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**A critical analysis of ECOWAS power infrastructure integration schemes as a
model for regional integration in Africa**

A MINI-DISSERTATION
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DECLARATION

I, the undersigned, hereby declare that this mini-dissertation which is submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at the International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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ABSTRACT

International trade has been a staple of the world economy for centuries. In today's world, as the pressure of globalization takes hold, and as the role of the state recedes while the role of regions increase, the need to maximize the benefits of international trade and investment inflows becomes even more accentuated. Africa, Sub-Saharan Africa (SSA) in particular, has perennially been on the periphery of global trade and investments, contributing no more than 3-4%, notwithstanding SSA having proportionately much higher population and natural resource base. To improve SSA ability to be competitive in international trade as well as to multiply intra-african trade, the continent's leaders have long resorted to forming regional economic communities (RECs). But more than five decades of regional economic integration in SSA has produced mostly failed RECs. Yet regional integration is being touted as SSA surest bet for relevance in the global economy. Therein lies the paradox! How can an undertaking that have produced mostly failures be the self-same route out of global economic irrelevance?

In this study, it is shown that the model for regional integration adopted by many SSA RECs, the linear model, also considered the Eurocentric model of regional integration, buttressed by an intergovernmental legal framework, does not suit the peculiar circumstances of the region and is the cause for the near total failure of regional integration on the continent. This research, using the ECOWAS specialized institutions as case studies – the West African Power Pool (WAPP) and the ECOWAS Regional Electricity Regulatory Authority (ERERA) – argues for a paradigm shift in the conceptualisation of regionalism on the continent. It argues for a shift to developmental regionalism, buttressed by strong supranational legal framework. The study shows that the West African regional bloc, ECOWAS, now recognises the nexus between the development of trade-related infrastructure and intra-african trade on the one hand, as well as the nexus between the development regionalism and the expansion of SSA trade with the rest of the world, on the other hand. Accordingly, the study concludes that ECOWAS institutionalization of a regional electricity market via the establishment of regional institutions of WAPP and ERERA is the new model for regional integration in SSA.

Key words: Infrastructure Deficit, Inter-governmentalism, International Trade, Legal and Institutional Framework, Power Pool, Productive Capacity, Power Infrastructure, Regional Integration, Supranational Institutions

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LIST OF ACRONYMS

ADB	Asian Development Bank
AEC	African Economic Community
AfDB	African Development Bank
APRM	African Peer Review Mechanism
AU	African Union
AUC	African Union Commission
BOAD	Banque Ouest Africaine du Development
CAPP	Central African Power Pool
CCJA	Common Court of Justice and Arbitration
CEB	Communaute Electrique du Benin
CEET	Compagnie Energie Electrique de Togo
CEN-SAD	Community of Sahel-Saharan States
CEP	Committee of Eminent Persons of ECOWAS
CIE	Compagnie Ivorienne d'Electricite
COMESA	Common Market of Eastern and Southern Africa
CRIE	Comision Regional del Interconexion Electrica
CU	Customs Union
DFI	Development Finance Institution
EAC	East African Community
EAPP	East Africa Power Pool
EBID	ECOWAS Bank for Investment and Development
ECA	UN Economic Commission for Africa
ECCAS	Economic Community of Central African States
ECG	Electricity Company of Ghana
ECJ	ECOWAS Court of Justice
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
Eds	Editors
EEC	European Economic Community
EIA	Environmental Impact Assessment
EIB	European Investment Bank

LIST OF ACRONYMS

ERERA	ECOWAS Regional Electricity Regulatory Authority
EU	European Union
FDI	Foreign Direct Investment
FERC	Federal Electricity Regulatory Commission
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GRIDCo	Ghana Grid Company
GW	Gigawatts
HOS	Heads of States of ECOWAS
IAP	Infrastructure Action Plan
ICC	Information Coordination Center (of WAPP)
ICT	Information and Community Technology
IEA	International Energy Agency
IFI	International Financial Institution
IGADD	Intergovernmental Authority on Drought and Development
IMF	International Monetary Fund
INGO	International Non-Governmental Organisation
IO	International Organisation
KfW	Kreditanstalt Fur Wiederaufbau
KV	Kilo volts
Kwh	Kilowatts hour
LDC	Least-Developed Country
LEC	Liberia Electricity Corporation
MERCOSUR	Mercado Comun del Sur
MNC	Multi-National Corporation
MOU	Memorandum of Understanding
MRU	Mano River Union
MW	Megawatts
NAFTA	North American Free Trade Association
NEPAD	New Partnership for Africa's Development
NEPOOL	New England Power Pool
NGO	Non-Governmental Organisation

LIST OF ACRONYMS

NORDEL	Nordic Electricity
NRA	National Regulatory Authority
NTB	Non-Tariffs Barrier
OAU	Organisation for African Unity
OHADA	L'Organisation pour l'Harmonisation du Droit des Affaires en Afrique
OMVG	L'Organisation pour la Mise en Valeur du Fleuve Gambie
OMVS	L'Organisation pour la Mise en Valeur du Fleuve Senegal
PAP	Pan African Parliament
PPP	Public Private Partnership
R & D	Research and Development
REC	Regional Economic Community
RERA	Regional Electricity Regulatory Authority
RTA	Regional Trade Agreement
SACU	Southern Africa Customs Union
SADC	Southern Africa Power Pool
SAIIA	South Africa Institute of International Affairs
SAP	Structural Adjustment Programs
SAPP	South African Power Pool
SONABEL	Societe Nationale d'Electricite de Burkina
SSA	Sub-Saharan African
UEMOA	Union Economique et Monetaire Ouest-Africaine
UK	United Kingdom
UMA	Union du Maghreb Arabe
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNIDO	United Nations Industrial Development Organisation
USA	United States of America
USD	United States Dollars
WAMZ	West African Monetary Zone
WAPP	West Africa Power Pool
WWI & II	World War I, World War II
XXIV	GATT article 24

LIST OF TREATIES AND OTHER LEGAL INSTRUMENTS

ECOWAS Treaty 1975

ECOWAS Treaty 1993

WAPP Articles of Agreement

ECOWAS REG C/REG.27/12/07 (ERERA Establishment Act)

ECOWAS REG C/REG.24/11/08 (ERERA Admendment)

ECOWAS Efficient Energy Policy 2012

ECOWAS Energy Policy 2003

African Economic Community Treaty 1991

European Coal and Steel Community Treaty 1951

ECOWAS Revised Master Plan for Generation and Transmissio of Electric Energy 2011

LIST OF TABLE CHARTS AND FIGURES

PAGE

Table 3.1	Assessment of ECOWAS' performance on regional integraton	43
Table 3.2	Organisation Structure of WAPP	46
Table 3.3	Status of Implementation of WAPP priority projects	50

TABLE OF CONTENTS	PAGE
Declaration	i
Abstract	ii
Acknowledgement	iii
List of Acronyms	iv
List of Treaties and Other Legal Instruments	vii
List of Tables	viii
Table of contents	ix
CHAPTER ONE : INTRODUCTION	1
1.1 Background to the research	1
1.2 Statement of the problem	3
1.4 Research questions	5
1.5 Thesis statement	6
1.6 Significance of the research	6
1.8 Literature review	6
1.7 Research Methodology	12
1.8 Delineation and Limitations	13
1.9 Definitions of Concepts	13
1.10 Organization of the Chapters	14
CHAPTER TWO: Conceptual Framework for the New Regionalism in ECOWAS	
2.1 Introduction	16

2.2	Regionalism – a conceptual backdrop	17
2.3	Regionalism – international law approach	19
2.4	Regionalism – a chronology	19
2.5	Theories of regionalism	21
	2.51 Theory of the old regionalism	21
	2.52 Theory of the new regionalism	22
2.6	The call for developmental regionalism in ECOWAS – the paradigm shift	23
2.7	Power pools as developmental regionalism	25
2.8	History of exchanges in ECOWAS	26
2.9	Power pool governance and regional integration.....	27
2.10	Regulating power pools: the role of the independent regional electricity market regulator.....	28
2.11	Power pools – an analysis of the merits	30
2.12	Mitigation of risks in power pools	34
2.13	Conclusion	35

CHAPTER THREE: The changing face of regional integration in ECOWAS:

	A critical analysis of WAPP legal framework.....	38
3.1	Introduction	38
3.2	The case for deeper regional integration in West Africa	38
3.3	ECOWAS – the West African response to to the regional integration	41
3.4	WAPP – an epitome of ECOWAS rethink of regional integration	44
3.5	A critical analysis of WAPP’s legal framework	45
	3.5.1 Analysis of WAPP’s organisation structure	46
	3.5.2 Analysis of WAPP membership	47

3.5.3	Analysis of decision-making in WAPP.....	48
3.5.4	Analysis of WAPP dispute settlement mechanism	49
3.6	Analysis of WAPP Regulatory interface With other regional institutions	49
3.7	Analysis of WAPP’s fundraising leverage	50
3.8	Conclusion	52
CHAPTER FOUR:	The move toward regulatory independence and supranationality in ECOWAS: a critical analysis of ERETA legal framework	54
4.1	Introduction	54
4.2	The empirical imperative for a supranational regional electricity market regulator in ECOWAS	54
4.3	A critical analysis of ERETA legal framework.....	56
4.3.1	Institutional Independence	57
4.3.2	Monitoring and Compliance	60
4.4	Assessing ERETA’s role in West Africa’s spaghetti bowl of regional institutions	61
4.5	Conclusion	64
CHAPTER FIVE: CONCLUSION	65
5.1	Summary of findings	66
5.2	Conclusions	70
5.3	Recommendations	72
Bibliography	73
Appendix 1	I

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The notion that Africa is disproportionately under-represented in international trade is no longer a debatable proposition. Africa, home to approximately 14% of the world's people¹, is the second most populous continent, after Asia. But Africa, notwithstanding its population, accounts less than 3% of international trade² and 3.7% of foreign direct investment worldwide³. Intra-African trade is not any better, accounting for, on average, only 11% of total external trade.⁴ This pales in comparison to other regions of the world like Europe, Asia and North America, where the comparable figures are 72%, 52% and 48% respectively⁵. Compounded by other problems, both natural and man-made, this situation has made African countries the home to some of the poorest people in the world. African countries perennially make up at least two-thirds of the world least- developed countries (LDCs)⁶.

The position of Africa, in general, and sub-saharan Africa (SSA) in particular, in international trade and investment flows, as among the least performing, has ostensibly not been greeted with glee on the continent. It has spurred some serious search on the part of SSA leaders as to why the situation persists in the first place, and what can be done to boost trade and investment on the continent. Toward this end, SSA leaders and their development partners have earnestly searched for answers to the continent's international trade woes.

There is also a growing body of research works which suggest that SSA's extremely low participation in international trade is as a result of lack of productive capacity (to supply

¹ Committee of Experts, United Nations Economic Commission for Africa (ECA)/African Union (AU): Assessment of progress on regional integration in Africa, Meeting of the Committee of Experts of the Sixth Joint Annual Meetings of the ECA (2013) p. 1

² Ibid

³ United Nation Conference on Trade and Development (UNCTAD), World Investment Report: Global value chains, investment and trade for development, (2013) p. xiii

⁴ ECA (n 1 above) p. 32

⁵ Ibid

⁶ Committee for Development Policy, Report on the fourteenth session (12-16 March 2012), UN Economic and Social Council Official Record, Supplement No 13, (2012), p. 15

goods and services at competitive prices) on the international market, which incapacity the region must overcome in order to be relevant in international trade ⁷.

Apart from this lack of productive capacity, there is a general level of infrastructure deficit (the lack of paved roads, modern ports, information/communication technology, water and cheap and reliable supply of energy. Energy, in particular power supply, has been singled out as one in which the region's infrastructure deficit is widest and one in which it trails the rest of the world by significant margins. The key question then is how can SSA best resolve its infrastructure deficit in the power sector?

One of the often suggested solutions to the power problem in SSA is for African countries to forge deeper regional integration in addressing the issue of infrastructure deficit prevalent on the continent, especially as regard cross-border supply of electricity, known as power pooling⁸. There is now ongoing collaboration for cross-border supply of electricity in virtually all regions of SSA. There is the Southern Africa Power Pool (SAPP), the East Africa Power Pool (EAPP), the Central Africa Power Pool (CAPP) and the West Africa Power Pool (WAPP). The SAPP project is currently operational and WAPP is also in the most advanced stages of implementation. The power supply collaboration in West Africa also involves the ECOWAS Regional Electricity Regulatory Authority (ERERA), which is the regional regulator for cross-border electricity interconnections in West Africa. But any mention of regional collaboration between SSA states throws up the next question of "will it work?" This question must necessarily be asked since SSA is home to numerous and even overlapping regional economic communities (RECs), dubbed the spaghetti bowl effect.⁹ ECOWAS itself has many regional organizations that have proved ineffective and inefficient in achieving its objectives. The failure of many of the community's schemes has been well

⁷ See also the works of Bartels, UNIDO SWP #06/2007,2007 and Harrison, Lin and Xu, WB-PRWP #6316, 2013

⁸ While power pooling started in Africa with the SAPP in 1995, the history of power pool goes much further and was originally associated with Nordic Electricity (NORDEL). See The World Bank, Building regional power pools a toolkit (2005) p. 13

⁹ The spaghetti bowl effect is the termed used to describe the tendency for a country in a region to be a member of several RECs thus creating multiple and often conflicting obligations on such a member country. This phenomenon is especially rife in Africa. According to an ECA study – assessing regional integration in Africa (2012) – [only] Six African countries are members of one REC, 26 are members of two RECs and 20 are members of three RECs, and one country belongs to four RECs.

documented by many scholars of international development studies¹⁰. So what difference will additional regional institutions make in ECOWAS?

1.2 Statement of the problem

Given the the many socio-economic woes facing the continent, and with the region's participation in international trade put at a low of 3%¹¹, signaling the continent's inability to compete in the international marketplace, a painful reality has been dawning on the region's leaders. According to Donald Kaberuka, Africa must forge "deeper regional integration" if it must keep pace with global economic developments¹². Hence, the necessity to compete in regional blocs, in the form of REC. But so far as the records show, notwithstanding the fact that SSA is home to many RECs, the story of regional integration in Africa has been anything but successful. It has been a story of mediocrity, which begs the question: what is the region's approach to economic integration and what kind of legal instruments or frameworks that SSA RECs use that are not delivering?

For example, in West Africa, ECOWAS was created to promote greater economic cooperation between states by trade liberalization (free trade area, FTAs and customs union, CUs etc) and the promotion of intra-regional trade. But decades after, tariffs are still discordant between francophone UEMOA and the rest of ECOWAS.¹³ Intra-regional trade within ECOWAS is as low as 9.1%¹⁴ compared to Europe at 72% and Asia at 52%¹⁵. ECOWAS' initial target of a unified currency under the WAMZ framework is at least 10 years off the mark¹⁶, while not less that 60% of the judgment of the ECOWAS Court of

¹⁰ See the writings of as T. Gathi, 'Africa regional trade agreements as legal regimes' (2011), and Chambers, Foresti, and Harris, *Political economy of regionalism in West Africa* (2012)

¹¹ UNCTAD, *Economic development in africa, intra-African trade, unlocking private sector dynamism* (2013) P. 11

¹² D Kabureka, AfDB President, opening remarks at the 8th African Economic Conference, on October.28.2013 in Johannesburg South Africa

¹³ www.ictsd.org/i/news/bridges-africa International Centre for Trade and Sustainable Development (ICTSD) retrieved November 19, 2013

¹⁴ DT Kennes, 'Africa's regional integration arrangements: history and challenges' (2007) ECDPM discussion paper #74. p. 1

¹⁵ ECA, 'Assessing regional integration in Africa, toward a continental free trade area' (2012) p. 32

¹⁶ ECOWAS has set and missed four different deadlines to achieve the ECO – unified common currency for West Africa, Its launch has been rescheduled from 2003 to 2005, 2009, and now to 2015. See online article at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/> retrieved November 18, 2003

Justice (ECJ) goes unimplemented.¹⁷ This wide disparity between the intended objectives of SSA RECs and the stark reality of under-performance is not just a staple of ECOWAS. Most RECs in SSA barely goes any further than the signing of the agreement and plan of actions¹⁸

Africa is in desperate need of a model framework for an effective and efficient approach to regional integration. The need for effective regional integration can best be seen by ECOWAS' attempt to address the critical issue of power supply across West Africa via the creation of WAPP and ERERA, which legal and institutional frameworks seem to differ from other ECOWAS' organizations. It is worth noting that the issue of power supply deficit has been singled out as one area where Africa trails the rest of the world by significant margins. For example, a World Bank study¹⁹, citing International Energy Agency (IEA) statistics puts Africa's (a region of nearly a billion people) power generation at about 68 gigawatts (GW) of power, roughly equivalent to the power generated by one country in Europe, Spain (a nation of only 45million). And without South Africa, SSA's power generation of 68GW of power generation drops to 28 GW, nearly equivalent to the hydroelectric power generation of only one country in Latin America, Argentina.²⁰ A further depiction of the scale of the problem is the fact that less than 30% of the population of SSA has access to electricity, compared to 65% for South Asia and 90% East Asia.²¹ Africa is also said to generate only about 4% of global electricity supply.²²

Various studies by several international financial institutions (IFIs) such as the World Bank and the AfDB put the sum for addressing SSA's entire infrastructure (roads, ports, energy, water and ICT) at about 93 billion USD per annum over the next decade,²³ of which \$40.8 billion per annum²⁴ (that is, 43% of the full cost) is needed in the power sector alone. Thus, the funding required is at least \$850 million USD in funding for each SSA country in the

¹⁷ Statement made by the Registrar of the Ecowas Court of Justice at a press conference in Abuja Nigeria on September 25, 2012, <http://www.nanngronline.com/section/africa/60-of-ecowas-court-judgments-not-enforced>, retrieved November 19, 2013

¹⁸ ECA & AU, *Assessing regional integration in Africa: rationalizing RECs*, (2006) p 73

¹⁹ V Foster & C. Briceño-Garmendia, (eds), *Africa's infrastructure a time for transformation* (2010) p. 182

²⁰ A Eberhard et al, 'Underpowered: the state of the power sector in sub-saharan Africa (2008), p 2

²¹ A Eberhard et al 2011, (n 20 above) 'Africa's power infrastructure: investment, integration, efficiency' (2011) p. 5

²² FL Bartels, 'Energy, industry modernization and poverty reduction: a review and analysis of current policy thinking, UNIDO SWP (2007) p iv

²³ AfDB, 'Infrastructure deficit and opportunities in Africa', *Economic Brief, Volume1, 2010. P. 7*

²⁴ Eberhard et al (n 21 above), p. 149

energy sector alone. Clearly, many countries in SSA are too poor to tackle this problem on their own; thus, the proposition for deeper regional integration, such as what ECOWAS has embarked upon by the creation of WAPP and ERERA.

