

THE ECOWAS ELECTRICITY MARKET

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Dedication

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May the Almighty God richly bless you all; love; (wife & mum)

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List of Acronyms

AHSG.....Authority of Heads of State and Government

CEP.....Committee of Eminent Persons

CIGRE.....Conférence Internationale des Grands Réseaux de Transport d'Énergie
Électriques à Très Haute Tension

ECG.....Electricity Company Ghana

ECOWAS....Economic Community of West African States

ECREEE.....ECOWAS Centre for Renewable Energy and Energy Efficiency

EEEP.....ECOWAS Energy Efficiency Policy

EREP.....ECOWAS Renewable Energy Policy

ERERA.....ECOWAS Regional Electricity Regulatory Authority

EU.....European Union

GATT.....General Agreement on Tariffs and Trade

GRIDCO.....Ghana Grid Company

IPCC.....Intergovernmental Panel on Climate Change

IPP.....Independent Power Producers

MFN.....Most Favoured Nation

MYTO.....Multi Year Tariff Order

NAFTA.....North American Free Trade Agreement

NERC.....Nigerian Electricity Regulatory Commission

NGEU.....Nigerian Government Electricity Undertaking

NGO.....Non – Governmental Organization

NIE.....New Institution Economics

SDGs.....Sustainable Development Goals

SEA.....Single European Act

TLS.....Trade Liberalization Scheme

UNCHE.....The United Nation Conference on the Human Environment

UNCTAD.....United Nations Conference Trade and Development

UNDP.....UN Development Program

UNFCC.....United Nations Framework Convention on Climate Change

UNIDO.....UN Industrial Development Organization

UNIPEDE.....Union Internationale des Producteurs at Distributeursd’Energie Electrique

VALCO.....Volta Aluminium Company

VRA.....Volta River Authority

WACSOFF.....West African Civil Society Forum

WAEMU.....West African Economic and Monetary Union

WAGP.....West African Gas Pipeline

WAPP.....West African Power Pool

WEF.....World Economic Forum

WTO.....World Trade Organization

ABSTRACT

The creation of the ECOWAS electricity market is an attempt to govern the West African regional electricity commons; that space for which if there is there is no framework for law and order, there can emerge tragic outcomes of overuse or under-exploitation of a valuable resource and space. The question then is what has driven the framework for the ECOWAS electricity market? While governing the commons is the prime rationale, law, when it appears at a certain time, reflects the ideas and interests of social and economic actors and variables at play. My thesis pursues this hitherto unexplored line of intellectual inquiry. My findings are that with the elaborate and detailed electricity market rules it seems ECOWAS continues down the path of transplanting European Union structures and practices without due consideration for whether such transplants find fertile soil in ECOWAS at this time.

CHAPTER I

BACKGROUND TO THE STUDY

1.1 INTRODUCTION

In 1993, in its Revised Treaty, the Economic Community of West African States (ECOWAS) set out the basis for energy cooperation among its members. Cooperation was to be guided and directed, by ECOWAS with its responsibility for West African regional integration. Consequent to this, ECOWAS has developed related protocols that detail the path to energy governance and in this expansion of cooperation is the framework for an ECOWAS electricity market. The ECOWAS electricity market is no different from other markets. It sets out the rights and obligations of market participants and it goes further to establish organs of ECOWAS to govern market relations. However, what is significant is that the ECOWAS electricity market is embedded in the ECOWAS shift from the Old Regionalism to the New Regionalism; the New Regionalism is a much more intricate model of regional integrations encompassing far more powerful relations between the members on the one hand, and ECOWAS as an organization on the other hand.

My thesis explores this deeper and stronger relationship. The overarching motivation lies in the increasing significance of regionalism in a globalizing world. As countries are exposed to the powerful currents of globalization, they have responded by seeking protection in stronger regional bodies. ECOWAS is no exception as from regional security to financial relationships there are calls for the use of ECOWAS as a tool for a collective response. Since 1990 when ECOWAS got involved in the Liberian civil war to more recent pressures for an ECOWAS single currency, ECOWAS has sought to play an increasingly authoritative and influential role in West Africa and with these processes in play, its foray into electricity relationships, given

its importance to economic and social development suggests that it cries out for study by scholars working across the various social science disciplines – including law.

Given the seeming paucity of work on the electricity market by students and legal academics, my thesis will add to the body of scholarship by exploring and discussing a range of issues including its contours, origins, and currents. Flowing from this and as a premise for the rest of my research, I put forward the following research questions:

What explains the creation of the ECOWAS electricity market?

What gap in the literature on ECOWAS does my thesis fill?

What can be done to strengthen the existing ECOWAS electricity regime?

The above questions have relevance for the following – academics and scholars researching regionalism in the developing world in general, the direction of ECOWAS; and those decision-makers formulating policy on cross-border electricity markets, especially electricity markets in the developing world.

My research hypothesis is that the ECOWAS electricity market is driven by the expansionist tendencies of the ECOWAS political-organizational actors. This contrasts with the thesis in the economics literature that markets are the outcome of spontaneous decisions by actors seeking greater economic advantage for themselves. Following on from this the lack of evidence to support a demand-driven market explains the sluggish development of actual cross-border electricity trading in ECOWAS.

In chapter I, I lay out the signposts for the thesis. The chapter provides the guiding concepts that will shape my research. I tease out core ideas and principles of law (as the thesis is primarily a law-based enterprise) but then the thesis is nested in a spaghetti bowl of other social science disciplines: history, economic theories, and organizational theories. This chapter is

therefore somewhat like a scatter diagram – laying out ideas, theories, and the relationships between these that my work develops. Subsequently the rest of the thesis unfolds as follows:

Chapter II also examines the main theories that shape my research, what is meant by the commons, the struggle to reverse the ‘Tragedy of the Commons’, the modes of governing the commons, history as a means of understanding the divergent electricity market speeds between ECOWAS on the one hand and its standard exemplar, the European Union (EU) on the other hand, institutions, and the role of international regimes. Chapter 2 continues with theory but focuses more on the state of electricity supply in ECOWAS member states to underscore the importance of increased service delivery at the domestic level and the need for the same across ECOWAS member states borders.

Chapter III essentially begins my thesis; it engages in the literature review. A doctoral dissertation must demonstrate the gap it fills in the scholarship and this is what my chapter 3 does. I trace the development and thrust of major legal texts on ECOWAS, and I conclude that there is no law thesis on ECOWAS electricity market. My conclusion here is that my work fills the gap with its originality. It is the doctoral dissertation on electricity regulation in ECOWAS that will fill the gap in the literature and also serve as a platform on which further doctoral work will be developed.

Chapter IV tries to answer my research question about the demand for market creation. The norm for the explanation of a market is in the economic benefits for the parties involved in the transaction. Markets can be simple relationships (such as taking a taxi ride to a relatively short destination or making a low-priced purchase from a shop) or they can be complex phenomena with multiple actors making costly purchases, investing in costly capital goods, and demanding long-term contracts. This latter depiction reflects the ECOWAS electricity market. What is interesting about this market is the seeming lack of a demand for it. Chapter 4 finds it hard to locate any clamour for cross-border market relations by either firms searching for profits, social

activists hoping for available electricity for their poor constituents; or a class of academics who see political, economic, or other benefits in market creation. Chapter 4 concludes that this instance of electricity supranationalism is borne out of the tendency towards so-called mimetic isomorphism in ECOWAS – where its decision-makers copy the EU because the EU represents a successful and ideal model of integration.

Chapter V links the ECOWAS market to the concept of sustainable development. It expounds on pathways to this goal. Sustainable development is one of the goals of the ECOWAS energy system. This goal implies, *inter alia*, access by consumers to cheap electricity. The route to this goal is not fully teased out in the Treaty and related protocols; my work sets out how a wider range of actors can help give form to sustainable development in the ECOWAS electricity market.

Chapter VI concludes; in this chapter I review my work and put forward issues that I think require further research when the market begins to work in practice.

1.2 GOVERNING THE COMMONS

Garrett Hardin's tale of the tragedy of the commons is a tale of environmental degradation, the remorseless working of a resource, when there is no identifiable owner of the resource and thus no restricted entry through rules to prevent its exploitation. It was Hardin who popularized the expression Tragedy of the Commons but the first acknowledged work in the field was by William Lloyd¹ who in his interpretation of over-population, asserted that an enclosed pasture a barrier is erected when the pasture reaches a saturation point but in an open and unrestricted pasture there is no such restraint.

However, it was the work of Garrett Hardin about a century later that captured the attention of those concerned with environmental degradation.² Again like Lloyd, Hardin focused on overpopulation, making the argument that unrestricted birth overburdens the earth's population carrying capacity yet given that there were no legal constraints on the desire of people to procreate, birth and the consequent increase of the human population was problematic. The earth was the commons on which more and more humans were being deposited so they could

¹ W. F. Lloyd 'On the Checks to Population,' 6 (3) *Population and Development Review*, (1980), pp. 473-496.

² The original 1970 Earth Day was just after Hardin had published his paper. The assertion that this was significant for generating environmental appeal is because it helped create what is termed a "republican moment"; in legal and political theory this is an instance when, driven by civic activism, citizens come together and in a burst of energy, albeit relatively brief, they focus on confronting and resolving a problem of pressing importance. Probably the best instance is the Earth Day in 1970 in the United States when an estimated 20 million Americans enthusiastically joined in several public events to draw attention to the emerging global environmental crises. Earth Day continues to echo across the US and other jurisdictions. While huge public outbursts are noted as drawing attention, this does not mean when the energy subsides, all is lost; the energy continues but at a lower less visible pace. Daniel A. Farber, "Politics and Procedure in Environmental Law" 8 (1) *Journal of Law Economics & Organisation* (1992), pp. 59-81. 66-67.

use the resources of the commons. Hardin asserted that the tragedy of the commons unfolds in this manner:

Picture a pasture open to all. It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. Such an arrangement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality. At this point, the inherent logic of the commons remorselessly generates tragedy.³

Hardin continued his exposition with reference to the rationality assumption of human behaviour. He asserts that those cattlemen exploiting the commons are rational beings – they seek advantage over their competitors and how they can derive ultimate gain or utility. As they increase their livestock on the common pasture, they derive gain but the negative effects of the added burden, i.e. overgrazing and destruction of the pasture is shared by all. This quest by the herders to maximize utility or wealth is a trait of all herdsmen since they are rational decision-makers. The rational decision-maker is the theory of the individual who makes decisions that provide him with the greatest benefit or satisfaction given the choices available. The consequence is that each herder refuses to be restrained by concerns for the common good, the preservation of the pasture for future use. There is a race to the bottom and the herders are trapped in this race as in the absence of rules to constrain their behavior they keep adding more and more cattle to the commons with the intention of extracting maximum value. This is what causes Hardin to claim that ruin is the destination toward which all men rush, each pursuing

³ Garrett Hardin, "The Tragedy of the Commons" 162, (3859) Science, (Dec. 13, 1968), pp.1243-1248.

his own best interest in a society that believes in the freedom of the commons. Freedom in the commons brings ruin to all.⁴

For Hardin, the degradation of the commons requires constraints on rational decision-makers. This should be in the form of an enclosure; rules that restrict the remorseless exploitation of the commons. Restrictions on liberty are essential to prevent environmental degradation. Hardin disagrees with the view that left to their own devices rational decision-makers will impose constraints on themselves to protect the commons. He does note however that an enclosure of resources is not always possible, especially in cases involving air and water. In such an instance, as Hardin noted, the solution to degradation of the commons should be by other means. Hardin underscores the significance of what can be done through an expansion of administrative power; in effect this is where the state comes into play with its power to impose rules on access and use of the commons. Coercive state powers compel restraint and thus eliminate or at least minimize the tragedy of the commons.⁵

In effect it is not ideal for there to be absolute freedom of the commons. Restrictions are essential to govern the commons. These are the social institutions that the state can create to control behaviour on the commons. He rejects the idea of an appeal to human nature - some form of coercion is essential. The type of coercion is debatable (either through privatisation or increasing state control of the resource) but the state needs to intervene and enclose the commons. Hardin clarified his thesis further in 1985 when he stressed that the freedom in the

⁴ Susan Cox is uncertain about the scope of this tragedy in the first place. She does not deny that the phenomenon, but she doubts the extent of it as formulated by Hardin and those who adhere to his position. Susan Jane Buck Cox, "No Tragedy of the Commons" 7 (1) *Environmental Ethics* (1985), pp.49-61.

⁵ See Hardin, "The Tragedy of the Commons" supra.

unmanaged commons is where the problem lies but nevertheless, the commons face a tragedy from rational decision-makers.⁶

In the 40 years since he published his paper, Hardin's work has had a considerable impact on scholarship and policy-making.⁷ His call for government action at all levels, sub-state, state and international, seemed to be received rather well at the time and added to the pressure for action to control the commons. The evidence in support of this is that the 1970s saw an increase in global action to combat environmental degradation. The ultimate level at which action was conceived was at the United Nations (UN). The United Nations Conference on the Human Environment⁸ (UNCHE) was a pivotal moment in this trend towards more expansive and stronger collective action for environmental purposes.⁹ One marked feature of UNHCE was the ascendancy of the view that state authority was an essential approach and instrument towards a better environment. Without an empowered state, the tragedy of the commons will

⁶ Hardin stated in his 1985 paper that his 1968 paper should have been titled *The Tragedy of the Unmanaged Commons*. Garrett Hardin, "The Tragedy of the Unmanaged Commons: population and the disguises of Providence" in *Evolutionary Perspectives on Environmental Problems* (2017) Dustin J. Penn and Iver Mysterud (editors), p.178, p.185, Routledge.

⁷ Hardin's work is deemed seminal as it created a new research field by expounding his ideas about the commons. Erling Berge and Frank van Lederhosen, 'Editorial: Governing the Commons for two decades: a complex story' 5 (2) *International Journal of the Commons* (2011) pp.160–187, p.161. Cox also goes as far as accepting the seminal status of Hardin's work: See Cox, "No Tragedy of the Commons" *supra*, p.50.

⁸ *Declaration of the United Nations Conference on the Human Environment* (16 June 1972) available at <https://www.un.org/en/conferences/environment/stockholm1972> (last accessed 4 January 1972).

⁹ The Conference recommended certain changes in the UN organization including a Governing Council for Environmental Programs to draw up general guidelines for the UN and the UN organs and to ensure that that states give sufficient attention to environmental problems of international significance. The Council was to report to the UN General Assembly. The UNCHE also recommended the establishment of the United Nations Environmental Programme to carry out the work decided on by the Council. Lars Emmelin, 'The Stockholm Conferences' *Ambo* (1972), pp.135-140. Louis B. Sohn, 'Stockholm Declaration on the Human Environment,' 14 *Harvard International Law Journal* (1973), pp.423-515.

persist.¹⁰ The drafters had faith in the power of the government and the presumption that it has the monopoly of knowledge to arrest environmental destruction.

While Hardin asserted the importance of state power to tackle environmental degradation as noted above, he also expressed faith in the role of the market. Again, we should note that the market, the assignation of property rights in the commons is done through the exercise of state power. It is for the state to assign and protect rights of use of the commons. An expansion in administrative power to arrest the Tragedy of the Commons power has advantages and also challenges. An increase in the power of the state is grounded in the assertion that the state, in some instances, is the most appropriate controller of a given property especially where there are a large number of users that seek the benefits of the resource but are too many to coordinate

¹⁰ The Preamble to the Declaration of the Conference stated that:

Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions. International cooperation is also needed to raise resources to support the developing countries in carrying out their responsibilities in this field. A growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive cooperation among nations and action by international organizations in the common interest.

Principle 13 asserted that:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population. Ibid.

Under Principle 17 members of the UN were to establish

Appropriate national institutions must be entrusted with the task of planning, managing or controlling the 9 environmental resources of States with a view to enhancing environmental quality. See *Declaration of the United Nations Conference on the Human Environment*, supra.

their actions, or transact efficiently among themselves.¹¹ State control over a resource could reduce the frictions that arise during transacting over the use of a resource.¹²

Nevertheless, the application of state power has its challenges. The state is open to capture and if capture is in play less well-organized interests can be excluded from the commons.¹³ Second, the assumption on state managerial ability rests on the state agencies being in possession of all information needed to efficiently manage a resource; but in reality, this is not always the case. There are limits to state knowledge, or even if the state does have all the knowledge, it might not have the capability to handle the knowledge. Another problem with state power is that it can be rigid and inflexible, unable to respond swiftly to the changing needs and demands of the resource. Moreover, it is quite incorrect to assume that the state apparatus is staffed with perfect decision-makers, efficient, disciplined, and strategic in taking measures to rescue the commons from tragic overuse. Sometimes government officials are error-prone, slothful, and inclined to make errors in the execution of their tasks.

Furthermore, because the government actors own nothing of what they control, they escape many of the consequences of wasteful mismanagement. Politics and more expansive state power provide injects a degree of constraint but there are limits to this impact. It is not fanciful

¹¹ Carol Rose, 'The Comedy of the Commons: Custom, Commerce, and inherently Public Property' 53 (3) *University of Chicago Law Review*, (1986) pp.711-781.

¹² This would be a case of the state acting to minimise, if not eliminate transaction costs - the non-market costs of doing business. R.H. Coase, 'The Problem of Social Cost' 3 *Journal of Law and Economics* (1960), pp.1-44, p.17.

¹³ In this regard, natural resources legislation can mask the goals of powerful economic interests. In Ghana this has been one interpretation of forestry legislation. Kufuor has shown how Timber Utilization Contracts under supposedly sustainable development legislation is, in his view, really a natural resources grab by the timber industry to the exclusion of small-scale chainsaw operators who do not have the organizational and lobbying ability of the established timber interests. Kofi Oteng Kufuor, 'New Institutional Economics and the Failure of Sustainable Forestry in Ghana' 44 (3) *Natural Resources Journal*, (2004) 743-760.

to assert that decision-makers within the government have the same self-interest as those in the private sector. They have career ladders to climb, they seek bigger budgets to help them climb their career ladders and also advance their pet projects. They work hard to ring-fence their political and administrative turf; they respond to the tug and push of outside voices, and which might result in skewed decisions that are not really in the public interest. Thus, while the preferences of the voters do have an impact on political and administrative class they also bow to the pressure and the demands of lobbying groups. Government agents will be inclined to send the costs of mismanagement in the direction of poorly organized interests, even though the latter might represent the majority will.¹⁴

The market as a solution to the Tragedy of the Commons also has its flaws and thus should not always be the default governance solution. For instance, there is no guarantee that a resource once sold will continue to be available under a private property regime. The owner having invested in acquiring the commons is not prevented from using the resource for other purposes and thus denies users under the commons arrangements the benefits they used to extract. The herder who over exploited the commons now has absolutely no commons at all to graze. Second, private property arrangements may provide owners of a resource with incentives to favour some users at the expense of others. Once sold off, the commons are subject to suboptimal decisions including discriminatory access. Thus, Hardin's cattle herders can easily find themselves in distinct camps and subject to the whims of the resource owner. In such a scenario the less-favoured class (on the grounds of ethnicity, culture, or religion for instance) will end up with their access minimized if not completely curtailed. Furthermore, the owner of the resource can shift its use from grazing to other uses with the upshot being the herdsmen

¹⁴ James E. Krier, 'The Tragedy of the Commons, Part Two' 15 (2) *Harvard Journal of Law & Public Policy* (1992), pp.325-347.

losing the benefits of the commons. This then strikes a blow at the aim of selling the commons – access by all to a now privately governed resource.¹⁵

Whether the market or state is the instrument for confronting the Tragedy of the Commons can result in a further complexity - that of the ‘Tragedy of the Anticommons’; this addition to the picture was set out by and described at considerable length by Michael Heller. From its instructions a state can leave a resource under-utilized. We should note here that Hardin did not seek paralysis of resource use; what he was concerned about was overuse. Nevertheless, if actors are to be empowered by the state to manage the commons, then there is the risk of too many actors, too much governance resulting in the under-utilization of a resource.

Privatising a common may cure the tragedy of wasteful overuse, but it may inadvertently spark the opposite. This type of fragmentation of decision-making authority is Heller’s tragedy of the anticommons. This term broadly covers any situation in which there is a multiplicity of decision-makers and each acting alone, has the power to hold up the beneficial use of a scarce resource. The Tragedy of the Anticommons is therefore the opposite of the Tragedy of the Commons. It is the instance where underuse of the commons is the opposite of overuse.¹⁶

1.3 ELINOR OSTROM: COMMON POOL RESOURCES AND POLYCENTRICITY

Elinor Ostrom has presented an alternative; one might say a reformulation, of Hardin’s proposed regulation or market solution to the tragedy of the commons. Ostrom’s thesis is grounded in the limits to knowledge the state is supposed to possess. From her research it is

¹⁵ William A. Blomquist, *getting out of the Trap: Changing and Endangered Commons to a Managed Commons* (1987) PhD dissertation submitted to Indiana University, p.166.

¹⁶ Michael A. Heller, “The Tragedy of the Ant commons: Property in the Transition from Marx to Markets” 111 (3) *Harvard Law Review* (1998), pp.621-628.

obvious that she has reservations about the model of an all-knowing government that has the solution to commons use is a rather unrealistic interpretation of knowledge and power.

Ostrom has argued that we need not have a clear binary approach to environmental governance – that of Hardin’s state or market governance model. Grounding her work in a series of field studies over decades Ostrom has questioned that automatic assumption natural resources that were collectively used by their users would be over-exploited and destroyed in the long-term. Elinor Ostrom’s field work challenged and disproved this idea with her work on local communities that governed natural resources. She has asserted that communities develop their own rules depending on their worldview. This does not mean a rejection of the state and its market or regulation divide but what it means is that in her observations from her fieldwork, communities had the knowledge needed for governance. Thus, the omniscient ruler in the national capital, issuing rules is not automatically the solution to the tragedy of commons.

Ostrom’s construct is not a simple one. She lays out a number of factors which need to be in play for her method of governance to be a success. Insisting that the tragedy of the commons is neither automatic nor an iron cage from which there is no escape she set out conditions by which the Tragedy can be avoided. These are Ostrom’s design principles to manage what she calls common pool resources. Ostrom asserts the following: First the resource must have clear demarcated boundaries to effectively those to whom the rules will not seek to apply. Governance needs to have a clearly targeted population or users of the resource. Second the rules need to be rooted in local conditions. To govern common pool resources requires adaptability of the laws to local conditions. The third design principle is that of the so-called collective-choice arrangements needed to govern decision-making. What she means here is that as much as possible, the rules should be inclusive allowing most resource appropriators to participate in the decision-making process.

Fourth there should be a robust framework for monitoring by monitors who are either part of the decision-making set up or who are accountable to those who appropriate the common pool resource. The fifth principle is that of sanctions in place to punish violators of the rules. Here, Ostrom stresses the importance of graduated sanctions though, suggesting a cooperative and managerial process to correct rule violations instead of a straightforward punitive approach. Her sixth principle is that of conflict resolution mechanism that are cheap and easy to use. The two final principles are that of the government accepting local communities have the right of self-determination (to cover the governance and use of local resources) and organization in the form of multiple layers of nested enterprises, with small local community organizations at the base level – this is the concept of polycentrism which impacts the argument I raise in the thesis.¹⁷

Polycentricity as a concept is closely linked with Indiana University and the Workshop on Political Theory and Policy Analysis. Elinor Ostrom was central to the establishment of this Workshop.¹⁸ The aim of the Workshop is to explore how collective action problems on the commons or common-pool resources can be minimized. Thus, what is probably the Indiana

¹⁷ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (1990), Cambridge: Cambridge University Press, chapter 3.

