ninety (90) days. See also, Decision A/DEC. 2/7/85 of the Authority of Heads of State and Government of the Economic Community of West African States (ECOWAS) relating to the Establishment of ECOWAS Travel Certificate for Member States. It was created to facilitate the intra-regional travel of member states' citizens for periods of a maximum 90 days. The passport can be used within the sub-region and is also recognized for international travel. Article 1(1) provides that, “It is hereby established a travel document other than national passports, known as the "ECOWAS Travel Certificate”.

¹³² Supplementary Protocol A/SP.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment. Article 23 of the Protocol provides that; “No matter the conditions of their authorisation of residence, migrant workers who comply with rules and regulations governing residence, shall enjoy equal treatment with nationals of the host Member State in the following matters: {a) security of employment; (b) possibility of participating in social and cultural activities; {c) possibilities or re-employment in case of loss of job for economic reasons, in this case, they shall be given priority over other workers newly admitted to the host country; (d) training and advanced professional training; (e) access to institutions of general and professional education as well as to professional training centres for their children; (f) benefit of an access to social cultural and other measures for the implementation of the pro- health facilities”. It provides further that; “migrant workers who comply with rules and regulations governing residence, shall enjoy equal treatment with nationals of the host Member State in the holding of enjoyment or the practice of their profession”.

¹³³ Article 66(1) of the Revised Treaty

¹³⁴ *Ibid*, Article 66(2) (c) and (d)

benefits, seem too theoretical without having any practical effects on the lives of Community citizens.

Thus, it is argued that a number of burdens and/or challenges, both at the sub-regional and municipal levels have hindered the effective implementation of the said Protocol and legal instruments of the Community. In effect, there is the burden of high barriers and unpredictable enforcement of trade related activities which have created strong incentives for informal trade throughout the sub-region. This situation has aggravated the complex border procedures and frequent harassment of Community citizens in member States' borders. For example, the Nigeria-Benin border is a frequent and relevant case scenario which has been identified as being problematic in this regard.¹³⁵ The situation of the Nigerian trade policy that is marred with incessant import bans, as well as harassment and extortion at formal border crossing at the Nigeria-Benin border provides a particularly striking example of the formalisation of informal trade in ECOWAS, most especially, the illicit petroleum products from Nigeria to other member States' territories, and the import of prohibited products into Nigeria, like rice.¹³⁶

In ECOWAS, despite the existence of treaty provisions, as well as municipal legal frameworks which prohibit any form of discrimination,¹³⁷ Community citizens who venture into other States territories, outside their own States are most times exposed to some forms of discrimination within the sub-region.¹³⁸ It is also a notorious fact that most benefits and rights accruable in member States territories

¹³⁵ Hoppe V. M. Treichel, O. Cadot and J. Gourdon, "Import Bans in Nigeria Create Poverty." *World Bank Policy Note*, No. 28, (2011).

¹³⁶ V. Chambers, M. Foresti and D. Harris, *Final report: Political Economy of Regionalism in West Africa – Scoping Study and Prioritisation*, (London: ODI, 2012).

¹³⁷ Article 4(1) of Supplementary Protocol A/SP 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 (stating that, "in matters of establishment and services, each member State shall undertake to accord non-discriminating treatment no nationals and companies of other member States").

¹³⁸ M. Awumbila, Y. Benneh, J. K. Teye and G. Atiim, *Across Artificial Borders: An Assessment of Labour Migration in the ECOWAS Region*, (Brussels: ACP Observatory on Migration, 2014); available at http://publications.iom.int/system/files/pdf/ecowas_region.pdf. Accessed 7 September, 2021.