But how does one reconcile the irony between the fact that addressing SSA's power infrastructure deficit requires extensive regional integration between states and the fact that regional integration in SSA, and in ECOWAS in particular, has not yielded much promise? Is there a promise of success, when the objective of the integration is more developmental, and where the implementation is entrusted to regional institutions whose legal and regulatory frameworks are substantively supranational in nature? This approach is in significant contrast to the prevailing free trade (tariff-elimination) model, further weakened by liberal inter-governmental legal regimes, that is the preference of many SSA RECs.

1.3 Research questions

By the conclusion of the research, a clear paradigm shall be evinced as to the way forward for regional integration in SSA, especially in terms of the object of the integration schemes and the appropriate legal framework, the instrumentality. Accordingly, this research will critically analyse the following questions surrounding ECOWAS' power infrastructure schemes in terms of its adaptability as a model for other SSA RECs. Some of the specific questions to be answered include:

- 1) What are the appropriate and necessary legal, regulatory and institutional frameworks for a sustainable, efficient and effective cross-border supply of electricity?
- 2) Will the supranational legal and institutional approach of ECOWAS as seen in WAPP and ERERA prove more successful than other ECOWAS inter-governmental approaches?
- 3) Can the ECOWAS power infrastructure regional integration schemes be used as a model for regional integration in Africa ?
- 4) Are there legal and institutional risks to this supranational approach to development? If so, what are some mitigation strategies that ECOWAS must adopt to counter said perceived risks?

- 5) Is the time now rife for SSA's RECs to switch its regional integration paradigm from trade liberalisation to development regionalism?

1.4 Thesis statement

This research is premised on the assumption that ECOWAS' supranational legal and institutional approach in addressing a transnational developmental issue, the inaccessibility, unreliability and extremely high cost of power supply in the West Africa region, as envisioned by WAPP and ERECA institutional design, is the most effective and efficient model for Africa to apply in overcoming its significantly low levels of participation in international trade.

1.5 Significance of the study

In finding a prescription for SSA's anaemic contribution to international trade and its dismal record as a destination for FDIs, it is important for the region's leaders to understand and appreciate why its industries are uncompetitive at the international level and why Africa is not garnering much attraction of foreign capital, notwithstanding the globalization of trade and investment flows. It is also important to note that regional integration has been perceived as SSA's way out but, so far, the region's numerous RECs have not measured up to the level of success attained by other RECs on other continents. Perhaps, there is a need to reassess SSA's conceptual, legal and institutional frameworks to regional integration. Ostensibly, this study will shed significant light on what empirical legal and institutional frameworks are appropriate and necessary for Africa to prosper from the globalization of trade and investment, and by so doing, raise the standard of living of its people.

1.6 Literature review

The quest to identify why regionalism in SSA has not made much impact in international trade and development and what is to be done about it, has been on the backburner for a number of years. After at least two decades of structural adjustment policies (SAPs),²⁵ the 21st century was the epoch when both SSA and its development partners, came to the conclusion that SAPs was part of the problem of the stagnation of economies on the continent. With the near unanimous failure of many of the region's RECs, the question now to be answered is: how is SSA going to overcome its many developmental challenges, not least its uncompetitiveness in a competitive world. Well, many have pegged it to a single necessity: SSA must integrate its economies in order to boost its capacity for trade and development. But with loads of failures of regional integration schemes, it is not surprising that researchers are going back to basics, questioning everything about regional integration in SSA, what works and what does not work. Furthermore, what model should SSA adopt since, there seems to be a failure by the wholesale copying of the trade-liberalization model of the EU, notwithstanding the fact that the EU itself is often touted as the most successful regional integration model. But is this the model for SSA?

AA Aly, takes on the subject in his seminal work "Economic cooperation in Africa, In search of direction."²⁶ Aly outlines the many failures of regional integration schemes in SSA and give cogent reasons for why he thinks integration has failed in SSA and why it needs a new direction. Notwithstanding his acknowledgment of failure of integration, Aly makes a bold assertion that "regardless of their unsuccessful attempts at regional integration, SSA countries have no choice but to integrate in this rapidly changing international political economic order".²⁷ His call for less dependence of Europe, while not addressing the root causes of the dependency leaves his thesis inadequate. Filling this gap, this study endeavors

²⁵ SAPs were economic programmes developing IFIs like IMF and World Bank that set conditions for developing countries to meet in order to get financial support. Those policy prescription for developing countries typically included trade liberalization, privatization of state enterprises, removal of subsidies for infant industries and contractionary fiscal policy. There is a near unanimous consensus that these policies failed to help africa. KS Jomo, Economic reform for whom, beyond the Washington Consensus (2005), www.paecon.net/PAERreview/issue35/Jomo35.htm

²⁶ AA Aly, Economic cooperation in Africa, in search of direction (1994).

²⁷ Ibid (1994). P 94

to know what type of regional integration model SSA should adopt and also to understand the root causes for the lack of intra-regional trade links.

SKB Asante also looked at the issue of the perennial under-achievement of regional integration in SSA in his scholarly work ‘Regionalism and Africa’s development: expectation, reality and challenges.’²⁸ Asante posits that, as a result of colonialism and imperialism, SSA countries with small populations, low per capital income and narrow resource base, are not viable economic entities standing alone.²⁹ Asante goes on to lament that even when SSA opts for integration, politics often gets in the way and prevents optimal economic decisions. He thus proposes a multi dimensional “new regionalism” for Africa, one that emphasizes the integration of institutional structures of production, and integration of markets. His analysis, though, still heralds the belief in the trade-liberalization European model, in addition to other regional dynamics. This research, on the contrary, postulates that trade-liberalization is a non-issue, if only African countries could build their productive capacities and become internationally competitive, then trade-liberalization will become a necessity even without a treaty mandating same.

Luk Van Langenhowe³⁰ presents three stages of regional integration namely: (1) the removal of economic obstacles; (2) the building of regional institutions and regulatory bodies, and (3) the building of a geo-political identity. Van Langenhowe, however, does admit that, up to date, no region has yet to reach stage three, notwithstanding his admission that the EU has achieved stage one and two. According to Langenhowe, true “integration cannot be achieved if trade and economic issues are isolated from other spheres of life” – ostensibly suggesting that the provision of goods and services often necessitates the move to supranationality and compels integration in other spheres of life and that inter-governmental institutions often have a track record of being weak³¹. His work, as plausible as thesis is, does not focus specifically on SSA which is the essence of this study.

²⁸ SKB Asante, *Regionalism and Africa’s development, expectation, reality and challenges* (1997)

²⁹ *Ibid*, p 29-30

³⁰ Langenhowe, LV, *Building regions: the regionalization of the world order* (2011)

³¹ *Ibid* p. 101-114

In 2005, Tony Blair’s Commission for Africa³² launched a report titled: “Our Common Interest”. In the western world, this was the first major institutional study with global implications that highlighted the relevance of infrastructure and how it may be undercutting Africa’s ability to trade competitively in international markets as well as improve the socio-economic development of its people. This report took a step towards a more pragmatic approach to privatisation and liberalisation, arguing that their role should be limited and specific only to where they are sure to increase welfare³³. However, this report was a *magnum opus*, casting a wide net over many issues relating to social and political developments. Part of its conclusion calls for the doubling of aid, debt cancellation and other actions that are a divergence to this study, which is focused on how to improve Africa’s trade competitiveness through regional integration. This research does not explore the issue of aid in relations to SSA’s development and trade competitiveness, nor does it explore the issue of debt cancellation and its impact on trade and development.

Subsequent to the Commission for Africa “Common Interest” report, and given the buzz generated by this report, the World Bank published two comprehensive reports on the state of Africa’s infrastructure, its link to trade competitiveness and the implication for regional integration as an approach to addressing these issues. In the first report, Vivien Foster and Garmendia (eds) (2010) were able to pinpoint the extent to which Africa lags behind other developing countries in at least four critical trade-related infrastructures – energy, ICT, ports and transport. Foster and Garmendia (eds) were also able to pinpoint how power presents, by far, the most daunting challenge for SSA’s industries and how the region’s firms are losing at least 5% of their sales due to frequent power outages, a figure which rises to 20% for firms which do not have backup generators³⁴. However, this report, notwithstanding its identification of power supply as the most important challenge facing Africa trade capacity, did not delve deeper into the phenomenon and the implications for the burgeoning power pools system across the region, a gap this research hopes to bridge.

³² The Commission for Africa was set up in early 2004 by the then British Prime Minister, Tony Blair. The Commission had seventeen members, nine of whom were from Africa

³³ Commission for Africa, Our common interest (2005) p 233-236.

³⁴ Foster, V. and Briceño-Garmendia, C. (eds), Africa’s infrastructure: a time for transformation (2010) p. 5

The Foster and Garmendia report was followed a year later by another report,³⁵ specifically on the power sector. This new report brought new insights into the discourse on SSA's power infrastructure deficit and what it means for trade. It also highlighted how the untapped potential power generation capacity of SSA stands at 93% and that the needed investment requirement of at least \$30-40 billion USD necessarily mandates cooperation amongst African states.³⁶ This report noted that the improvement of the physical infrastructure alone will not produce economic growth; that, in order to benefit from physical infrastructure improvements, it is mandatory that the necessary legal, regulatory and institutional frameworks be put in place, in order to make the use of the infrastructure effective and efficient. This, in the view of the authors, calls for deeper regional integration. But the report, being a continental one, falls short of specifically assessing ECOWAS regional integration schemes – WAPP and ERERA's legal and regulatory frameworks – a point that this research work is resolved to explore.

Picking up on this issue of regional integration is the UN Economic Commission for Africa's (ECA) series on regional integration in Africa. In some of the ECA's landmark reports: (1) 'Assessing regional integration in Africa II, 'rationalizing RECs (2006)' and 'Assessing regional integration in Africa IV, enhancing intra-African trade IV (2010)', the ECA zeroes in on the need to address the multiplicity of RECs in Africa, and the ambiguity of the legal framework of African RECs, a point that will be further explored in this research. According to the ECA, the necessity for effective regional integration in SSA boils down to two main theses: (1) economies of scale (2) increased competition. However, whereas ECA's report calls for a stronger continental involvement in rationalizing RECs, this research is not premised on grand continental schemes, but on 'niche' schemes – clearly identify development challenges like the issue of power supply, and where the RECs or a derivative institution is granted sufficient supranational powers to monitor implementation and enforce compliance.

Ogochukwu Nzewi (2009) questions the sincerity with which SSA's leaders approach regional integration, suggesting that their desires for sovereignty lead them to form weak

³⁵ Second report, Foster and Garmendia (eds), Africa's power infrastructure: investment, integration, efficiency (2011)

³⁶ Ibid, p 43 -49

inter-governmental legal frameworks as a way of avoiding the sharing of sovereignty, as would be the norm if powerful regional institutions were established.³⁷ He concludes by saying that leaders' failure to delegate some level of sovereignty threatens the "strengthening of AU as a nascent democratic regional institution." Ogochukwu, thus, appeals for strengthening of the Pan-African Parliament (PAP) to be able to make binding laws for African countries. However, his research work, as emphasized previously in this literature review section, does not espouse a continental agenda, but on pragmatic regional approaches to solving the tremendous trade-related developmental challenges facing the continent.

Other authors making powerful theoretical arguments for supranationality in regional integration schemes as a basis of success include, Daniel C. Bach who asserts that ECOWAS "seems to have reached state of paralysis in virtually every area of endeavor" and that the problem in ECOWAS is not just about the signing of treaties, but about RECs establishing strong regional institutions, with sufficient supranational powers to deliver on the institutional objectives.³⁸ Similar theoretical arguments were put forth by Westbrook (2008) essentially arguing that growing economic integration [of states] necessarily leads to the establishment of "truly supranational legal institutions". And the emergence of these supranational legal institutions helps in the "unification of legal standards". According to Westbrook, using the interaction between NAFTA regional courts and US domestic courts as an example, the rise of globalization has necessitated the rise in supranational institutions.³⁹ Notwithstanding the reference of these authors to the concept of supranationality, the focus of his analysis – the EU, NAFTA, and USA – leaves a craving for understanding how this approach will play out in Africa.

One researcher who came the closest to assessing the problems of regional integration in Africa and what ought to be done about it is Babatunde Fagbayibo in 'Common problems affecting supranational attempts in Africa: an analytical review (2013).' Babatunde had also previously addressed this issue in his 2010 LLD thesis titled: 'Politico-legal framework for

³⁷ N Ogochukwu, 'The challenges of post 1990 regional integration in Africa' (2009) CPS p. 5

³⁸ DC Bach, Revisiting a paradigm, in Real Lavergne (ed) *Regional integration and cooperation in West Africa*, (1997) p. 85-98

³⁹ JL Westbrook, 'Legal integration of NAFTA through supranational adjudication, (2008) TILJ Vol. 43 p.349

integration in Africa, exploring the attainability of a supranational AU'. The works of Fagbayibo present a common theme – that legal framework for regional integration in Africa was purposely designed by SSA's leaders to be weak in order to avoid any loss of sovereignty⁴⁰. Fagbayibo cites OHADA and UEMOA as rare examples of successful RECs in SSA, specifically because they have features of supranationality, notwithstanding greater resistance by many other regional and continental bodies to the idea of shared sovereignty. According to Fagbayibo, there is a strong nexus between effective implementation of integration initiatives and the autonomy of regional institutions.⁴¹ His preference for the continental integration agenda is where his research deviates, as this research is focused on functional regional integration.

Foster and Ranganathan were more specific in their research focusing on "ECOWAS" infrastructure. In this well written piece, the pair seemed to strike all the right chords, emphasizing why infrastructure development and regional integration matter for ECOWAS. However, the bulk of the piece was an overview of not just power but other infrastructure constraints as well. Moreover, the study seem to be focused on the means for overcoming the monumental financial constraints holding back the development of ECOWAS' infrastructure. Without taking away from the importance of finance, this research is rather focused on the legal and institutional frameworks necessary for such multi-country collaboration, as WAPP and ERERA, to work effectively and efficiently.

Overall, many of the related literature identified infrastructure, especially power supply, as a problem. The related literature also notes that given the scale of the problem and the limited capacities of many African countries, regional integration seems to be the best approach to addressing the problem, which points will be further examined by this research. The previous studies however, fail to identify a model (except Fagbayibo) and fail to analyze the legal and institutional challenges for which ECOWAS established WAPP and ERERA, which institutional approach is among the region's first genuine attempt at developmental regionalism within a supranational legal and institutional framework. However, while

⁴⁰ B. Fagbayibo, 'Politico-legal framework for integration in Africa, exploring the attainability of a supranational AU'. unpublished LLD thesis, University of Pretoria (2010) p. 6

⁴¹ B Fagbayibo, 'Common problems affecting supranational attempts in Africa', an analytical review (2013) p.149

applauding the foresight of Fagbayibo and others for their emphasis on supranationality as an approach, they do so from the perspective of the AU, NEPAD, APRM and PAP mechanisms, an approach which this study eschews, because it is clear that in order to get African countries to give up some level of sovereignty to tackle common challenges, such as power infrastructure deficit, the objective must be developmental and with much less emphasis on continental politics, normally the preference of the AU and its auxiliary institutions. The ECOWAS power infrastructure schemes (of WAPP and ERERA) seem to fit into this model of integration, for which this study is determined to investigate.

1.7 Research methodology

This research is primarily a library and desktop-based research. Research emphasis is placed on the various protocols and other international agreements of ECOWAS and the agreements and protocols specific to the schemes of WAPP and ERERA.

The secondary sources shall include books and articles by scholars in the field of international law, international political economy and international relations. This study shall also draw upon the insights of the many studies done by DFIs and IFIs such as the AfDB, The World Bank, UNCTAD, ECA, UNIDO and as many other development literature as can be identified.

1.8 Delineation and limitation

This study is focused on analyzing West Africa in order to understand the paradigm shift in regionalism in ECOWAS. Specific focus will be placed on the institutional structure of the schemes (WAPP and ERERA), as well as their legal and institutional frameworks.

The main limitation of this study is the fact that WAPP and ERERA are institutions that are still very much a 'work-in-progress', so observations and conclusions reached shall be limited to the current state of progress, and as such, only upon the full realization of the project can definitive observations, reservations, and conclusions be reached.

1.9 Definition of concepts

Productive capacity – The capacity of an economy to produce and supply goods and services at internationally competitive quality and prices. In this research work, the spotlight is placed on the lack of access to power supply and its impact on SSA productive capacity and ultimately on region’s contribution to international trade.

Regional integration – International cooperation among neighboring countries that are geared towards the promotion of trade, commerce, development, security and other such goals. In this study, regionalism is used interchangeably with regional integration.

Infrastructure deficit – Refers to the lack of the necessary infrastructure to promote and facilitate trade and development. Particularly, infrastructure deficit refers to the fact that Africa lags behind all other regions of the world in the provision of infrastructure for its citizens and for businesses productivity and efficiency.

Supranational institution – A reference to the concept in international treaties where greater legal rights of enforcement and compliance to treaty provisions is granted to the supranational institution in preference to domestic institutions.

Africa – Unless otherwise indicated, is a reference to Sub-Sahara Africa (SSA), a conglomeration of 48 African countries south of the Sahara.

Power infrastructure – Refers to the means and capacity by which countries are able to generate and distribute electricity to its citizens and residents and to other neighboring countries with which they have bilateral trading or power-pooling arrangements.

Power pooling – An institutional arrangement in which electrical grids of various countries making up a region are interconnected and pooled for efficiency gains, greater reliability and lower costs.