¹⁸ The Workshop in Political Theory and Policy Analysis is now an integral part of the academic framework of Indiana University. It stresses theory and how it impacts research into public policy. The research focuses on institutions and how these constructs shape governance arrangements, how they create the incentives that people face and, consequently, on human behavior. A large body of the research produce in this Workshop sessions has focused mainly on institutions for governance of urbanization and urban areas in the US. Further the research also seeks to explain the governance and exploitation of common pools throughout the world. The Workshop has other areas of discussion and research. For instance, it examines the connection between the commons on two levels – the local and global levels and the institutions thereof. The empirical research of Workshop participants on small-scale fisheries, irrigation systems, grazing areas, and forests is also at the heart of the participant's intellectual inquiries.

School is a reaction to questioning of faith in higher-level governance arrangements in the US from around the 1950s and the need for an intellectual and policy response.

Among other perceptions of governance at the time was that the terrain was congested – a multitude of government units dotted over the US (and Europe). The governance landscape had so many small-, medium-, and large-scale government units operating in the same metropolitan area.¹⁹ The impulsive response to this mass of administrative entities was that this produced anarchy and therefore it was best to whittle them down to the smallest number possible to avoid waste, mischief, duplication of effort and the turf battles that tend to spring up with so many competing administrative bodies providing largely the same collective goods.

However, in research carried out by Ostrom et al the pathologies associated with a bloated policy and administrative terrain²⁰ did not seem to exist²¹. In developing her intellectual response to the allegation of congestion and its problems, Ostrom asserted that upon

¹⁹ Elinor Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems' 100 (3) *American Economic Review* (2010), pp.641-672.

²⁰ The argument here is that as more and more government agencies appear on the scene that imposes costs on the policy setting. Agency overlap with so many actors scrambling to make policy on related issues has the following consequences: The first is the intensification of transaction costs. A large body of research exists to show how the proliferation of administrative rules can create or increase transaction costs - the administrative costs of doing business. The higher transaction costs are, the harder it is for a state or organization to function at the optimal level. Second there is the natural tendency for organizations to clash over bureaucratic turf to ensure each organization's political survival. To this end bureaucracies demand greater resources to justify their existence, and this of course tends to be a drain on national resources. Douglass C. North, 'Transaction costs, institutions, and economic history' 140 (1) *Journal of Institutional and Theoretical Economics* (1984), pp.7-17; and Douglass C. North, 'A transaction cost theory of politics' 2 (4) *Journal of Theoretical Politics* (1990), pp. 355-367.

²¹ This would seem to be in line with the position taken by Rose in her work on the benefits of a congested commons. See Rose, 'The Comedy of the Commons: Custom, Commerce, and inherently Public Property', *supra*.

examination of police departments across a range of metropolitan areas in the US there seemed to be very little evidence of the much-criticized duplication of services by more than one department. Ostrom also made the further assertion that there was very little evidence of a link between the multiple departments on the one hand and inefficiency on the other hand. There, on the contrary, seemed to be evidence of greater administrative efficiency the greater the number of service providers. Ostrom et al concluded that there was a dichotomy between complexity on the terrain and chaos on the same.²²

This now brings us to the definition of polycentricity that is at the heart of Ostrom's thesis. The definition is that:

‘Polycentric’ connotes many centres of decision making that are formally independent of each other.... To the extent that they take each other into account in competitive relationships, enter into various contractual and cooperative undertakings or have recourse to central mechanisms to resolve conflicts, the various political jurisdictions in a metropolitan area may function in a coherent manner with consistent and predictable patterns of interacting behaviour. To the extent that this is so, they may be said to function as a “system”.²³

While polycentricity does not connote a completely horizontal scheme for decision-making in which there is no paramount body, it nevertheless does mean that actors within this frame have enough policy and legislative latitude to make their own norms and rules within set boundaries.

²² See Ostrom, 'Beyond Markets and States: Polycentric Governance of Complex Economic Systems', *supra*, p. 644. This conclusion would seem to place Carol Rose's 'Comedy of the Commons' in the context of Ostrom's views.

²³ *Ibid.*, p.643.

Participants in a polycentric system have certain advantages. First there is the abundance of the local knowledge that is available to them as they can learn from other organizations in the framework of polycentricity. As the polycentric system unfolds users or those governed by the multiple structures can address any flaws in the system such as problems with complying with the rules (for common pool resources). With the flaws of governance in mind, polycentric systems have considerable merits borne out of their interactions, overlap and learning from each other.²⁴

Polycentricity promotes innovation among decision-makers, it helps cultivate greater learning through the production of more knowledge, it allows the structures to adapt to changing circumstances by copying other bodies embedded in the polycentricity framework. The more the decision-makers the more they build trust through repeated interactions with one another; this also enables deeper and stronger levels of cooperation needed for effective governance. A further benefit of multiple units is that they bring about face-to-face discussion and the achievement of common understanding. When decisions are left to larger, distant decision-making bodies the fruits of face-to-face interaction are likely to disappear or be diluted and this compromises effective governance.²⁵

The main relevance of the polycentric approach is that it challenges, maybe even displaces, the assumption that to provide public goods was something only large-scale decision-making units could do (usually located in distant metropolitan areas), and this logic should be extended to international decision-making. This strikes a blow at the heart of decision-making to govern the global commons should be limited to international bodies. On the contrary, cascading power down to local units of action helps reinforce the goals of global (or regional)

²⁴ Elinor Ostrom, 'Polycentric Systems for Coping with Collective Action and Global Environmental Change' 20 *Global Environmental Change* (2010) pp.550-557, p.552.

²⁵ *Ibid.*

organizations. An important lesson is that simply recommending a single governance unit to solve global collective-action problems—because of global impacts—needs to be seriously rethought.²⁶

In the mid-twentieth century, the dominant scholarly effort was to try to fit the world into simple models and to criticize institutional arrangements that did not fit. I will briefly review the basic assumptions that were made at that time but have been challenged by scholars around the world. The market was seen as the optimal institution for the production and exchange of private goods. For non-private goods, on the other hand, one needed the government to impose rules and taxes to force self-interested individuals to contribute necessary resources and refrain from citizens and officials would fail to generate efficient levels of public goods, such as peace and trade.

The strength and significance of a polycentric system is reinforced when contrasted with monocentric governance. A classical monocentric system involves concentration of power in one body thus eliminating any notions of democracy, power-sharing, and avenues for participation. All that lower levels of governance in a monocentric system do is that they carry out assigned tasks that are handed down to them by the all-powerful central body.

Polycentricity in international governance is found in the work of Lawrence Helfer in his research on the global framework for protecting intellectual property. Helfer adopts a different perspective on multiple and rival decision-making forums in international law. On its face then, a view that the presence of supposedly rival entities, this being a feature of the ECOWAS electricity organization architecture does not bode well for electricity policy coherence represents only a partial interpretation of organizational rivalry. However, a more critical

²⁶ *Ibid.*

perspective sees the existence of multiple regimes as sites to produce hard and soft law on electricity governance that will come together, converse if you will, to produce socially and economically beneficial law on electricity in ECOWAS.

Another benefit of polycentricity is that with multiple organizations this allows for weaker states in ECOWAS to circumvent or overcome the domination of the Community by its more powerful states – especially its hegemonic power Nigeria. While on paper a supranational body, ECOWAS is not free from the influence of its regional hegemon. The evidence is incontrovertible that Nigeria is the most powerful state²⁷ - the driving force behind its

²⁷ Notwithstanding its power, Nigeria is beset with a host of socio-economic and political problems that question its ability to continue to function as the regional hegemonic power. Dhikru Adewale Yagboyaju and Adeoye O. Akinola, 'Nigerian State and the Crisis of Governance: A Critical Exposition' (2019) Sage Open pp.1-10; and Ekpenyong Nyong Akpanika, 'Religious and Political Crises in Nigeria: A Historical Exploration' 22 (9) *Journal of Humanities and Social Science*, (2017) pp.65-74.

creation²⁸, it has its largest economy, sustains ECOWAS²⁹ and is responsible for the development of ECOWAS as a regional military force.³⁰

One marked feature of an international order is that the hegemonic power dominates relationships. However, there are limits to hegemonic power. The growth and strengthening of international organizations are a phenomenon that has constrained hegemonic power. International organizations create scope for smaller, weaker states to coalesce and counter hegemonic action.³¹ Thus international organizations allow for what Laurence Helfer calls

²⁸ Olatunde J.B. Ojo, 'Nigeria and the Formation of ECOWAS', 34 (4) *International Organization* (1980), pp. 571-604.

²⁹ Nigeria's commitment to the ECOWAS is visible in its financial contributions to the organization. Between 2003 and 2011 according to Udo and Ekott, Nigeria contributed \$918.7 million (₦138 billion) to the running of the community, followed at a distance by Ghana at \$225.7 million (₦34 billion) and Cote d'Ivoire at \$107.5 million (₦16.1 billion). For years, Nigeria's funding to ECOWAS dwarfed contributions by other members. It was between three to six times the contributions of the other members' contributions. With the introduction of the ECOWAS' Community Levy this ratio escalated further as Nigeria was now responsible for over 60 percent of ECOWAS total revenues. Ikenna Ukpabi Unya, 'The Emergence of ECOWAS: Nigeria's Hegemonic Role, Past and Present' (2022) *A Festschrift in Honour of Professor Matiu Adejo, ECOWAS at Forty*, pp.3-14, p.4 (this page is based on the downloadable copy from ResearchGate publications).

³⁰ In 1990 ECOWAS established the ECOWAS Ceasefire Monitoring Group (ECOMOG) to intervene in the Liberian civil war. ECOMOG included forces from five countries of ECOWAS: Gambia, Ghana, Guinea, Nigeria and Sierra Leone, later joined by Mali. It has grown exponentially with now about 10,000 and 12,000 troops committed to its goals, with the vast majority of troops being Nigerians. For Nigeria's dominant role in this regard, see Chukwuma C.C. Osakwe, 'The Nigeria Led ECOMOG Military Intervention and Interest in the Sierra Leone Crisis: an Overview' 8 (4) *Mediterranean Journal of Social Sciences* (2017) pp.107-115.

³¹ Some scholars in international organization theory have assembled arguments to suggest that a functioning open global or regional economic order requires the existence of a hegemonic or dominant power. Without a hegemonic power to bear the costs of bringing nations together and showing the way forward for a liberal economy, the world or regional trading order loses the benefits of liberalism with countries retreating behind protectionist walls. However, this argument has not been accepted at face value. Other scholars have challenged the hegemonic theory of stability that international order might benefit from a hegemonic power, but order can appear and function without

“regime shifting.” International organizations become sites for new or continuing treaty negotiations, lawmaking initiatives, or the development of standards. If weaker states are unable to pursue their goals in one regime because it is dominated by the hegemonic power, they can shift their strategies to another regime and so create opportunities to generate “counterregime norms”—binding treaty rules and nonbinding soft law standards that seek to alter the prevailing legal landscape.³²

Second, staff in the disparate organizations can converse with each other and produce beneficial inter-staff relationships to help guide the regime further towards in this case, electricity supply in line with the goals of the ECOWAS order. It may also increase competition among intergovernmental organizations and conflicts between competing principles, norms, and rules—both of which are useful for actors seeking to contest or supplant existing legal prescriptions.³³

The West Africa electricity commons is upon us due to the regulatory changes of the past 50 years. Electricity provision has gone from private provision to state provision and back. A thread running through electricity is that with technological changes and an increasing faith in the ability of the state to regulate economic life, including public utilities, resulted in the state

a hegemon. This argument was then advanced further by Robert Keohane, where he argued that an international system could continue to function through its international institutions even after the decline or collapse of the hegemon that had created it in the first place. Thus, according to the neoliberal approach, although a hegemon is a necessary condition for the construction of a specific international order, the system can survive the decline in the hegemon’s fortunes. In this manner, neoliberalism attempted to shift the focus of analysis from the subject of hegemony (i.e. the hegemon) to the conditions and mechanisms of its operation. Robert O. Keohane, *After Hegemony Cooperation and Discord in the World Political Economy* (1984) Princeton University Press: Princeton, New Jersey chapter 4.

³² Laurence R. Helfer, ‘Regime Shifting: the TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’ 29 *Yale Journal of International Law* (2004), pp.1-83, p.14.

³³ *Ibid*, p.17.

creating a commons of sort in national electricity systems.³⁴ Added to this was the sheer size of electrical plants, the scale of investment required to construct and maintain them made private provision seem practically impossible and, of course politically unacceptable. Electricity provision was centralized with more and more consumers demanding electricity and tapping into the electricity networks. This mirrored Hardin's remorseless processes and distorting outcomes. The rise of centralized, huge non-competitive electricity arrangements coincided with the tendency of governments to subsidize consumer behaviour in general including electricity consumption.³⁵

³⁴ While left-wing thought had been part of government policy and belief cycles since the late 1800s, this way of thinking and administering a state accelerated in the 1900s, especially after the Second World War. As Africa began to free itself of European rule, its post-colonial elites indicated a preference for a state built on the ideas of more government and big government. Thus, with complete independence a left-wing post-colonial elite came to power and set about attacking the fragile liberal democratic structures that the colonial authorities had planted as they exited the continent. This attack was premised on a rejection of imperialism (neo-imperialism as it was later formulated) and that the colonial democratic structures allowed imperialism to continue to have a hold on African nations. These systems needed to be uprooted. On the other hand, constitutions and political parties were luxuries Africa could not afford as the continent needed authoritarian rule, akin to what prevailed in the left-wing people's democracies found predominantly in the then Soviet Union and its Eastern European satellite states. Tied into this was the view that market liberalism was a Western colonial ideology that needed to be rejected in favour of an economy where state intervention was the dominant feature. George B.N. Ayittey, *How Socialism Destroyed Africa* (March 14, 2019) available at <https://www.africanliberty.org/2019/03/14/how-socialism-destroyed-africa/> (last visited 22 July 2022).

³⁵ Full cost recovery of electricity sold to both residential or commercial and industrial customers is virtually non-existent in Sub-Saharan Africa. This stance taken by governments is based on poverty alleviation policies and state industrial policy. Even powerful mining concerns have benefited from government largesse and favour by way of subsidies for their power consumption. Examples of such government preferential treatment can be found in the aluminum smelting industry in Cameroon and Ghana and the mining industry in Zambia. There has been a general criticism of the utility of subsidies to all regardless of income levels. The main issue with blanket subsidization is that it impacts all consumers, regardless of income, and because so few poor households are connected to the grid. To the unconnected, cheap power is as inaccessible as costly power. Anton Eberhard, Vivien Foster,

However, state intervention in the economy, and left-wing thought that privileged a bureaucratic and political elite as being endowed with all knowledge needed to steer an economy began to decline in the 1970s as a range of factors including stressed national budgets, ideological beliefs and new political leaders all came together to demand a shift towards the privatization of commons, including electricity commons. The ascendancy of the neoliberal agenda demanded competition in electricity supply, the fragmentation of electricity generation, transmission and distribution and the empowering of consumers with choice and low-cost electricity within reach.

1.4 THE EARLY PATH TOWARDS ELECTRICITY INTEGRATION: COMPARING EUROPE TO WEST AFRICA

The groundwork for the creation of the EU's energy union began outside the scope of formal governmental interchange and before the creation of any institution with a semblance of the EU. This process has been termed technocratic internationalism. By 1920 electricity was spreading across most of Europe, if not all.³⁶ With World War I there was a flowering of peace networks committed to preventing a slide into the destruction that the War had created. These

Cecilia Briceño Garmendia, Fatimata Ouedraogo, Daniel Camos, and Maria Shkaratan, *The State of the Power Sector in Sub-Saharan Africa* (May 2008) World Bank: Washington DC, pp. viii-ix.

³⁶ The United Kingdom was the first country to have a public electricity supply in 1881. However, notwithstanding its social and economic benefits, the embrace of electricity did meet with some resistance. Maria Hidvegi and Nikolaus Wolff, 'Power Failure: the Electrification of Central-Eastern Europe 1918-39', 26 (2) *European History Review* (2019), pp.219-242.

peace networks were the crux of what has been described as technocratic internationalism, an integral part of a new international economy.³⁷

Technocratic internationalism was a phase in European political life in which its advocates saw an open international economy was essential to world peace.³⁸ The view was that as essential as economic integration was for peace, it had to be on the back of technology that created a regional mass of networks including energy networks. Technocratic internationalists asserted that to breathe life into the peace treaties of the post-War world required connecting countries with power lines was a better guarantor of peace than the words of a treaty. This was the first prong of a two-pronged approach to comprehending and appreciating technocratic internationalism with the concept being woven into the fabric for the European unification agenda.³⁹

The second prong of technocratic internationalism is the fusion between national and international interests in the making of a European energy network. This synthesis was

³⁷ Johan Schot and Vincent Lagendijk, 'Technocratic Internationalism Building Europe on Motorways and Electricity Networks' 6 (2) *Journal of Modern European History* (2008) pp.196-217, pp.197-199.

³⁸ One of the factors explaining the First World War is the collapse of the global economy in 1913. Nationalism and protectionism came together to create a climate of hostility towards other nations, and this helped the world along the road to war. Brink Lindsey, 'The Decline and Fall of the First Global Economy: How Nationalism, Protectionism, and Collectivism spawned a Century of Dictatorship and War'. *Reason* (December 2001).

³⁹ At this time, there was increasing activity towards European Unification. See *Memorandum on the Organisation of a System of European Federal Union, League of Nations Geneva*, (September 15th, 1930). France requested a meeting for all nations of Europe to consider some sort of federal union that would in effect amount to a single European state. The proposal seemed to have considerable effect as the representatives agreed to recommend this proposal to their respective governments the consideration of the question which had been directly submitted to them by the French representative. I do not claim that there is a straight line from electricity unification to plans for European unification, but my point is that the technological changes were part of the mix of ideas and initiatives that helped build up what is now the EU.

grounded in the need for technical efficiency and that this should override any attachment to national parochialism as political boundaries will circumscribe the shape of any trans-state energy networks. The claim here is that the paramount concern in deciding the optimal size of a network should be based on technical considerations and not by the borders of the state. Thus, any clash between love of nation and loyalty to one's professional standards was likely to be resolved in favour of the latter.⁴⁰

Moreover, technocratic internationalists were capable of de-politicizing their work by separating their work from any political considerations and therefore were able to build constructive links across European borders. This made them a class apart from politicians who were tied to political constraints, presumably anti-European union constraints and which made it hard for them to act in the interests of cross-border cooperation.

That technocratic internationalism focused mainly on the role of skilled professionals in the energy industry did not mean they operated completely distinct from other decision-makers. They extended their reach to embrace civil servants of international organisations and intellectuals keen on creating a new post-War order. The significance of this variant of internationalism lies in the fact that by the beginning of the 20th century a number of cross-border connections existed: France, Switzerland and Germany had a connection; so too were Italy and Switzerland connected, and around the Rhine between France, Switzerland and Germany; between Italy and Switzerland; and Denmark and Sweden.⁴¹ This interplay of

⁴⁰ Johan Schot and Vincent Lagendijk, 'Technocratic Internationalism Building Europe on Motorways and Electricity Networks, *supra*, pp.198-99.

⁴¹ *Ibid.*, pp.207-208.

institutions, ideas and experts is what has been termed by Misa and Schot as “hidden integration”.⁴²

From these systems and ideas and increasingly across Europe there was an emerging set of practices that involved linking and delinking of infrastructures, and the circulation and appropriation of knowledge. In this way Europe was further knitted together through the sharing of various technologies in constituting, maintaining, and sometimes even fragmenting communities and thus identities through time and space (presumably for the purpose of stripping community identities in favour of a European one).

To borrow the technical language linking Europe refers to the regional and national linking of infrastructures, railroads, highways, energy systems and communication networks. As Erik van der Vleuten and Arne Kaijser show in ‘Networking Europe,’ such infrastructures include the physical couplings, regulatory and institutional structures, and standardization practices needed to make the couplings work and to facilitate the flow of information, goods, people, and energy.⁴³

The European push towards technocratic internationalism was nested in a broader internationalism. For instance, the International Electrotechnical Commission founded in 1906 was “to consider the question of standardization of the nomenclature and ratings of electrical apparatus and machinery”. Another was the *Conférence Internationale des Grands Réseaux de Transport d’Énergie Électriques à Très Haute Tension* (CIGRE), which convened for the first time in Paris in 1921. CIGRE brought together engineers interested in electricity-transmission from related national professional organizations. Conference attendants did not turn up as

⁴² Thomas J. Misa & Johan Schot, *Inventing Europe: Technology and the Hidden Integration of Europe*’21(1) *History and Technology*, (2005), pp.1-19.

⁴³ *Ibid.*, pp.7-10.

representatives of their national governments, instead they came in their private and knowledge capacities. Further in 1925 the electro-technical industries of Italy, France and Belgium set up the *Union Internationale des Producteurs et Distributeurs d'Énergie Électrique* (UNIPÉDE).

In the 1920s, most of these societies discussed national legislation, and how international collaboration could be continued. Generally speaking, membership of these organizations was often arranged through national committees and national professional organizations. Though they were open to all nationalities, the organizations were in effect dominated by countries with an advanced electricity industry.

West African electricity integration does not seem to have had the same forces that shaped European integration. The research does not reveal a role for technocratic internationalism. Thus, I assert that the forces driving this dynamic in Europe were not at play in West Africa. In the first instance while West Africa had been dragged into World War I because they were colonial possessions and their colonial controlling states needed manpower, West Africa was not the tinderbox for a future global conflict⁴⁴ and thus there was a need to build post-War interlocking electricity networks necessary to constrain potential future hostile parties that might go to war again.

Second, while European electricity integration was to bring independent states together in a burst of hoped for economic openness and subsequent integration, it is hard to sustain the same argument for West African colonies. Largely British and French possessions, the essence of colonial rule was to demarcate areas of control and influence for Europe's metropolitan

⁴⁴ World War I was largely the product of tensions in Europe. Some felt the war had not resolved these tensions and was likely to erupt in that region again.

countries. This was at the centre of the Berlin Conference.⁴⁵ Therefore colonial possessions of one metropolitan country were insulated from the possessions of another metropolitan country with no goal of bringing them together as a unit. West Africa saw no trans-colony networks to bring French, British, (and even Portuguese and Spanish) entities together. Railway networks, for instance, were not created to interlock these units and the same applied for electricity the purpose of which was to power industrial and social life within colonies.

Moreover, the colonial elite were more in thrall to their European metropolises and thus this is where their technocratic allegiances drew their inspiration and were duly connected. Colonial rule cemented a process of compressing Africa into a world economic order dominated by European countries. Thus, any links were still South-North. Therefore, there were no associations of experts in West Africa aimed at laying the tracks of cross-border electricity integration. Research suggests that probably the closest to this was the work of Duncan Rose, the South African engineer on the Gold Coast who sought to establish West African Aluminium as a publicly traded firm to construct what is now the Akosombo Dam in Ghana. Not only did West African Aluminium fail to flourish as a firm, but we should also note here further that nothing on its surface suggested that this was a cog or even a spoke in a regional electricity hub.⁴⁶

⁴⁵ The outcome of the Berlin Conference was the General Act of the Berlin Conference which formalized European powers' division of Africa. General Act of the Berlin Conference on West Africa, 26 February 1885. One key point under the Act was the concept of effective occupation.

⁴⁶ A Special Correspondent, 'The Volta River Project', 55 (221) *African Affairs*, (1956), pp.287-293, p.287.

1.5 COMMON POOL RESOURCES

Ostrom's concept of commons pool resources has implications for the ECOWAS electricity market. Common pool resource theory derives from Hardin's Tragedy of the Commons. A common pool resource is a good that functions as a hybrid between a public and private good because it is shared and available to everyone but also scarce, with a limited supply. These common pool resources are easily over-exploited and that they are open to diminished availability if there is unrestricted, self-interested exploitation.