are exclusively reserved for their nationals and to which foreign nationals, including ECOWAS citizens are not entitled to partake in such benefits. For instance, in Ghana, foreigners including ECOWAS citizens are not permitted to work in sensitive security services.¹³⁹ In addition, in Ghana, foreigners are not permitted to engage in petty trade which is exclusively reserved for its nationals only. Section 18 of the Ghana Investment Promotion Centre Act (Act 478 of 1994) exclusively reserves certain enterprises for only Ghanaian nationals. This provision discriminates against nationals from other member States and as such, it violates the ECOWAS free movement Protocol, which stipulates that ECOWAS nationals who intend to pursue livelihood activities should be subjected to the same laws as nationals of the destination member State; and it has greatly affected the implementation of the ECOWAS right of establishment Protocol. There is no gain saying that these factors have resulted in very low levels of formal intra-regional trade activities in ECOWAS.

In a similar vein, the implementation of the second and third phases of the Protocol on rights of residence as envisaged, and which ought to have accorded Community citizens the right to work and earn a living in member States territories, have also suffered tremendous setbacks.¹⁴⁰ For instance, the recent inhuman treatment and deportation meted on some Nigerians traders living in Ghana is a perfect example of the above setbacks to the ECOWAS Protocol on free movement, right of residence and establishment.¹⁴¹ Thus, those attacks on Nigerian traders in Ghana were viewed to have negative consequences on integration of the West African

¹³⁹ *Ibid.*

¹⁴⁰ Ifeadi, “Free Movement,” 16.

¹⁴¹ Sahara Reporters, (August 15, 2020), “Security Officials in Ghana Attack Nigerian Traders, Confiscate Goods Despite Evidence of Tax Payment”, <<https://saharareporters.com/2020/08/15/security-officials-ghana-attack-nigerian-traders-confiscate-goods-despite-evidence-tax>> accessed 20 December, 2023; The Punch News Paper, “Attack on Nigerians Traders in Ghana, Xenophobic —Reps” <<https://punchng.com/attack-on-nigerians-traders-in-ghana-xenophobic-reps/>> accessed 20 December, 2023.

sub-region especially, if Nigeria retaliates in kind.¹⁴² It is also not farfetched that the aforementioned setbacks have conspicuously hindered the ability of ECOWAS to actualise its set of objectives as envisaged in the planned implementation of the Protocols on rights of residence and establishment.¹⁴³ More so, it suffices to state that the lack of enthusiasm by some member States of ECOWAS on economic integration through rights of movement, residence and establishment could be a function of fear of giving away their supreme sovereignty and independent status as full nation States.¹⁴⁴ It is also a notorious fact that most governments within the sub-region have continued to view one another with utmost suspicion and as a result of that, they have incessantly paid lip services to implementing the Protocol on rights of movement, residence and establishment due to the self-protectionist reasons.¹⁴⁵

In consequence, not until the above stated setbacks and other identifiable challenges are curtailed, member States may lean towards adopting a protectionist approach to its economic and citizenry affairs and thus, may not be favourably disposed to ensuring a full implementation of the Protocols on right of movement, residence and establishment. In spite of the foregoing discouraging factors, member States should therefore be encouraged to jettison the prevalent attitude and psychological state of reasoning, which leans towards undue tenacities of national sovereignty. It is believed that such tenacious attachments to national sovereignty over and above ECOWAS Treaty objectives have led to the nonchalant attitudes in actualising the integration promises of the Community.

¹⁴² International Centre for Investigative Reporting (ICiR), “Caught between legality and diplomacy: Pathetic story of Nigerian traders in Ghana” <<https://www.icirigeria.org/caught-between-legality-and-diplomacy-pathetic-story-of-nigerian-traders-in-ghana/>> accessed 22 December, 2023; Nana Akufo-Addo, “Ghana President speaks on attacks on Nigerian traders” <<https://www.premiumtimesng.com/news/top-news/286994-ghana-president-speaks-on-attacks-on-nigerian-traders.html?tztc=1>> Accessed 22 December, 2023.