West Africa Power Pool (WAPP) – A specialized institution of ECOWAS consisting of 14 of the 15 countries of ECOWAS and 26 member power companies. WAPP aims to increase

the provision of electricity to citizens and firms of its member's states by "regional power system integration and realization of a regional electricity market"⁴².

ECOWAS Regional Electricity Regulatory Authority (ERERA) – The regulator of regional electricity market in West Africa.

1.10 Organization of the chapters

This research is organized into five chapters. In the first chapter, the researcher explores the background to the study and sets out a clear and concise statement of the problem as well as the questions to be answered and the basic assumptions under which the research work is being undertaken. A brief survey of the relevant studies and related literature is as carried out.

In the second chapter, the research examines the conceptual framework of the new regionalism in ECOWAS. As a backdrop to this legal analysis, the chapter first explores the historical necessity for the rise of regionalism and all the various schools of thought on regionalism. The chapter also examines the various international law approaches to regional integration such as inter-governmentalism versus supranationality. The chapter lays bare the variations in the concept of the old regionalism versus the new regionalism. It examines developmental regionalism as a facet of the new regionalism, which SSA countries must adopt, since the old regionalism did not quite fit the regions' socio-economic circumstances and developmental needs of the region. Chapter two also examines power pooling as valid developmental regionalism, its governance, merits, risk factors and mitigation strategies and the role of an independent and supranational regional electricity market regulator.

The third chapter introduces WAPP and assesses the legal framework of this organization that is the primary mechanism through which ECOWAS hopes to address the gaps in its power infrastructure. The chapter also examines the shallowness of legal framework of prior ECOWAS institutions that has contributed to the failure of other regional integration schemes of ECOWAS. It does a comparative analysis of the implementation efforts, project finance, and compliance in relations to other institutions of ECOWAS that differ in their legal framework.

⁴² www.ecowapp.org, retrieved November 1, 2013

The essence of this investigation and analysis is to underscore the drive for development regionalism to improve the productive capacity of the region's industries and to underscore the usefulness of elements of supranationality in the WAPP legal framework, which makes the institution more likely to be effective in making and implementing decisions.

Chapter four introduces ERERA, the regional electricity market regulator. It outlines the legal necessity for such a regulator in an interconnected market. It also examines the legal framework of ERERA, especially against the backdrop of independence and supranationality. In an effort to understand and explain why this market regulator is more likely to succeed as opposed to other regional integration efforts of ECOWAS, chapter four further examines the failure of the inter-governmental approach by juxtaposing some of latter approach with the former. Implicit in this critique is the premise that the paradigm shift in the legal and institutional framework from inter-governmentalism to supranational institutions offer the best approach for SSA countries to boost trade and development on the continent.

Chapter five summarizes the findings of the previous chapters, making all the necessary conclusions. Chapter five wraps up the study by highlighting what differentiates ECOWAS' WAPP and ERERA integration schemes from other regional integration projects in ECOWAS and across SSA, and why these institutions signal a paradigm shift in SSA approach to regionalism. The chapter also makes recommendations to further strengthen the aforementioned institutions and to underscore the central thesis that SSA can overcome its development and trade-related challenges.

CHAPTER TWO

Conceptual framework for the new regionalism in ECOWAS

2.1 Introduction

The basis for this study was undercored in chapter one where the issues of the failure of SSA RECs to significantly improve the continents relative standing in international trade or at least boost intra-regional trade. African RECs have generally failed on both scores. But in an era of globalization and increasing regionalization of trade and development, the rise of transnational interest groups and threats, regional integration has taken on a aura of inevitability and regions that fail to integrate risk being cast to the periphery of the global marketplace

Chapter two picks up on this dilemma of the failure of SSA's RECs to perform and the fact that, for a balkanized continent, regional integration may yet be the continent's only way out to global economic relevance. Chapter two does this by trying to provide a historical backdrop to the various international attempts at regionalism, from the 19th century efforts among German and Swiss states, to the post-GATT and post-WWII integration schemes, both of which principally focused on the establishment of FTAs and CU.

Beyond the issue of history, chapter two explores the international law approaches to regional integration and the various schools of thought on interstate economic relations and regional integration. This chapter also explores, in particular, the concept of the 'new regionalism' which emerged at the dawn of the 21st century and shifted the focus from border-related trade issues to the dynamic relationship between trade, development, globalization and modern transnational non-state actors and interest groups and how they impact international trade and economic development, especially for developing countries.

Lastly, this chapter assesses regional power pooling from a development regionalism perspective, the benefit of such a scheme for the participating countries, the associated risks and the role of the independent market regulator to monitor and enforce the rules of an integrated regional market.

2.2 Regionalism: a conceptual backdrop

Most scholars of regional integration would agree that the term is very fluid and does not lend itself to any fixed definition⁴³. Ideally, regional integration is the fostering of closer links between states in recognition of common interests (tariffs reduction/GATT, larger markets/EEC) or to ward off common threats (security/NATO, colonialism/OAU). It is normally concretized by the signing of an international treaty and often by the establishment of a regional organization. Whichever dimension a regional project takes, one or more of the following attributes must be present: geographical proximity, mutual economic interdependence, cultural/linguistic similarities, geopolitical interests, transnational regulation and governance⁴⁴.

There are many schools of thought as to why regionalism evolved. There is the functionalist school and the neo-functionalist school.⁴⁵ The functionalists emphasized that limited functional, technical, and/or economic areas, areas of “low politics,” where sovereignty losses would be limited while the pooling of technical expertise in administrative networks would yield greater tangible benefits to participating countries.⁴⁶ The experience of mutually-beneficial economic cooperation would spiral into concrete collaboration and create the necessary incentives for greater cooperation in other spheres of national life, ultimately culminating into a regional institution or REC. The neo-functionalist, an offshoot of the functionalist school, saw regionalism evolving because transnational pressure groups – such as MNCs, industrialists, labor unions – push states to expand beyond their territorial confines and to integrate at the regional level giving rise to new international institution to which these pressure groups shift their loyalty.⁴⁷ Both the functionalists and the neo-functionalist agree that these pressure groups (domestic and transnational) lead to the formation of more powerful and more integrated regional blocs and even supranational institutions. Other theories underlying the formation of

⁴³ See works of T. Borzel and K Striebinger, ‘Comparative regionalism, a new research approach’ (2011) KFG working paper no 28 and works of GP Sampson and S Woolcock (eds), *Regionalism multilateralism, and economic integration: the recent experience*, (2003)

⁴⁴ E Mansfield and HV Milner, ‘The new wave of regionalism’ (1999) IO Journal, p. 589-627, 1999, p 591

⁴⁵ The functionalist school was led by Haas (1958) who published several works on the theory European integration beginning with *The uniting of Europe, political, social and economic forces 1950-1957*. A modification of the functionalist thought led to the neofunctionalist school, when emphasis on transnational pressure groups.

⁴⁶ T Borzel, ‘Comparative regionalism’, a new research agenda’ (2011) KFG working paper no 28, p6

⁴⁷ Ibid, P6

regional blocs see the failure of the Westphalian concept of the state,⁴⁸ as well as the failure of multilateralism to respond to new pressures on the state as the primary reasons why nations resort to regionalism.⁴⁹ According to this school of thought, the Westphalian concept of the state failed because:⁵⁰ (1) states were not equal; (2) differences in economic and political clout meant inevitably that some states must dominate others and; (3) the non-binding nature of international law (multilateralism) meant that many states could not be held accountable for their actions. Thus, according to this school, regionalism evolved because the state had to find a third way between balkanization and multilateralism.

Then there is the plutocratic school,⁵¹ the regional hegemon narrative theory. Under the plutocratic approach to regionalism, poorer and less-powerful members of the region voluntarily gave the wealthiest and more powerful member, the regional hegemon, the “go ahead” to set the rules for the integration schemes and allocate the benefits. The regional hegemon theorists point to South Africa in SACU, Russia in the Russia-Eurasian Customs Union, the USA in NAFTA and Brazil in MERCOSUR, as evidence of the plutocratic hegemon in the formation of REC. However, this relegation is not free of conditions. For plutocratic regionalism to take place, the following essentials must be present:⁵²

- i. there must be only one plutocrat;
- ii. the hegemon has the explicit permission from other members of the region to set the rules;
- iii. other members of the region must face actual or anticipated economic constraints;
- iv. the hegemon must provide immediate and easily measurable economic benefits; and
- v. the other members of the arrangement must have no better alternative to the narrative offered by the regional hegemon.

⁴⁸ The Westphalian concept of the state is a reference to the Peace of Westphalia (1648) signed in continental Europe by the major powers, which agreement enshrined respect for states territorial integrity, equality of states, states sovereignty and the non-interferences in the domestic affairs of sovereign states.

⁴⁹ L Van Langenhove, *Building regions: the regionalization of the world order* (2001) p. 26-27

⁵⁰ Ibid p 27

⁵¹ For further reading on plutocratic regional governance see Katleen J. Hancock: *Regional integration, choosing plutocracy* (2009)

⁵² Ibid p 45-55

2.3 Regionalism: a chronology

Contemporary scholars often place the origin of RTAs in the post World War II (WWII) and post-GATT '47 establishment. At the time, during the interwar period – between WWI and WWII – the rise of nationalism and fascism stymied international cooperation and led many nations to erect barriers to international trade. Back then, it was not uncommon to see double or even triple digit tariffs levels, as economic protectionism was seen as the way to protect local industries. However, in Europe, there were several instances of regional economic cooperation that resulted into new states; though those agreements at the time were not called RTA, PTA, CU or any of the more contemporary nomenclature. Yet their effects and scope were of the nature that they can rightly be termed as the first-known instances of regional integration.

The German empire (1871), for example, is generally considered to have been created out of a customs-union like arrangements between the German states of Prussia and Hasse-Darmstadt in 1828.⁵³ The economic integration agreement was followed by the Zollverein which expanded the preferential trade arrangement amongst twenty-eight German states, between 1834 to 1842.⁵⁴ Other similar PTA was noted amongst a number of Swiss cantons leading to the creation of Switzerland in 1848.⁵⁵ Other recorded instances of economic integration leading to statehood were also on the European continent and included the likes of Austria (1848), Denmark (1853) and Italy (1860)⁵⁶. However these earliest CUs didn't fit a precise model and did not continue into the 20th century, perhaps due to the rise of fascism, nationalism, colonialism, and the disruptive effects of WWI.

2.4 Regionalism: an international law perspective

There are generally two poles to regional integration. Approaches to regional integration can either be more inter-governmental or more supranational. Intergovernmental approach to regional integration is where governments work together to pursue their collective objectives (via a treaty or an inter-governmental organisation), but they do not lose any significant shred

⁵³ L Van Langenhove, *Building regions – the regionalization of the world order* (2011) p. 101

⁵⁴ Ibid p 101

⁵⁵ Ibid p 101

⁵⁶ Mansfield and Milner, 'The new wave of regionalism' (1999) *IO Journal*, p 589-627, p. 596

of their sovereignty. Accordingly, with intergovernmentalism, each member-state effectively retains a veto on the application of regional agreements, and depending on the impact of implementation on national politics, a member-state can effectively exercise a veto over implementation of the regional pact with very little or no repercussion by the regional body⁵⁷.

Intergovernmental treaties and institutions often have a secretariat that exercises little or no independent power, and often cannot compel compliance with regional agreements. A prime example of inter-governmental regional integration was the Organization for African Unity (OAU). The OAU charter enshrined the principle of non-interference in the internal affairs of member-states, which by hindsight, proved to be its undoing as each member-state felt it had veto over OAU resolutions, and would only implement same if local politics were more favorable⁵⁸. Intergovernmental institutions normally rely on the goodwill of member-states and/or the threat of retaliation by other member-states as an enforcement mechanism. When these circumstances are inapplicable, there is little incentive to implement decisions reached at the regional level.

Supranational approach to regional integration is an approach to regional integration in which member-states agree (via a treaty or international body) to cede some sovereignty individually, so that the international body, the supranational entity, can collectively exercise said power and be more effective in ensuring that decisions reached are implemented by all concerned. Under the supranational approach to regionalism, laws passed (that is, laws passed at the regional level in those areas where the regional group has been given preference) trumps national legislation and are binding directly on member-states and citizens of those states, which is the principle of *direct effect*. The concept of supranationalism originated with the European Union, and to date, it is the sole region that is at the most-advanced stage of regional integration and is often the point of reference in most discourses on regional integration⁵⁹. For supranational regional

⁵⁷ ECOWAS has been learning the difficulty of intergovernmentalism. According to KO Kufour (2006:30), most of the community organs work by protocols, but the member states record of ratification is dismal to say the least. For example, between 1978-1989, the Authority of the Community adopted and signed 21 protocols. [But] up to 2006, [only] one out of the 21 protocols had been ratified by all 16 members of the Community. No member has [ever] ratified all the 22 protocol. Owing to this dismal record, the Committee of Eminent persons asked by ECOWAS to study the regional body, in the preparation for the new treaty (1993) properly proposed that ECOWAS abandons intergovernmentalism in favor of supranationality.

⁵⁸ SKB Asante, *Regionalism and Africa's development: expectations, realities and challenges* (1997) p. 37

⁵⁹ www.princeton.edu/~achaney/tmve/wiki100k/docs/Supranationalism (2014), retrieved on April 30, 2014

governance to work, the legal and institutional frameworks must assure the democratic participation of all stakeholders, the transparency of supranational decision-making processes and the accountability of regional institutions.

2.5 Theories of regionalism

Regionalism is generally seen as evolving in two different epochs. The first epoch is often traced to the post-WWII era and the post-GATT establishment era and is often associated with the theory of comparative advantage; whereas, the second epoch is placed in the 1990s, the end of communism, the fall of the Berlin wall, as well as the advent of globalization. The next two sub-sections explore the thinking ascribes to the waves of regionalism.

2.5.1 Theory of the ‘old regionalism’

Contemporary theory of regional integration (PTAs, FTAs, CUc etc) is generally chronicled as commencing in the post WWII era and the post-GATT establishment era. This period (1950s, 60s and up to 1990s), now considered the the period of the ‘old regionalism.’ This period saw the creation and profilation of RTAs within the Eurocentric (Balassa⁶⁰) model, also termed as the linear model of integration.⁶¹ The core theretical underpinning was the classical economic theory of comparative advantage; the theory that nations ought to specialize in the production of goods for which they have a ‘comparative advantage’ and trade for good for which they do not have such a comparative advantage. Thus, scholars of international trade at the time were more concerned about the welfare effects of border issues affecting international trade, such as tariffs, quotas and bans. The core analytical mode was the Viner-Meade⁶² analytical framework that underscored trade creation and trade diversion. Under this framework, the validity of RTA or FTA was known only after an

⁶⁰ The linear model of economic integration is attributable to Hungarian economist Bela Balassa, who postulated in his celebrate work: *Trade creation and trade diversion in the European common market* (1967) that economic integration passes through stages from FTA to political union by first going through intermediary stages of customs union, common market and economic union.

⁶¹ B. Gavin and L Van Langenhove, ‘Trade in a world of regions’, in GP Sampson and S Woolcock (eds), *Regionalism, multilateralism and economic integration: the recent experience* (2003) p. 278

⁶² Under the Viner-Meade framework, RTAs are said to both be trade-creating and trade-diverting and that RTAs have to be analysed empirically to know if they created more trade than they diverted in order for them to be considered welfare enhancing.

empirical analysis as to whether a particular FTA or CU trade-creation effects trumps its trade-diversion effects.⁶³

The ‘old regionalism’ was shallow in scope and was essentially focused on tariffs and other border-related impediments to international trade in goods, as well as the net effects of the RTA trade-creation and trade-diversion attributes. However, the emergence of empirical evidence of the simultaneous growth of regional trade and multilateral trade, cast doubts over the theory that, under an RTA, it was possible that trade diversion could trump trade creation and negate the validity of RTAs. The conceptual framework of the ‘old regionalism’, which sufficed to explain regionalism was no longer tenable for the new wave of regionalism.

2.5.2 Theory of the ‘new regionalism’

As stated in the previous section, the theory of the ‘old regionalism’, with its focus on comparative advantage, trade creation and diversion and linear regional integration could not account for the structural changes and the geopolitical dynamics of the new world order. The ‘new regionalism’ (of the 1990s and beyond) came against the backdrop of the collapse of communism and the end of the bipolar world, the emergence of multipolar centres of power, the rise of MNCs and INGOs as stakeholders in international affairs and the extensive impact of information and communication technology (ICT) across nations and cultures⁶⁴. The ‘new regionalism’ seeks to integrate the dynamic effects of economic integration between trade and investment and the role of regional institutions in transnational trade and environmental regulations, in the monitoring and compliance with trade pacts and the effective transnational dispute settlement regimes.

So, whereas, the ‘old regionalism’ was deemed as state-driven internationally and domestically driven by local firms, the ‘new regionalism’ is a complex web of interaction between multiple stakeholders, including, states, private industry, INGOs, IFIs, MNCs, the

⁶³ ME Burfisher et al, ‘Regionalism: old and new, theory and practice’ (2004) MTID-IFPRI, discussion paper no. 65, p27

⁶⁴ Gavin and Van Langenhove, ‘Trade in a world of regions’ in GP Sampson and S Woolcock, *Regionalism, multilateralism and economic integration: the recent experience*, (2003), p 277

UN and legions of RTAs, acting in the international sphere in their own accord, at the domestic, regional and multilateral levels⁶⁵.