Common pool resources straddle the public goods and private goods divide. A public good is one that has 2 main features – non rivalry and non-excludability. Non rivalry means one person using the public good does not prevent another person from using the public good as the good never runs out. Clean air is an example of non-rivalry. One person breathing clean air (on the back of government legislation mandating measures for clean air) does not prevent another person from breathing the same clean air as the air is still available to all. The second characteristic of a public good is that they are available to all. Street lighting is an example of a non-excludable good.

The feature of common pool resource is that they are non-rivalrous in consumption but also scarce, in effect they are finite. It is this finite characteristic that places common pool resources squarely in the tragedy of the commons framework where everybody acting for their own benefit over-consumes the resource, depleting it for all. Together non-excludability in supply and rivalry in consumption exposes common-pool resources to intense exploitation and congestion and thus makes them prone to Hardin's tragedy as rational individuals seek to maximize benefits from common pool resources.

Much of the problem with common-pool resources, such as overuse or crowding effects, stems from this combination of free access and rivalry. Another name often used for common-pool resources is open-access common property, resources “to which everyone has free access and an equal right to exploit.” Property owned collectively such as by a group of private individuals, or a local, regional, or national government can be subject to open access/common pool resource problems. The heart of the problem is how groups of people manage, or fail to manage, these resources, irrespective of whether they are owned collectively or by no one.

1.6 INSTITUTIONS

The tragedy of the commons and the related exploitation of common pool resources therefore demands institutions - the formal and informal rules that and their enforcement characteristics that shape human relationships. This is the definition of institutions provided by Douglass North. Formal institutions are acts of parliament, constitutions etc. Formal institutions have been consciously designed for the purpose of ordering society. Informal institutions are customs; norms etc and they emerge gradually with no single actor directing this process.⁴⁷ Both Ostrom and Hardin stress the importance of institutions, whether they are state created formal institutions or privately created informal ones.

The significance of institutions for governing common pool resources is heightened when seen through the prism of the prisoner’s dilemma. While commonly used to explain institutions for international trade governance, the prisoner’s dilemma can be extended to examine and solve the tragedy of the commons. The prisoner’s dilemma is a situation where 2 prisoners are

⁴⁷ Douglass C. North, *Five Propositions about Institutional Change*, Working Paper no: 9309001, (1993) p.1 available at <https://econwpa.ub.uni-muenchen.de/econ-wp/eh/papers/9309/9309001.pdf>

uncertain about cooperating with each other or breaking their pre-agreed commitments and thus securing a better outcome than if they had stuck to their earlier position. The typical prisoner's dilemma is set up in such a way that both parties choose to protect themselves at the expense of the other participant. As a result, both participants find themselves in a worse state than if they had cooperated with each other in the decision-making process. The prisoner's dilemma is one of the most well-known concepts in modern game theory. The prisoner's dilemma presents a situation where two parties, separated and unable to communicate, must each choose between co-operating with the other or not. The highest reward for each party occurs when both parties choose to co-operate.⁴⁸

The Tragedy of the Commons occurs because although it is of collective benefit if there are restraints on the use of resources, allowing the resource pool to continue to subsist and be of benefit to all users, and this it is in the collective interest of all to conserve and reinvest in the commons or a common pool resource to enable future consumption, rational decision-makers are inclined towards intense exploitation of the resource. This reflects the prisoner's dilemma and is best solved through the development of institutions that help users coordinate their actions and constrain aggressive rationality.

The role of institutions in this setting is even more important when a given resource has multiple users beyond the standard 2-person model in the orthodox prisoner's dilemma. In such a multi-user situation, communication to constrain rationality is more complex and thus

⁴⁸ David Lempert & Hue Nguyen, 'The Global Prisoners' Dilemma of Unsustainability: Why Sustainable Development cannot be Achieved Without Resource Security and Eliminating the Legacies of Colonialism', 7 (1) *Sustainability: Science, Practice and Policy*, (2011), pp.16-30; and Christine Gerbode, 'The Prisoner's Dilemma and the Paris Accord', <https://blogs.nicholas.duke.edu/between-the-lines/the-prisoners-dilemma-and-the-paris-accord/> (March 13, 2018).

coordination is increasingly difficult. Complicating this is the possibility of the assumption that the larger the number of agents, the lower both the perceived and the actual environmental impact of each single player will be.⁴⁹ The prisoner's dilemma extends to the common pool resources setting. Here too signals pertaining to resource use are such that pool appropriators are likely to persist with their dominant strategy of defection.

The link between the Tragedy of the Commons and the prisoner's dilemma is the free rider problem. The free-rider problem occurs whenever one person cannot be excluded from the benefits that others provide. The resulting situation is that each person is motivated not to contribute to the joint effort, but to free ride on the efforts of others. If all participants choose to free ride, the collective benefit will not be produced. As such, the temptation to free ride in such situations may dominate the decision process, and thus all will end up where no one wanted to be. Alternatively, some may provide while others free ride, leading to less than the optimal level of provision of the collective benefit.⁵⁰

One way of understanding the barriers faced by community energy is to consider the type of 'good' created. If energy is a private good that is provided in isolation from other goods we consider the commodity of energy in isolation to its mode of provision then it could be argued that it is a private good; it is excludable (energy companies can prevent those that have not paid for it from using the good) and rivalrous (each unit of energy generated can only be used once). However, there is a nascent body of work arguing that many of the outcomes of infrastructure

⁴⁹ Alessio Carrozzo Magli, Pompeo Della Posta and Piero Manfredi, 'The Tragedy of the Commons as a Prisoner's Dilemma: its Relevance for Sustainability Games', 13 (5) *Sustainability*, pp.1-10.

⁵⁰ Kelvin Munisi, 'Common Pool Resources Dilemma: Theorizing What Drives Sharing States to Cooperate' 43 (1) *The African Review: A Journal of African Politics, Development and International Affairs* (2016), pp.103-127.

provision could be more appropriately defined as a common good or public good and the challenges faced in its provision are similar to common pool problems.

Both common goods and public goods are described as non-excludable, where it is difficult or undesirable to prevent access to a particular good, for example a public park. Common goods are also rivalrous, where the use of a unit of good by one consumer precludes benefit from another consumer using the same unit of good, for example extraction of wood from an area of forestry. Energy infrastructure is often described through property rights whether it is private or common. However, few of the social and environmental outcomes described in section 2 have defined property rights therefore classification requires more detailed consideration.

In light of the global trend towards privatisation and liberalisation of energy provision there is increasing reliance on private property rights, and market-based governance. This presents a number of challenges to common pool governance and community energy provision. The economic instruments which dominate current energy policy are effective if stocks and flows of goods are predictable, if the number of users or producers is low and if regulated users or producers are homogenous.

It could be argued that these conditions hold for the current highly centralised, supply-oriented system of energy provision but if we are to move to a more renewable, decentralised system, that fully engages actors such as community energy providers and includes significant demand management, they most certainly do not hold. Firstly, the diversity of goods produced by different projects at different scales, and the dynamic nature of goods, which change as the priorities of groups changes, makes stock, and flows very difficult to predict. Secondly, there are thousands of producers (compared to the six energy companies that dominate the UK market today). Finally, producers all vary dramatically in motivations and capabilities so are

highly heterogenous. Therefore, market instruments are unlikely to be effective for governance of community energy provision.⁵¹

The institutions to solve the Tragedy of the Commons at the international level are what scholars of international law called regimes. Regimes can be defined as:

‘sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.’⁵²

From the definition it does seem that regimes are laws (rules) and the organizations charged with responsibility for making and enforcing the rules. However, regimes are not just made up of formal, written commands. They include informal rules, ways of thinking, customs, habits, value systems that sit side-by-side with the formal rules to make international regimes.

The function of regimes in a world where sovereignty can still be a valuable construct that states use to shield themselves, and defend their own interests is that regimes can constrain state behaviour and ensure coordinated action to solve global problems the basic function of regimes is to coordinate state behaviour to achieve desired outcomes in particular issue-areas.⁵³

⁵¹ Katy Roelich, Christof Knoeri, *Governing the Infrastructure Commons: Lessons for Community Energy from Common Pool Resource Management* (July 2015) SRI Papers (Online) No.87 Sustainability Research Institute University of Leeds, pp. 11-13.

⁵² Stephen D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as intervening Variables’ 36 (2) *International Organization* (1982), pp.185-205, p.186.

⁵³ *Ibid.*, p.191.

The accepted explanation for why regimes are established is the self-interest of the states that stand to benefit from them. Regimes can emerge spontaneously, created by the coalescence of a variety of individual actions; they can be formally negotiated and therefore set out in an international regional or bilateral treaty; or they can be foisted by a powerful state or states on other less powerful states or states.

CHAPTER 2

INTRODUCTION TO ELECTRICITY WITHIN ECOWAS

2.1 INTRODUCTION

It goes without saying that the electricity supply crisis in West Africa is dire. The supply of electricity across Nigeria, the most powerful country in the ECOWAS bloc reflects the nature of the problem as commercial and private users of this resource continue to face serious electricity access. The problems in Nigeria are typical of the problems across the region. With this picture in mind, detailed further below it is self-evident that there should be a greater supply of electricity through an expanded range of suppliers and generators. ECOWAS members fall into the category of lower income countries. Based on recent World Bank figures, of the bloc, only 3 members, Ghana, Nigeria, and *Cote d'Ivoire* fall into the category of lower middle-income states.⁵⁴ This low level of development across the region underpins the exceptionally poor supply of electricity.

The spread of electricity across what is now ECOWAS was a slow state-driven process with some elements of private supply. West African electrification started at the end of the end of the 19th century. In Nigeria a generating power plant was installed in Lagos. This plant had a fairly modest generating capacity of 60 Kilowatts. With the creation of Nigeria out of two separate colonial entities there was an escalation in electricity supply across the new entity.

⁵⁴ Available at <http://data.worldbank.org/income-level/lower-middle-income> (August 1 2023). This chapter draws to some extent on my LLM dissertation. Abena Acheampong, *The Development of Sub-Regional Energy Institutions: The Case of ECOWAS* LLM Dissertation submitted to the School of Business and Law in the University of East London (2016).

An interesting development of note here was the centralization of supply in the emerging national electricity bureaucracy. The expansion of electricity supply in Nigeria saw the Native Authorities, rival suppliers to the central government, lose their function as in 1946 the colonial state established the Nigerian Government Electricity Undertaking (NGEU). The function of this body was to assume responsibility and direction for electricity supply in Lagos. Progressively this body was endowed with more power, and it came, by 1950, to be the sole organization responsible for electricity supply within Nigeria.⁵⁵

The Nigerian electricity problem is a symptom of the dire performance of that country's political and economic performance since the mid-1980s in particular although some see the problem starting in the 1960s when independence was won. Notwithstanding when the crises began, the consensus allegation is that successive Nigerian governments have failed woefully to invest in the power sector. The picture is reflected in low government spending on power generation, transmission of electricity and the distribution infrastructure. The outcome of this as one scholar has noted is the depreciation of the value and use electricity machinery resulting in their redundancy.⁵⁶

Underinvestment has resulted in a serious shortfall of electricity infrastructure. Of particular note here are the reliance on outdated electricity meters (both commercial and private) and this has implications for revenue generation as outmoded meters fail to properly record electricity

⁵⁵ Claudius A. Awosope, 'Nigeria Electricity Industry: Issues, Challenges and Solutions', 3 (2) *Public Lecture Series*. (2014) pp.5-7; and Norbert Edomah. 'The governance of energy transition: lessons from the Nigerian electricity sector' 11 (1) *Energy, Sustainability and Society* (2021) pp.1-12, pp.6-10

⁵⁶ Natasha Mellersh, (13 July 2015), A scramble for power – the Nigerian energy crisis explained <https://www.africanlawbusiness.com/news/5679-a-scramble-for-power-the-nigerian-energy-crisis-explained>; and Saheed Layiwola Bello, 'Evaluating the Methodology of Setting Electricity Prices in Nigeria' 4 *International Association for Energy Economics*, (2013) pp.31-32.

use.⁵⁷ In addition to infrastructure and equipment, another difficulty plaguing the Nigerian electricity sector is the lack of strategic planning by the power bureaucracy as a whole that could provide a framework and agenda for efficient and low0cost electricity supply.⁵⁸

Then there is the problem of levying appropriate tariffs. Consumer tariffs are set by the Multi Year Tariff Order (MYTO). This is set by the Nigerian Electricity Regulatory Commission (NERC). The utility and value of the MYTO is debatable. Unsurprisingly, NERC consistently sticks to the argument that the MYTO is cost reflective for the following reasons. First MYTO enables government to realize its return on investment in the energy sector. Second, in NERC's view the MYTO enables investors to make profits on their stake in the energy sector. In contradistinction to this optimistic assessment about the MYTO is the claim by investors themselves that their returns are below expectation leading to regular losses on their investments in the electricity sector. It does seem that the gloomy picture painted by investors has had an effect since the electricity sector is unable to attract new private capital to boost the fortunes of the sector with improvements on generation, transmission, and distribution of power.⁵⁹

Arguably, the biggest problem and also a paradox that the Nigerian electricity sector faces is regular fuel supply. Notwithstanding Nigeria's immense crude oil deposits and production, fuel supply to the power sector is bedevilled by fluctuations and uncertain fuel supply. A number of reasons explain this, it seems the paramount reason is that the Nigerian government has

⁵⁷ J. Ikeme, and Obas John Ebohon, 'Nigeria's Electric Power Sector Reform: What should Form the Key Objectives?.' 33 (9) *Energy Policy* (2005) pp.1213-1221.

⁵⁸ Abubakar Sadiq Aliyu, Ahmad Termizi Ramli, and Muneer Aziz Saleh, 'Nigeria Electricity Crisis: Power Generation Capacity Expansion and Environmental Ramifications' 61 *Energy* (2013), pp.354-367.

⁵⁹ Ibid.

imposed price caps on gas prices. Of course, price controls depress and freeze the value and prices that gas would have fetched in the open market if subject to demand and supply instead of state intervention. With price cap on gas comes the obvious response by gas firms to back off from the needed investment in ensuring the requisite level of investment in their business and, consequently, to ensure the necessary level of gas being supplied to power Nigeria's power plants.⁶⁰ Furthermore, the Nigerian power sector does not have the technological ability to lead on dealing with power sector problems in general and electricity supply in particular. Thrown into this morass of low investment, fuel supply problems and poor technology is the perennial problem of power theft. The practice consumers tap into gas pipelines for the purpose of setting up illegal connects. A side effect of this is also the damaged caused by illegal connections to pipelines.⁶¹

There is of course a consequence to the above array of faults in the Nigerian power sector. Recent figures indicate that only around 40% of Nigerians are connected to the national power grid. But this is not the full picture of the problem. The fortunate 40%, enjoy only a 50% regular power supply on average. Complicating this picture is the fact that Nigeria has an extremely low per capita electricity consumption of 149 kilowatts per capita in a population of in excess of 200 million people. This level places Nigeria somewhere at the bottom of global energy consumption per capita, one of the lowest in the world. In addition, the majority of Nigerians

⁶⁰ Samson A. Aladejare, 'Energy, growth and economic development: A case study of the Nigerian electricity sector' 2 (2) *American Journal of Business, Economics and Management* (2014), pp.41-54

⁶¹ Olaoluwa, O. G. (2017). Electricity theft and power quality in Nigeria' 6 (6) *International Journal of Engineering Research & Technology*, (2017) pp.1180-1184; Augustine C. Osigwe, Chukwuemeka O. Onyimadu, Chinedu A. Ikpeazu, and Adaobi J. Ofordem, 'Electricity theft in Nigeria: How effective are the existing laws?.' (2018) (available at Google Scholar); and D.O. Dike U.A. Obiora, E.C. Nwokorie, & B.C. Dike, 'Minimizing household electricity theft in Nigeria using GSM based prepaid meter' 4 (1) *American Journal of Engineering Research* (2016), pp.59-69.

live in rural areas and are not connected to the national grid on account of the difficulty in penetrating the rural areas because of broader problems of communications infrastructure.⁶²

The power situation in Sierra Leone is just as bad if not worse. Still recovering from the destructive civil war that lasted almost a decade, and in the wake of the humanitarian crisis following the outbreak of Ebola in 2014, Sierra Leone's power sector is virtually non-existent. The features of this poor situation are as follows: load shedding⁶³ and major fluctuations in voltage have created a situation where there are lengthy electricity blackouts and only about 13% of the population have access to electricity that is also intermittent.⁶⁴

What is worse is that all of what is plainly a porous electricity supply is concentrated in the countries' leading urban centres 4 main cities: 90% of all electricity goes to Freetown (the capital), Kenema, Bo and Makeni. Not surprisingly therefore, rural areas are in the tailwind of an exceptionally bankrupt power sector, and they get only 1%, of access to the national power grid. Yet there is still a high demand for electricity that cannot be filled by domestic providers at the current pace of electricity infrastructure development. While national generation capacity is 100 Megawatts, the projected demand to meet national economic and social needs

⁶² Ayodeji Olukoju, 'Never Expect Power Always': Electricity consumers' response to monopoly, corruption and inefficient services in Nigeria.' 103 (410) *African Affairs* (2004), pp.51-71.

⁶³ Abdul Conteh, Mohammed. Elsayef Lofty, Kiptoo Mark Kipngetich, Tomonobou Senjyu, Paras Mandal, & Shantanu Chakraborty, 'An economic analysis of demand side management considering interruptible load and renewable energy integration: A case study of Freetown Sierra Leone' 11 (10) *Sustainability*, (2019), pp.1-19.

⁶⁴ Available at

http://www.undp.org/content/dam/sierraleone/docs/focusareadocs/undp_sle_energyprofile.pdf (last accessed August 1 2023).

is for 500 Megawatts electricity of the demand for electricity in Sierra Leone is enormous, estimated at 500MW.⁶⁵

Sierra Leone's power generation is primarily derived from two sources - the oil fired Kingtom Power Station and the Bumbuna hydro-electric power plant located on the Seli river in the Tonkolili district. The Kingtom Station is outdated, dilapidated and in a derelict condition. This station is alleged to be incapable of guaranteeing a reliable and stable supply of electricity. While the plant at Bumbuna is in better shape as compared to Kingtom plant and can generate 50 MW, this plant is beset with the consequences of natural problems. The dry season in Sierra Leone impacts the reservoir and causing it to run dry. This contributes to the stunting of electricity supply especially in Freetown.⁶⁶

The Gambia is also trapped in a problem of electricity supply. The evidence is that Gambia does not have the capacity to satisfy the country's electricity needs. ECOWAS' smallest member state, the Gambia is dependent on imported fossil fuels for its electricity generation. As is the case with Sierra Leone and Nigeria, there is a sizeable chasm between demand for electricity in the Gambia and the ability of the government to supply the same to meet national needs. The Gambia's reliance on fossil fuels for electricity generation, is further aggravated by organization losses due to structural shortcomings, dilapidated machines and so on.⁶⁷ The upshot of this is that the Gambia is also facing serious load shedding problems. National

⁶⁵ Ibid

⁶⁶ Available at <https://www.ashleyedison.com/voltage-sierra-leone-907/#sthash.m9kYvpDw.dpuf> (last accessed August 1 2023).

⁶⁷ Thomas Hamilton Forster and Venkataraman Nilakant, 'Role of Trust in Privatization Transformation of the Electricity Utility in the Gambia' 41 (3) *The Journal of Applied Behavioral Science* (2005), pp.348-366.

electricity access figures are very low with about 35% of electricity concentrated in the Greater Banjul area where access is about 93%⁶⁸.

The crisis pervading the Ghana electricity sector is similar to that which prevails in the other ECOWAS members outlined above (and across the rest of the region). As is the case across Britain's West African colonies, it was in the colonial era that electricity was introduced into the then Gold Coast. In the formative years of the electricity system, supply came through isolated diesel generator plants dispersed across the country. This was therefore a mix of public and private provision of electricity. Mines, factories, municipalities, and other institutions including hospitals and schools owned most of these generator plants.

Progressively however, the state took over the supply of electricity and squeezed out private supply. The Gold Coast Railway Administration established the first public electricity generation system in 1914. This was aimed at supplying electricity for the emerging railway sector at the time. By 1955, while still under colonial rule but on the verge of independence the Gold Coast's major urban areas had access to electric power for commercial and social purposes. While this was under the direction of the Gold Coast Public Works Department (PWD) there was a parallel development for electricity governance in the form of an Electricity Department which was created and located in the Ministry of Works and Housing to take over electricity supplies from the PWD and the Railways Administration.

As at writing there is an electricity crisis in Ghana that has negatively impacted industrial development and the country's economy in general. This crisis is in the wake of the

⁶⁸ Hamilton Forster, Thomas, V. Suchitra Mouly, and Jayaram K. Sankaran, 'Deregulation and Industrial Change: A Comparative Study of the Electricity Sectors of New Zealand and the Gambia' 6 (3) *Journal of Change Management* (2006), pp.321-347.

framework for electricity supply in Ghana that plays out as follows: Electricity is produced by the Volta River Authority (VRA) and a number of Independent Power Producers (IPPs) through the various dams and plants. After production electricity is then distributed across the country in the following way: the Ghana Grid Company (GRIDCO); GRIDCO is a subsidiary of the VRA. GRIDCO is the sole supplier of electricity to the Northern Regions of Ghana, part of the Asante and Volta Regions. The rest of the country gets its electricity from the Electricity Company of Ghana (ECG). Thus, there seems to be a state-created binary supply system for domestic electricity supply where the ECG and GRIDCO have the responsibility for selling electricity in Ghana.⁶⁹

Due to population growth and economic activity, there has been a rapid increase in the demand for electricity in Ghana. The figures suggest a 52% over the last decade (2006–2016) while installed generation capacity has more than doubled over the same period. Notwithstanding these seemingly remarkable achievements Ghana still suffers from persistent power supply problems. This is explained by fuel shortages causing a fall in supply for fuel to generate power. The electricity sector has a huge reliance on the Akosombo Dam and which in some instances has fallen far below acceptable operational levels. These occasional shortages have led government to rely on thermal generation sources (running on mostly natural gas) to power the sector. The problem with these sources is that supply of natural gas to Ghana through the West African Gas Pipeline (WAGP) has been quite unreliable.

⁶⁹ Michael A Opam, and John K. Turkson, 'Power Sector Restructuring in Ghana: Reforms to Promote Competition and Private Sector Participation' *Power Sector Reform in SubSaharan Africa*. Palgrave Macmillan: UK, (2000), pp.50-82.

As is the case with Nigeria, one facet of Ghana's electricity quandary is that the main bodies VRA, GRIDCO and the IPPs continue to find it difficult accessing the required investment for plant maintenance or to invest in new technologies to increase the nation's electricity supply. There are also organizational problems. The ECG has always found it hard to collect revenue due from both residential and commercial customers. The consequence of course is the perennial revenue shortfall that has an impact on the ability to invest in the electricity sector. Moreover, the IPPs also suffer from the revenue losses, and this stunts their ability to reinvest in electricity production.⁷⁰ Another revenue problem is the incestuous relationship between the ECG and other government organizations. ECG has noted the problem of collecting money due it from government departments and other public service and civil service bodies such as parliament, hospitals, and universities. A similar relationship plays out between VALCO on the one hand and VRA on the other hand. VALCO tends to default on its debts to VRA.

This scenario is a barrier to foreign investment in the Ghana power sector. Even though the electricity sector would benefit from the injection of large doses of capital this has not been forthcoming since foreign investors apparently have grave reservations about investing in a country and sector where they might not recoup their investments due to a weak legal system and organizational incompetence.⁷¹ Broader issues in Ghana's political economy present a further barrier to the development of the country's power sector. Ghana's tax policy is the problem here as the electricity sector is the victim of high tariffs rates and taxes, unstable

⁷⁰ Samuel Gyamfi, Mawufemo Modjinou and Sinisa Djordjevic, 'Improving Electricity Supply Security in Ghana—The Potential of Renewable Energy' 43 *Renewable and Sustainable Energy Reviews* (2015), pp.1035-1045.