¹⁴³ A. Adepoju, *Patterns in Migration in West Africa: International Migration and Development in Contemporary Ghana* (Accra, Ghana: Sub-Saharan Publishers, 2005).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

RECOMMENDATIONS AND CONCLUDING REMARKS

Fundamentally, the ECOWAS Protocols on right of movement, residence and establishment are strategically designed to promote and actualise economic integration and development of member States. It is also established for the development of the standard of living of its community citizens, its principles should be profusely promoted and implemented as it will not only benefit ECOWAS member States, but also, its citizens. Thus, to effectively harness the benefits of regional integration objectives envisaged by ECOWAS in its instruments, this study therefore recommends that the Authority of Heads of State and Government of the ECOWAS should be encouraged to put in more efforts in pacifying the ill-conceived fear that implementing the Protocol on rights of movement, residence and establishment will lead to the unwarranted domination by the bigger countries such as Nigeria and Ghana, over smaller ones, such as the Gambia and the likes. This unspoken fear and inferiority feelings certainly, presents maliciously false ideological mind-set that bigger and more endowed member States with larger population, more sophisticated infrastructural development, higher and more improved Gross Domestic Product (GDP), enviable State status within the global circuit and abundant natural resources and relatively stable economies, would overshadow smaller and less endowed member States, if its citizens are freely allowed to move, reside and establish with its territories.¹⁴⁶

Moreso, as earlier stated in this study, all evidence predicts a promising future for the free movement of ECOWAS citizens, goods and services, right of residence and establishments within the ECOWAS sub-region, provided that, the mission to build and consolidate integration is not left solely to the member States. However, for this to be actualised, it is further recommended that ECOWAS citizens need to be more effectively enlightened as to the stakes, in order to enable them to seize the opportunity provided under the ECOWAS legal order, which empowers the Authority of Heads of State and Government of ECOWAS to impose certain sanctions on any member State who fails to fulfil its obligations to the

¹⁴⁶ *Ibid.*

Community.¹⁴⁷ Apart from political sanctions for instance, the ECOWAS Supplementary Act, 2012 on Sanction for Failure of Member States to fulfil their Community obligations, authorises sanctions on a delinquent member State.¹⁴⁸ Although, the Act did not expressly state who should approach the Court (which is also a challenge), it suggested that, the beneficiary of such judgment should be able to initiate such an action. This in our view means that, the judgment of the ECOWAS Court of Justice is binding on all parties, namely, member States, institutions of the Community and individuals as the case may be; and failure to comply with them amounts to breach of the Community obligations of the State concerned.¹⁴⁹

Conclusively, it is a truism that, from the inception of ECOWAS, the free movement policies were adopted quite early, for the benefits of Community citizens. Also, looking at above policies, it is rightly observed that the problem of ECOWAS is not the existence of these burdens per se, but the inexistence of adequate judicial remedies, (stemming from the inability of individuals to litigate the Treaty and relevant Protocols) and lack of administrative remedies (stemming from the lack of administrative mechanisms) which have resulted in so many unilateral closure of member States' borders, particularly, the Nigeria-Benin border, who is supposedly the hegemony of ECOWAS and other related attacks called "xenophobic attacks" as prevalence in Ghana against Community citizens who are petty traders. It is therefore hoped that, for ECOWAS to surmount these burdens, the means for holding member States accountable to their integration

¹⁴⁷ Article 77 of the Revised Treaty

¹⁴⁸ Article 3(1) of the Supplementary Act A/SP.13/02/12 providing that, "Member State or their leaders that fail to honour their obligations to the Community shall be liable to judicial and political sanctions"; Article 7(3) (g) of the ECOWAS Revised Treaty vest in the Authority of Heads of States and government the powers to refer where it deems necessary any matter to the Community Court of Justice when it confirms that a Member State or Institution of the Community has failed to honour any of its obligations.

¹⁴⁹ Article 15(4) of the Revised Treaty; Article 2(1) of the Supplementary Protocol on the Community Court of Justice, 2005

promises, should be made available, particularly, to the individuals who are the movers of integration.

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