It is important to note the role of GATT in the evolution of RTAs, especially as regards, the universal lowering of tariffs and ensuring that RTAs in the post-GATT era was more trade creating than trade diverting. This lowering of tariffs was done through a series of trade rounds, while the dominance of trade-creating attributes of RTAs can squarely be put down to GATT article XXIV, which essentially mandates that: (1) RTA must cover substantially all trade (XXIV.8b); and (2) must not make trade any more restrictive than same had been before the formation of the RTA (XXIV.5a & 5b). As tariffs and non-tariff barriers NTBs were lowered, and as globalization took root, the need to attract FDIs, the need to harness economies of scale, the need to foster production links and value chains, heralded the dawn of the new regionalism.⁶⁶ Other contemporary issues driving the 'new regionalism' include the mobility of factors of production, the need for harmonization and facilitation of international currency transactions, the need for regulation of transnational product and factor markets, the need for institutions to manage and facilitate regional integration and a whole host of other issues set the pace for the evolution from the old to the 'new regionalism.'⁶⁷

2.6 Developmental regionalism in ECOWAS, the paradigm shift

Development regionalism is a variant of the 'new regionalism'. The old theories of regional integration (functionalism, neo-functionalism, hegemonic) did not fit the typical developing country profile, for example, SSA countries. It could neither explain the rapid industrialisation of Asia, where there were no regional blocs until the 1990s. One of the first scholars to note the deficit in the paradigm was John W. Sloan in his ground-breaking work on development regionalism.⁶⁸ Other contemporary advocates for development regionalism include: SKB

⁶⁵ Gavin and Van Langenhove, 'Trade in a world of regions' in GP Sampson and S Woolcock, *Regionalism, multilateralism and economic integration: the recent experience* (2003) p. 277

⁶⁶ ME Burfisher et al 'Regionalism: old and new, theory and practice' (2004) p. 4

⁶⁷ Ibid p10-11

⁶⁸ John W. Sloan, an American political science professor, published an article (1971) titled: strategy of developmental regionalism: benefits, distribution, obstacles and capabilities, in which he stressed that the linear model of regional integration was not suitable for developing countries with little or no productive capacity.

Asante⁶⁹, the ECA⁷⁰ and UNCTAD⁷¹. The central thesis in the argument for development regionalism as the ideal fit for developing countries is the fact that while elimination of tariffs and other NTBs (the Eurocentric model) work well for countries with an industrial base, for example, OECD countries; it is insufficient to benefit countries that lack productive capacity. These countries could not significantly benefit from regionalism since their economies are based on the production a limited number of primary commodities which are destined for advanced economies outside of their regional bloc. This conundrum explains why intra-regional trade in ECOWAS, for example, even 40 years after its establishment, is still at a low of 9%⁷² compare to the 50% and 70% in developing Asia and Europe respectively.⁷³

Given the ostensible failure of regional integration in the intergovernmental trade-liberalization mould to work for SSA, it is high time SSA RECs found an alternative, which alternative supposes that countries treat regional integration as an approach to development, instead of seeing it as a trade or tariff issue. Thus, the concept of developmental regionalism as an approach to regional integration, supports the idea of a common industrial policy, the development of the private-sector capacity, economic diversification, structural transformation, technological development and infrastructural development on a regional scale⁷⁴

ECOWAS, as a RECs, is one of the typical case studies on the limits of regionalism for RTAs whose members lack productive capacity and competitiveness to engage meaningfully in the global economy. A case in point is the substantial lack of infrastructure to facilitate trade and private-sector development. ECOWAS' countries have significant capacity constraints in the energy and transport sector, which undermines their capacity to trade (regionally and internationally). For example, a survey noted in an UNCTAD report on Africa shows that 50% of African firms surveyed between 2006-2010 identified lack of access to electricity as the

⁶⁹ SKB Asante, a Ghanaian economist, emphasized this theme in: *Regionalism and Africa's development: expectations, realities and challenges* (1997)

⁷⁰ ECA has been regularly exploring this theme in the series: 'Assessing regional integration in Africa', which is now in its 4th edition

⁷¹ Developmental regionalism is the focus of UNCTAD's most recent work on economic development in Africa (2013), where the research explored the challenges in increasing intra-african trade by unlocking private-sector dynamism

⁷² DT Kinnes, 'Africa's regional integration arrangements: history and challenges' (2007) ECDPM discussion paper no.74, p32

⁷³ UNCTAD, 'Economic development in Africa, intra-african trade, unlocking private sector dynamism, (2013), p.2

⁷⁴ Ibid p 100

major constraint to their business, while another 28% identified transportation as the major constraint of doing business⁷⁵. ECOWAS leaders, fully cognizant of these limitations, have begun to harken to the logic of development regionalism in the mould of independent and supranational regional institutions that can drive the new model of integration with little political interference. This underscores the theoretical underpinings for the new regionalism in ECOWAS.

2.7 Power pools as developmental regionalism

The issue of power supply availability, reliability, and cost in ECOWAS countries has been duly noted in many studies conducted by the World Bank, ECA, Afdb, UNCTAD, Commission for Africa and many other development research institutes. And the story of power supply in ECOWAS countries leaves much to be desired. For example, access to power in ECOWAS is at 41%⁷⁶ compared to 30.5%⁷⁷ for other parts of SSA, but when compared to other regions of the world at 80%⁷⁸ or more, ECOWAS has a lot of catching up to do. In respect of cost, the average cost of power (per kwh) is 20 cents per kwh,⁷⁹ while in other parts of the developing world its in the rate of 4 – 8 cents per kwh⁸⁰. At this rate, the cost of power in SSA is 300 – 400% times more expensive to access power in ECOWAS countries compared to other parts the developing world. In respect of reliability, power outages in ECOWAS countries is severe, estimated to be 165 day per year,⁸¹ nearly one-half of the year. Putting that into perspective, a manufacturing firms in the USA experience power outages one day in 10 years.⁸² The estimated cost of stabilizing SSA power supply to the level at par with the rest of the world is put at US\$23.3 billion over 2005-2015.

Given the above dismal picture of the state of power supply in the region, and the importance of power to the quality of life, export competitiveness and economic growth, and the sheer cost to

⁷⁵ UNCTAD, 'Economic development in africa, intra-african trade, unlocking private sector dynamism, (2013) p. 51

⁷⁶ V Foster and R Ranganathan, 'ECOWAS infrastructure: a regional perspective' (2011) p. 40

⁷⁷ The World Bank, 'Turning the lights on in Africa, action agenda for transformation' (2013) p. 18

⁷⁸ Ibid p 18

⁷⁹ Foster and Ranganathan, (n 76 above) p. 45

⁸⁰ The World Bank, (n 77 above) p 27

⁸¹ Foster and Ranganathan (n 76 above) p. 45

⁸² Eberhard et al, 'Africa infrastructure country diagnostic: underpowered, the state of power infrastructure in africa (2008) p vii

rectify the problem, ECOWAS leaders do get the picture: that developmental regionalism backed by strong supranational legal framework is the surest way to surmount this development challenge. This underscores the region's drive to work its way out of this power supply conundrum by forging deeper regional integration with the framework of WAPP and ERERA.

Power pooling in SSA is a relatively new phenomenon, with SADC/SAPP being the first to be established in 1995, followed by WAPP (1999), and later the EAPP and CAPP. Power pooling, initially was much more common feature of the electricity in Europe and the America. However, in West Africa, there is some evidence of power trade (bilateral) existing prior to the establishment of WAPP. Below are examples of bilateral power exchanges in ECOWAS that predates WAPP.

2.8 History of power exchanges in ECOWAS

- i. Ghana-Togo-Benin Exchange – Ghana's Akosombo hydroelectric dam has been operational since the 1960s and has supplied electricity to Togo and Benin through the Communauté Electrique du Benin (CEB) via a 161 kV double circuit line since 1972 and to Côte d'Ivoire via a 225 kV power line since 1984⁸³.
- ii. There is also a bilateral agreement between Compagnie Ivoirienne d'Electricite (CIE) and the Société Nationale Burkinabè d'Electricité (SONABEL) which came into effect in April 2001⁸⁴ and under which terms of this Agreement, CIE has to supply electrical energy in a maximum amount of 100 GWh per

⁸³ ECA, 'Assessment of power pooling arrangements in Africa', (2004) p. 33

⁸⁴ Note that this agreement predates WAPP since WAPP Article of Agreement was only signed in 2006.

2.9 Power pools governance and regional integration

In order for power pools to be successful, two legal arrangements are a necessity. There must be agreement between the countries involved in the project and the utilities companies involved. The two most important agreement necessary for power pools to function are noted below.⁸⁵

Inter-governmental memorandum of understanding (MOU) – Under this agreement, governments of the cooperating countries explicitly grant permission for their utilities to contract. They also provide guarantees regarding obligations resulting from the interconnection contract. There are several contractual issues that would not bore well if national government did not make such guarantees. Some of these issues include: currency conversions, arbitration, utilities pricing, force majeure etc.

Inter-utility MOU – Under this agreement, signed by participating national power utilities, assets allocation and use and other contractual rights are properly defined. Some of the key principles to be agreed upon by the utilities include: issues relative to technical specifications, operations planning, commercial operations as well as the coordination and management of the now integrated regional power grid. A key component of the inter-utility MOU is the system operation framework. The integration of national power grids requires development of cross-border interconnections up to the level that each national utility are placed in the position that they can easily exchange energy. Operating a power pool also requires clear-cut agreement on arbitration and dispute resolution.

Establishment of a regional institutions – Notwithstanding the MOU, cooperating governments and utilities, it may also be imperative to have a regional institution with sufficient power and authority to enforce the agreement and mediate or arbitrate disputes. Accordingly, for the development of regional power trade, the regional institution will take responsibility and leadership in coordinating, overlooking and fostering the process required to develop trade. Regardless of the chosen model (i.e., cooperative or competitive, tight or loose), a regional institution is an absolute necessity if the power pool is to succeed. The regional institution provides the continuous monitoring and goading of the interconnection.

⁸⁵ ECA, 'Assessment of power pooling arrangements in Africa' (2004) p4

2.10 Regulating power pools: the role of the independent regional electricity market regulator

The move by ECOWAS to create a market regulator is not new. The idea of an independent regulator for the market (especially in network industries like electricity, communication and transportation) arose upon the abandonment of classical economic thought⁸⁶. The realization of the fact that markets were not, in fact, perfectly self-regulating, the rise of giant enterprises (monopolies) capable of abusing their market position and the recurrent cycles of boom and bust in the economy,⁸⁷ convinced traditional market-based economies such as the US, UK, Europe etc to initiate the idea of an independent regulator for the market.

Historically, as industries became more powerful with established relationship with the ruling classes, this new market dominance often meant abuse of market position. But in a democracy, with its cycles of voting, this also meant unpopular leaders, or leaders seen to be in connivance with the money barons, could be voted out of power. The ruling elites policy prescription to insulate themselves from such dilemma was to create independent regulators⁸⁸. Under this line of reasoning, the independent market regulator served some significant political and economic purposes. Firstly, the independent regulator relieves the politicians from having to take the blame of necessary economic decisions that may be politically unpopular. Also, under the “credibility hypothesis”, the independent regulator, demonstrates that in respect of the regulation of industries, the political authorities are committed to reform that is based on objectivity, expertise and evenhandedness⁸⁹. The notion of an independent regulator of experts was also premised on the assumption that the said institutions could ably resolve the problem of “asymmetric information” as the regulator, was in the best position to function as a “quasi-judicial” structure that applied transparent administrative procedures to establish prices, review

⁸⁶ Classical economists advocated the concept of laissez-faire – the ideology that the best thing for a government to do is to leave the market alone, because the “invisible hand” (interplay of supply and demand forces) was sufficient to correct any imbalance in the economy.

⁸⁷ The cycle of boom and bust in business permeates economic history, but any semblance of a self-correcting market was shattered significantly by the occurrence of the Great Depression in the USA (1930s) and in even more recently by the Global Recession (2008). After the Great Depression, the number of independent regulators in the USA increased significantly and began trending around the world. Similar trend occurred after the recent Global Recession.

⁸⁸ The creation of autonomous public agencies, staffed by technocrats and independents, was a novel arrangement in constitutionalism, whereas, in so far as the constitutional doctrine had called for the separation of power by the executive, the legislature and the judiciary. These new type public agencies were now being given the power to legislate, adjudicate and enforce.

⁸⁹ L Saskia and A Ottow, ‘Independent supervisory authorities’ (2012), LIEI (Journal), 39(4), p 424

investment and financing plans and to specify and monitor other terms and conditions of service.⁹⁰

The independent market regulator, is similar to the national regulator, but must exhibit flexibility for collaborative governance, broad-based participation, transparency and accommodation of all stakeholders (including a mix of public-private participants).⁹¹ It must operate without the need to seek approval from national or regional authorities. At the regional level, this equally means independence from member-states and from regional governing authorities.⁹² A key component for the granting of independent status by the member-states is that the regulator must be trusted. And for the independent regional regulator to be trusted, it must demonstrate expertise, transparency, judicial and financial accountability. It is essential for the regulator to have explicit power to monitor interstate transactions, check participants compliance with legal and technical norms and standards and issues out sanctions when market rules are violated⁹³

On the downside of the theory of independent regulatory institution is the potential for ‘regulatory capture’.⁹⁴ Normally, the regulators would have developed expertise from the very industry that it is to regulate. There may exist a certain degree of affinity or empathy for the market participants and the problems that they enumerate. The risk of ‘regulatory capture’ may be accentuated by an oligopolistic market structure. However, in network industries, the empirical evidence does “suggest that [generally] the impact of regulatory independence on industry performance is [mostly] positive”, even where the extent of the impact cannot be ascertained.⁹⁵

⁹⁰ Trillas, ‘Independent regulators, theory, evidence and reform proposals (2010) IESE , p 1

⁹¹ CH Koch, ‘Collaborative governance: lessons for Europe from US electricity restructuring’(2009), ALR vol 61, p.

72

⁹² L Saskia and A Ottow, ‘Independent supervisory authorities’ (2012), LIEI (Journal), 39(4), p 440-441

⁹³ Saskia and Ottow, (n 92 above) p. 422

⁹⁴ Trillas, ‘Independent regulators, theory, evidence and reform proposals’ (2010) IESE p. 10

⁹⁵ Trillas (n 94 above) p 20

2.11 Power Pools: analysis of the merits

When countries integrate their national grids to create a power pool, there are tremendous benefits that can accrue to each participant in the interconnection, whether or not the countries are developing countries or developed countries. Although some benefits are more pronounced in developing countries than developed ones and vice versa, there are ostensible benefits, and that partly explains why, irrespective of a country level of development, countries in a region or sub-region are increasingly intergrating their national power grids with the hope of reaping said benefits. Below is an enumeration of some of the benefits to be accrued from establishing power pools.

- 2.11.1 Complimentarity in generation – For countries highly dependent on hydropower for power supply, it is important to secure a reliable source of power during periods when river levels are low. The countries reliant on gas, coal, or nuclear, reduce their impact on the environment by limiting their generation by using the hydropower country resources for significant periods in exchange for supplying the hydropower country during periods when there are no rains The complimentarity benefits all countries participating in the pool.
- 2.11.2 Cost Reduction – When countries integrate their power grids, this cooperation encourages countries to coordinate investments in new facilities and operations. Such cross-country cooperation in investment and operation reduces the utilities’ overall cost of operation – notably investment and operating expenses, and create valuable economies of scale that work to the benefits of all collaborating countries and their respective utilities. Another way in which utilites reduce costs is by producing power in the least-cost manner, which is done by using the least-cost power supply first.
- 2.11.3 Attraction of Investment by IFIs – This scenario is especially pronounced for power pools composing of developing countries. In developing countries with small domestic power systems, the one sure benefit of establishing a regional power pool is that it enhances the attractiveness of an entire region and raises the stake in investment. The regional market now becomes a very competitive market for investment due to the guarantee of reliable power supply.

2.11.4 Support by IFIs – Support for energy infrastructure projects comes from such multilaterals as World Bank Group, AfDB and ADB, among others. For example, The World Bank under its Infrastructure Action Plan (IAP), launched in July 2003, in collaboration with other IFIs, is co-financing regional infrastructure development projects that support developing countries drives to integrate their respective national power grids so as to establish regional power pools. Currently, the World Bank supports projects in Africa (eg WAPP), Southeastern Europe (Energy Community of South East Europe), East Asia (Greater Mekong Subregion Power Trade Organization), Central America (Central American Electrical Interconnection System), and South America (South American Regional Energy Integration Commission).⁹⁶ In total, the annual support by the World Bank for power sector projects is at least 10 billion USD⁹⁷. The ADB in Asia, for example, provided crucial partial funding for the first-ever South-Asian interconnection to the tune of \$112 million loan to link India's eastern electrical grid to Bangladesh's western grid⁹⁸. The AfDB in SSA is also another active player in the funding of energy projects, funding over a dozen energy projects across the region⁹⁹:

2.11.5 Increased reliability and sustainability – Countries participating in power pool improve their reliability and security of their electricity supply and ostensibly create a better environment for residential, commercial, and industrial purposes.

2.11.6 Infrastructure Development – International cooperation in regional power pools leads to significant improvement in the physical infrastructure, as well as the institutional (soft) infrastructure that must support the system. In order for a power pool to work seamlessly, systems in different countries have to be harmonized so that the power pool can work without glitches. Without the pools, there may be little incentive for neighboring countries to be bothered with going through the hassle of changing their systems to be more in sync with their more advanced neighbors.

⁹⁶ The World Bank, 'Building regional power pools: a toolkit'(2008) p.3

⁹⁷ The World Bank, 'Turning the lights on across Africa, an action agenda for transformation' (2013) p. 30

⁹⁸ <http://articles.economictimes.indiatimes.com/2, Yashodhara Dasgupta , retrieved February 3, 2014>

⁹⁹ For a full listing of the projects see H Cheikhrouhou, 'Meeting the challenge of energy access for all Africans, AfDB (2010) p. 5

- 2.11.7 Facilitation of Regional Integration – When countries participate in power pools, this cooperation amongst different nations normally inspires confidence and spurs integration and attempts at integration in other aspects of national life. Regional integration in power systems, especially one that is effective and functional, creates a model that can be utilized in other spheres of national life.
- 2.11.8 Improvement in technical efficiency – Participation in power pool also leads to efficiency in technical capabilities, as the attraction of greater investment leads to more effective and efficient power generation. Given that the power generated by the more efficient producers are utilized more, the entire system becomes better.
- 2.11.9 Improved commercial, legal and regulatory frameworks – It is understandable and expected that countries participating in a power pool have to upgrade to a regionally acceptable framework that makes it easy, not only to generate and supply the power, but also to ensure that bills are paid and commercial disputes are swiftly and judiciously handled. This would normally require countries to adopt a harmonized and much improved legal, regulatory and institutional framework necessary for a transnational commercial and industrial system to work. The common trend has been to establish supranational regional institutions (operators and regulator), that are able to develop standards, impose the rules, coordinate and monitor compliance and mediate or arbitrate commercial disputes.
- 2.11.10 Market Liberalization – Eventhough electricity markets have been originally more vertically-integrated, power pools may lead to the unbundling of operators¹⁰⁰ as the market for the supply of power became more competitive

¹⁰⁰ Unbundling of a vertically-integrated utility company means the breaking up of a single utility company into several companies, often involving the separation of the generation, transmission and distribution functions, which process normally lead to a competitive market as opposed to a state monopoly.