⁷¹ Francis Kemausuor, et al. 'A Review of Trends, Policies and Plans for Increasing Energy Access in Ghana' 15 (9) *Renewable and Sustainable Energy Reviews* (2011), pp.5143-5154.

foreign exchange, and the uncertainty of conditions of the country make it unattractive to some foreign investors.

Pulling the above arguments and issues together, West Africa has an energy supply problem. The lack of electricity supply undercuts any serious efforts to develop West Africa as economic growth and industrial development depend considerably on regular low-cost electricity. In the context of this, there have always been calls by private and public sector actors that the rapid transformation of electricity across ECOWAS is essential. It is expected that demand for electricity will expand across the region, and it is essential that there is massive investment in technology, infrastructure, and a radical reorganization of the electricity bureaucracies across ECOWAS. Moreover, another observation is that electricity generation and distribution has never been always under the monopoly of the national government. As the evidence indicates Nigeria saw dual supply split between national and local government during the colonial era. The same was the case in Ghana where private firms provided electricity in areas to support their mining operations for instance (and perhaps build some links with local communities).

The shift across the region was not because private investment was flawed, or private supply of electricity was riddled with incompetence what did happen was that electricity fell victim to the growing tendency towards state control over national economies across most of the developing world. Arguably, the ECOWAS electricity market as discussed and critiqued through this thesis reinforces the rebirth of opportunities for the supply of electricity by private actors across the region.

2.2 THE FRAMEWORK OF THE ECOWAS REGIONAL ELECTRICITY MARKET

The ECOWAS Energy Efficiency Policy (EEEP) is a specialized centre of the ECOWAS. It is charged with the following energy-related responsibilities: It has a promotional obligation with a particular focus on advocating the importance of renewable energy and stressing the significant impact of energy efficiency through markets. ECOWAS created EEEP as a response to the regional energy crises. In addition to its promotional role, EEEP is duty bound to play a role in the economic transformation of the regions through contributing to West Africa's sustainable economic, social and environment development. It will do this by enhancing the supply of up to date, dependable and low-cost energy services⁷². EEEP also has an investment role. As noted above low investment in electricity infrastructure is a recurring problem. The EEEP therefore is to create favourable conditions for Foreign Direct Investment into the ECOWAS bloc. This, it is hoped will help add to the provision of cheap electricity and the consequent rapid development of local industry through the reduction of energy charges. A further task of the EEEP is that it is to add to the regularity and security of energy supply. This will be through working to prevent losses at all links in energy value chains.

The EEEP has developed a set of strategies and action plans to help it achieve its goals. Going down this path the EEEP is expected to work in tandem with national energy structures. The EEEP strategy stresses focuses on strategy, developing the necessary ability to execute its functions, sensitizing its beneficiaries, and mobilizing finance. The action plan is somewhat similar as it builds on the EEEP strategies. The action plan includes working towards the attainment of efficient lighting, improving performance and distribution of electricity across ECOWAS to the optimum level, creating conditions for safe, cheap, and sustainable cooking.

⁷² Kathleen J. Hancock, 'Energy Regionalism and Diffusion in Africa: How Political Actors Created the ECOWAS Centre for Renewable Energy and Energy Efficiency 15 (5) *Energy Research & Social Science*, (2015), pp.105-115.

The action plan is to also develop financial mechanisms to achieve the goal of sustainability.⁷³ Another policy in the raft of plans to develop energy and electricity for ECOWAS is the ECOWAS Renewable Energy Policy (EREP). The EREP was adopted to help move ECOWAS towards the direction of renewable energy sources such as solar, wind, small-scale hydro plants. These are approaches that can help lower the cost of electricity and therefore make it more accessible to consumers especially in the rural areas of the region.

EREP will supplement additional significant yet normal sources of power production. Thus, EREP mainly stresses on the region's electricity sector, but it also is extended to cover domestic heating and the potential production of biofuels. The gender-balanced component also sees EREP playing a labour policy role of creating employment in the sector and the development of businesses.⁷⁴ The EREP's aim is interlocking the ECOWAS member's domestic energy systems with multiple suppliers of the same. With universal access to energy by 2030 in mind, the EREP does not seem to limit investments to only national governments; there is the goal of cross-border energy supplies as an essential component of the path to cheap, available, and renewable energy.⁷⁵

Added to the proliferation of energy related documents is the 2006 ECOWAS White Paper on Access to Energy. This White Paper was a logical step along the path of a range of measures by ECOWAS over a decade that were aimed at cutting energy costs while simultaneously

⁷³ Available at www.eceee.org/page/ecowas-energy-efficiency-policy-eeep (last accessed 20 June 2024)

⁷⁴ Available at www.aecid.es>151012_ecowas_renewable_energy_policy_final (last accessed 20 June 2024).

⁷⁵ Available at www.eceee.org/page/ecowas-renewable-energy-policy-erep (last accessed 20 June 2024).

improving on the quality of energy service delivery for ECOWAS citizens. Under the White Paper on Access to Energy members have committed themselves to the provision of energy to more the half of rural and peri-urban dwellers across ECOWAS' member states by 2015. This is an ambitious target as it entails a fourfold increase of those with access to the kind of sophisticated energy services that the White Paper aims for with the year 2005 as the base level. At the time the White Paper was drafted and in figures, this meant stretching the expected energy coverage approximately an additional 36 million more households in just under 50,000 localities.

To attain this target, the White Paper mapped out the following three ancillary targets:

First the member states were to reinforce the process of regional integration by engaging in the cross-border sharing of good practices to develop and enhance their ability to meet the White Paper's objectives. Second is the promotion of policy harmonization across ECOWAS. This entails drawing together the policies that underscore access to energy services. The third target under the White Paper on Energy Access is that the members should target the development of their energy policies towards poverty reduction in rural and peri-urban areas as a component of targeting the Millennium Development Goals. The grand vision of the White Paper after these targets have been reached is that there will be a fuelling economic life across ECOWAS, a flowering of fundamental essential services (education, health care, water, etc.) and an improvement in the economic and social conditions of women in particular improving women's living conditions.

Consistent with their ambition to deepen and reinforce cooperation ECOWAS' members have seen a cross-border answer to the question of how to resolve their national power dilemmas. It is with this in mind that in 2000, ECOWAS adopted a regional strategy to shore up the respective domestic re-design of their electricity industry. At the core of this strategy is the aim of drawing on their national primary energy resources and the building up of inter-grid

connections across the region. These two core goals were grafted onto the wider aim of establishing a West African Power Pool (WAPP).⁷⁶

The sum of the details and analysis in this part is that one of the critical factors shaping regional integration in West Africa is energy security and a guaranteed supply of the same at affordable costs and with the widest coverage possible. The hoped for transformation of ECOWAS members economic fortunes will depend to a large extent on energy supply and affordability. While some strides have been made, some argue for a much more rapid transformation of ECOWAS energy as a whole led by policymakers shaping the legal and policy framework and investments coming from governments and private firms.⁷⁷

ECOWAS, when established in 1975,⁷⁸ was a reflection of the following international relations and law concepts: functionalism, neo-functionalism, and the so-called Old Regionalism. Romania-born political theorist David Mittrany is credited with the conceptual model known as the functionalism. His 1943 work on the topic built on his previous scholarship and also

⁷⁶ International Renewable Energy Agency, *West African Power Pool: Planning and Prospects for Renewable Energy* (2013). I outline and analyze the function of the WAPP in the latter part of this chapter.

⁷⁷ The ECOWAS Process and Strategy on the Development of the Sustainable Energy for All (E4ALL) Action Agendas, National Renewable Energy Action Plans (NREAPs) and National Energy Efficiency Action Plans (NEEAPs) p.7.
http://www.ecreee.org/sites/default/files/documents/basic_page/ecowas_se4all_aa_and_re_ee_action_plans_status.pdf.

⁷⁸ This treaty is available at
http://www.internationaldemocracywatch.org/attachments/351_ecowas%20treaty%20of%201975.pdf.
On the background to establishing ECOWAS, see Gowon, Yakubu. *The Economic Community of West African States: a study in political and economic integration*. Doctoral Dissertation submitted to the University of Warwick, 1984. For an analysis of the 1975 treaty arrangements see Samuel KB Asante, *The political economy of regionalism in Africa; a decade of the Economic Community of West African States (ECOWAS)* (1986): Praeger.

provided a platform for further research in the field. This work was his paper titled *A Working Peace System*.⁷⁹

The functionalist thesis outlines and delves into the evolution and working properties of cooperation. The United States for example was a good model of how functionalism works in practice. Mittrany saw this as the basis for international cooperation and nations consolidate their strengths and work together to attain common goals. Interestingly, his functionalism did not equate with supranationalism. So, while Mittrany was an exponent of strong international cooperation he was not into the surrender of national sovereignty to a single all-powerful supranational organ. Moreover, he did not even seem to embrace intergovernmentalism and thus create a weaker international body like ECOWAS in its 1975 incarnation. However, it does seem that enthusiasts of regional integration have blindly embraced the functionalist thesis as the basic model for regional integration with progressively stronger supranational bodies.

Mittrany was scornful of the League of Nations as a weak ineffective body that had done nothing to prevent the collapse of world peace in the 1920s and 1930s. Thus, his functionalism was a panacea for this sad state of affairs. Functionalism was also a much better approach to international cooperation than the fanciful hopes of the international federalists. At the end of the Second World War, some international statesmen were so enthusiastic about world government in the form of a federation of independent nations.⁸⁰

⁷⁹ David Mittrany, 'A Working Peace System' *The European Union*. Macmillan Education UK, (1994), pp.77-97.

⁸⁰ David Mittrany, 'A Political Theory for the new Society' *Functionalism. Theory and Practice in International Relations* (1975), pp.25-37; David Mittrany, 'The Functional approach in Historical Perspective' 47 (3) *International Affairs (Royal Institute of International Affairs (1944))*, pp.532-543; and David Mittrany, 'The Prospect of Integration: Federal or Functional' 4 (2) *Journal of Common Market Studies* (1965), pp.119-149.

The functionalist thesis therefore is that nations can provide and enjoy so-called international public goods⁸¹ by coming together for the purpose of solving international problem and creating international order. However, there is nothing in functionalism that suggests creating a durable supranational body. The functionalists see cooperation to solve global problems but not to direct world affairs on with the creation of some centralized global authority.⁸²

Rather at the core of their point is that international cooperation while essential to a better world does not undercut the orthodox notion of state sovereignty: in effect governments must transfer to international organizations any functions tasks that governments acting individually find hard to carry out efficiently on their own. Functionalism sees the need for the creation of a technocracy of sorts. Staff in the service of cooperation should be employed to attain solutions to basic shortfalls in the provision of global public goods and that this should be the limits to their roles. Mittrany's functionalism therefore is grounded in notions of efficiency stemming from economies of scale on the international level.

The neo-functionalist thesis absorbs the functionalist thesis. Arguably its leading theoretician is Ernest B Haas.⁸³ Neo-functionalism sees interstate cooperation move slowly from basic cooperation towards much stronger and more ambitious goals. Here there is no agenda for a sudden burst of energy and thus the creation of a powerful integration body. Circumspection is

⁸¹ Public goods are those goods that are, supposedly, difficult to obtain through private action. Thus, they need to be provided by governments at the state or international level. They include armies, police forces, and international peace and stability: Inge Kaul, Isabelle Grunberg and Marc A. Stern "Defining Global Public Goods", p.2 in Inge Kaul, Isabelle Grunberg and Marc Stern (eds.), *Global Public Goods: International Cooperation in the 21st Century* (1999) Oxford University Press.

⁸² In Africa, the functionalists were at the forefront of resistance to the fanciful notions of an African super-state, advocated by the likes of Kwame Nkrumah and Sekou Toure, presidents of Ghana and Guinea respectively at the time the Organization of African Unity was being contemplated. Obviously, they lost the debates and by the late 1960s any such notions were *passe*. Thus, when ECOWAS was being proposed by Gowon, it was a strict functionalist agenda, as is evinced from his thesis on the topic and the treaty outcome.

⁸³ Ernst B. Haas, *The Uniting of Europe*. (1958) Stanford: Stanford Univ. Press

the method for the neo-functionalists as international bodies that they create acquire more and more competencies and increases its power to govern its new remits more effectively. What propels the neo-functionalist bodies is when they attain greater success along the way. This seems to justify their existence and methods and then creates a sort of virtuous circle.⁸⁴

2.3 ECOWAS AND THE NEW REGIONALISM

What theories underpin ECOWAS? A grasp of the theories allows a greater and stronger comprehension of ECOWAS as a whole, its energy goals and its electricity market. ECOWAS is between the Old Regionalism and the New Regionalism. It is a product of the former but in its current incarnation it is forged by the ideas of the latter model.

Established by treaty in 1975 and ECOWAS was re-configured by a Revised Treaty in 1993. ECOWAS is another milestone in West Africa the emergence and consolidation of regional integration bodies. The formation of regional bodies, including ECOWAS, reflects the ostensible importance of cooperation in West Africa. In addition to economic integration, ECOWAS was aimed at bridging the Anglophone-Francophone tensions that came to the fore when during the Nigerian Civil War (1967-1970) Ivory Coast recognized secessionist Biafra's claim to break away from Nigeria.⁸⁵ As the only regional body encompassing all Francophone and Anglophone states in West Africa ECOWAS was to bring about harmony and unity of purpose irrespective of the members colonial past, and political inclination. Excavating the

⁸⁴ Karen J. Alter, and David Steinberg, 'The Theory and Reality of the European Coal and Steel Community' in S. Meunier and K. McNamara (eds) *European Integration and Institutional Change in Historical Perspective* (1997), pp.89-104.

⁸⁵ Chukwuemeka Nwosu, 'Recognition of Biafra and the Commencement of Diplomatic Relations with Gabon, Cote d'Ivoire, Zambia and Tanzania, 1968-1970' 1(1) *Ulysses International Journal of Humanities and Comparative Studies* (2018), pp.130-144

history of the idea of regional integration further, however, unearths intellectual groundwork laid in the late 19th century by the Liberian, Edward Blyden, the pioneer pan-Africanists and theoretician about West African unification.⁸⁶ While in its early formation, there might not have been an enthusiastic embrace of Blyden's work, progressively, as we shall see below, his belief in unity seems to have captured the imagination of policy makers and decision makers behind the ECOWAS agenda as it has evolved.

The preamble to the Revised Treaty, spells out the goals of ECOWAS. It is obvious that it seeks to raise living standards and deliver on social welfare for ECOWAS citizens. A product of the turn to neoliberalism across the developing world in the 1980s and also as noted marked by the concept of the New Regionalism, the Revised Treaty has a far wider and more ambitious remit than its comparatively weaker and narrower 1975 antecedent treaty.

The 1975 Treaty had a limited set of aims, when compared to the Revised Treaty. The 1975 Treaty while dotted with many provisions seemed in practice to only really aim at trade liberalization – forcing open national markets and collapsing them into a single space – a West African market to enable the attainment of the goal of trade liberalization among the members. This reflected the 1975 Treaty's context – the Old Regionalism, also referred to as Developmental Regionalism.

The expression Developmental Regionalism was coined by John Sloan in his authoritative article published in the *Journal of Common Market Studies*. Sloan categorizes Developmental Regionalism as those collective policies covering a range of economic areas where parties to a

⁸⁶ Hollis Lynch, "Edward W. Blyden: Pioneer West African Nationalist" 6 (3) *Journal of African* (1965), pp. 373-388

regional integration treaty set out plans to coordinate and integrate common their policies. This type of regionalism is the type followed by developing countries.⁸⁷

The developing countries sought an expansion of the range of their commercial activity for a number of reasons, The primary reason was that there were limits on their ability to develop on their own. The policy response to this problem was that they needed to build constructive and profitable commercial links with neighbouring and similarly situated countries in terms of economic development. Thus, the developing countries aimed to enhance growth and development through, *inter alia*, trade liberalization treaties. Ostensibly influenced by the theory of classical liberalism, this belief was reinforced by the work of the United Nations Conference on Trade and Development (UNCTAD) which supported intra-developing country trade as vital for their economic prosperity.⁸⁸ Africa responded to the importance of cooperation by forging a range of regional integration arrangements. Regionalism has a long history on the continent, with older arrangements such as the Southern African Customs Union being created in the early 1900s but it was the post-colonial era that saw an explosion in regional bodies, including the overarching regional body, the Organization of African Unity (OAU).⁸⁹

However, the proponents of regionalism in this period were circumspect about any surrender of state sovereignty. As much as regional cooperation was deemed important, developing countries in general. Including African countries, insisted on remaining sovereign independent states, and thus they were not going to be subordinated to any external body. This aversion to

⁸⁷ John W. Sloan, "The Strategy of Developmental Regionalism: Benefits, Distribution, Obstacles, and Capabilities" 10.2 *Journal of Common Market Studies* (1971), pp.138-162, p.142.

⁸⁸ John Toye, *UNCTAD at 50: a Short History* (2014) United Nations: New York

⁸⁹ Lynn K. Mytelka, 'A Genealogy of Francophone West and Equatorial African Regional Organisations' 12 (2) *Journal of Modern African Studies* (1974), pp.297-320.

compromising sovereignty was premised on concerns about exposure to the forces of international capital that had impacted Africa, Asia and Latin America.⁹⁰

While doubtful if, especially in Africa, participants in a regional integration body had the financial wherewithal to distort national domestic priorities through heavy inflows of capital, the position taken by national decision-makers still was largely one of a country being in a position to determine its own developmental priorities, irrespective of the power of their neighbours. Moreover, there were issues of trade dominance through the dumping of cheap goods which would be exacerbated if strong regional bodies were created. Of course, too there was the non-market symbolism of an independent state that had emerged from decades of colonial rule and thus was not primed to subsume itself into a powerful regional body with the power to roll back the outcome of the nationalist struggles.

Not surprisingly therefore, the Old Regionalism was protective of the state; even if its proponents appreciated the importance of the work of Haas⁹¹ or Mittrany⁹² about cooperation at the regional level, the Old Regionalism was not about to create a virtually new state – the kind of super-state found in the current structures of the European Union (EU). Concomitant with the protection of state sovereignty was the limited range of activities. The Old Regionalism therefore was not that ambitious. Projection of the power of a regional body across a range of activities would most probably have meant giving the regional body immense power or at the least opening the door to this possibility – the very development national elites were

⁹⁰ Walter Rodney, *How Europe Underdeveloped Africa* (1973) London: Bogle l'Ouverture.

⁹¹ Ernest B Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957* (1958) Stanford: Stanford University Press.

⁹² David Mittrany, 'The Functional Approach to World Organization' 24 (3) *International Affairs*, (1948), pp.350–363.

wary of. In the African context this position was not surprising as by the time the ECOWAS 1975 Treaty system was in place the ideological battle between the radical Casablanca Group and the moderate Monrovia Group over the powers of the OAU had been fought and won with Monrovia moderation emerging triumphant.⁹³ Arguably therefore, it is realistic to assume that no policy-makers on the winning side wanted to open the backdoor to a reprise of this polemical struggle over the prototypical regional body, under the umbrella of ECOWAS.

Against the above backdrop and created in 1975 as a result of diplomacy by Nigeria, and to some extent Togo⁹⁴, ECOWAS was in its early incarnation, a regional economic bloc with limited aims and objectives. Law's role in this setting was designed to protect state sovereignty. If any cross-border cooperation was to take place, it was to happen as steered and dictated by the ECOWAS members acting on their own and not under the canopy of the ECOWAS organs. Jonathan Rudahindwa has described this role of the law as derived from the law and development movement and its concept of law in social change.⁹⁵ Law had an instrumentalist role that differed from its formalist role. While formalism sees law as essential for economic growth, formalism limits law to predictability to ensure the growth of market relations between business partners. Law protects transactions by furnishing economic actors with rules to inform potential parties what they can and cannot and law also provides a dispute resolution framework to protect economic decision-makers from state or private predation.

⁹³ Zdenek Cervenka, *The Unfinished Quest for Unity: Africa and the OAU* Friedmann; Nordiska Afrikainstitutet, (1977) chapter 1.

⁹⁴ Yakubu Gowon, *The Economic Community of West African States: a study in political and economic integration*. Doctoral Dissertation submitted to the University of Warwick, (1984).

⁹⁵ Jonathan Bashi Rudahindwa, *Regional Developmentalism through Law: Establishing an African Economic Community* (2018) Routledge: London.

Instrumentalism however differs in that it sees law as a tool in the hands of the state and which can be used to attain specific developmental goals of the state. Development is not left to emerge from the millions of transactions from the multitude of atomised actors in the marketplace. Development is a consciously willed activity of which the state is at the centre. Law is an instrument, a tool in the hand of a developmentally oriented vanguard and it is through law's instrumentalism that countries are likely to prosper.⁹⁶ Thus law in the hands of a ruling vanguard, a politically socially and economic elite, can change a country's fortunes and direction.

Proponents of developmental regionalism borrowed from the instrumentalist handbook of law. Thus, as noted above as in the case of the 1975 ECOWAS Treaty, while they were happy to open markets, they never wanted regionalism to be an economic free-for-all where private actors had pride of place in the integration process. A supranational entity, ambitious, powerful and expansionist would produce such an outcome. Developing countries wanted to control the process of integration and thus limited the powers of the treaty bodies and pointed to regionalism as a process to enhance national development instead of being a private welfare-enhancing venture.

Observers of the Old Regionalism paradigm have formed the conclusion that this approach to regional integration was a failure especially in Africa. The abundance of evidence suggests that intra-African trade was still very low, frustrated by domestic interests who were happy to use tariff and non-tariff barriers to stifle the very trade flows the various treaties were supposed to energize. The ECOWAS Trade Liberalization Scheme (TLS) when first launched in 1983 is a good example of this as through highly restrictive rules of origin, these being the result of

⁹⁶ David M. Trubek, 'Toward a Social Theory of Law: an Essay on the Study of Law and Development' 82 (1) *Yale Law Journal* (1972), pp.1-50.

Ghanaian and Nigerian domestic industrial interests and their reservations about easy and preferential access to ECOWAS markets by French owned firms in Senegal and Ivory Coast.⁹⁷

In addition to low levels of trade⁹⁸, there was the general lack of compliance with ECOWAS Treaty provisions and related protocols and decisions.⁹⁹

One main peculiarity of the Old Regionalism was it was grounded in the concept of intergovernmentalism and thus the ECOWAS organs were unable to enforce compliance with ECOWAS law. Article 3 of the 1975 Treaty underscored this treaty limitation this by calling upon the members to take the necessary measures to give effect to ECOWAS law. This was its General Undertaking clause¹⁰⁰ and the interpretation of this provision by ECOWAS scholars is that there were no commands emanating from Lagos, the seat of ECOWAS at the time. While compliance with international law stems from the concept of *pacta sunt servanda*, half of ECOWAS members were then dualist states and thus saw the ECOWAS treaty regime as a distinct legal framework that required positive measures before ECOWAS law had effect at within their respective domestic jurisdictions.¹⁰¹

Furthermore, ECOWAS based its decisions on unanimity and the sum effect of this provision was that one member state in disagreement with the others was in a position to stifle ECOWAS'

⁹⁷ Kofi Oteng Kufuor, 'Public Choice Theory and the Failure of the ECOWAS Trade Liberalisation Scheme' 23 (4) *World Competition* (2000), pp.137-154.

⁹⁸ As of 2014, 30 years after the launch of the Trade Liberalisation Scheme, intra-ECOWAS trade stood at only 12% of the members' total trade. See *Ministerial Declaration on the Abuja Process on Regional Cross Border Trade Facilitation* (28th September 2013) Nigeria.