2.12 Mitigation of risks in power pools

Establishment of power pools, like all other national or regional infrastructure projects, are associated with risks. When countries belonging to a RECs seek to combine resources to jointly implement such a project, they need to guard against the following risks factors:

- 2.12.1 Institutional risk – Many regional integration projects in SSA have been “characterized by a plethora of bodies, acronyms and failures.”¹⁰¹ Against this backdrop, there is always the risk of institutional failure that RECs have to guard against. Most scholars and analysts recommend a supranational regional regulatory or quasi-regulatory body to ensure the proper functioning of the integrated regional electricity market, capable of resolving transnational disputes.¹⁰²
- 2.12.2 Legal and regulatory risks – Closely akin to institutional risks is the legal and regulatory risks, which have the potential of making international cooperation difficult or even impossible. Given the impact of colonial legacy on ECOWAS countries, it is important to take note of this risk factor and to mitigate same by ensuring that regional operators and regulators have the independence and supranational prerogative to superintend the market integration process.
- 2.12.3 Infrastructure harmonization risks – Power grids integration require that technical specs and standards are harmonized. Only a regional body, with the appropriate legal framework and financing can ensure that participating countries harmonise their technical standards as per the regional integration requirement.
- 2.12.4 Political risks – The design and implementation of regional power programmes require smooth relations between the participating countries. For multinational power projects to be successful, there must be clear delineation of legal competencies between the national utility authorities, which are often managed by

¹⁰¹ G Mills, ‘Africa and regional integration: what works and why’ (2004) SAIIA JIA, volume 11, issue 2, p 24

¹⁰² M Politt, ‘Evaluating the evidence on electricity reform: lessons for South-East Europe (2007) CCP working paper 08-5, p18

political appointees vis-à-vis the regional operator and regulator, which must remain independent of national and regional political authorities

2.12.5 Environmental risks – All multinational megapower power projects now require environmental impact assessment (EIA). Projects may be stalled or stopped based on protests by activists and/or by local communities. Environmental risks present some of the most daunting challenges for energy-generation projects.

2.13 Conclusion

Chapter two examined the origins of regional integration amongst states. It sought to explain the origins of integration by pointing to the failure of the Westphalian concept of the state and the concomitant failure of multilateralism.¹⁰³ Faced with the failure of balkanization (Westphalian statehood) and multilateralism (voluntary submission), states had to devise a third way – regionalism. Although no common definition of regionalism exists, one common theme is that states do cooperate and integrate out of common economic interests or out of the need to confront common national threats, often within a specific geographic proximity.

The other issues examined in this chapter is the issue of the international legal regime suitable for regionalism to flourish. From an international law perspective, a regional integration scheme may either be intergovernmental or supranational. Most SSA RECs integration schemes are intergovernmental and are considered weak, as many empirical studies of ECOWAS and other similarly-situated SSA RECs have proved incapable of implementing their treaties.¹⁰⁴ Intergovernmentalism is distinct from supranationalism, wherein states agree to cede some of their sovereignty to a regional institution that is tasked with the responsibility of enforcement and compliance. Supranational institutions are noted for their democratic tendencies, adherence to the rule of law, transparency and accountability and is now generally thought that for any

¹⁰³ L Van Langenhove, *Building regions, the regionalization of the world order* (2001) p. 26-27

¹⁰⁴ KO Kofour, 'The institutional transformation of the Economic Community of West African States' (2006) p. 30

ambitious transnational project to work, some element of supranational power must be given to the regional implementor. The success of the EU, with its many supranational institution and multilevel governance structures, has led to a growing interest in such multinational governance.

Chapter two also examined the different schools of thought on regional integration, from the functionalist to the neofunctionalist to the plutocratic school, and lastly to the contemporary developmental regionalism school of thought initially espoused by Sloan.¹⁰⁵ Later advocates of the developmental regionalism include DFIs and IFIs such as ECA¹⁰⁶ and UNCTAD¹⁰⁷ who are now contending that the trade-liberalization linear model of integration with its focus on tariffs, NTBs, and the establishment of FTAs and CUs, while relevant for developed countries, does not work for developing countries, especially for SSA countries that lack a diversified industrial base. This conundrum explains why intra-regional trade in ECOWAS, for example, even 40 years after the establishment of the regional body, has an intra-regional trade in the single digits when other regions like Asia and Europe have intra-regional trade of 50% and 70% respectively.¹⁰⁸ The understanding of this reality has led to call that regional integration in SSA and other developing regions ought to be treated from the perspective of economic development as opposed to being considered a trade issue.

Based on the growing consensus from academics, analysts, and IFIs on the necessity of a new model of integration for developing countries, ECOWAS has sought to chart a new course in its approach to regionalism. Faced with extremely low levels of access to power, unreliable supply and high cost of electricity.¹⁰⁹ ECOWAS has responded to the call for a paradigm shift in its approach to regional integration with the establishment of WAPP to address the critical developmental and trade-related issue of access to power supply in the region, which

¹⁰⁵ John W. Sloan, an American political science professor, thought to have originated the concept of developmental regionalism in 1971 in which he stressed that the linear (trade liberalization) model of regional integration was not suitable for developing countries with little or no productive capacity.

¹⁰⁶ ECA has been regularly exploring this theme and other issues in its series: 'Assessing regional integration in Africa', which is now in its 4th edition

¹⁰⁷ Developmental regionalism is the theme of UNCTAD's most recent work on economic development in Africa (2013), where the research explored the challenges in increasing intra-african trade by unlocking private-sector dynamism

¹⁰⁸ UNCTAD, Economic development in Africa: intra-Africa trade, unlocking private sector dynamism (2013)p. 2

¹⁰⁹ ECOWAS Efficient Energy Policy 2012 p. 13

institutional establishment led to the subsequent establishment of an equally independent and supranational regional market regulator, ERERA.

The establishment of these power infrastructure schemes in ECOWAS shows a shift in regionalism from tariffs, NTBs and other border measures to the institutionalization of development networks and corridors to boost industrialization and the region's competitive edge. Some of the avowed benefits of this move, especially as regard the issue of power supply are: (1) the attraction of FDIs and support by DFIs;¹¹⁰ (2) reduction in electricity costs; (3) increase reliability and sustainability; (4) infrastructural development; and, (5) greater confidence in the beneficial aspects of regional integration, thereby spurring increased cooperation and integration in other areas. But in order for ECOWAS to realize these aforementioned benefits, it must mitigate the risks associated with such multinational ventures by ensuring the appropriate legal and institutional frameworks, the harmonizing of infrastructure and technical specifications and by neutralizing political and environmental risks, which risks, when not adequately mitigated against, could undermine the realization of the goal of the regional enterprise.

¹¹⁰ A World Bank 2013 report: Turning the lights on across Africa, an action agenda for transformation, p 30, estimates its funding for integrated power project to be at least 10 billion USD per annum, the AfDB for its part sponsors at least a dozen power projects across africa, and estimates that at least 11% of its funding goes to power projects, see H. Chiekhrouhou, 'Meeting the challenge of energy access for all Africans, AfDB (2010) p5

CHAPTER THREE

The changing face of regional integration in ECOWAS: a critical analysis of WAPP legal framework

3.1 Introduction

Chapter two provided the conceptual framework for the critique of WAPP. At this stage, it is important to note that linear model of integration has been challenged as a suitable model for SSA countries and the alternative theory of developmental regionalism highlighted. Chapter two also called into question the inefficacy of intergovernmentalist legal framework for integration in contradistinction to supranational legal framework.

This is the conceptual backdrop against which chapter three critiques the WAPP Organization – its legal and institutional frameworks – in order to understand its unique strand. The chapter examines the status of many of ECOWAS previous attempts at regional integration and notes the limited level of achievements. Cardinal to this limited level of success is the orientation of the regional integration schemes and the complementing legal framework. Chapter three does a critical analysis of the legal and institutional frameworks of WAPP against the aforementioned theories, noting the paradigm shift in the region’s thinking on how best to approach regionalism. The chapter also assesses the probability of success of WAPP vis-à-vis other ECOWAS efforts at regional integration, especially as regards its stated objective of affording the West Africa region access to cheap and reliable access to electricity.

3.2 The case for deeper regional integration in West Africa

The earliest known advocacies for regionalism in West Africa did not originate from pressures from technical and administrative networks as the functionalists suggest, nor did it evolve from pressures for transnational interest groups as the neo-functionalists allude, but from visionary African leaders, moved, perhaps by ideology (pan-africanism and anticolonialism), or more

preferably by the desire of emerging West African leaders for rapid economic development of the region. In this league of visionary African leaders, you find the likes of Africanus Beale¹¹¹ of Sierra Leone, Edward Wilmot Blyden of Liberia,¹¹² JB Danquah and Kwame Nkrumah of Ghana,¹¹³ Nnamdi Azikiwe and Adebayo Adedeji of Nigeria.¹¹⁴

The ECA, subsequent to its establishment, seeking to survey the prospects for industrialization in West Africa, also played a very vital role in sponsoring the first set of conferences that created the momentum for economic cooperation in the West African region¹¹⁵

West Africa, as a region, consists of 15 nations with an approximate population of some 300 million people and GDP of US\$ 316 billion,¹¹⁶ the ECOWAS region accounts for 4.5% of the world's population, but only 0.5% of the world's GDP.¹¹⁷ Eight of ECOWAS member-states have population of less than 10 million people, and 11 ECOWAS member-states have a GDP of less than \$5 billion,¹¹⁸ much less than the average annual sales of the top 50 fortune 500 companies. Out of the 15 ECOWAS countries, 11 are considered as LDCs¹¹⁹ by UNCTAD. Thus, states of the region bear all the hallmark of weak and/or failed states that must integrate if they are to make any impact on the global economy. Faced by the relentless onslaught of globalization, the integration of Europe and the Americas, and the rapid industrialization of Asia, West African states are forced to come to terms with some of the cogent arguments for the integration of the individual economies. Some of the core rationale for deeper regional integration include:

¹¹¹ KO Kufour, 'The institutional transformation of the Economic Community of West African states' (2006) p. 20

¹¹² Ibid p. 20

¹¹³ SKB Asante, *The political economy of regionalism in Africa: a decade of the Economic Community of West African States*, (1986), 46-47

¹¹⁴ ibid, p 46, 55

¹¹⁵ According to SKB Asante (1986:50), the ECA sponsored the Lagos conference (1963) on industrial coordination in West Africa; the Niamey conference on economic cooperation in West Africa (1963); the Accra West African conference on Economic Cooperation (1967), where an Article of Association for the establishment of an economic community

¹¹⁶ <http://news.ecowas.int/presseshow>, retrieved April 30, 2014

¹¹⁷ <http://news.ecowas.int/presseshow>, retrieved April 30, 2014

¹¹⁸ Foster and Ranganathan 'ECOWAS infrastructure: a regional perspective' (2011) p. 45

¹¹⁹ Least developed countries is an UNCTAD classification since 1971. Countries so classified have at least 75% of their population living in poverty and are also characterized by structural disequilibria, vulnerability to external shocks, illiteracy and diseases. For detail see www.unctad.org/

- i. Attraction of FDI – The cost of investment in most infrastructure projects (especially in the power sector so vital to industrialization) is so high that it is virtually impossible for individual countries to tackle alone, especially given the reality that other countries could very well benefit from such projects. Accordingly, it makes sense for countries to integrate. For example, Guinea would need to invest around US\$900 million annually over the course of a decade in order to maximize its hydroelectric potential, which coincidentally will have the capacity to service several neighboring countries.¹²⁰ Given the unusually high initial investment cost and given the projects potential benefits for the entire region, it would be most prudent to work on such project jointly.
- ii. Difficult geography – Several West African countries are land-locked. Thus, in order for such countries to survive economically, they would need tremendous amount of cooperation from countries with outlets to the sea. If such countries are members of the same regional bloc, international cooperation is much easier to be achieved.
- iii. Bigger Market – Regional projects means regional market and when properly governed, they have greater returns and significantly lower risks, hence they are more likely to attract funding from IFIs and other private-sector sources.
- iv. Economies of Scale – Regional projects tend to have greater potential for efficiency and sustainability, especially in the power sector, where cheap and clean hydropower can supply electricity in an environmentally sustainable manner.
- v. Domino Effect – It is well known that when countries succeed on a regional initiative, this success normally has a spillover effect, spurring cooperation and integration in other spheres of the economy¹²¹.

¹²⁰ V Foster and R Ranganathan, 'ECOWAS infrastructure: a regional perspective' (2011), p 11

¹²¹ This is one fundamental precept of the functionalist/neofunctionalist school of thought on regional integration. For example, what the world knows today as the EU started off in 1951 by cooperation between France and Germany as the European Coal and Steel Council and has now encapsulated 28 countries across Europe encompassing integration in nearly all facets of community life

3.3 ECOWAS: the West African response to the logic of integration

Given the logic present in the case for regional integration in the West Africa, a treaty was signed on May 28 1975 in Lagos by several countries of the region. Its stated aims and objectives were to “promote cooperation and development in all fields of economic activities, particularly in the fields of industry, telecommunications, energy, agriculture, natural resources, commerce... etc.”¹²² In order to achieve the above-mentioned lofty objectives, ECOWAS set out to “eliminate custom duties between member states, [abolish] quantitative and administrative restrictions on intra-regional trade, abolish obstacles to the free movement of persons, services and capital,” among others.¹²³

ECOWAS revised its treaty in 1993, which revision comes against the backdrop of the signing of treaty for the establishment of the African Economic Community (AEC, 1991), the successor to the defunct OAU and the growing necessity of the need to revise SSA RECs operating on the model of the ‘old regionalism’. The AEC treaty created the AU, scrapped the OAU’s core principle of intergovernmentalism and called for deeper regional integration in RECs, ultimately culminating into a political and economic union of all African states. Thus, the revision of the ECOWAS Treaty took into consideration the ideals of the AEC for political and economic union and well as other revisions to make the body more effective. ECOWAS, as a body, retains nearly the same number of members as the signatories of 1975, except for the addition of Cape Verde in 1976, and the withdrawal of Mauritania in 2000.

ECOWAS has several regional institutions and bodies that are tasked with the attainment of its economic integration objectives. Some of these institutions include: the ECOWAS Commission, ECOWAS Court of Justice, ECOWAS Bank for Investment and Development (EBID), the West Africa Monetary Zone (WAMZ), ECOWAS Parliament, Specialized Commissions, amongst others.

The record of success of regional integration schemes in SSA has been less than inspiring, and ECOWAS is no exception. For example, in West Africa, ECOWAS was created to promote

¹²² ECOWAS 1975 Treaty, art. 2(1)

¹²³ Ibid, art. 2(2)d

greater economic cooperation between states through trade liberalization and through the promotion of intra-regional trade. But decades after, tariffs are still discordant between francophone UEMOA and the mostly Anglophone rest of ECOWAS¹²⁴ and intra-regional trade in ECOWAS is at a low of 9.1%¹²⁵ compared to Europe 72% and Asia 52%¹²⁶. ECOWAS initial target of a unified currency under the WAMZ framework is at least 10 years off the mark,¹²⁷ while not less than 60% of the judgments of the ECJ (the regional court) goes unimplemented.¹²⁸ Sadly, under the revised ECOWAS Treaty, and in line with the vision to create the AEC, ECOWAS was to be the sole REC of the West Africa sub-region.¹²⁹ But to date, not even an MOU or a roadmap exist to enlighten the way to the merger of RECs in West Africa. Accordingly, ECOWAS exists along with UEMOA, CEN-SAD and MRU, all pursuing similar policies and significantly complicating the region's drive deeper regional integration.

ECOWAS does reserve the right to claim some successes though, in the area of free movement of people, as visa requirement amongst member-states have been eliminated. ECOWAS member-states now have a common passport which has been adopted by six of the member-states.¹³⁰ The ECOWAS peacekeeping group (ECOMOG) was very instrumental in bringing peace to conflict-ridden Liberia and Sierra Leone in the 90s. ECOWAS also does have a functioning development bank (EBID) located in Lome Togo, which was originally intended to be a compensation scheme for losers in the trade-liberalization scheme, but which objective has been hamstrung by the non-payment of members' contributions.

Notwithstanding the noted limited successes, the institution is generally seen as another failed SSA RECs, ostensibly because its core objective of economic integration has not been achieved.

¹²⁴ ICTSD 2013, www.ictsd.org/i/news/bridges-africa, retrieved November 19, 2013

¹²⁵ T Dinka and W Kennes, 'Africa's regional integration arrangements: history and challenges' (2007) p. 1

¹²⁶ ECA, 'Assessing regional integration in Africa, toward a continental free trade area' (2012) p. 32

¹²⁷ ECOWAS has set and missed four different deadlines to achieve the ECO – unified common currency for West Africa. Its launch has been rescheduled from 2003 to 2005, 2009, and now to 2015. See online article at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/> retrieved November 18, 2003

¹²⁸ Statement made by the Registrar of the Ecowas Court of Justice at a press conference in Abuja Nigeria on September 25, 2012, <http://www.nanngronline.com/section/africa/60-of-ecowas-court-judgments-not-enforced> retrieved November 19, 2013

¹²⁹ ECOWAS Treaty 1993, art. 2.1

¹³⁰ The six member states adopting the ECOWAS as of March 2013 include, Benin, Guinea, Liberia, the Niger, Nigeria and Senegal, see minutes of AU/ECA Committee of Experts of the Sixth Joint Annual Meeting, March 2013, p 7

Tariffs are still discordant,¹³¹ while the common currency has not been achieved. Intra-regional trade is still negligible and rationalization of RECs has still not being achieved. It is ostensibly against this backdrop that ECOWAS opted to devise WAPP and ERERA on a much limited development objective (power supply) and stronger (supranational) legal framework, departing significantly from its previous liberal inter-governmentalism bent. The table below uses the linear model of integration to analyse ECOWAS progress through the various stages. As can be observed from the analysis, ECOWAS has yet to fully achieve stage one and two, even after nearly 40 years of existence. Many studies even question whether the achievement of FTAs or CET can change the fortunes of SSA RECs in the absence of structural transformation of their economies.¹³²

Table 3.1 Assessment of ECOWAS' performance on regional integraton

	Removal of quota & tariffs	Adoption of Common external tariff	Free movement of Labor and Capital	Common Commercial Policy + development of supranational inst
FTA	P			
Customs Union	X	P		
Common Mkt	X	X	X	
Economic Union	X	X	X	X

Y = Success P = partial success and X = failure

* note that the limited success in the FTA and CU is mostly on account of UEMOA.

3.4 WAPP: an epitome of ECOWAS rethink of regional integraiton

In 1975, when West African countries got together to form ECOWAS, cooperation in energy policy was as much a part of the bargain.¹³³ Similar vision was upheld in the 1993 Treaty. However, it was on December 10, 1999 in Lome Togo that ECOWAS leaders reached the decision to establish WAPP. On July 6, 2006, the legal architecture, the Articles of Agreement

¹³¹ Note that the francophone regional group (UEMOA), consisting of 8 countries, do have a CET and common currency, but similar convergence with other members of ECOWAS has failed to materialize and still does not seem likely in the near futur; eventhough ECOWAS Treaty does speak of it ultimately being the only regional group of West Africa – a vision of RECs rationalization called for under the the Abuja Treaty of 1991.

¹³² UNCTAD, 'Economic development in Africa, intra-african trade, unlocking private sector dynamism (2013), p. 98

¹³³ ECOWAS Treaty (1975), art. 2.2f, 4.1e, and art. 48

(the WAPP Agreement) establishing the entity, was agreed at the 29th Summit of the Authority of ECOWAS Heads of State and Government (HOS). According to the Agreement, WAPP as an institution was established to: operate for the benefit of the bulk electric transmission system and to ensure the reliability of the entire region's power supply.¹³⁴ WAPP is a 14-member country organization covering 26 public and private utilities.

It is important to note that the decision to collaborate under the framework of WAPP was borne out of the economic necessity of the lack of access to cheap and reliable electricity supply for ECOWAS citizens as well as for domestic industries. The lack of access to electricity has repercussions – like the lowering of the standard of living of citizens and increased cost of production for local industries. Ultimately, this makes the products of local industries uncompetitive on the international market. The severity of the lack of power supply as well as its unreliability and the associated high cost relative to other regions of the world has been adequately documented by international development organizations and other researchers. Various studies on the status of power supply in ECOWAS revealed that:

- i. Access to power in the ECOWAS regional bloc ranges from a low of 10% in Niger to a high of 87% in Cape Verde, with average rate of access put at 45%¹³⁵. The ECOWAS' average access rate when compared with about 65% in South Asia and more than 90% in East Asia¹³⁶ shows how far the region has to go in order to catch up with other regions of developing countries.
- ii. Power outages in ECOWAS averages 165 days per year.¹³⁷ This amount to a lack of supply for at least 5.5 months a year, significantly impacting on the living standard of citizens and driving up the cost of doing business.
- iii. Even when power supply is guaranteed and available, with the average historic cost at US\$0.21 per kWh, the cost of power supply in ECOWAS countries is an astronomical

¹³⁴ WAPP Agreement, art. 1 par 2

¹³⁵ ECOWAS Regional Energy Efficiency Policy (2012) p 13

¹³⁶ Eberhard, A. et al, 'Africa's power infrastructure: investment, integration, efficiency' (2011), p 5

¹³⁷ Foster and Ranganathan 'ECOWAS infrastructure: a regional perspective' (2011) p. 45

300% of the average cost in other regions.¹³⁸ Essentially this makes power supply relatively unavailable from a cost perspective and prohibitive a producer perspective.

Given this dismal power supply situation in West Africa, ECOWAS member-countries, drawing insights from the prevailing call for developmental regionalism, and having gotten empirical insights from prior successful implementation of power pools in Europe, USA and lately SADC member-countries, decided to create WAPP and empower it with a robust legal framework as a regional electricity operator. As it seems, creating a regional market for power supply is, so far, seen as the sole best solution for addressing the problem of lack of access to electricity in the ECOWAS region. Obviously, the odds of success are much better than the alternative of addressing the issues as 15 individual nations.

3.5 Critical analysis of WAPP's legal and institutional framework

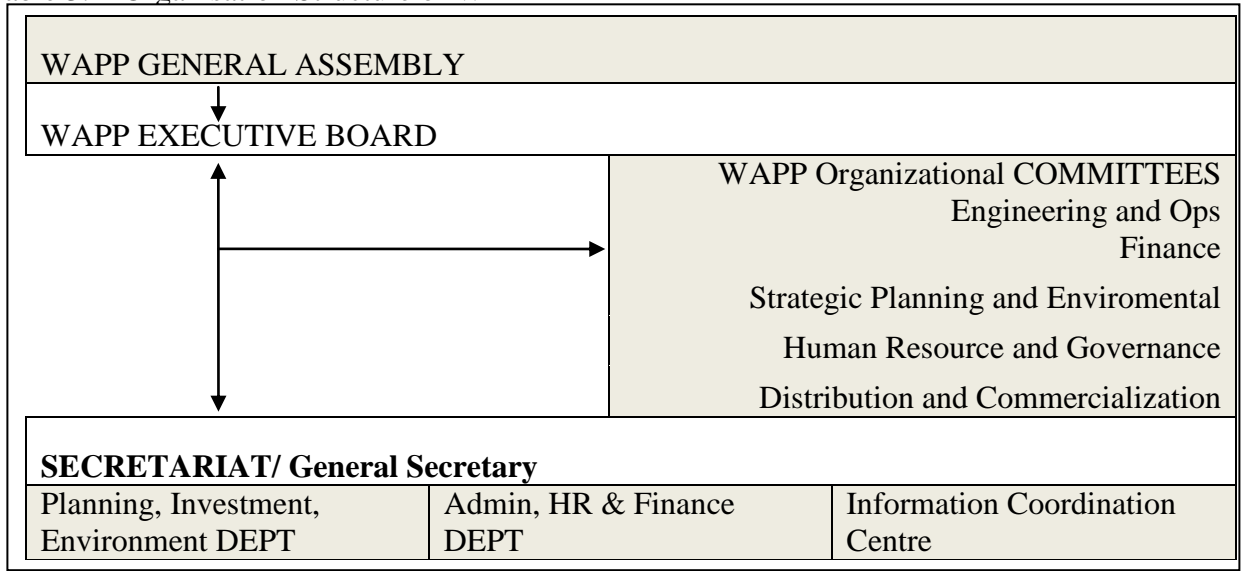
As stated in the previous section, the decision to form WAPP was borne out of economic necessity, as opposed to political considerations, which has been the norm for many regional integration schemes across SSA and in ECOWAS in particular. With a clearly identifiable development challenge, and an imperative for regional integration, ECOWAS sought to create a legal and institutional framework devoid of politics. Against this backdrop, ECOWAS came up with the following articles of in the WAPP agreement as the basis for ensuring the success of the project.

3.5.1 Analysis of WAPP's organizational structure

WAPP is a international public organization within a public-private partnership (PPP) legal framework, comprising of 16 utility companies in West Africa. The WAPP Organization is structured in the following manner, as shown on the next page.

¹³⁸ Ibid p. 45

Table 3.2 Organisation Structure of WAPP



Adapted from WAPP Annual Report 2011-2012, p 9

i. The General Assembly

The General Assembly is the highest decision-making body and has representation of all members – the public and private electric utilities making up WAPP. It, among other things, approves the new applications for membership, elects the members of the Executive Board, examines and adopts the staff and financial regulations, and structures of governance¹³⁹. Decisions are taken by majority vote, but amendment of the WAPP Agreement must be had by a two-third majority decision. Membership is by application, and has minimum criteria and not on the basis of the utilities being located in the ECOWAS region¹⁴⁰

ii. The Executive Board

The Executive Board manages, controls and directs the general business of WAPP. These include directing the activities of all Organisational Committees and authorizing all major contracts and finance and debt instruments. The Board comprises of seven members, the

¹³⁹ WAPP Articles of Agreement (WAPP Agreement), art 5 a-g

¹⁴⁰ WAPP Agreement, art. 9.2

Secretary General (SG) of WAPP and six members from transmission-owning or transmission-using members, which members are a mix of public and private utilities.

The Organisational Committees provide technical expertise for the Board and have specific tasks such as (a) engineering and operation, (b) strategic planning, and (c) finance and human resources.¹⁴¹

iii. The WAPP General Secretariat

The Secretariat is the administrative arm of the organization and is responsible for administering the daily affairs of WAPP.

iv. WAPP Information and Coordination Center

The WAPP ICC, operates under the supervision of the Secretariat and facilitates the dissemination of information amongst the members.

3.5.2 Analysis of WAPP's membership criteria

Membership in WAPP is based on application¹⁴² and even though it is voluntary, there are minimal standards¹⁴³ that must be met by the applicant: (a) applicant must own/operate a 20MW (or more) power-generating facility and must distribute and/or retail power; (b) must own/operate "major transmission facilities in the region;" if such facilities are physically interconnected and have an impact on coordination of system operations in the West Africa region. It is important to note here that because WAPP is based on contract, unlike other regional organizations, membership may be terminated for failure to comply with the

¹⁴¹ Ibid art. 6.1

¹⁴² WAPP Agreement, art. 9.1

¹⁴³ Ibid, art. 9.2

contractual terms.¹⁴⁴ The setting up of conditions for entry and contract for continued membership is a novelty and cardinal to compliance, as participation in WAPP is not, per se, on the basis of geographical location and is certainly not a right for any country.

Such strong legal clause is missing, for example, in the ECOWAS Treaties of 1975 and 1993, in which, for instance, the maximum sanction for non-compliance is “suspension from community activities”¹⁴⁵

3.5.3 Analysis of decision-making in WAPP

Unlike other regional institutions with limited mandate to negotiate and decide substantive matters with third parties, decision-making in WAPP is vested in the Executive Board. The authority is granted to the Executive Board of WAPP to undertake initiative on behalf of and in the best interest of the organization.¹⁴⁶ This provision is one of the salient features of the Agreement as it empowers WAPP and underscores the institution’s success in fundraising and project implementation to date. “WAPP Executive Board plays an active role in promoting investments in new generation and transmission facilities, while SAPP, for example, has focused on developing short-term trading tools only for its current existing capacity.¹⁴⁷ Accordingly, working with ECOWAS Master Plan, which was recently updated in 2012, WAPP Executive Board was able to secure funding from multilateral DFIs for a number of its “priority projects”.¹⁴⁸

¹⁴⁴ Ibid, art. 10

¹⁴⁵ ECOWAS Treaty 1993, art. 77, Note that sanction against a non-conforming member is completely omitted from the 1975 Treaty

¹⁴⁶ WAPP Agreement, art. 5 chapeau clause

¹⁴⁷ Castalia Strategic Advisors, International experience with cross border power trading, (2009) p15, 54

¹⁴⁸ For example, the WAPP Annual Report 2012 (p 10-28), lists several development finance institutions that have provided soft loans and grants to WAPP in excess of US\$1 billion. Some of the funders include, WBF, AfD, AdDB, EU, EIB, KfW, which funds provision enable WAPP to new power generation capacities across the region.

3.5.4 Analysis of WAPP's dispute settlement mechanism

The WAPP agreement does provide for a dispute settlement mechanism¹⁴⁹ ranging from; (a) advisory only; (b) mediation only; (c) 'non-binding' dispute resolution proceeding; and (d) 'binding' dispute resolution proceedings. The entire process takes 90 days from the date of establishment of the panel. Parties to the dispute are obliged to split the cost of the proceedings. The Agreement is silent on whether decisions of the panel are appealable to ERERA, UEMOA or the ECOWAS court.

3.6 Analysis of WAPP's regulatory interface with other regional institutions

The WAPP Agreement is not clear on the regulatory interface with other institutions of ECOWAS or even regulatory bodies of member states. For example, ECOWAS has a regional court (ECJ) and ERERA (as a quasi-judicial institution)¹⁵⁰ and equally important UEMOA has a competition commission and the Common Court of Justice and Arbitration of OHADA (CCJA). The Agreement does state, however, that WAPP agreement does not "diminish existing regulatory jurisdiction and authority of the agencies of ECOWAS member-states" and/or regulatory bodies. Hence, each ECOWAS member-state expressly reserves the right to exercise all lawful means available to protect its existing jurisdiction and authority.¹⁵¹ Clearly, notwithstanding these provisions, there exist a legal quandary, in so far as there exist potential overlapping regulatory jurisdictions. This status quo necessitates the need for a legal understanding agreement on the issue of regulatory interface.

3.7 Analysis of WAPP's fundraising leverage

The ability of the WAPP's Executive Board to fundraise independently of members' approval or participation is one cardinal area in which WAPP exhibits significant supranational power. WAPP's Executive Board's power to initiate funding on behalf of the organization come

¹⁴⁹ WAPP Agreement, art. 17-21

¹⁵⁰ ERERA is discussed in full in chapter 4

¹⁵¹ WAPP Agreement, art. 23.1 and 23.2

explicitly from article 5.1c of the Agreement. And it is a power that WAPP has used effectively for the benefit of the organization. Based on this mandate, WAPP has engaged a myriad of DFIs and IFIs to mobilize funding for its activities which is couched in stages.

Currently, WAPP has at least 22 projects planned, out of which it has secured funding for nine projects, which are currently under implementation. The Table (3.2) below shows the current status of WAPP priority projects, the sources of funding and the estimated completion dates. Note that the nature of the funding, from development financiers as well as from regional PPPs. All projects are covered by multi-country agreements as well as agreements between the utilities involved in the specific project.

Table 3.3 Status of Implementation of WAPP priority projects¹⁵²

Priority Projects Under Implementation	Financiers and Sponsors	Estimated Value of the Project	Estimated Commissioning Date
330 kV Volta (Ghana) – Lome ‘C’ (Togo) – Sakété (Benin) Interconnection Project	AfDB, KfW, WB and BOAD	US\$105 million.	2015.
225 kV Bolgatanga (Ghana) – Ouagadougou (Burkina Faso) Interconnection Project	WB, AfDB and EIB	US\$105 million	2015
330 kV Aboadze (Ghana) – Prestea (Ghana) – Kumasi (Ghana) – Bolgatanga (Ghana) Transmission Line Project	AFD, (GRIDCo).	€141 million	by 2017.
161 kV Tumu (Ghana) – Han (Ghana) – Wa (Ghana) Transmission Line Project:	GridCo	US\$75 million	2014.
60 MW Felou Hydropower Facility	World Bank and the EIB	US\$236 million	Completed

¹⁵² Table adapted based on info from the WAPP Annual Report, November 2011 – October 2012, p. 11-23

Priority Projects Under Implementation	Financiers and Sponsors	Estimated Value of the Project	Estimated Commissioning Date
225 kV Côte d'Ivoire – Liberia – Sierra Leone – Guinea Interconnection Project	secured from the AfDB, WB, EIB and KfW	€329 million	2017
Côte d'Ivoire – Liberia (1st Energy Facility)	EU, LEC, SE (CI-Energies),	€9.6 million	2014
Ghana – Togo South (2nd Energy Facility):	EU, ECG, CEB, CEET	€2.3 million	December 2014.
Benin – Togo North (2nd Energy Facility):	EU, CEB and CEET	€2.1 million	December 2014.

- Table based on info the WAPP Annual Report, November 2011 – October 2012, p. 11-23

3.8 Conclusion

When countries decide to pursue regional integration, they have the option of implementation via intergovernmentalism or by the creation of supranational institutions. Nations may also pursue a trade-liberalization objective (such as FTAs, CUs, CMAs) or they can pursue a development-oriented or regional security objective. ECOWAS, since its founding, has particularly favored the pursuit of tariff-reduction trade-liberalization objectives within an inter-governmental legal framework. The prevailing view among scholars and practitioners is that inter-governmental institutions are much weaker and inefficient as opposed to supranational institutions and that the region's focus on tariffs, NTBs and FTAs (border-related trade issues), notwithstanding their inherent merit, are not particularly suited for developing countries with little or no productive capacity. There is also the view that the trade-liberalization model, associated with EU, in particular, has not worked for SSA RECs, hence the need for ECOWAS

and other SSA RECs to develop their own model of regional integration. Ostensibly, this is where the paradigm shift to developmental regionalism in ECOWAS is being heralded as a wise alternative.

Although the ECOWAS Treaty was remodeled in 1993, the legal approach remains the same – intergovernmentalism – even against the admonition of its Committee of Eminent Persons (CEP), which had advised prior to the revision that ECOWAS institutions should be endowed with more supranational powers as a way of ensuring implementation and compliance. More recently, however, ECOWAS, faced with failure and mediocrity in many of its institutions, has opted to depart from its norm of inter-governmentalism to supranationality in the formation of WAPP. ECOWAS has also realized that need to pursue developmental objectives, such as provision of cheap and reliable power supply and that strong regional supranational institutions are better placed to achieved such objectives. Ostensibly, the realization comes against the backdrop of many of the region’s failed integration schemes.

With the benefit of hindsight, and the constant reality of little or no progress towards many of the region’s trade-related economic objectives, ECOWAS decision to rethink its approach to regional integration – to pursue clear development objectives and to endow its institutions with supranational powers to ensure that these institutions are strong enough to meet their objectives led to the creation of WAPP.

The WAPP project, having being decided in 1999 and operationalized in 2006, is ECOWAS first PPP development-oriented project. This time instead of politicians calling the “shots”, the project was a combination of 16 utilities companies some of whom are private. The objective of the project was purely developmental: resolve the lack of access to power, the high cost of power, and the unreliability of power supply. In order to get this done ECOWAS granted WAPP Executive Board with extensive powers to engage with DFIs, IFIs and other private actors in order to promote increased power generation in the region. Exercising this power, WAPP was able to secure at least US\$1.1 billion¹⁵³ in project finance in 10 of the 15 ECOWAS countries. A

¹⁵³ Author’s calculation based on summary of report from www.ecowapp.org/

success worth noting since the lack of funding had crippled many regional schemes in ECOWAS.