⁹⁹ Economic Community of West African States (ECOWAS), *Review of the ECOWAS Treaty: The Final Report by the Committee of Eminent Persons* (1992) Lagos: Nigeria, paragraph, 59.

¹⁰⁰ See 1975 ECOWAS Treaty, *supra*, article 3.

¹⁰¹ Notwithstanding the plain meaning of monism and the fact that most francophone ECOWAS members are monist, there is not always a straight and short leap from adopting an international instrument to having it being part and parcel of a monist legal order. Some scholars hold that there are conditions attached to monism and if these conditions are not in play, then monism is limited.

development as an integration body.¹⁰² What seemed to be the only positive aspect of the ECOWAS project was that in the early 1990s it intervened in the Liberian civil war¹⁰³ and this set in motion a series of security related actions that have imposed some semblance of peace and security across the region.¹⁰⁴

The 1975 ECOWAS Treaty system was upended on the back of the shift from the Old Regionalism to the New Regionalism. Where did the New Regionalism come from? The answer seems to it is a product of the period known as ‘Eurosclerosis’ within Europe during the 1970s and 1980s. This was a period of inertia in Europe when its regionalism project seemed to stall. It was however the cracks in the Soviet bloc together with the 1985 White Paper on the internal market and the Single European Act that set off a new dynamic process of European integration. EU reinvigorated dynamism was mimicked on a global scale in the New Regionalism.¹⁰⁵

The New Regionalism referred to several new trends and developments. These were the spectacular increase in the number of regional trade agreements, an externally oriented and less protectionist type of regionalism and an anti-hegemonic type of regionalism which emerged from within the regions themselves instead of being controlled by the superpowers. The theory

¹⁰² See CEP Report, *supra*, paragraphs 64-69.

¹⁰³ Abiodun Alao, *The Burden of Collective Goodwill: The International Involvement in the Liberian Civil War* (1998) Routledge; and Margaret Vogt, *The Liberian crisis and ECOMOG: a bold attempt at regional peacekeeping* (1992) Gabumo Publishing Company.

¹⁰⁴ After action in Liberia, ECOWAS has intervened in Sierra Leone, Gambia and threatened military intervention in Cape Verde and Ivory Coast.

¹⁰⁵ Kufuor has noted the tendency of ECOWAS and other African bodies to copy the EU model: see Kufuor, *African Unification: Law, Problems and Prospects* (2016) Carolina Academic Press: Durham: North Carolina; and Kufuor, *The Institutional Transformation of the Economic Community of West African States*, (2006) Ashgate: Aldershot, England. The New Regionalism is not limited to African regionalism. The Caribbean Community (CARICOM) has shifted in this direction too with more ambitious goals and stronger organs.

of hegemonic stability suggests that a powerful state is required to create and energise a global order.¹⁰⁶ However, with the slight erosion of United States power as the global hegemon, this theory has been challenged as no longer so important for a global economic order to function. Not surprisingly there is the increase in regionalism across the globe without the backing of the US. Furthermore, we are witnessing an attack by the US on regionalism in the form of its recent hostility to the North American Free Trade Agreement (NAFTA).¹⁰⁷

The above contributed to what is called the New Regionalism the essence of which is captured in the work of scholars in the field such as Hettne and Soderbaum. The core and components of the New Regionalism are essential to understanding this study on ECOWAS. The geopolitical setting for the New Regionalism was the change of the bipolar Cold War structure and alliance systems towards a multipolar structure. The collapse of the Soviet Union and its loss of its eastern bloc satellites led to the end of the Cold War and new geopolitical alignments. Suddenly it did seem that military might on its own was insufficient for global domination. What was required was economic efficiency and economic might to meet the challenges of a world without competing political and economic ideologies.¹⁰⁸ Reinforcing this shift was the relative decline of American hegemony manifested to an extent by the rising power of

¹⁰⁶ Noor Mat Yazid, 'The Theory of Hegemonic Stability, Hegemonic Power and International Political Economic Stability' 3 (6) *Global Journal of Political Science and Administration* (2015), pp.67-79.

¹⁰⁷ Jeff Mason and Andrea Shalal, *Trump signs USMCA, 'ending the NAFTA nightmare'; key Democrats not invited* (29 January, 2020) available at <https://www.reuters.com/article/us-usa-trade-usmca-idUSKBN1ZS0I5> (last accessed 22 July 2022).

¹⁰⁸ The new regionalism thus implies a surrender of political power to regional bodies as compared to the situation under the old regionalism. With this surrender, the new regionalism bodies assume responsibility for and more and wider political issues. The new regionalism is essentially a post-Cold War phenomena as hitherto national economies have expanded at such a pace that they have outgrown their national polities. It is, furthermore, a world-wide phenomenon, although, just like in the first wave, it started from Europe. Björn Hettne & Inotai Andris (1994): *Research for Action. The New Regionalism. Implications for Global Development and International Security*, UNU/WIDER.

international organizations and the constraints they imposed on US global power¹⁰⁹ in combination with a more positive attitude on the part of the USA towards regionalism, at least in the form of ‘open regionalism’.

The phenomenon of globalization with its high-speed flow of capital technology goods and services across national borders demanded also new forms of regional governance. With particular reference to the European, Union (EU), NAFTA and the Asia-Pacific, regionalism could no longer function using the archaic frameworks of the 1950s to 1970s. The process needed to be reinvigorated with new rules and new organs of regional governance and thus it demanded a break with the Old Regionalism. Regionalism assumed even greater importance as during the Uruguay Round of Trade Talks members of the General Agreement on Tariffs and Trade (GATT) saw regional bodies as insurance against a failure to achieve comprehensive trade liberalization. The Round faced a threat of collapse in the wake of problems over subjecting international trade in agriculture to the discipline of the GATT and the concern was the entire Round could collapse leaving GATT members no option to but retreat into regionalism. Of course, regional bodies kept non-members out or made it difficult for them to trade with the members as the latter had the benefit of preferential tariff and non-tariff treatment.

New Regionalism also reflected the dizzying collapse of the old order of international law that was birthed at the Peace of Westphalia¹¹⁰ and which was buffeted by the forces of economic,

¹⁰⁹ Addison Daniel Huygens, ‘American Decline and Changing Global Hegemony’ (2017) Doctoral dissertation, submitted to Iowa State University.

¹¹⁰ Scholars regard the Peace of Westphalia as a seminal moment in international law and diplomacy as this was the moment when the modern state system crystallized around the concept of state sovereignty and consequently giving birth to modern international law and professional diplomacy. In the Peace of Westphalia were the following principles that helped cement state sovereignty: religious freedom, the introduction of the diplomatic profession, and the recognition that states were now sovereign. Thus, the idea and practice of a European central authority that was already being

social, political, and technological changes after the Second World War. The Westphalian system of international law gave the world the idea of state sovereignty. The peace treaty acknowledged the sovereign equality of states, it broke the hold of the Holy Roman Emperor had across Europe and it affirmed the monopoly of the princes and kings over international law and relations. Thus, Westphalia established “territorial superiority in all matters ecclesiastical as well as political” of princes in the Holy Roman Empire, granting them rights that were previously held only by the emperor including the right to declare war and ratify peace treaties without the consent of the Holy Roman Emperor.

One feature of the globalized world in this post-Westphalian order is the rise of private authority. As states found it increasingly difficult to function effectively on account of their weak domestic structures and systems private actors mobilized at the domestic and international level and demanded and secured space in policy-making forums hitherto dominated by governments. Regional and international organizations followed suit as they provided additional venues for the resolution of global dilemmas. Thus, the monopoly the state had on the back of the Westphalian order crumbled after 300 years and was replaced with a new order that triggered new patterns of interaction both among governments and non-state actors.¹¹¹

challenged became accepted in 19th century Europe. With this came the need for diplomatic representation, formalized, for the new ‘independent’ states of Europe that were now free of papal control. Leading scholars of international law provided the intellectual ammunition needed to justify further the dismembering of the world order and the rise of the modern state with its diplomatic staff and representatives. This concept of state sovereignty and diplomacy was so durable that it persisted for centuries until cracks began to show after the Second World War The collapse of these ideas and systems is in Jessica T. Matthews, "Power shift: The rise of global civil society" 76 (1) *Foreign Affairs* (1997), pp.50-66, and Anne-Marie Slaughter, 'The real new world order' *Foreign affairs* (1997): 183-197.

¹¹¹ Alexander C. Chandra, 'Indonesia's Non-State Actors in ASEAN: A New Regionalism Agenda for Southeast Asia?' 26 (1) *Contemporary Southeast Asia* (April 2004), pp.155-174; Shaun Breslin &

The final development was the phenomenon known as the end of the Third World and its consequences for open markets.¹¹² The cohesiveness of developing countries was captured under the umbrella of post-colonial Third World solidarity and its anti-liberalism, both economic and political. One of the pillars of this post-War solidarity was that it rejected wholesale embrace of open markets. Colonial rule to which virtually all of them had been subjected had left their governments wary of free markets. The assertion here was that open markets favoured their former metropolitan countries. If the Third World was to prosper it had to restrain a flood of imported manufactured goods from the former colonial powers. It was this perspective on trade that led developing countries towards faith in in statism, and protectionism.¹¹³

However, in the 1980s there was a dramatic turn of events within the Third World, and which had serious consequences for their perspectives on international trade and regionalism in particular. Carrying huge debt burdens, forced to confront escalating world oil prices, and with a collapse in their export commodity prices, the developing countries were caught in what become known as the debt crisis and which manifested itself in their general economic collapse. To overcome this shock to their economies required adoption of policy prescriptions by the Bretton Woods Institutions generally referred to as the Washington Consensus.¹¹⁴ The World

Helen E. S. Nesadurai (2018) Who Governs and How? Non-State Actors and Transnational Governance in Southeast Asia, *Journal of Contemporary Asia*, 48:2,187-203; and Samuel O. Olorunfoba, 'ECOWAS and Regional Integration in West Africa: From State to Emerging Private Authority' 14 (7) *History Compass* (2016), pp.295-303.

¹¹² Mark T. Berger, 'The End of the 'Third World'?' 15 (2) *Third World Quarterly*, (1994), pp.257–275; and Philani H. Dhlamini, 'Is the "Third World" Concept Relevant?' *Politics in Developing Areas: Makerere University* (2013).

¹¹³ Björn Hettne & Fredrik Söderbaum *The New Regionalism Approach* Pre-publication manuscript, *Politeia*, Vol 17, No 3 (1998).

¹¹⁴ John Williamson, 'What should the World Bank think about the Washington Consensus?' 15 (2) *The World Bank Research Observer* (2000), pp. 251-264.

Bank prescribed economic deregulation and trade liberalization as key to reducing national debt burdens through increased foreign exchange earnings.

This new political economy of development impacted regional integration in the developing world, including ECOWAS. Caught up in the debt crises ECOWAS members had very little room for policy manoeuvre. This quandary, coupled with the inertia of the ECOWAS 1975 Treaty system sparked a major shift in thinking among policy-makers and elites and resulted in the decision to establish a committee to review the 1975 ECOWAS Treaty

The ECOWAS Committee of Eminent Persons (CEP) came up with a number of recommendations. Of relevance for this study is the proposal that ECOWAS shift from an intergovernmental arrangement to a supranational order that was straight out of the New Regionalism construct. This was designed to give ECOWAS greater power in executing its treaty objectives. This move towards supranationalism reflected the CEPs' enthusiasm for the EU's success relative to other integration groupings.¹¹⁵

Running parallel to the above change in thinking and the construction of the Revised ECOWAS Treaty of 1993 was the growing acceptance at the global level that increased and aggressive economic liberalization caused harm to the environment. This view stemmed from the notion of sustainable development and the need to impose some regulations, in this case, on international trade as a means to conserve natural resources. So much had this view found its way into trade liberalization that the rather dormant Article XX of the GATT that authorized members to impose trade restrictions on imports that threatened plant life, human life, human health etc. was now coming into focus during the Uruguay Round of Trade Talks.

Supranationalism and sustainable development were both enabled within the new ECOWAS matrix on the back of its move away from the Old Regionalism and its intergovernmental apparatus to the New Regionalism. This new paradigm of regional integration is far more

¹¹⁵ CEP Report *supra*, paragraphs 33-38.

ambitious than the Old Regionalism. The New Regionalism allocates greater powers and competencies to the regional body's organs, it has a stronger commitment to trade liberalization, it includes new issues in the global political economy such as trade in services and the protection of intellectual property and, for our purposes it embraces a commitment to sustainable development.

On the back of its new approach and wider objectives, ECOWAS became much more ambitious and dynamic. The Revised Treaty strengthened existing organs and created new ones. The ECOWAS AHSG now was armed with supranational powers¹¹⁶ and thus had the authority to immediately bind the ECOWAS members¹¹⁷; similar powers were conferred on the ECOWAS Council of Ministers¹¹⁸. The ECOWAS Secretariat (now the ECOWAS Commission) saw its bureaucratic remit clarified and enhanced, and the Court of Justice, long dormant was now

¹¹⁶ Decisions of the Authority shall be binding on the Member States and institutions of the Community, without prejudice to the provisions of paragraph (3) of Article 15 of this Treaty. 6. Such decisions shall automatically enter into force sixty (60) days after the date of their publication in the Official Journal of the Community.

¹¹⁷ The absence of any unambiguous, direct and authoritative provision in the Treaty conferring, powers of harmonization and co-ordination of the socio-economic policies and activities of Member States on any of the institutions of the Community, is matched by an even more striking absence of any power to bind Member States.; With the exception of the decisions of the Court of Justice. (Article 56), and the provisions of Article.4 (3) on sanctions for non-payment of budgetary contributions, not even the decisions of the highest organ of the Community -the Authority of Heads of State and Government - are binding on Member States. Such decisions and directions are binding only on the "Institutions of the Community". (Article 5 (3). Similarly, the decisions and directions 'of the Council of Ministers are "binding only all subordinate institutions of the Community.

¹¹⁸ Regulations of the Council shall be binding on institutions under its authority. They shall be binding on Member States after their approval by the Authority. However, in the case of regulations made pursuant to a delegation of powers by the Authority in accordance with paragraph 3(f) of Article 7 of this Treaty, they shall be binding forthwith.

energized.¹¹⁹ New organs were provided for including the ECOWAS Parliament¹²⁰ and the ECOWAS Economic and Social Council.¹²¹

Civil society was hitherto largely neglected in the study of regionalism. New regionalism scholars pointed to an increasing relevance and strength of civil society regionalization around the world. Civil society regionalization emerged for a range of different reasons, such as functional problem-solving and service delivery, a ‘need’ to transcend the structures and boundaries of individual nation-states, sharing of information, and learning. The point was not that national civil societies were disappearing, but rather that they became intertwined on a regional basis and to some extent became integrated within an emerging global civil society.

2.4 THE POLICY JUSTIFICATION FOR THE ERERA

It is well settled in international economic law that the ‘greening’ of international trade is a relatively recent development. Not surprisingly therefore, in 1975 ECOWAS barely mentioned any link between trade and the environment. At the global level, the then GATT while it did have Article XX as its trade and environment provision, there was hardly any use of this clause. International economic law and its sub-component, international economic law, was disconnected from energy law or other forms of environmental law. Not surprisingly, the main

¹¹⁹ Karen J. Alter, Laurence Helfer, and Jacqueline R. McAllister, ‘A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice’¹⁰⁷ (4) *American Journal of International Law* (2013), pp.737-779.

¹²⁰ There is hereby established a Parliament of the Community. Revised Treaty, supra, article 13.

¹²¹ There is hereby established an Economic and Social Council which shall have an advisory role and whose composition shall include representatives of the various categories of economic and social activity. Revised Treaty, supra article 14.

works on ECOWAS hardly treat the environment or energy resources as these were marginal components of the 1975 Treaty system.¹²²

Nevertheless, the concept of sustainable development was getting a grip on the minds of global decision-makers. In 1972 the UN convened its Stockholm Conference and this was the first major step of internationalizing environmental issues and embedding them in international law and also linking the environment with global economic issues.¹²³ However, it was the 1992 UN Conference on Environment and Development where countries began to finally get to grips with the reality that aggressive exploitation of natural resources through heightened economic activity, can have deleterious consequences for the environment.

Immersed in the compound of rules and policies to govern cross-border electricity in ECOWAS is the ECOWAS Regional Electricity Regulatory Authority (ERERA). The case made to create this body is based on failures of electricity regulation at the domestic level and also market failure at the domestic level in the various ECOWAS members and which I have referred to previously in this dissertation. Governments nationalized electricity supply on the grounds that this was their customary responsibility and also leaving provision of electricity to the market might result in under-provision of the service. This latter conception falls under the heading of market failure.

¹²² Olatunde JB Ojo, 'Nigeria and the Formation of ECOWAS' 34 (4) *International Organization* (1980), pp. pp.571-604; Gowon, *The Economic Community of West African States: a study in political and economic integration* supra; and Bruce Zagaris, 'The Economic Community of West African States (ECOWAS): An Analysis and Prospects' 10 (1) *Case Western Reserve Journal of International Law* (1978) pp.93-122.

¹²³ Under Principle 4: Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development.

Economists argue that with underdeveloped or even non-existent markets the public will be denied the benefits of beneficial public goods, including electricity. This therefore justifies the presence of government to fill the void left by market failure. Notwithstanding this assertion, economists do not automatically conclude that government can efficiently deliver what market failure has failed to provide. Government can be just as inefficient in the allocation of goods and services leading to skewed outcomes and sub-optimal delivery of services.

For instance, there may be shortages of goods and services if government imposes prices that deny retailers or producers the opportunity to yield dividends if they incorporate the goods in their production processes or other economic decisions. In cases where there is too much by way of regulations produced by the bureaucracy can also result in government failure. The Nigerian Electricity Regulatory Commission is an example of government failure with its intervention in the electricity market in a manner that is a drag on electricity supply. This kind of failure is probably a reason behind pressure for new supranational power allocated to ECOWAS to resolve the undersupply of efficient legislation for the electricity market. I have mentioned above the complaints in Nigeria against the failings of NERC and which are worsened the fact that Nigeria is produces oil in large commercial quantities and should not really have any problems with power supply. Relief from power shortages and periodic, unjustifiable tariff increases is probably best sought therefore through widening the market for participation in the supply of power to Nigerians and, in this vein, a new level of governance is needed – hence ECOWAS and its electricity regulatory body.¹²⁴

¹²⁴ 'NERC: We are working with stakeholders to address current issues in power sector' available at <https://www.thecable.ng/nerc-we-are-working-with-stakeholders-to-address-current-issues-in-power-sector> (last accessed 13 January 2023); and Ngozi Chinwa Ole, 'The Nigerian electricity regulatory framework: hotspots and challenges for off-grid renewable electricity development' 38 (4) *Journal of Energy & Natural Resources Law* (2020), pp.367-390.

Returning to the electricity situation in Ghana, this ECOWAS member also exhibits aspects of government failure in its electricity supply system. In a study of how the Ghana Electricity Company functions, the observation was that the company's internal mechanisms, no matter how perfectly crafted, the *de facto* application of the rules can still be problematic leading to the failure of the company to function effectively.¹²⁵

Another explanation that is related to the problem of government failure at the domestic level within ECOWAS is that the solution can be found if a regional body copies the EU and its successful model of electricity market liberalization and integration. The policy-makers of ECOWAS, along with numerous civil society actors in favour of deeper West African integration, have always been inspired by the EU successes.¹²⁶

Thus, and not surprisingly, ECOWAS is doing what comes to it through observation and learning – it is embracing EU style electricity integration as part of a goal of its own energy union. Consequently, under the plan to integrate the sub-region, there is a directive for the gradual establishment of the ECOWAS regional electricity market through the knitting together of its members' domestic electricity markets. This plan is set out in a publication by ERERA. The plan also provides for a regional market design and market phases, open access to the regional transmission network and access by eligible customers.¹²⁷ A market-based approach to creating a regional market for electricity is a groundbreaking move in ECOWAS' history

¹²⁵ Francis Gyebi and Samuel Quain, 'Internal Control on Cash Collection. A Case of the Electricity Company of Ghana Ltd, Accra East Region' 4 (9) *International Journal of Business and Social Science* (2013), pp.217-223.

¹²⁶ Tooraj Jamas, and Michael Pollitt, 'Electricity Market Reform in the European Union: Review of Progress toward Liberalization & Integration' 26 *Energy Journal* (2005), pp.11-41.

¹²⁷ Supplementary Act A/SA.2/1/08 Establishing The ECOWAS Regional Electricity Regulatory Authority (2008).

and development. It signifies a major shift in the embrace of the core elements of the New Regionalism, neo-functionalism, and functionalism that I referred to in the earlier part of this dissertation.

Furthermore, EREERA with its market supporting agenda reflects a shift from state-owned utilities, monopolizing their domestic jurisdictions to the opening up of wider economic space and the role of private actors. In tandem, this set of ideas and this process are playing out in across the globe and West Africa has not been excluded. In the rise towards regionalism and market liberalization, there is the need for peeling away the protection countries gave to their utility markets.

The history of electricity supply within West Africa prior to the formation of ECOWAS reinforces the importance of EREERA. Electricity sectors almost everywhere in West Africa began basically with vertically integrated geographic monopolies that were either state owned enterprises or were under the direction of state authority regarding the prices they set for their customers, their service obligations, the major investments that they were permitted to undertake financing they could source, and areas of business they sought to expand into.

That is, the most important components of electricity supply such as its generation, transmission, distribution, and retail supply were all woven into firms that were granted by their respective governments' permission to supply residential, commercial, and industrial consumers within a defined geographic area.¹²⁸ With these monopolies, the electricity sector remained basically very uncompetitive. Afraid to rely on market forces to determine prices, and with no competitors, across West Africa there was a woeful performance of electricity

¹²⁸ Folorunso Oladipo and Temitayo Olowu, 'The Nigerian Power System Till Date: A Review', 1 (5) *International Journal of Advance Foundation and Research in Science & Engineering* (2014), pp.20-33; and Guide to Electric Power in Ghana, Resource Center for Energy Economics and Regulation, http://www.beg.utexas.edu/energyecon/IDA/USAID/RC/Guide_to_Electric%20Power_in_Ghana.pdf.

firms. An increase in population and expectations especially in the rural areas that electricity will be extended to them added to the sector's woes, but governments still did not want to create opportunities for more efficient suppliers to expand and to place pressure on less efficient suppliers to improve or contract.

CHAPTER 3

THE ECOWAS ELECTRICITY LEGAL FRAMEWORK

3.1 THE ECOWAS TREATIES AND ENERGY PROTOCOLS

The main research issues and questions in this are how has the ECOWAS treaty system evolved in response to the need for it to play a role in regional electricity? What theories provide justification for the deepening of ECOWAS energy law? What is the state of the literature in law, pertaining to the ECOWAS electricity market?

ECOWAS first came into existence by the Treaty of Lagos, Nigeria, on May 28, 1975. It has its roots in earlier attempts at a West African economic community in the 1960s¹²⁹ and the primary purpose of ECOWAS is to promote economic trade, national cooperation, and monetary union, for growth and development throughout West Africa. The 1975 Treaty was the backbone of ECOWAS and the goal of promoting cooperation and development among the members.¹³⁰

The 1975 Treaty made provision for energy cooperation and also created energy-specific structures to help steer this process. While the ECOWAS Authority of Heads of State and Government (AHSAG) was empowered to establish various technical commissions as it deemed

¹²⁹ Prior to ECOWAS coming into existence there was a host of attempts at integration: see Kufuor, *African Unification: Law, Problems and Prospects*, supra, chapter 3.

¹³⁰ "It shall be the aim of the Community to promote co-operation and development in all fields of economic activity particularly in the fields of industry, transport, telecommunication, energy, agriculture, natural resources, commerce, monetary and financial questions and in social and cultural matters for the purpose of raising the standard of living of its people, of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to the progress and development of the African continent. ECOWAS Treaty (1975), article 2(1).

necessary, the Treaty especially provided for the establishment of four technical and specialized commissions including a commission on transport, telecommunications, and energy. This commission, like others in the commission set up had two express functions; (1) to submit reports and recommendation from time to time to the Council and (2) to possess “such other functions as are imposed on it under this Treaty”¹³¹

As far as the aims relating to energy were concerned, under article 48 of the 1975 Treaty, the members were under an obligation to coordinate policies and activities in the field of energy and submit its recommendations to the ECOWAS Council of Ministers¹³². A further obligation was that they were to co-operate, consult on and co-ordinate their policies, regarding energy and mineral resources; harmonise their energy policies especially as regards the production and distribution of energy, research, and production; exchange information on the results of research being carried out plan joint programmes for training technicians and personnel; and formulate a common energy policy especially in the fields of production and distribution of energy.¹³³

Arguably the 1975 Treaty was premature in relation to its energy and mineral resources provisions. This was because the 1975 Treaty was adopted just around the period when global concern for the environment and escalating crude oil prices were only starting to emerge. As noted previously in this thesis, the 1972 Stockholm Conference was a decisive moment in the development of the international environmental movement and international environmental law. It represented a first full assessment and stock-taking of human economic activity on the global environment, a concerted effort at building a common front on how to address and

¹³¹ Ibid., article 9, para 4.

¹³² Under the 1975 Treaty this Council was the second most powerful body in the ECOWAS organizational hierarchy.

¹³³ See 1975 Treaty, *supra*, article 48.

combat the seemingly degrading human environment¹³⁴. The main aim of UNCHE was the need for a common outlook and for common principles to inspire and guide countries in the preservation and enhancement of human environment.¹³⁵

It was not only human exploitation of resources that was at issue in the 1970s; also, the dramatic rise in oil prices in 1974 caused by the Organization of Petroleum Exporting Countries (OPEC) demonstrated how dramatic escalations in oil prices could send shock waves through national economies. The price of oil quadrupled from \$3 to nearly \$12 per barrel (\$75 per cubic meter), equivalent in 2018 dollars to a price rise from \$17 to \$61 per barrel.¹³⁶ Notwithstanding this change in the global political economy, it most probably happened too late for it to have an impact on the origins of the 1975 ECOWAS Treaty it probably impacted its further development.

Further, plausible assumptions about minimizing energy in the 1975 Treaty could be traced to Nigeria's self-interest. By 1975 the Nigerian economy was one fuelled by its oil wealth with this new bonanza at the heart of Nigeria's quest for influence and power in Africa and beyond. Given its appreciation of the role crude oil could play, it made geopolitical sense for Nigeria to

¹³⁴ Gunther Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) 1972 and the Rio Declaration on Environment and Development (1992)' 11 (6) *United Nations Audiovisual Library of International Law*, (2012) pp.1-11.

¹³⁵ Louis B. Sohn, 'The Stockholm Declaration on the Human Environment' 14 *Harvard International Law Journal* (1973) pp.423-514; and E.T Sullivan, "The Stockholm Conference: A Step toward Global Environmental Cooperation and Involvement" 6 *Indiana Law Review*, (1972) pp.267-282.

¹³⁶ Charles Issawi, 'The 1973 Oil Crisis and After' 1 (2) *Journal of Post Keynesian Economics* (1978) pp.3-26; and James E. Akins, 'The Oil Crisis: This Time the Wolf is Here' 51 (3) *Foreign Affairs* (1973), pp.462-490.

ensure that this natural resource asset was beyond the reach of the less-endowed members of ECOWAS.

Other factors pertaining to the failure of the Treaty include (with most likely there being consequences for energy governance): nonperforming bureaucracies, political corruption, and inept political leadership. Specific to the field of energy there were some challenges and problems like insufficient power generating capacity across the region, difficulties in managing energy infrastructures, the region was not too attractive to foreign investors who could help develop the energy sector, a booming population, urbanization etc.

3.2 THE ECOWAS REVISED TREATY

The Revised Treaty was signed in Cotonou, Benin Republic on 24 July 1993. Article 28 expands the scope of cooperation in energy. Article 28 asserts the following:

1. Member States shall co-ordinate and harmonise their policies and programmes in the field of energy.
2. To this end, they shall: a) ensure the effective development of the energy resources of the region; b) establish appropriate co-operation mechanisms with a view to ensuring a regular supply of hydrocarbons; c) promote the development of new and renewable energy particularly solar energy in the framework of the policy of diversification of sources of energy; d) harmonise their national energy development plans by ensuring particularly, the inter-connection of electricity distribution networks; e) articulate a common energy policy, particularly, in the field of research exploitation, production

and distribution; f) establish an adequate mechanism for the collective solution of the energy development problems within the Community, particularly those relating to energy transmission, the shortage of skilled technicians and financial resources for the implementation of energy projects of Member States¹³⁷.

ECOWAS developed an ambitious regional energy agenda, rooted in the ECOWAS founding treaty of 1975 but departing from its rather weak framework. It seems the early objectives were to promote cooperation and development in all fields of economic activity, including energy and increase the collective energy autonomy of the sub-region. However, it was 24 years later in 1999 that this regional agenda and its implementation slowly started to materialize with the establishment of the West African Power Pool (WAPP) and the ECOWAS Energy Protocol in 2003 which sought to promote long-term cooperation, increase complementarity, and attract investments to promote regional energy trade in West Africa. The energy agenda was further expanded with the establishment of the West African Gas Pipeline (WAGP) in 2005 and the ECOWAS Centre for Renewable Energy and Energy Efficiency in 2010.

The deepening of energy in the Revised Treaty coincided with the UN Conference on Environment and Development of 1992 (UNCED/Rio Conference). On the eve of the Rio Conference enough scientific evidence had been produced to support claims of the threat to the global commons by excessive economic exploitation. Therefore, the task for the international community became one of developing and implementing new norms for environmental protection and restating existing ones within the context of sustainable development.

Moreover, the ECOWAS system, notwithstanding its shortcomings was poised to be more energetic as far as collective action was concerned. The Revised Treaty was birthed in the era

¹³⁷ See Article 28 ECOWAS Revised Treaty (1993), *supra*.

of contemporary globalisation. The new or recalibrated regional bodies in this period have served as sites for collective action beyond their traditional remit. Starting from its intervention in the Liberian Civil War in 1990 ECOWAS had started to forge a greater commitment to cooperation not just *de jure*, but also *de facto*, in a range of areas hitherto included in the body of ECOWAS law, but largely left untouched.

The New Regionalism explains the expanding and active role of regional bodies within the context of globalization. This assertion stems from the supposition that globalization and New Regionalism are not only economic phenomena but also multidimensional and political processes. In this regard, we note that even in the absence of economic interdependence, as is still the case with ECOWAS with its low levels of intra-ECOWAS trade¹³⁸ regionalism can still be a very stimulating episode in a country and a region's economic development dynamic based on members of the regional body disconnecting their national governments from the drag of domestic lobbies and pressures they apply for protection such as protection from cheap imports or the demand for domestic subsidies to give them greater economic advantage. This is done by transferring critical policy decisions from the domestic setting to the regional setting to avoid national mood swings about trade openness and its consequences.¹³⁹ With regard to

¹³⁸ Carmen Torres and Jeske van Seters, *Overview of trade and barriers to trade in West Africa: Insights in political economy dynamics, with particular focus on agricultural and food trade* (2016) Discussion Paper No. 195 European Centre for Development Policy Management (2016). Intra-regional trade in ECOWAS represents 8 to 13% of total ECOWAS trade according to official data, p.ix.

¹³⁹ Critical, perhaps even cynical perspectives on this interpretation thus see one rational for international organizations is that they carry out the dirty work politicians find costly, even impossible, to execute at the national level. By shifting politically controversial goals they have from the national level to the international level, politicians are able to avoid scrutiny by domestic rivals and interest groups of policies that might very well be unpopular. They however secure agreement at the international organization level and then bring the agreement or objective home to the national level as a *fait accompli*. Perhaps the ECOWAS attempt to save President Doe from overthrow was possible

ECOWAS the shift to a stronger regionalism has served to enable the members engage in military activities without the consent of domestic parliamentary bodies or having to confront a possible hostile reaction by their respective national populations to any such action.¹⁴⁰

Furthermore, around this period ECOWAS was gaining status and visibility and strength due to its proactive role in resolving the Liberian civil war. Therefore, when drafted and adopted in 1993 the Revised Treaty was, as stated, a much stronger international instrument and Nigeria was willing to cooperate in creating a supranational energy market because it was still the dominant producer and exporter of crude oil in West Africa. The plausible assumption here is that Nigeria concluded that the West African market will probably benefit the Nigerian state (but not necessarily private market actors) if there was an extension of energy investments from Nigeria across West Africa. Due to this significant shift in the interpretation of its role, ECOWAS established the West African Power Pool and the West African Gas Pipeline both of which are described and analysed below.

3.3 THE WEST AFRICAN POWER POOL

The members of ECOWAS had their attention drawn to the shortfalls in distribution and access to energy across their bloc. It was this realization that spurred the creation of the WAPP as a specialized institution of ECOWAS, covering 14 of the member 15 countries. The WAPP was launched by the ECOWAS Energy Ministers in 1999. Its overarching aim is to bring together

because the members coalesced around the solidarity that ECOWAS fosters. It might have been difficult if not impossible for any of the ECOWAS members to have acted on their own to save him.

¹⁴⁰ J. E. Okolo, 'Integrative and Cooperative Regionalism: The Economic Community of West African States', 39 (1) *International Organization* (1985) pp.121-153.

the national power networks of 14 of the 15 ECOWAS countries¹⁴¹. Headquartered in Cotonou, Benin, the WAPP exists to drive a single electricity market with the goal of ensuring a consistent supply of energy at market-driven prices to the citizenry of the ECOWAS region. WAPP will also champion and promote and develop power generation and transmission systems. It also has a coordinating role in that WAPP will coordinate power exchange among the ECOWAS Member states¹⁴².

Although part of ECOWAS, the WAPP has its own governance structure: its paramount body is the WAPP General Assembly followed by the WAPP Executive Board, its Organizational Committees, and the General Secretariat. As the highest decision-making body of the WAPP the General Assembly, is composed of all the members' utility bodies. The significant functions of the bodies in the WAPP organizational hierarchy are as follows. The General Assembly is to shoulder the following undertakings: (a) it monitors the WAPP Agreement, it coordinates the necessary measures to attain the WAPP goals and thus has an implementation role pertaining to the WAPP Articles of Agreement.

The General Assembly also examines and adopts amendments to WAPP law and thus this gives the Assembly a law-making function, it also can approve application for new WAPP members (assuming Cape Verde currently not a member of WAPP but an ECOWAS member wants to join, or another country wants to join ECOWAS as a whole). The General Assembly is responsible for forming the WAPP Executive Board, adoption of Annual Reports of the

¹⁴¹ The WAPP includes all ECOWAS countries except Cabo Verde which as a small Island state is self-reliant in electricity. More information at https://www.researchgate.net/publication/272399480_Energy_regionalism_and_diffusion_in_Africa_How_political_actors_created_the_ECOWAS_Center_for_Renewable_Energy_and_Energy_Efficiency

¹⁴² <http://www.ecowapp.org/en/content/creation-wapp>.

Executive Board. Whenever necessary, the WAPP General Assembly can delegate some of its powers to the Executive Board.¹⁴³

The Executive Board also has a range of functions covering supervision and direction of the WAPP Organisational Committees; recommending acceptance and expulsion of WAPP members or applicants, entering into contracts and other instruments.¹⁴⁴ The Organizational Committees, comprised of technical experts from within ECOWAS are to provide policy support and advice to the Executive Board on all WAPP policy matters.¹⁴⁵ The WAPP General Secretariat provides administrative support to the Executive Board, WAPP Organizational Committees and any other ad hoc committees or bodies established to further the WAPP goals.¹⁴⁶

Dispute resolution is essential to building faith in an international agreement. Under the WAPP, these dispute settlement procedures are established for the equitable, efficient, and expeditious resolution of disputes. These procedures are intended to cover disputes between any two or more Members, between Members and consenting non-members or between the WAPP Organization and any Member(s) or consenting non-member(s).

The WAPP Organization and Members are strongly encouraged to take part in the complete process herein described prior to litigation or the utilization of other dispute resolution processes. Administrative involvement of the WAPP Organization in the proceeding is to establish a non-biased and independent dispute resolution panel to facilitate the resolution of the dispute and to provide meeting coordination and facilities. If the WAPP Organization is a

¹⁴³ Article 4 *Articles of Agreement of The West African Power Pool*.

¹⁴⁴ *Ibid.*, Article 5.

¹⁴⁵ *Ibid.*, Article 6.

¹⁴⁶ *Ibid.*, Article 7.

party to the dispute, its administrative duties shall be turned over to a contracted facilitator mutually selected by the disputing parties. These procedures do not apply to disputes that are covered by the dispute resolution procedures of any specific commercial agreement between Members.

Any Member may begin dispute resolution procedures by writing to the Secretary General to set the process in motion. The Secretary General will forward copies of this request to the Executive Board. This written request must contain the authorized signatures of all parties to the dispute. The request must contain: (a) a statement of the issues in dispute; (b) the positions of each of the parties relating to each of the issues; (c) the specific dispute resolution procedure desired; and (d) any modifications agreed-upon or specific additions to the proceedings described in this Articles of Agreement by which the dispute may be resolved¹⁴⁷.

It would thus seem that the WAPP dispute settlement procedures allow for inter-state litigation as the procedures allow any party to it may initiate disputes in the collective interest of all WAPP members.¹⁴⁸ However, the procedures exclude Non-Governmental Organizations (NGO) from bringing disputes before WAPP. Given trends towards NGO participation in

¹⁴⁷ Ibid., Article 17.

¹⁴⁸ In the South West Africa Cases the International Court of Justice defined the concept of *actio popularis*, as the right resident in any member of a community to take legal action in vindication a public interest. While the ICJ acknowledges the concept under domestic law, it stated that this concept was alien to international law at the time. *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, second phase, 1966, ICJ reports. 6, para. 88. A few years later, the dissenting opinions in the Nuclear Tests cases held that: «although [...] the existence of a so-called *actio popularis* is a matter of controversy [...] the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this court. *Nuclear Tests (Australia v. France)*. Dissenting opinion of Judges Onyeama, Dillard, Jiménez de aré-chaga and Waldock [1974] ICJ reports 312, para. 117.

international disputes¹⁴⁹, including ECOWAS itself, the exclusion of NGOs is a break with realities of access to international dispute settlement bodies.

The procedural provisions for to establish a panel to hear a dispute are as follows: The Secretary General is under obligation to immediately provide to each party to the dispute a list of candidates to be used in forming a three-person dispute resolution panel. The panelists are to be drawn from a roster maintained by the WAPP Organization and can be added to at any time by any Member. This list shall contain at least seven persons meeting the requirements established by the Executive Board.

The Secretary General shall then call a telephone conference meeting or any other means that is adjudged appropriate for the purpose of the parties agreeing on the final composition of the dispute settlement panel. This panel shall select a Chairperson from its membership. Should any candidate decline to serve or resign from a current appointment for any reason, the candidate whose name was last struck from the list shall automatically be contacted to serve. The Secretary General shall assign a staff representative to assist the panel as secretary. The Secretary General shall administer the panel selection process to ensure its completion within one week from receipt of the request¹⁵⁰.

The types of proceedings available for the resolution of disputes are: (a) An Advisory Proceeding to assist each party through discussion and advice, on a separate and individual basis without active participation in the joint discussions and negotiations, to resolve the

¹⁴⁹ Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' 18 (2) *Michigan Journal of International Law* (1996), pp.183-286; and Dinah Shelton, 'The Participation of Nongovernmental Organizations in International Judicial Proceedings' 88 (4) *American Journal of International Law* (1994), pp.611-642.

¹⁵⁰ Ibid.

dispute informally by mutual agreement; (b) A Mediation Proceeding to assist the parties through active participation in the joint discussions and negotiations (including specific recommendations of the issues in dispute) through which the parties indirectly attempt to resolve the dispute informally by mutual agreement; (c) A non-binding Dispute Resolution Proceeding to hear formal evidence on factual matters related to the issues submitted, make written findings and conclusions of fact, and issue specific written recommendations for resolution of each issue in dispute; (d) A binding Dispute Resolution Proceeding to hear formal evidence on factual matters related to the issues submitted; make written findings and conclusions of fact; and issue directives and awards for resolution of each issue in dispute.

The panel Chairperson shall determine meeting arrangements and format necessary to efficiently expedite the resolution of the dispute, and the Staff secretary shall notify the parties of these details. Each party to the dispute must have at least one representative present at all related meetings; such representative shall have full authority to resolve the dispute. Upon conclusion of this process, the panel Chairperson shall notify the Secretary General of its outcome. After consultation with the parties to the dispute and the panel Chairperson to determine the completion of the process as described herein, and/or as modified by the parties, the Secretary General shall discharge the panel, and notify the Executive Board of the results. The parties to the dispute agree to complete the process within 90 days from selection of the panel. The staff secretary shall maintain minutes of the panel meetings, which shall become part of the historical records of the WAPP organization.¹⁵¹ The West African Power Pool is a specialized organization set to deal with issues regarding energy.

¹⁵¹ Ibid, Article 19.

3.4 THE ECOWAS COURT OF JUSTICE

The ECOWAS Court of Justice is the main ECOWAS judicial organ and is charged with resolving disputes related to the Community's treaty, protocols, and conventions. While established primarily to hear disputes arising out of what is mainly an economic treaty, it has expanded its jurisdiction to include the competence to hear individual complaints of alleged human rights violations¹⁵². The ECOWAS Court of Justice was first created by protocol in the 1990s and its powers expanded pursuant to the Revised Treaty. In addition to providing advisory opinions on the meaning of Community law, the ECOWAS Court has jurisdiction to examine cases involving:

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

The Court is governed by Protocol A/P. 1/7/91 of July 6, 1991, which was amended by Protocols A/SP1/1/05 of January 19, 2005 and A/SP2/06/06 of June 14, 2006. It is the only jurisdiction of appeal for decisions taken by Institutions of the Community, including ECOWAS Regional Electricity Regulatory Authority (ERERA). Notably, it possesses extensive authority over disputes arising from the application or interpretation of laws, acts and decisions of the Community or breaches by Member States of their obligations stemming from these laws. This authority extends to all issues concluded in any agreement between Member

¹⁵² <https://ijrcenter.org/regional-communities/economic-community-of-west-african-states-court-of-justice>.

States, or with ECOWAS and those which give it jurisdiction, as well as any other matters entrusted to it by subsequent Protocols and Decisions of the Community.

Also, the ECOWAS AHSG has the power to refer cases to the Court on any dispute other than those cited in the Protocols relating to the Court of Justice. Finally, the Court of Justice, which is empowered to hear cases on human rights violations in any Member State, can receive cases not only from Member States, but also from any individual or legal entity for appeal on the judgment of the legality of any act of the Community causing grievance. Looking at all the provisions on dispute settlement, it can clearly be seen that there is a dispute resolution procedure under the WAPP whilst there is also an ECOWAS Court of Justice which also deals with dispute resolution.

The overarching framework for the ECOWAS electricity market is the concept of supranationalism. ECOWAS has shifted from the intergovernmentalism of the 1975 Treaty, to supranationalism under the Revised Treaty. Given the effect of the EU on ECOWAS, EU supranational jurisprudence should guide ECOWAS in its framework for protecting cross-border electricity trades and investment. The EU Court's two ground breaking cases clarified the relationship between national legal orders and the EU. In *Costa v ENEL* the ECJ made it plain that membership of what is now the EU is an express commitment to members limiting their sovereignty in furtherance of the EU's goals.¹⁵³ The ECJ developed this relationship

¹⁵³ The Court held the view that

By creating a Community of unlimited duration, having its own institutions its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. *Flaminio Costa and ENEL 1964 — Case 6/64.*

further in *Internationale Handelsgesellschaft*¹⁵⁴ where it affirmed the superiority of EU law over its members' constitutional law.

There are some marked differences between the two judicial organs though. Under the WAPP, the disputes are between any two or more Members, Members and consenting non-members or between the WAPP Organization and any Member(s) or consenting non-member(s). These disputes are then settled by an advisory procedure or mediation whereas the dispute resolution under the ECOWAS Court of Justice deals with a wide range of disputes among the Member States. Also, individuals have access to the ECOWAS Court of Justice with the evidence suggesting this is the option utilized to clarify ECOWAS law. What is of greater significance to be treated as the thesis develops is the question as to which dispute resolution forum fits with the aims of the WAPP and whether the stage is set for a clash between the 2 bodies.

3.5 THE ECOWAS REGIONAL ELECTRICITY REGULATORY AUTHORITY

Within the framework of the Energy Protocol and the West African Power Pool Program (WAPP), the Member States of ECOWAS in January 2008 established the ERETA by Supplementary Act A/SA.2/1/08 as a specialized institution of ECOWAS.¹⁵⁵ ERETA's main objective is to ensure the regulation of interstate electricity exchanges and to give appropriate support to national regulatory bodies or entities of the Member States. ERETA's governance

¹⁵⁴ *Internationale Handelsgesellschaft mbH and Einfuhr- und Vorratsstelle für Getreide und Futtermittel* Judgment 1970 Case 11/70.

¹⁵⁵ Supplementary Act A/SA.2/1/08 Establishing The ECOWAS Regional Electricity Regulatory Authority (18 January 2008) available at <https://www.ereta.arrec.org/wp-content/uploads/2016/08/ERETA-s-Establishment-Act.pdf> (last accessed 18 January 2023).

structure is provided by Council Regulation C/REG.27/12/07 of 15th December 2007 on the Composition, Organization, Functions and Operations of the Authority while its headquarters is located in Accra, Ghana¹⁵⁶.

The desire of Member States of ECOWAS to realize electricity interconnections through the joint implementation and sharing of energy resources of the region has manifested in the adoption of an Energy Protocol designed to put in place the appropriate legal and institutional environment for the development of the electricity sector of West Africa.¹⁵⁷

Created by an ECOWAS Supplementary Act¹⁵⁸ it is also governed by Regulation C/REG.27/12/07 dated 15 December 2007 which states the composition, organization, responsibilities, and operations of the authority. The adoption of these two legal instruments marks the beginning of the transition phase during which the activities of the institution will commence, and the on-going demonstrative regulatory actions started during the implementation of the ECOWAS Regional Electricity Regulation Project will be continued.

ERERA is specifically empowered to do the following: create and ensure the maintenance of suitable conditions for the development of the regional market and regional infrastructures for energy transmission; supervise operation of the regional market specifically by warning and sanctioning anti-trust practices; settle disputes between stakeholders (mediation, conciliation, arbitration) and; support and assist national regulators.¹⁵⁹

The further mission of ERERA is somewhat similar to that of secondary lawmaker as it has the power to regulate cross-border electricity exchanges and support national regulatory

¹⁵⁶ Ibid.

¹⁵⁷ Available at <https://erera.arrec.org/en/about-erera/overview/>.

¹⁵⁸ A/SA.2/01/08 of 18 January 2008.

¹⁵⁹ See Supplementary Act A/SA.2/1/08 supra, Article 16.

mechanisms. EREERA is to serve as a sort of centralized clearinghouse for a normative institutional and harmonized contractual framework to promote cross-border electric energy exchanges within ECOWAS. Therefore, EREERA is the prime *de facto* regulator (notwithstanding it being subordinated to the AHSG) and it must ensure the creation of a sustainable electricity market and its gradual opening up to competition.