Moreover, membership in WAPP is not automatic, by virtue of being located in the West Africa region, as is the case with other regional schemes. There is a membership criteria¹⁵⁴ for utilities wanting to join and continued membership is based adherence to the rules. Membership may be terminated for non-adherence to the rules.¹⁵⁵

The governance of WAPP is done by the Executive Board and this Board is not filled by political appointments, but by election,¹⁵⁶ with proviso that said members must be CEO of utilities. The Board is assisted in their functions by technical committees and a professional secretariat. Effectively, WAPP operates as a corporation, buttressed by a legal framework that made this possible. However, there are still uncertainties as to how the regulatory interface will work with ERERA and other institutions of ECOWAS with overlapping jurisdictions (especially in the absence of MOUs). But even as a work-in-progress it is a stunning success for a RECs that has only known failure and mediocrity.

¹⁵⁴ WAPP, Agreement, art. 2.3 and 9.1

¹⁵⁵ WAPP Agreement, art. 10

¹⁵⁶ WAPP Agreement, art. 5.1

CHAPTER FOUR

The move toward regulatory independence and supranationality in ECOWAS: a critical analysis of ERETA legal framework

4.1 Introduction

In the previous chapter the rationale and actual institutionalization of a regional power pool was examined and explained. The chapter noted a paradigm shift from liberal intergovernmentalism and trade-liberalization focus to supranational institutions with a development focus, which shift in paradigm led to the creation of WAPP and the consequent establishment of a regional electricity market.

Chapter four examines the economic necessity for the creation of ERETA against the backdrop of the prior establishment of WAPP. The move by ECOWAS to create a regional electricity market regulator, as one of those landmark special institutions of ECOWAS, demonstrates the regional body's willingness to craft new legal and institutional frameworks that departs from the archetypical regional institution in SSA – the types that have not worked. Accordingly, as this chapter will explore, ERETA legal framework shows a regional body that is shifting towards the creation of regional institution that are more independent and supranational. The core legal theory for analysis in this chapter is the principle of independent regulator. The independent regulator, under administrative and constitutional law, must be capable of unbiased regulation and be free from political domination, both from national authorities and from regional political institutions.

4.2 The empirical imperative for a supranational regional electricity market regulator in ECOWAS

The path to the establishment of ERETA can be traced to the decision of ECOWAS Heads of States [HOS] to establish WAPP in 1999. While it cannot be inferred that the decision may have

been taken jointly, the decision to establish ERERA in 2007 was taken barely one year after the WAPP Agreement was finalized (2006), signaling the imperative that establishment of a regional electricity market necessitates the parallel establishment of regional market regulator. ECOWAS HOS reasoned, rightly, that in an era of the unbundling of electricity markets worldwide or at least the inclusion of private-sector participants in the sector, even in cases where the market has not been unbundled, the creation of a market regulator was an utmost necessity. This was now the status quo, whether at the national or at the regional level.

Historically, cross-border interconnections have always being accompanied by independent and often supranational or at least transnational regulators. Examples include the Federal Energy Regulatory Commission (FERC) of the USA, National Regulatory Authorities (NRA) in Europe, the Comision Regional del Interconexion Electrica (CRIE) in Central America and Regional Electricity Regulators' Association (RERA) in Southern Africa, which region, coincidentally, established the first power pool in Africa, SAPP in 1995. But the creation of ERERA by ECOWAS cannot be comprehensively explained by historical precedence alone. Functionally, power pools require the physical integration of electricity grids. However, in order for such multi-state infrastructure project to function efficiently, the regional cooperation must go beyond the physical linkages to create regulatory frameworks and procedures to ensure the necessary efficiency gains from the aforesaid physical interconnection.¹⁵⁷ Note that there are many practical reasons for the creation of the regional market regulator, ERERA. Any viable and effective regional regulator for this new West African regional electricity market ostensibly:

- i. creates the incentive for private-sector participation;
- ii. reduces transaction cost via the harmonization of policies and standards;
- iii. monitors and enforces the rules of the regional electricity market, resolving dispute and administering sanctions where necessary;
- iv. ensures consumer protection in a market still dominated by state monopolies;
- v. ensures predictibility and stability for investors but also prevent economic opportunism.

¹⁵⁷ ADB & PPIA, 'Cross-border infrastructure ; a toolkit', (2007) p. 10

ECOWAS, as a latecomer in the establishment of power pools, with the benefits of observing previous power pools regulatory arrangements, was in a better position to create a more effective regional regulator. Accordingly, ECOWAS, did accord ERECA with sufficient independence and supranational powers to render it effective in its regional regulatory role. Supranational institutional powers are a necessity for any ambitious regional integration scheme.¹⁵⁸ The extent of the powers of ERECA shall be fully analyzed in the next section, but suffice it so say that in comparison to other schemes, the level of integration in ERECA is far superior to the regulatory frameworks observed in regulators in other regional power markets, and as a consequence thereof, many researchers and analysts have given ERECA a much better odds at achieving its objectives¹⁵⁹.

4.3 Critical analysis of ERECA's legal and institutional framework

Essential to the establishment of an effective regional regulator, capable of achieving its aims and objectives, is the priori establishment of a sound legal framework. There are benchmarks enabling legal clauses that are indicative of an organization that is significantly empowered to implement its mission. Critical among these necessary legal criteria are the key attributes of independence and enforcement capabilities. The analysis of ERECA legal framework will accordingly be made against these aforementioned benchmarks.

¹⁵⁸ E. Best, 'Supranational Institutions and regional integration' (2005) *presentation at ECLAC/UK workshop, Lima, Peru* p.36

¹⁵⁹ For example Eberhard et al (2011) notes in "Africa power infrastructure, investment, integration and efficiency" that WAPP/EREC framework is more attuned to promoting a joint enterprise (capable of attracting private investment) as opposed to SADC/RERA, which seems more concerned with protecting the interests of its respective national utilities. Similar observation was made by Castalia Strategic Advisors in "International Experience with cross-border trading" (2009), when it asserted that ERECA is much more effective institution for regulation as opposed to SADC/RERA which regulatory framework is weak and does not engender investor confidence. Reinstein et al (2011) in "Regulating power integration, structural and regulatory challenges" also lamented that the "limited capacity and resources in CRIE, the regional regulator, make it vulnerable to national interests" and that CRIE requires urgent institutional strengthening".

4.3.1 Analysis of the institutional independence of ERERA

There are two types of independence that an institution with regulatory powers must possess: institutional independence and functional independence.¹⁶⁰ A regional body possessed with institutional independence should be capable of running its internal affairs. Practically, this translates into the entity being able to do all of the following without substantial dependence on external higher authorities:

- i. Operate separately and distinctly as a legal entity, not subscribing to political authorities;
- ii. Choose its managers and other staff based on merit only;
- iii. Finance its operations with little or no budgetary constraints, especially one that would require the discretion of higher political authorities

The next level of independence is for the regional institution to be possessed with functional independence. At this level, the institution must be able to set and implement policies without the need for approval from higher political authorities.

Going now to the legal text of ERERA, and treating the Establishment Act¹⁶¹ and its subsequent Admendment¹⁶² as one document, for comprehensive analytical purposes, one will note the following legal construct which establishes and reinforces the independence of ERERA.

Decision-making and organizational structure of ERERA – ERERA’s highest “decision making and managerial body” is the Regulatory Council,¹⁶³ and this body is seised with the power to implement the mandate of ERERA including recruiting management and other technical staffs. Given the critical role the Regulatory Council has to play, it is interesting to note what legal

¹⁶⁰ L. Saskia & A. Attow, ‘Independent supervisory authorities: a fragile concept’ LIEI Journal, Vol 39(4), 2012, p 428-440

¹⁶¹ Adopted by the 59th ordinary session of the ECOWAS Council of Ministers in Lome Togo, Resolution referred to as Regulation C/REG.27/12/07, herein called the Establishment Act

¹⁶² Adopted by the 61st ordinary session of the ECOWAS Council of Ministers, Ouagadougou, Burkina Faso, Resolution referred to as Regulation C/REG.24/11/08, herein called the Admendment

¹⁶³ Establishmetn Act, art. 2

framework there is to ensure its functional independence from both national governments and from regional political structures.

This independence shows up in how the body is constituted. Shortlisting of the Regulatory Council candidates shall be done with the support of an “independent international recruitment consultancy” before the involvement of ECOWAS management succession committee, which shall in turn be assisted by Council of Ministers (Energy) in the final selection process, article 5ii.¹⁶⁴ This provision allows for competence to take precedence over political affiliation in the management of the REC regulatory body. Note also that appointment criteria shall be in accordance with the provisions of the ECOWAS staff regulations.¹⁶⁵ This provision has important implications for financial management as the body cannot go about arbitrarily setting its own salary structure, allowances and other emoluments.¹⁶⁶ The decision also sets a template managerial framework from which ERERA executives may not arbitrarily deviate from. Regulatory Council members are also to serve on a full-time basis, which makes decision-making easier as opposed to intermittent meetings by national representatives, as is the case with other regional organizations, such as the case in with RERA of SADC.

It is important to note that ECOWAS has taken care to ensure that ERERA does not suffer from the lack of funding, which unfortunate scenario has crippled many RECs into inaction. Such provision for financial independence and accountability can be found in the Establishment Act and provides for the levying of fees on utilities operating within the system.¹⁶⁷ Other extraordinary sources of financing include loans, subsidies and grants, notwithstanding the fact that initial funding shall be provided by the ECOWAS Commission.¹⁶⁸

Another crucial provision is the one that ensures that Regulatory Council members’ tenure “shall not be interrupted before its expiry except on grounds of negligence, serious misconduct and/or conviction for criminal offense;¹⁶⁹ in which case, the decision shall be taken by ECOWAS Council of Ministers, based on the recommendation of the Meeting of Energy

¹⁶⁴ The Admentment, art. 5(ii)

¹⁶⁵ Ibid, art. 54ii

¹⁶⁶ Ibid 12.2

¹⁶⁷ Establishment Act, art. 32-35

¹⁶⁸ Ibid, art. 17 – 20

¹⁶⁹ Ibid, art. 6

Ministers of the REC.¹⁷⁰ Ostensibly, this provision creates security of tenure and incentivises independent decision-making.

Critical issues to highlight among the many functions of ERETA include the power to:¹⁷¹

- i. oversee conformity of national rules and regulations with the Community law and inform ECOWAS of deviation of member states from community rules;
- ii. supervise the drafting and approve the rules for the functioning of the regional market;
- iii. ensure proper functioning of the regional market by enforcing compliance to technical and commercial rules;
- iv. prevent and sanction defaulters of anti-competitive practices, abuse of dominant market position and all other violations of market operation rules or license or authorization contracts and possibly initiate a process to enforce compliance in the case of non-execution of a sanction;
- v. approve tariff proposals emanating from operators;
- vi. ensure power pooling in the region operates within a competitive framework;
- vii. ensure the application of non-discriminatory rules for power pooling and dispute resolution; and
- viii. ensure that the regional market participants adhere to the principles of functional independence of operators, transparency in regulation, and consistency and predictability in regulation.

4.3.2 Compliance and sanctions under the ERETA framework

One of the often cited reasons for the failure of many African RECs to achieve their objectives is the issue of weak compliance and sanctions regimes¹⁷². Even though ERETA is still in its

¹⁷⁰ Establishment Act, art. 6

¹⁷¹ Establishment Act, art. 17 – 20

nascent stage, the wording of its enforcement and compliance regime and its given ability to sanction violators can provide an inkling of its ability to rise to the occasion, when the circumstance demands.

Like most African RECs, ERERA does have the standard provisions for complaints and investigations, dispute resolution, and sanctions which include fines, suspension or revocation of operating license of the operator.¹⁷³ In providing for these, the institution may appear like any other African RECs, but its legal provisions on enforcement shows a deviation from the standard inter-governmentalism in earlier RECs to a more supranational legal paradigm, much similar to the EU principle of direct effect.¹⁷⁴ The actual texts on enforcement states as follows:

Except in the case of an appeal before the ECOWAS Court of Justice, and in accordance with article 31 of this Regulation, decisions of ERERA shall be binding. The decision of ERERA shall be enforceable and binding on the parties unless stayed by or set aside by the ECOWAS Court of Justice.

The Signatory State shall ensure the execution of decision taken by ERERA. Where a State or any of its component parts fails or refuses to enforce the decision taken, ERERA shall refer the matter to the ECOWAS Commission which shall ensure the application of the provision of the ECOWAS Treaty relating to sanctions applicable in the case of non respect of treaties.

The provision indicates a strong proof of willpower by ECOWAS to empower its more recent institutions like ERERA and WAPP to be able to make independent decisions and enforce them for the greater good of the region. It is often noted that SSA RECs copied many of the features and names of the EU, but failed to endow these institutions with similar powers as their EU

¹⁷² D Motsamai & M. Qobo, 'Regionalism in Africa, development crises and the growing influence of emerging powers', in L Fioramonti, (ed), *Regions and crises, new challenges for contemporary regionalism* (2012) p. 151

¹⁷³ Establishment Act, art. 26-30

¹⁷⁴ The principle of direct effect under European law grants individual and other party litigants the right to invoke EU law before local/national courts, independent of whether a domestic enabling legislation exist. This principle ensures the effectiveness of EU law within the territorial jurisdiction of member states. This legal principle is one of the cardinal legal underpinnings of supranationality in the EU and helps cement the high level of compliance for regional legislation, directives and policies.

counterparts.¹⁷⁵ ERERA and WAPP as seen from their legal framework, mark the paradigm shift.

This, perhaps, is ECOWAS response to a reality that can no longer be ignored. As suggested earlier, ERERA is still in its embryonic stages, so its difficult to predict how real-life circumstances will play out, but suffice it to say that so far it has got a more appropriate legal framework to tackle future eventualities, which ultimately will erupt, given the nature of multinational ventures.

4.4 Assessing ERERA's role in ECOWAS spaghetti bowl of regional institutions

The previous section outlined the legal and institutional framework and its many provisions that institutionalized independence and supranationality and note that ERERA is more likely to succeed as a specialized regional institution, as opposed to previous generations of ECOWAS institutions.¹⁷⁶ While ERERA does not have much of a bottleneck, arising from its legal and institutional frameworks, it does seem that in its relational aspects with other ECOWAS and UEMOA institutions, there is potential for problems bordering on overlapping jurisdictions and the opportunity for forum-shopping by aggrieved market participants. And on the point of overlapping jurisdictions, ERERA does have a lot to fret about – regional institutions that potentially have the legal standing to delve into matter that would otherwise be the exclusive domain of ERERA. The ECA has put a lot of effort in getting SSA to “rationalize” their RECs, a diplomatic way of suggesting reduction. But to date, such efforts have not gained traction, as SSA is known to be the home of at least 17 RECs, out of which number the AU recognises only eight.¹⁷⁷

¹⁷⁵ C Koitzch, ‘Institutional similarities between regional organizations: an analysis between ECOWAS and the Arab League’, in T. Borzel et al (eds), *Roads to regionalism: genesis, design and effects of regional organisation*, 2012, p 128

¹⁷⁶ For example WAMZ which has continuously push back its role out of the regional currency, the ECO

¹⁷⁷ The eight REC officially recognized by the ECA & AU are CEN-SAD, COMESA, EAC, ECCAS, IGADD, UMA SADC, but at least 9 others are known to exist and are either fully or partially functioning, thus complicating the REC landscape; hence, the call rationalization of RECs

An ECOWAS study¹⁷⁸ lists the following institutions as having real or potential legal and regulatory interfaces, which must be addressed if ERERA is not to get enmeshed in a ‘turf war’ with other similarly-situated regulatory bodies. Also complicating the matter further is the fact that some of the entities have similar legal supremacy clauses, and therein lies potential for conflict, if and when they render a decision that ERERA does not agree with. Some of the noted institutions include:

- i. UEMOA Institutions – UEMOA, the 8-member Francophone West African group was created in 1994. UEMOA members share a common currency (FCFA), a common central bank and have instituted a CET. All these eight countries are also members of ECOWAS. Their goals and objectives are very similar to ECOWAS. Even though the ECOWAS 1993 Treaty posits that, ultimately, ECOWAS is to be the sole REC in West Africa, there is yet to be movement toward merger. In terms of regional economic integration, the Francophone West African bloc seems well ahead of ECOWAS on trade liberalization and monetary integration.

Their common vision means that these two institutions have adopted laws or established institutions with the same area of authority. UEMOA institutions have the legal authority to delve into cross-border disputes and anti-trust issues. These institutions include UEMOA Commission and UEMOA Court of Justice, whose decisions are final and binding on members, and who may, on anti-trust ground, delve into matters that are also cognizable before ERERA.

- ii. OHADA Common Court of Justice and Arbitration¹⁷⁹ members are committed to harmonizing the business and corporate laws within its member-states through the design and adoption of common rules, implementation of appropriate judiciary proceedings and encouragement of resort to arbitration for the resolution of disputes. The rules are also supranational and, as a consequence thereof, are immediately applicable in the member states, and supersedes the internal rules of these member-

¹⁷⁸ Cabinet, Serres and Associates, Diagnostic report on the institutional and regulatory interfaces of ERERA (2008)

¹⁷⁹ L’Organisation pour l’Harmonisation du Droit des Affaires en Afrique (OHADA) unites members of the francophone zone which are Benin, Burkina Faso, Cote D’Ivoire, Guinea, Guinea Bissau, Mali, Niger, Senegal and Togo which are also all ECOWAS members.

states. Given this body oversight over business, investment and competition issues affecting its members, such legal prerogative could potentially overlap with ERERA jurisdiction, thereby necessitating the urgency for clarity of jurisdiction.