ERERA is also charged with capacity building for national regulators and the establishment of efficient procedures for the resolution of disputes between stakeholders. Other responsibilities are efficiency-related as it is responsible for developing and supervising the application of uniform technical rules for management of the exchanges carried out between interconnected systems so as to maximize their technical efficiency.¹⁶⁰ It is to play a role in electricity contracting as EREERA has the power to supervise wholesale electricity transactions between the various buyers in Member States, analysis of their efficiency especially by warning and sanctioning anti-trust practices.¹⁶¹

A further charge on EREERA is that of resolving electricity transaction disputes. In this regard EREERA is to develop procedures for dispute resolution and oversee adherence to commercial rules and contractual undertakings by the partners involved.¹⁶² In a form, this is another lawmaking role as the rules are most likely to add to the body of laws that govern the electricity market.

The powers assigned by the legal instruments creating EREERA empower it to enact, fix, specify or interpret technical and commercial rules on cross-border electric energy exchanges through the transmission network existing between the ECOWAS Member States. Within the framework of realising its objectives and its assigned missions, EREERA may also make any

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

recommendation to the various national and regional participants in the power sector. With regard to the technical regulation of cross-border power exchanges, EREERA is also empowered to authorize, approve, and supervise the activities of the various participants of the regional power market.

Furthermore, EREERA can initiate investigations, request for audits to be conducted, issue any injunction or protective or safeguard measure and sanction any breaches or violations of rules governing cross-border electric energy exchanges. Actions taken by EREERA in the performance of these different duties will be by way of regulations aimed at defining community regulation on cross-border electricity exchanges.¹⁶³ Similar to the existing laws, such regulations shall be binding on those to whom they are intended, once they are adopted and they will also be applicable on all participants on the regional market. The opinions and recommendations initiated by EREERA or issued at the request of the national or regional stakeholders of the power sector will only be advisory in nature. Also, EREERA can take decisions on cases of mediation, conciliation or dispute resolutions which are submitted to it, or sanction observed breaches or violations. These decisions would be enforceable on those to whom they are intended. Member States guarantee the application of the decisions of EREERA on their territory.

All of these actions and decisions of EREERA are subject to appeal before the ECOWAS Court of Justice which intervenes in the process as the jurisdiction of appeal. These appeals are limited to cases involving the failure of EREERA to respect its legal mandate or errors committed by EREERA in the application of its procedures. The Court of Justice may therefore re-examine the substance of the decision and substitute it with its own judgment. Finally,

¹⁶³ Ibid.

ERERA can take any protective measures automatically at its own instance or at the request of one of the parties involved provided a risk of irreversible damage exists.¹⁶⁴

The creation of an open and competitive electricity market at the regional level requires the existence of an appropriate institutional and regulatory framework, including amongst others, national legislations and harmonized technical and commercial standards and rules for the promotion and protection of investments. It is because of this that an Energy Protocol was signed after the adoption of the ECOWAS Revised Treaty and the energy policy. This protocol served as the general outline for the adoption of the different legislations required for the development of the West African Power Pool (WAPP).

3.6 THE REVISED ECOWAS TREATY AND ENERGY PROTOCOL

Articles 3, 36, 28 and 55 of the Revised Treaty state the basic principles relating to promotion, cooperation, integration, and development of the energy sector of Member States. Prior to this in 1982 ECOWAS AHSG adopted Decision A: DEC.3/5/82 relating to the energy policy of ECOWAS.¹⁶⁵ This policy aims mainly to ensure energy security, diversify primary energy sources, and promote increased access to energy. Even though the objectives of this policy remain real, there is a need for it to be adapted to technological changes, energy resource constraints and the global environment. In concrete terms, the application of this policy has been resulted in the implementation of regional projects such as the West African Gas Pipeline Project (WAGP), WAPP and the Project on Energy Access to Rural and Peri-urban

¹⁶⁴ Ibid.

¹⁶⁵ ECOWAS Decision A: DEC.3/5/82.

populations. These projects and programmes were accompanied by institutional arrangements at the regional level to promote cooperation between Member States.

The WAPP General Secretariat, which commenced activities in February 2006, is responsible for ensuring the sustainability of electric energy in the region essentially through the development of regional generation and transmission projects and the definition of technical and commercial rules for cross-border electric energy exchanges. (ii) The regional electricity market itself is organised and regulated according to the principles and rules mainly defined in Supplementary Act A/SA.2/01/08 of January 2008 and Regulation C/REG.27/12/07 of 15 December 2007 which establishes and governs the regional regulatory body.

These pieces of legislation provide for the regional electricity market to be organised on the principles of free exchange between Member States within a competitive framework founded on the following principles: the application of non-discriminatory rules of exchange and dispute resolution, the protection and promotion of private investments as well as environmental protection and the promotion of energy efficiency.

Commitment was obtained from all the Member States on the application of these principles so as to encourage the following: the eventual interconnection of all Member States; the freewheeling of electric energy on the basis of non-discriminatory, transparent and available network access at fair price; the gradual introduction of a regional wholesale electricity market within an open and competitive framework; the adaptation of rules for operations, safety and transmission tariffs to allow cross-border electricity exchanges; the harmonization of the rules for the organization of national markets in conformity with the rules and principles defined in the above-mentioned Regulation; - application of the principles of national treatment and those of most favoured nation treatment in the cross-border electricity exchanges; gradual

elimination of technical, administrative and other barriers to the trade of electricity; and fight against distortions and hindrances to competition in the regional electricity market.

Finally, the following provisions are the principles which will guide the regulation of the regional electricity market: - independence of the regional regulator (ERERA) from public authorities, private interests and all participants in the electricity sector ; - transparency in the regulation process, with the development of the rules and procedures of regulation through a process involving all institutional, state and regional stakeholders; rationality, predictability, coherence and stability of decisions and actions of the regional regulator; effectiveness and efficiency of regulatory actions through the provision of an observation and information system and adequate expertise at the disposal of power sector participants; and collectiveness in decision-making by the regional regulatory body.¹⁶⁶

Hence ERERA, which should operate according to the above-mentioned rules and principles, is required to play a vital role in the establishment of a sustainable regional electricity market and to ensure its gradual opening up to competition. It is for this reason that it is composed of a Council of Regulation, which is the managerial authority supported by a team of Technical Staff.¹⁶⁷

The Council of Regulation comprises of five members, of which one is the Chairman of ERERA. They will be appointed to work full-time for a non-renewable term of five years and with full independence and collectiveness required in their decisions. The team of Technical Staff is a structure composed of experts responsible for the provision of technical and administrative support to the Council of Regulation.¹⁶⁸

¹⁶⁶ See Supplementary Act A/SA.2/01/08, supra Article 18.

¹⁶⁷ Ibid

¹⁶⁸ Ibid., Article 20

Furthermore, in the performance of its duties, ERECA may establish the following consultative committees: a committee composed of representatives of national regulators and representatives of national administrations in charge of the power sector; a committee composed of representatives of ECOWAS power sector operators; a committee composed of representatives of electricity end-use consumers in the ECOWAS region.¹⁶⁹

ERERA is required to operate in a regional environment already characterized by the existence of institutions, both within the ECOWAS region itself or within its territorial space, whose functions and activities could have an impact upon its own. It is important to briefly present these institutions and their functions in order to facilitate the examination of the issues of overlapping and conflicting powers which shall be treated in the second part of this report. This presentation is however limited to regional institutions.

3.7 THE ECOWAS COMMISSION

The Commission is the organ responsible for the implementation of the decisions and policies of the governing bodies of the Community and is composed of nine commissioners including a President and a Vice-President. In general, the Commission oversees the promotion of community development projects and programmes, organization of Ministerial meetings for various sectors to examine the sectoral issues which contribute to the realization of the objectives of the Community, preparation of draft laws and work programmes.

¹⁶⁹ Ibid.

For these purposes, the powers conferred on it by the Supplementary Protocol A/SP.1/06/06 of 14 June 2006 notably include the powers to do the following: Make proposals to the AHSG and the Council of Ministers to enable them to declare their rulings on the main direction of the policies of the Member States and the Community, and formulate recommendations and opinions and Regulations to implement the laws of the Community, collect useful information and engage in consultations with Community institutions and bodies.¹⁷⁰ The Commission is therefore involved in the development of draft laws which must be submitted for adoption by the AHSG or the Council of Ministers whose meetings it is also responsible for organizing.

3.8 THE ECOWAS ENERGY EFFICIENCY POLICY

The ECOWAS Energy Efficiency Policy (EEEP) is a specialized centre of the ECOWAS. The EEEP has a promotional role; it is mandated to promote regional renewable energy and energy efficiency markets. It was established by the ECOWAS member states after a careful look at the severe energy crisis in the region. However, its promotional role is seemingly secondary to its role of promoting the sustainable economic, social and environment development of West Africa by improving access to modern, reliable, and affordable energy services¹⁷¹. The centre is to facilitate investments in the ECOWAS energy system by creating a favourable environment for private investments in energy efficiency which, it is hoped, will help drive industrial development and employment in ECOWAS through the reduction of energy bills.

Also, EEEP will contribute to reliability and security of energy supply, by decreasing losses at all links in energy value chains. The overall target of the EEEP is to double by 2020, the annual

¹⁷⁰ Supplementary Protocol A/SP.1/06/06 of 14 June 2006.

¹⁷¹ See Hancock, "Energy Regionalism and Diffusion in Africa: How Political Actors Created the ECOWAS Centre for Renewable Energy and Energy Efficiency, *supra*.

improvement in energy efficiency, to attain levels comparable to those of world leader. This means that each year, the amount of energy needed to produce a certain quantity of goods and services will decrease by about 4 %.

The centre has strategy policies and action plans that will add value through regional support to national efforts. The strategy focuses on policy, capacity, awareness, and finance whilst the action plan is based on five flagship energy initiatives each of which includes the strategies mentioned - policy, capacity, awareness, and finances. The flagship also includes the following: Initiative on Efficient Lighting, Achieving High Performance Distribution of Electricity, Safe, Sustainable and Affordable Cooking, Standards and Labelling Initiative, Develop and adopt and Finance for sustainability.¹⁷²

Thirdly is the ECOWAS Renewable Energy Policy (EREP). This centre was created to ensure increased use of renewable energy sources such as solar, wind, small-scale hydro and bioenergy for grid electricity supply and for the provision of access to energy services in rural areas. The EREP scenario will complement other important conventional sources of power production. The policy primarily focuses on the electricity sector, but also considers some additional issues regarding the use of heat in the domestic energy sector and the potential production of biofuels. The gender-balanced policy aims also at promoting job creation and business development throughout the value chain of renewable energy technologies (e.g. manufacturing, installation and construction, operation and maintenance)¹⁷³.

The EREP vision is to secure an increasing and comprehensive share of the Member States' energy supplies and services from timely, reliable, sufficient, cost-effective uses of renewable

¹⁷² Available at www.ecreee.org/page/ecowas-energy-efficiency-policy-eeep.

¹⁷³ Available at www.aecid.es>151012_ecowas_renewable_energy_policy_final.

energy sources enabling Universal access to electricity by 2030, A more sustainable and safe provision of domestic energy services for cooking thus achieving the objectives of the White Paper for access to modern energy services by 2020. The EREP has set a target group which includes grid-connected renewable energy application, off-grid and stand-alone applications, and domestic renewable energy application. The EREP, in combination with the EEEP responds to the severe energy crisis in the ECOWAS region.¹⁷⁴

The ECOWAS Energy Efficiency Policy (EEEP) is a specialized centre of the ECOWAS with the mandate to promote regional renewable energy and energy efficiency markets. It was established by the ECOWAS member states after a careful look at the severe energy crisis in the region. The overall objective of the EEEP is to contribute to the sustainable economic, social and environment development of West Africa by improving access to modern, reliable, and affordable energy services¹⁷⁵. The centre also aims to contribute to creating a favourable environment for private investments in energy efficiency and will spur industrial development and employment through the reduction of energy bills.

Furthermore, the EEEP will contribute to reliability and security of energy supply, by decreasing loses at all links in energy value chains. The overall target of the EEEP is to double by 2020, the annual improvement in energy efficiency, to attain levels comparable to those of world leader. This means that each year, the amount of energy needed to produce a certain quantity of goods and services will decrease by about 4 %.

¹⁷⁴ Available at www.ecreee.org/page/ecowas-renewable-energy-policy-erep.

¹⁷⁵ See Hancock, 'Energy regionalism and diffusion in Africa: How political actors created the ECOWAS Centre for Renewable Energy and Energy Efficiency', *supra*.

3.9 LITERATURE REVIEW

Yakubu Gowon's thesis submitted to the University of Warwick in 1984 was a major landmark in the study of ECOWAS. It achieved the following goals: first, and at a time when information was at a premium, with inter-state negotiations carried out behind closed doors¹⁷⁶ and behind the veil of state sovereignty, Gowon's thesis laid bare the complex and tortuous negotiations that culminated in the creation of the 1975 ECOWAS regime. This is because he played a major role in creating ECOWAS. Hence, this makes his thesis unique in the sense that we are treated to an account of regional statecraft from the person representation the West African hegemonic power that sought to create a regional order encompassing West Africa.

Gowon's research is very historical. While he doesn't suggest his work is interdisciplinary, the reader makes that inference as the originality of his study is partly based on history and partly on the comprehensive thesis-length study of regional politics. Gowon's work is thus a major contribution toward understanding the currents underpinning ECOWAS; the history of the region, the forces at play and the difficulties in securing an accord all come together to produce a thesis. An additional strength of the thesis is that it lays bare the Anglophone-Francophone tensions in the region and thus buries the myth of a harmonious sub-region in which efforts at regional cooperation are not too complicated.¹⁷⁷

¹⁷⁶ This approach fits squarely with the post-World War politics. Keohane and Nye have expounded on what they call the club model of decision-making in international politics. They assert that for decades post war international negotiations were, inter alia, conducted behind closed doors and by government negotiators disconnected from domestic publics. This approach was efficient as it allowed decision-makers to take decisions and reach agreements without being held hostage by the local constituencies. Robert O. Keohane and Joseph S. Nye Jr., *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* Paper prepared for the American Political Science Convention, Washington, D.C., August 31-September 3, 2000.

¹⁷⁷ Gowon provides a bit more detail and of course another primary account of what Francophone West Africa saw in keeping Nigeria in check. Ivory Coast acted as the praetorian guard of French

For my purpose however, there are limitations to Gowon's thesis: first it is a political science dissertation; thus, while there is some legal content, it is primarily aimed at a politics audience. My thesis is primarily legal while appealing to a wider social science audience. Second while the historical approach Gowon uses is original, it does mean that the work is heavily weighted down with description. He provides a detailed account of interactions with West African heads of state as he sought to garner support for a region-wide umbrella regional integration treaty. I do not suggest that this is wrong.

Gowon set out to narrate a version of events that required description. Moreover, his work does expand from its descriptive base to a wider analysis of what led to the creation of ECOWAS. Moreover, Gowon underscores the role of history in interpreting ECOWAS and his stress on history seems to have been followed by Kufuor in particular.¹⁷⁸ However, notwithstanding any gaps and shortcomings, Gowon's work is significant in that it was an original doctoral thesis which helped fertilize the field for the study of ECOWAS by scholars to come.

Another thesis outside law was the thesis on submitted by Douglas Zormelo to the London School of Economics in 1994.¹⁷⁹ Zormelo paints a gloomy picture of ECOWAS. His assertion

interests in the region and proved a stumbling block to ECOWAS' formation. There had been some cross-language cooperation such as the Ghana-Guinea-Mali Union, but this was a short-lived project. Largely, until ECOWAS French West Africa and British West Africa kept to separate zones of cooperation.

¹⁷⁸ Kofi Oteng Kufuor, *The Institutional Transformation of the Economic Community of West African States* (2006). One difference between Kufuor and Gowon is that Kufuor provides a theory for his historical methods. This is his fall back on historical institutionalism in which he takes pains to explain that ECOWAS is trapped on a path going back to the 19th century and thus it is hard to interpret modern ECOWAS without reference to past advocacy by the likes of Edward Blyden. For his part Gowon makes no mention of history as a method.

¹⁷⁹ D.K.K Zormelo, *Integration theories and economic development: A case study of the political and social dynamics of ECOWAS* (Doctoral dissertation, London School of Economics and Political Science (United Kingdom) (1995).

is that socio-political dynamics within the member states impede the development of integration. His thesis is that commitment to regional integration is superficial and rather members of the Community focus more on their narrow interests as shaping their decision sign up to ECOWAS and implement ECOWAS laws.¹⁸⁰ He even goes as far as questioning the position by Gowon that ECOWAS was designed to bring Anglophone and Francophone West Africa together.

Zormelo's thesis, submitted at the time the Revised Treaty had just been adopted seems to make no mention of it. He also avoids energy issues even at a time when sustainable development and deeper integration through law was on the international and regional agenda respectively. He thus skirts a good opportunity to be one of the first to explore the role of energy in regional integration and what domestic interests could do to deepen regional cooperation. Furthermore, like Asante and Gowon before him Zormelo does not write from a law background: Zormelo's research is in the international relations discipline. He makes this plain in his reliance of international relations concepts and research methods.

His thesis is that the domestic political and social structures provide opportunities for ECOWAS success but they also, paradoxically, act as constraints on regional collective decision making. Both domestic and foreign policy of the individual countries have

¹⁸⁰ One point of note is that his interpretation seems to add to the division between so-called Monrovia moderates who wanted to develop their national economies and Casablanca radicals who have always pressed for a swift and powerful regional body, While this debate had its high point during the debates over the OAU and the direction it should take it did not vanish completely (as the Monrovia moderates won the struggle). Traces of it were found in the formation of the Senegambia Confederation as Senegal and Gambia formed what seemed to be a unified entity in the 1980s. While this Confederation collapsed in less than 10 years its creation suggested lingering dreams of a unified West Africa. Zormelo seems to suggest that Monrovia moderates were more than just cautious of surrendering state sovereignty to a regional or continental body they were never actually going to do so and thus moderation was just a mask for their hidden aim.

implications for the desire to work together. By concentrating on nation building and national economic development governments tend to pay less than adequate attention to regional objectives despite rhetoric to the effect that regional policies hold the key to national development. At the same time the overwhelming desire of governments to be seen by their citizens as doing something about development makes it possible for them to participate in integration without excessive nationalism. Thus, regardless of the actual motives of governments, the national interest both provides opportunities and constrains regional integration.

Zormelo identifies domestic politics a problematic for ECOWAS. The basis of his position is that domestic politics tend to be disconnected from the ECOWAS project. In effect the ECOWAS members see no real political capital or advantage in building strong links with other members for foreign relations purposes. Complicating this position, as Zormelo argues, is the fact that intra-regional relations also determine how willing governments are to work with each other to solve common problems. The foreign policy orientation of individual countries and the ideology of governing elite determine whether they will co-operate. He asserts therefore that notwithstanding the end of the Cold War, ideological cleavages persist, and this shapes relationships between the members and their attitudes towards ECOWAS. He stresses this by pointing out the ideological differences between the Pan Africanist and socialist oriented regimes on the one hand, and the more conservative and pragmatic regimes on the other made it difficult for a region wide organisation to be formed and, supposedly even if formed, to manage to free itself from this clash of ideologies. These factors and beliefs make it difficult to agree on common policies for ECOWAS.

This conflict between radicals and conservatives affected interaction and the desire to associate with each other. In effect this also validates the following: ideological ties, where they exist, are helpful to integration; ideological cleavages are most divisive and cannot be overcome by

shared economic aims. Though this was especially the case in the period before ECOWAS was formed integration between Francophone and Anglophone countries could only be formed after pan Africanism had ceased to be an important variable in African politics. Thus, strong cooperation is haunted by differences of regimes – as long as there are radical pan-Africanists pitted against moderates, cooperation will remain problematic for Zormelo.

Compounding the ideological problem, colonial heritage has produced a linguistic divide in West Africa and this divide has further sharpened differences among ECOWAS members. Whilst the French speaking countries are highly dependent on France, the English-speaking countries see such dependence as a colonial relic and thus persistence of deep relations is in reality undesirable.¹⁸¹ The different attitudes toward extra-regional actors make it difficult to agree on whether dependence itself was good or bad. As we pointed out earlier, the fact that France was able to convince her former colonies to form what is now the West African Economic and Monetary Union (WAEMU) as a countervailing organisation to check Nigerian power in West Africa indicates that the linguistic tensions influence attitudes towards regional integration.

In reviewing the literature, Zormelo also highlights the role of social structure in ECOWAS and how this too impacts the depth and strength of cooperation. The diverse ethnic composition of countries within the region means that nation building becomes very salient. These domestic

¹⁸¹ This is very likely a reflection of the differences in colonial administration, The French governed their colonies based on the principle of direct rule and, also, they pursued a cultural agenda of assimilation – trying to make their colonial subjects into Frenchmen and women. Martin Deming Lewis, 'One Hundred Million Frenchmen: the "Assimilation" Theory in French Colonial Policy' 4 (2) *Comparative Studies in Society and History* (1962), pp.129-153. On the other hand, the British pursued indirect rule and made no deliberate effort to make Nigerians and Gold Coasters etc into black Britons. Michael Crowder, 'Indirect rule—French and British style' 34 (3) *Africa* (1964), pp.197-205. As a result, the French developed deep and close bonds with the African elite but this was not the same with the British. The patterns of relationships created then, persist to this day.

political stresses render secondary, the issue of regional integration; it does not register on the scale of importance for domestic policy makers. Since decolonization, West African states have struggled to sustain the new territories bequeathed to them by the departing colonial authorities. Thus, nation building and eliminating irredentism is the goal that has very little truck with regionalism.

As noted, Gowon's thesis focused on the evolution of the ECOWAS regime. He ignores the treaty provisions on energy and any significance that they may have. Zormelo's thesis, submitted at the time the Revised Treaty had been adopted seems to make no mention of it. He also avoids energy issues even at a time when sustainable development and deeper integration through law was on the international and regional agenda respectively. He thus skirts a good opportunity to be one of the first to explore the role of energy in regional integration and what domestic interests could do to deepen regional cooperation.

With the entry into force of the Revised ECOWAS Treaty in 1993, we can identify a shift in intellectual output. The Revised Treaty coincided with 2 developments; first was the expansion of ECOWAS' role into the field of security and military activity. Its intervention in 1990 in the Liberian civil war and its intervention in the Sierra Leone civil war produced a large volume of academic papers and monographs dealing with ECOWAS newfound security and military role. Papers by Ofodile, Alao, Olonisakin, Ofuatey-Kodjoe etc. started a wave of scholarship on ECOWAS in its security incarnation.¹⁸² While energy is a security issue, none of the papers

¹⁸² 'Funmi Olonisakin, 'ECOWAS and civil society movements in West Africa' 40.2 *IDS Bulletin* (2009), pp. 105-12; Wentworth Ofuatey Kodjoe, "Regional organizations and the resolution of internal conflict: The ECOWAS intervention in Liberia' 1 (3) *International Peacekeeping* (1994), pp.261-302; Anthony Chukwuka Ofodile, 'The Legality of ECOWAS Intervention in Liberia' 32 (2) *Columbia Journal of Transnational Law* (1994), pp.381-418; Jeremy Levitt, 'Pre-intervention Trust-building, African States and Enforcing the Peace: the Case of ECOWAS in Liberia and Sierra Leone'. 24 (1) *Liberian Studies Journal*, pp.1-26; Emmanuel Kwesi Aning, 'Eliciting compliance from Warlords: the ECOWAS experience in Liberia, 1990–1997' 26 (81) *Review of African Political Economy* (1999), pp.335-348;

however drew energy concerns into their research. The only link with the 1975 Treaty in terms of research was that scholars continued to focus mainly on issues of trade and monetary integration. Thus, several papers were produced by academics on legal issues pertaining to the ECOWAS Trade Liberalisation Scheme and, the search for a regional currency.