- iii. “Organisation pour la Mise en Valeur du Fleuve Sénégal” (OMVS) - The OMVS brings together the four riverside countries of River Senegal (Guinea, Mali, Mauritania and Senegal) for the joint exploitation of the resources of the river and its valley. In the energy component of its activities, OMVS has identified close to ten sites for dams, representing an evaluated hydroelectric potential of more than 4,000 gwh/year¹⁸⁰. The Manantali dam is the first stage of this hydroelectric generation complex, with an installed capacity of 200 MW (operational since 2000) and a network of 1500km of transmission lines interconnecting three Member States (Mali, Mauritania and Senegal)¹⁸¹
- iv. Organisation pour la Mise en Valeur du Fleuve Gambie (OMVG)¹⁸² – This sub-regional organisation, brings together “The Gambia, Guinea, Guinea- Bissau and Senegal, and is responsible for the integrated development programmes of its four country members towards the rational and harmonious utilisation of the joint resources of the Rivers Gambia, Kayanga-Geba and Koliba-Corubal. It has almost the same constitutive legislation and institutional architecture as OMVS”¹⁸³. OMVG is presently in the process of implementing an energy project on the construction of two hydroelectric power stations totalling a nominal capacity of 225 MW (Sambagalou and Kaleta) and a high voltage transmission network (225kV) of approximately 1723km in length, which will interconnect the power systems of the four Member States¹⁸⁴.

¹⁸⁰ Cabinet, Serres and Associates, Diagnostic report on the institutional and regulatory interfaces of ERERA, 2008, p16

¹⁸¹ Ibid p 16

¹⁸² *OMVG, L’Organisation pour la Mise en Valeur du Fleuve Gambie*

¹⁸³ Cabinet (n 180 above) p 16

¹⁸⁴ Cabinet, Serres and Associates, Diagnostic report on the institutional and regulatory interfaces of ERERA, 2008, p 16

What is obviously clear from the above-cited instances is that there is an opportunity for forum-shopping and jurisdictional conflicts. Given these real and potential flashpoints, ERERA needs to resolve this legal uncertainty and potential roadblock to the exercise of its community-wide jurisdiction, preferably by entering into MOUs with these institutions for clarity on jurisdictional issues and other areas for international cooperation. This is now the reasonable way out, since the other potential way out – the assimilation of other West African RECs into ECOWAS – seems to be politically inachievable in the short to medium term.

4.5 Conclusion

This chapter analyzed the legal framework of ERERA. The establishment of ERERA was shown to be an economic necessity, given that, today, it is widely accepted that markets need regulation in order to be efficient. Without market regulators, there is a potential for abuse by the dominant actors and other forms of destructive competition.

The fundamental theory of a market regulator posits that the independent regulator resolves a string of market-related problems, such as the “credibility hypothesis” problem and the asymmetric-information problem. Thus, the concept of an independent market regulator posits that with an independent regulator, the political authorities demonstrate commitment to objectivity, professionalism and fairplay. The concept also posits that the independent regulator functions as a ‘quasi-judicial’ structure that applies transparent administrative procedures to establish prices, review investment and financing plans, enforce the rules as well as rectify market imperfections.

In the case of ERERA, the creation of WAPP as the operator of the West African interconnection, and the creation of a regional electricity market, necessitated the creation of a regional market regulator. It is one thing to interconnect physical structures like power grid, but in order for these structures to work properly, they must be accompanied by strong and effective regulatory frameworks, capable of transcending borders, harmonizing operational standards, monitoring compliance and enforcing the rules where necessary.

Accordingly, as noted in this chapter, ECOWAS did accord ERERA the necessary independence and supranational powers to ensure the success of its regulatory duties, which superior legal framework has been duly noted by industry analysts as being superior other similarly-situated regional regulators like RERA of SADC and CRIE of Central America.

The points of reference for ERERA legal analysis are its two constitutive documents: (1) the Establishment Act and the Supplemental Act, which two documents established ERERA as a specialized institution of ECOWAS, and enshrined its legal framework. For example, ECOWAS, in order to ensure that ERERA remains a technically-competent body, free from political influence, limited political actors in the nomination of the executives of the Regulatory Council, preferring that Regulatory Council candidates be shortlisted by an independent management consultant before consideration by the Council of Minister (Energy).¹⁸⁵ Another attempt by ECOWAS to institutionalized independence is to provide for budgetary independence by levying fees on operators within the system, which fees are used to fund the operations of ERERA.¹⁸⁶

In order to ensure that ERERA is legally competent to enforce rules across borders and rein in non-compliant members, irrespective of national borders, ECOWAS gave ERERA the power to initiate investigations, as well as receive complaints from institutions and individuals. This is also a novelty, as many SSA regional institutions are inaccessible to individuals. Under the Establishment Act, ERERA, in addition to its normal powers, to investigate, regulate, and resolve dispute, also has the power to sanction (which decision is binding across the ECOWAS region,¹⁸⁷ unless otherwise stayed or set aside by the ECJ.

Notwithstanding its strong legal framework, the multiplicity of RECs across the region is equally a problem for ERERA, as it creates many opportunities for forum-shopping, as well as the potential for overlapping jurisdictions, which must be resolved if ERERA is to exercise effective control over the regional electricity market, in line with its regional mandate.

¹⁸⁵ The Admendment, art. 5ii

¹⁸⁶ Establishment Act, art 32-35

¹⁸⁷ Ibid, art. 28

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Summary of findings

The primary objective of this research is to investigate and identify an appropriate model for regional integration in SSA. This is against the backdrop of the failure of many RECs across the continent. Toward this end, the ECOWAS regional power infrastructure schemes of WAPP and ERERE were used as case study in order to understand the aspects of regionalism that failed for ECOWAS and also to understand the aspects of regionalism in SSA that have the potential to reset the paradigm and succeed where many other such schemes have failed. Specific emphasis was placed on the legal and institutional frameworks of these regional schemes, as well as the object of the schemes, whether the focus was international trade or development. However, in making the analysis, extensive efforts were deployed to understand the region's precarious position in international trade, the causes for such position, which model of regional integration works for SSA and which does not work and why? Based on this analytical backdrop, the researcher was able to zero on the following findings:

- i. SSA participation in international trade is low relative to its population – Africa accounts for at least 14% of the world's people, but its contribution to international trade and investment flows is no more than 3-4% of the global total. And this is an utterly unacceptable state of affairs, after at least 50 plus years of multiplicity of attempts at regional economic integration.
- ii. Intra-African trade in SSA is low relative to other regions of the world – The average intra-African trade level is a low 11% of total external trade, which pales in comparison to the majority of other regions of the world where 50% or more is the norm.

- iii. ECOWAS has been seen as a failure like many other SSA RECs and desperately in need of a new model. ECOWAS was formed to foster economic integration in West Africa with some of its specific objectives being the elimination of custom duties between member states, abolition of NTBs, abolition of obstacles to the free movement of persons, services and capital,” among others. But for ECOWAS, it has being a case of easier said than done, as intra-regional trade is still a fraction of what is obtaining in Asia or Europe. The role out of the ECO, the ECOWAS proposed common currency continued to miss deadlines – at least 4 missed deadlines at the last count. The ECJ’s judgement are basically ignored, as 3 out of every 5 of its decision are not implemented. Tariff levels between the francophone West Africa and the Anglophone West Africa are still discordant. And even amongst the Anglophones, tariff levels are still discordant as free trade in the region remains a dream. ECOWAS contribution to global GDP is a meager 0.5% notwithstanding its population that is at least 5% of the world’s total.
- iv. Notwithstanding the failure of many SSA RECs, regional integration remains the region’s best alternative to improve trade and development on the continent. Even though the study noted failure of regional integration in SSA, countries of the region has no choice but to integrate. This is so because of the new global economic reality of globalisation, the modern realisation of the limitation of statehood, the regionalisation of the new economic world order, the universal lowering of tariffs, the disaggregation of production into multiple transnational value chains, the rise in multinational stakeholder groups, the unification of Europe and many other new economic realities have made regional integration an imperative.
- v. The wholesale adoption of the Eurocentric linear model of integration has not worked for SSA. Nearly all SSA RECs have had as their objective the lowering of tariffs, dismantling of NTBs, the formation of CUs and CMA as their objectives. But as noted from above points (i) to (iii), this model of integration has not worked for SSA, and after 40-50 years of failure, SSA needs a new model.

- vi. Development regionalism is better suited for SSA than the Eurocentric linear model of integration – Development regionalism does not have explicit objective of trade but on the meeting of the development agenda of countries. However, the overcoming of these challenges, whether power supply, transportation networks, ICT, ports, irrigation, can exert significant influence on international trade and development, especially as regard boosting a region’s productive capacity and competitive edge. Many IFIs now specifically target regional projects for funding because of their greater investment returns potential, lower risks, better governance structures etc.
- vii. ECOWAS attempt to address its power supply problem via the creation of WAPP and ERERA is a positive response to the call for development regionalism in SSA – ECOWAS, faced with a development challenge of unreliable, inaccessible, and expensive power supply, has responded to the call for development regionalism via the establishment of a regional electricity market with the creation of WAPP (the regional operator) and ERERA (the regional market regulator)
- viii. ECOWAS has tilted towards development regionalism and functional independence in the institutional framework of WAPP, especially given the crucial role played by electricity (cheap and reliable supply). ECOWAS had sought to ensure that the regional operator, WAPP, is an institution that is functionally independent and legally capacitated to pursue its development objectives. In this regard, ECOWAS granted WAPP Executive Board with extensive powers to engage with DFIs, IFIs and other private actors in order to promote increased power generation in the region.¹⁸⁸ Exercising this power, WAPP was able to secure up to a billion dollars (USD) in project finance. A success worth noting since the lack of funding had crippled many regional schemes in ECOWAS. ECOWAS has also restructured the membership criteria making it possible to terminate membership for failure to comply with contractual terms.¹⁸⁹ Other important improvement in the institutional

¹⁸⁸ See WAPP Agreement art. 5.1c

¹⁸⁹ See WAPP Agreement art. 10 chapeau clause

structure is the decision to recruit only technocrats (CEOs of utilities) to superintend the project, as opposed to political appointees.¹⁹⁰

- ix. ECOWAS institutionalized independence and supranationality in legal framework of ERERA – As a regional market regulator, ERERA legal framework has insulated the institution from political influence, whether at the national level or at the regional level. Its governing body, the Regulatory Council, is recruited based on the international best practice of using independent management consultants¹⁹¹. The regional body has been given functional financial independence by ascribing to it the power to levy fees on the operators in the power pool.¹⁹² In order to ensure that ERERA is legally competent to enforce rules across borders and rein in non-compliant members, irrespective of national borders, ECOWAS gave ERERA the power to initiate investigations, as well as receive complaints from institutions and individuals. This is also a novelty, as many SSA regional institutions are inaccessible to individuals. In addition to its normal powers, to investigate, regulate, and resolve dispute, ERERA also has the power to sanction, which decision is binding across the ECOWAS region, unless otherwise stayed or set aside by the ECJ.¹⁹³
- x. The issue of multiplicity of regional institutions is still a problem for WAPP and ERERA – notwithstanding these institution’s superior legal and institutional frameworks. The issue of multiplicity of RECs across SSA is still a problem and is yet the greatest risks posed to WAPP and ERERA. Without an inter-regional and intra-regional MOUs, WAPP and ERERA have to share regulatory space with UEMOA, OHADA, OMVS, OMVG, MRU. This situation creates the incentive for conflicting domestic and regional objectives, forum-shopping and conflicting implementation agendas and schedules.

¹⁹⁰ See WAPP Agreement art. 5.2.1

¹⁹¹ ERERA Amendment, art. 5.4(ii)

¹⁹² ERERA Establishment Act, art. 32

¹⁹³ ERERA Establishment Act art. 28

5.2 Conclusions

This research has comprehensively analysed the legal and institutional frameworks of the ECOWAS regional institutions of WAPP and ERERA vis-à-vis the conceptual and historical backdrop. The object of the analysis was to see if these institutions can serve as new model for regional integration in SSA. Given the aforementioned comprehensive analysis, the following conclusions have been reached:

- i. In an era of the abandonment of the Westphalian concept of the state, and the observed inadequacies of multilateralism, coupled with the realities of the new economic world order, regionalism has been on the rise and is becoming a necessity for countries across all regions of the world. The new world order evolved, thanks to the rise of globalization, the rise of transnational regulation, the rise of MNCs, the growing importance of the need to attract FDIs, the integration of Europe, the growing influence of transnational interest groups and regulation.
- ii. Regional integration in SSA has had very little success. It has not helped SSA to tap into global trade, nor has it helped SSA countries trade with each other. Africa's contribution to international trade is infinitesimal and its intra-regional trade lags behind all other regional blocs. Trade in SSA is still dominated by minerals and primary products destined for Europe and the USA, and increasingly China.
- iii. Africa has traditionally pursued the linear model of integration, pursuing FTAs, CUs and CMAs, within an inter-governmental legal framework. There is ample empirical evidence provided in this study to show that this model has not worked for SSA. This is essentially because this model is ideally suited for developed countries, countries with advanced industrial sectors, capable of producing goods and services at international competitive prices.
- iv. Sub-Saharan countries have significant deficit in trade-related infrastructure and this has made SSA RECs uncompetitive. Some of the well documented trade-related infrastructure deficit include shortage of paved roads, inefficient ports, limited water and irrigation system and the all important issue of access to cheap and reliable power supply. The lack of cheap and reliable power supply has been noted as one of the most important issues affecting SSA ability to be competitive in global trade.

- v. Notwithstanding the failure of regional integration in SSA, the only real hope for Africa is regional integration. But the European-styled linear model of regionalism that the continent has followed to date is ineffective. Africa needs a new model and that model is developmental regionalism, implemented by strong supranational legal and institutional frameworks.
- vi. ECOWAS has signaled a paradigm shift in its approach to regionalism by tilting its regional economic integration objectives to developmental regionalism. This, ECOWAS has done by the establishment of a power pool to address the serious development challenge of access to cheap and reliable power supply. To achieve this development objective, the regional body has established two regional institutions, WAPP and ERERA, which institutions the body hope will address the critical issue of power supply in the region
- vii. Apart from the above-noted significant departure of ECOWAS by opting for developmental regional integration as opposed to treating regional integration as a trade issue (tariff issue), ECOWAS has also signalled a new paradigm by establishing viable regional institutions with sufficient supranational legal and institutional frameworks, so as to overcome its previous sad experiences with weak implementation of regional programmes and projects.
- viii. Some of the significant changes in these regional power infrastructure schemes that depart from the legal framework of previous regional schemes include the legal provision for: (1) international recruitment of technocrats to manage these institutions, as opposed to political appointees; (2) budgetary independence and ability to source funds internationally, as opposed to relying on member-states' contribution; (3) full-time staff to run the institutions as opposed to using ad-hoc meetings of national representatives; (4) legal supremacy for ERERA, the regulator, to issue and enforce the rules, and meet out binding decisions on market participants, appealable only to the ECJ.
- ix. Development regionalism, within a supranational legal framework is now clearly the new model for regional integration in SSA as the region seeks to stake out its place in the global economy, as well as to promote much higher levels of intra-african trade.

5.3 Recommendations

This research has been able to establish that developmental regionalism implemented by strong and independent supranational institutions is the best model for SSA RECs to adopt as they grapple with the new realities in the new economic world order. However, one overriding cause for concern is the issue of overlapping jurisdictions of regional institutions, which is especially the case in the West African region. Accordingly, ECOWAS, must do the following to minimize the legal risks:

- i. Devise a clear MOUs between regional institutions whose legal provisions demonstrate the possibility of jurisdictional conflicts. Different regional institutions, under such an MOU, must be given definitive and exclusive jurisdiction over certain aspects of transnational regulation. For example, an MOU between ERERA and other regional institutions, could see ERERA being awarded exclusive jurisdiction over matters pertaining to the regulation of the regional electricity market, even if the two parties to the conflict are also part of other sub-regional bodies as UEMOA or MRU. This eliminates the risks of overlapping jurisdictions as well as the risks of forum shopping.
- ii. In the medium to long term, and in line with the AEC's objective, ECOWAS and UEMOA, must set a deadline for the latter to be absorbed into the former. The continuous duality of centers of regional integration is a bane for progressive regional institutions to flourish, especially since this duality creates overlapping jurisdictions and even multiple conflicting regional objectives and commitments.
- iii. Without subtracting from the merit of free trade or customs unions, the ECOWAS shift to developmental regionalism should be expanded to include road and rail networks, ports and other similar trade-promoting infrastructure, including most importantly a currency exchange infrastructure, which exchange infrastructure would suffice, especially against the backdrop of the perpetual deferment of the roll out of regional currency, the ECO.

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I. LIST OF MEMBER COUNTRIES OF WAPP AND MEMBER COMPANIES OF WAPP

Members of WAPP	Member Utility Companies of WAPP
<ol style="list-style-type: none"> 1. Benin 2. Burkina Faso 3. Cape Verde 4. Cote d'Ivoire 5. Gambia 6. Ghana 7. Guinee 8. Guinea Bissau 9. Liberia 10. Mali 11. Niger 12. Nigeria 13. Senegal 14. Sierra Leone 15. Togo 	<ol style="list-style-type: none"> 1. Societe de Gestion de l'Energie de Manantali (SOGEM) 2. Communaute Electrique du Benin (CEB) 3. National Power Authority 4. Compagnie Energie Electrique de Togo (CEET) 5. Transmission Company of Nigeria (TCN) 6. Societe Nationale d'Electricite de Senegal (SENELEC) 7. Societe Nigerienne d'Electricite (NIGELEC) 8. Power Holding Company of Nigeria (PHNC) 9. Liberia Electricity Company (LEC) 10. Energie du Mali SA (EDM) 11. Empresa Publica de Electricidade e Agua de Guine-Bissau (EAGB) 12. Electricity Company of Ghana (ECG) 13. Volta River Authority (VRA) 14. Societe de Gestion de Patrimoine du Sector de l'Electricite (SOGPEPE) 15. Electricity Company Ltd (NAWEC) 16. Azito Energie Cote d'Ivoire 17. CIPREL, Cote d'Ivoire 18. Societe d'Operation Ivoirienne d'Electricite (SOPIE) 19. Compagnie Ivoirienne d'Electricite (CIE) 20. Societe Beninoise d'Energies Electrique (SBEE) 21. Societe Nationale d'Electricite du Burkina (SONABEL) 22. Ghana Grid Company 23. Contour Global (Togo) 24. CENIT Energy (Ghana) 25. GTS Engineering Services (Ghana) 26. ELECTRA cape verde