After Sam Asante published his book on ECOWAS in 1986¹⁸³, the next major text was published by Kufuor in 2006. His monograph *The Institutional Transformation of ECOWAS* was a major step in understanding the development of the Revised Treaty regime, how ECOWAS functioned and what measures could be adopted to give vigour to the ECOWAS integration project. Kufuor's work has been described as "pioneering work" in the field.¹⁸⁴ This assertion about his work being a forerunner is based on the methods of analysis he uses. Kufuor moves the study of ECOWAS forward by abandoning the doctrinal approach of ECOWAS law that other legal scholars used, and instead uses the New Institutional Economics research methods as his guide to explain the origins and shifts within the ECOWAS legal regime. In this vein Kufuor introduces 3 strands of analysis namely: rational choice institutionalism, sociological institutionalism, and historical institutionalism into the study of ECOWAS by academic lawyers. His assertion is that rationality (rational choice institutionalism) explains

Osarhieme Benson Osadolor, 'The Evolution of Policy on Security and Defence in ECOWAS, 1978-2008' *Journal of the Historical Society of Nigeria* (2011): 87-103; Kai Striebinger, 'When pigs fly: ECOWAS and the Protection of Constitutional Order in events of Coups d'Etat' *Roads to Regionalism: Genesis, Design, and Effects of Regional Organizations, Farnham: Ashgate* (2012): 179-196; Akin Iwilade, and Johnson Uchechukwu Agbo, 'ECOWAS and the Regulation of regional Peace and Security in West Africa' 8 (4) *Democracy and Security* (2012), pp.358-373; and Thomas Jaye, 'The Security Culture of the ECOWAS: Origins, Development and the Challenge of Child Trafficking' 26 (2) *Journal of Contemporary African Studies* (2008), pp.151-168.

¹⁸³ This is a political science book.

¹⁸⁴ Richard Frimpong Oppong, 'Review of The Institutional Transformation of the Economic Community of West African States by Kofi Oteng Kufuor' 16 *African Journal of International and Comparative Law* (2008), pp.115-18.

the 1993 Treaty, but this is a narrow approach to understanding ECOWAS and judging whether it is a success or not. This is a new approach to the study of ECOWAS.

Most scholars have limited themselves to rationality as an explanation for the emergence of the treaty system; but Kufuor asserts that the work of Edward Blyden, the father of pan-Africanism, has made regional integration in the form of a super state, path dependent. This is Kufuor's introduction of historical institutionalism into the study of ECOWAS (in addition to drawing attention to sociological institutionalism) and why he believes Blyden set West Africa on a path towards deeper integration that continues to be problematic. Blyden's work did not argue for a radical approach to unification rather, he saw integration as a gradual process. He set no time limits for this process to crystallize, and he also saw the real drivers of unification being non-state actors such as Churches and Mosques. What has taken place however is the radicalization of the agenda and the pressure for swift and deeper unification culminating in an entity with all the trappings of a state. As noted above Gowon provides a detailed historical narrative about the development of the 1975 Treaty; what Kufuor does that differs from Gowon is provide a theoretical framework for understanding the role of history in the formation of the 1993 Revised Treaty. Kufuor extends his assessment and interpretation of ECOWAS' performance to sociological institutionalism. This he says interprets ECOWAS not as just an economic organization but also as a forum or setting for sharing norms, values, hopes and aspirations of the members. The common bonds of the past, colonial rule and the trans-Atlantic trade in humans, the locking in of African countries into an unjust international economic order, and the current problems of political instability and economic underdevelopment all provide good reason.

Also, Kufuor applies the intra-national prisoners' dilemma to the study of ECOWAS. This dilemma is overlooked in understanding why ECOWAS has been slow to attain its goals. Scholars favour the international prisoners' dilemma to explain the failure of integration;

Kufuor does not reject this standard approach but, however, he insists we should incorporate the intra-national prisoners' dilemma into the range of explanations. The intra-national prisoners' dilemma faults domestic rent-seeking groups and the alliances they forge with the state as a powerful explanation for the failure of ECOWAS. Cooperation at the international level is made stronger by preventing a domestic undercutting of internationally agreed commitments.

Three further papers of note that influence my thesis are written by Kufuor. These papers cut across his published monograph.¹⁸⁵ The papers he published deal with ECOWAS trade law. Again, his work is not descriptive-rather he grounds his analysis in the economic theory of legislation. The first paper is on why the TLS failed despite it being perhaps the primary purpose of the entire ECOWAS project.

He begins from the economic theory of legislation towards understanding regional integration in West Africa. He examines the failure of the TLS from this conceptual point of view. He holds responsible ECOWAS organs for agreeing to adopt trade rules that, ostensibly, opened the region to trade in goods amongst the members, yet subtly erected barriers that frustrated trade. ECOWAS organs were responding to pressure from local interests wary of the power of French firms with a presence in Senegal and Ivory Coast and, also, the organs were responding to the ideological beliefs of Ghana and Nigeria at the time.¹⁸⁶

His second paper continues with his research into the TLS and uses the methods he has embraced. Kufuor examines problems in trade in agricultural commodities within ECOWAS. He focuses on the trade in tomatoes between Burkina Faso and Ghana. Kufuor notes the market

¹⁸⁵ See Kufuor, *The Institutional Transformation of ECOWAS*, supra.

¹⁸⁶ Kofi Oteng Kufuor, 'Public Choice Theory and the Failure of the ECOWAS Trade Liberalisation Scheme' 23 (4) *World Competition* (2000), pp.137-154.

access difficulties Burkinabe tomato traders face. The essence of the paper is that while the Revised Treaty seeks to cure the problems of trade liberalization under the 1975 Treaty the drafters of this Revised Treaty continue to face the complex political economy that sabotaged the 1975 Treaty system. What is termed contingent protection persists in Ghana (as it seems to do across ECOWAS) notwithstanding the commitment of the members to a regional single market. This is perpetuated through an intricate web of actors, and ideology and it plays out in the ECOWAS tomato trade. The focus of the paper is that it underlines how domestic actors can thwart regional trade. For all the enthusiasm about regional integration, consumers of tomatoes in Ghana, market traders and domestic manufacturers who use tomatoes in their production processes encounter the power of local tomato growers and the grip they have on the trade policy process.¹⁸⁷

Kufuor restates Ordoliberalism as essential for understanding ECOWAS law and why it fails and/or can succeed, but it seems to be a concept that remains untouched by the numerous ECOWAS scholars. Apart from Kufuor, and while the Ordoliberal school is well established, legal scholars have not applied its methods to understand how ECOWAS integration can succeed or fail. His third paper is on the difficulties arising out of implementing the right of free movement, residence, and establishment within ECOWAS. In a paper published in the *African Journal of Legal Studies*, again Kufuor examines the difficulty of compliance with ECOWAS law and why the member states wrestle with what is supposed to be a supranational order.¹⁸⁸ Kufuor notes that politics influences choices and that the government of Ghana is

¹⁸⁷ Kofi Oteng Kufuor, 'Sub-state Protectionism in Ghana' 18 (1) *African Journal of International and Comparative Law* (2010), pp.78-91.

¹⁸⁸ Kofi Oteng Kufuor, 'When Two Leviathans Clash: Free Movement of Persons in ECOWAS and the Ghana Investment Act of 1994' 6 (1) *African Journal of Legal Studies* (2013), pp.1-16.

trapped between its ECOWAS commitments and its membership of the ECOWAS supranational order on the one hand, and a militant traders union in Ghana on the other hand.

Chioma Ishiodu submitted a doctoral dissertation on ECOWAS to the School of Oriental and African Studies¹⁸⁹ and this doctorate did two things: it is the first doctorate to explore in detail the ECOWAS Commission - the bureaucratic and administrative arm of the Community. Second, it continues Kufuor's approach to understanding regional integration law using economic theories of legislation. Ishiodu explores whether the ECOWAS Commission is a powerful player in the treaty system or whether it is docile, just organizing meetings, receiving reports etc. As noted, this is the first major study of ECOWAS' bureaucratic wing. Ishiodu lays down important questions that call for further study. She questions the classical assumption about public bodies, this assumption being that administrative bodies serve the public interest. She uses two approaches in this regard.

The first approach she uses is from commercial law and it is the principal-agent approach to relationships. Her hypothesis is whether given the difficulty of monitoring international organizations, the Commission (the agent) acts in its own interest instead of the public interest, this being the wider ECOWAS and its citizens that the Commission is to serve. The second perspective is from public choice theory, this being a sub-field of the economic theory of legislation. Her research question is whether the Commission exhibits public choice characteristics. Public choice theory asserts that bureaucracies are inclined to expand their turf. Because bureaucracies cannot be controlled easily after they are created, and because of their

¹⁸⁹ Chioma Ishiodu, *The ECOWAS Commission: a Tool of Regional Governance* (2019) Doctoral Dissertation submitted to the School of Oriental and African Studies, London. At writing I am unable to confirm the status of this thesis as there is no available evidence it has been defended. I am grateful to my supervisor for providing me with a copy.

information advantages, they become immensely powerful and, also, difficult to dissolve. This makes the Commission a potentially powerful organ. Ishiodu's thesis seems inconclusive, and she calls for further research; however, in exploring ECOWAS and the expansion of the Commission's powers she leaves alone the field of energy.

She does not examine the relationship between the Commission and the emerging environmental bureaucracy within ECOWAS. Neither does she focus on whether the Commission has assumed greater responsibility for energy issues as public choice theory suggests. Nevertheless, her thesis is of significance as it applies economic theory of legislation and seems to support Kufuor's approach to understanding ECOWAS. As it also explores the ECOWAS bureaucracy then to some extent my thesis also owes a debt to Ishiodu's work. Furthermore, Ishiodu's work has highlighted the importance of researching ECOWAS' organs. Her work is situated in a range of studies on the ECOWAS parliament and the Court of Justice.

The ECOWAS parliament has been the subject of study by Densua Mumford and, by Nansata Yakubu. Mumford devotes a chapter of her doctoral dissertation on regional parliaments in Africa, to the ECOWAS Parliament. The thrust of her submission is on the evolution of the ECOWAS Parliament as the product of expert preferences and not any real democratic pressures from within the member states. She outlines how and why the idea of a regional parliament found its way onto the agenda of the CEP. Mumford notes the low level of activity by the ECOWAS Parliament and makes no mention of its work as a driver of ECOWAS' energy agenda. However, what is of significance here is the portion of the chapter that she devotes to the role of elites in treaty design. While Mumford does not call for further study about this development, she still draws attention to a dimension of treaty design: the role of

epistemic communities in forming and sustaining international treaties.¹⁹⁰ This role has been the subject of considerable focus in international law and relations yet seems to be lacking when understanding ECOWAS' dynamics.

Nansanta Yakubu's thesis is a more detailed account of the ECOWAS Parliament. She researches the extent to which the ECOWAS Parliament impacts conflict prevention and whether the Parliament has been effective in this role. The thesis, while original, also ignores the role of energy issues in conflict and how tackling them minimizes or eliminates conflicts altogether. Again, this thesis is not submitted to a law faculty and thus also does not contain legal analysis of the Revised Treaty and associated protocols and decisions on energy and electricity markets. Moreover, the dissection of the ECOWAS Parliament does not use tools for the economic theory of legislation. Thus, Yakubu seems to assume the ECOWAS Parliament was created, and sustains itself, in the standard public interest role.¹⁹¹

Olabisi Akingube's thesis is shaped by sociological approaches to international economic law. He draws on the leading papers in the field and applies them to ECOWAS. He and Kufuor seem to be the only ones who have gone beyond legal formalism as a method to study and interpret ECOWAS.¹⁹² While Kufuor devotes a chapter to this approach, Akingube's

¹⁹⁰ Densua Mumford, *The power of experts: why non-democracies create regional parliaments* Thesis submitted in partial fulfilment of the requirements for the degree of DPhil in International Relations in the Department of Politics and International Relations at the University of Oxford, (2018) chapter 6.

¹⁹¹ Nansanta Yakubu, *The ECOWAS Parliament as a tool for conflict prevention in West Africa* (Doctoral dissertation, University of East Anglia) (2015).

¹⁹² Olabisi Delebayo Akinkugbe, *Revisiting the Economic Community of West African States: A Socio-Legal Analysis* A thesis submitted to the Faculty of Graduate and Postdoctoral Studies in partial fulfillment of the requirements for the Doctorate in Philosophy (PhD) degree in Law University of Ottawa 2017.

sociological method covers his entire thesis. His principal research question how has the implementation of the ECOWAS Treaty of 1975 and the revised Treaty of 1993 been shaped and influenced by the changing historical, economic, and political conditions? Analytically, this question is posed as: To what extent does a socio-legal and contextual reading of ECOWAS modify the dominant interpretation of failure of the organization.

However, most of the legal scholarship that examines the impact of ECOWAS a body for regional integration is legal formalism. Legal formalism is a black letter analysis of law, including international law. Akingube argues that this is a limited approach to understanding ECOWAS. He claims that the ECOWAS Treaties and their implementation are embedded in the broader socio-political structures and relations of its members. His dissertation suggests that it is difficult, if not impossible to avoid a sociological approach that embeds ECOWAS in social relations. Drawing on the work of scholars in this area, Akingube claims he adopts a socio-legal approach because he seeks to challenges the dominant narrative of failure that accounts for the bulk of research on ECOWAS. He also aims to enrich the literature in the field by this approach. Akingube therefore is also one of the few legal academics who adopt an interdisciplinary approach to ECOWAS. Again, most texts and papers, while very good, describe ECOWAS law and proceed to explain the problems ECOWAS faces to attain its goals.

The consensus using this approach is that there are serious shortcomings with the law. Once these have been identified and repaired the ECOWAS system should function as effectively and efficiently as its model system, the EU. A rules-based legal order injects durability, stability and even some legitimacy into ECOWAS and this should move it towards greater strength. Nevertheless, Akingube is skeptical about rules being the solution to ECOWAS' inertia. A strong rules-based order might not even be possible given "the reality of African societies" after independence. It seems regional laws are disconnected totally from post-colonial Africa, and this causes ambitious regional structures to collapse.

As noted above, Gowon's thesis focused on the evolution of the ECOWAS regime. He ignores the treaty provisions on energy and any significance that they may have. Zormelo's thesis, submitted at the time the Revised Treaty had been adopted seems to make no mention of it. He also avoids energy issues even at a time when sustainable development and deeper integration through law was on the international and regional agenda respectively. He thus skirts a good opportunity to be one of the first to explore the role of energy in regional integration and what domestic interests could do to deepen regional cooperation. Kufuor also falls into this category as his work, the first on the Revised Treaty and written when energy had become an essential issue in global political economy, also ignores the shifts within ECOWAS regarding energy.

Research on energy within ECOWAS, and more specifically the development of the electricity market is thus one of the gaps in the field. My observation in carrying out my research is that scholars started to turn their attention to energy and electricity in West Africa 15 years ago. My assumption is that this is based on the increasing pressure on energy resources, the rising demand for literature and the view that there is still so much work to be done on ECOWAS after the considerable output regarding trade and military intervention.¹⁹³

Agbobodo, Adeyemo, Maharaj and Davidson¹⁹⁴ wrote a short paper on Transforming the West African Regional Electricity Market. This paper is very good but not thorough. It is an overview and insight into the transformation of the WAPP into a regional electricity market from a technical and socio-economic perspective. It summarizes efforts made to date, identifies, and evaluates some opportunities for improvement and proposes considerations for future development. The paper draws attention to the study of summary of the lessons and

¹⁹³ I also noticed that there is very little literature in law on industrial policy, agriculture, the ECOWAS Secretariat (now the Commission) and the ECOWAS Special and Technical Committees to mention a few.

¹⁹⁴ E. Agbobodo, B. Adeyemo, A. Maharaj and I.E Davidson *Transforming the West African Regional Electricity Market – Lessons and Experience* (2017) (Copy on file with me).

experiences in WAPP. The paper goes on to highlight the role of law in developing the regional electricity market and that for the WAPP to be a success, it requires a robust regulatory framework to support and develop contracting among parties in the electricity market.

In this regard though one paper I reviewed noted that the existing regulatory framework has some major limitations including the following: the performance standards and targets are limited, the energy market structure among WAPP member countries require modification to promote competition, inadequate funding, poor financial management and technical performance, resulting in poor power quality; service delivery and an inability to meet growing electricity demand etc. The point is that the WAPP limitations are key historical, social, political, and economic issues which are beyond the control of the relatively constricted WAPP and must instead be addressed by ECOWAS.¹⁹⁵

Under the organizational development in this paper, the above 3 authors highlighted that WAPP has a lot of ECOWAS protocols which are either completed or are still in process. These include ERERA which has been formed and is functional, the WAPP has set up an Information Coordination Centre with the aim of collating and disseminating best practices in the region, the ECOWAS Centre for Renewable Energy and Energy Efficiency has been established to promote Renewable Energy and Energy Efficiency in the Region, WAPP has completed the design of the regional electricity market, WAPP has developed Bilateral Contract templates and other market related documents. The paper drew attention that there are some opportunities to improve in the WAPP organizational market.

Also, the authors explained that the infrastructure development, associated with WAPP is engaged in ongoing efforts to increase the number of inter-national grid interconnections and,

¹⁹⁵ Francisco J. Burgos, *Regional Electricity Cooperation and Integration in the Americas* (March 2009) (copy on file with me).

on the back of EU funding it is building the regional grid control and communication centre, there are still some infrastructure shortfalls and these include; insufficient generation capacity in countries such as Sierra Leone¹⁹⁶, and the seriously weak financial positions of many utilities such as that which pertains in Liberia¹⁹⁷ means inability to finance new generation investment. As stated above, this paper points to the significant strides made by the WAPP. However, the paper only skims across the ECOWAS electricity market. It touches on ERERA as the regulatory body but does not tease out its functions in any depth.

V.C. Svanikier wrote a paper titled, *What Are the Hurdles to Regional Integration of Electricity Supply As a Part of the Solution to West Africa's Power Shortage?*¹⁹⁸ Again this paper does

¹⁹⁶ There is a problem with access to electricity in Sierra Leone. Supply figures are as low as approximately 10% to 12% of the urban population and only around 2% of the rural population. Most consumers rely on petrol or diesel generators for electricity because most of the regions lack a stable public power supply. The large mass of the population, over 90% rely on kerosene, battery lamps or candles for lighting. Cooking is normally done with firewood or charcoal. There is significant potential for the use of renewable energy, particularly solar energy and hydroelectric power. Overall Sierra Leone's power sector is small, with less than 150 MW of operational capacity and roughly 150,000 connected customers. Challenges to electricity supply are reflected in rather low generation capacity and seasonal variation. Then there is the decrepit infrastructure that is outmoded as well as grossly inadequate. Distribution networks are also unfit for purpose. Together therefore, not only is there inadequate electricity, what is available is delivered inefficiently and at high cost. Sierra Leone Country Commercial Guide (Energy Infrastructure) available at <https://www.trade.gov/country-commercial-guides/sierra-leone-energy-infrastructure>, (last accessed 20 June 2024).

¹⁹⁷ As at 2019, it was alleged that the Liberia Electricity Corporation (LEC) is losing 62-percent of its revenue to power theft, amounting to US\$4.26M monthly. This serious leakage is compounded by lack of connection materials that limits the corporation's capacity to expand connections and generate the needed revenue to sustain itself as a viable public utility. *Liberia: LEC loses 62% of Revenue to Power Theft* (02 Jul 2019) available at <https://africa-energy-portal.org/news/liberia-lec-loses-62-revenue-power-theft> (last accessed 20 June 2024).

¹⁹⁸ V.C. Svanikier, 'What Are the Hurdles to Regional Integration of Electricity Supply As a Part of the Solution to West Africa's Power Shortage?.' 7 (3) *Oil, Gas & Energy Law Journal* (2009) (available at Google Scholar).

not give detailed information about the electricity market in Ghana hence focusing on the regulatory department. Firstly, he seeks to answer the question whether regional integration of electricity supply is a viable solution to West Africa's power problems. Secondly, he explains that WAPP is an important plan in the development of West Africa, both in terms of fulfilling the basic domestic needs of West African States, as well as in terms of encouraging essential economic development. His paper looks at this plan in its various parts and identifies the possible hurdles to be faced in terms of it achieving its goal of helping solve problem of West Africa's power shortage. Using Ghana and Nigeria as his case study, he identified the main challenges facing integration initiatives in West African electricity sector. The approach taken is a combination of content analysis of key developments on energy integration in Africa and the examination of the domestic power industries of key players in West African Power Pool project.

Also, there is a paper written by Edgard Gnansounou titled "Boosting the Electricity Sector in West Africa: An Integrative Vision".¹⁹⁹ The paper discusses the low performance of the electric power sector of the West African countries and the solution they envisaged to cope with their present electricity crisis. The objective of the paper is to help refine research on the nature and direction of reforms in the electricity industry in West Africa. The author proposes a restructuring of the electricity sector with the author stressing cross-border electricity cooperation. He sees a West African electricity market as crucial for electricity supply across the sub-region. He compares two strategies: First, there is the strategy based on the expansion of the national power systems and the electricity exchanges among the countries in sub-zones.

¹⁹⁹ Edgard Gnansounou, 'Boosting the electricity sector in West Africa: An integrative vision' *IAEE Energy Forum* (2008) (available at Google Scholar).

This strategy is geared towards the management of national electricity generation systems. The second strategy, recommended in his paper leads to developing a regional market to boost investment.

Gnansounou examined the collapse of electricity supply across ECOWAS at the time and how it has affected the socio-economic development in the region. He highlighted that the electricity shortages stem from huge debt loads across ECOWAS that their utilities carry. These debts also explain the under-capacity of electric generating systems in West African countries. In addition, the governments are unable to provide the necessary funding renovation and further development of electricity infrastructures. Tied in with obsolete equipment was management dysfunction and which together created weak organizational performance across the West African electricity industry. For their part, private companies were constrained in their roles; they were restricted to the management and operations of utilities, their ownership remaining in the hands of the state.

Gnansounou's paper pressed forward on the ECOWAS electricity system. He stated that even though there are electricity crisis in West Africa, the ECOWAS members still have brilliant economic future. He used Nigeria as an example as the richest ECOWAS member with huge crude oil deposits and natural gas, but it is presently viewed as a rather fragile state due to political instability²⁰⁰, maladministration and high levels of corruption²⁰¹. In his conclusion, he reiterated the claim that exploitation of and gas across West Africa can become attractive for those industries such as petrochemicals which need these raw materials. It will create the

²⁰⁰ I. A. Afegbua, 'Conflicts and political instability in Nigeria: Causes, consequences and prospects' 2 (10) *Journal of Social Science and Public Policy* (2010), pp.10-18.

²⁰¹ Ilufoye Sarafa Ogundiya, 'Political Corruption in Nigeria: Theoretical Perspectives and some Explanations' 11 (4) *The Anthropologist* (2009), pp.281-292.

opportunity to develop the economy of West Africa based on value added products instead of reliance on raw material exports²⁰².

Kathleen J. Hancock in her article titled, “Energy regionalism and diffusion in Africa: How political actors created the ECOWAS Centre for Renewable Energy and Energy Efficiency (ECREEE). Kathleen focused more on energy renewable and energy efficiency. She focused on using the diffusion theoretical framework to analyse the organization’s founding with focus on the actors who created the organization. She focused on three states namely, Austria, Brazil, and Spain because they are the key players behind the creation and support of ECREEE. The states supporting the organization all have self-identified as leaders in renewable energy as well as, in the case of Austria and Spain long – term commitments to provide development aid to West Africa.²⁰³

Hancock gives a detailed reason why ECOWAS created the renewable energy centre and raised three questions for creating the ECREEE but paid attention on state actors that they are behind the creation of ECREEE and what was the process by which ECREEE was created. In her findings, she found out that regional organizations including ECOWAS were apparently not critical creators, but some international organizations played important roles. Although they

²⁰² Kathleen J. Hancock, ‘Energy regionalism and diffusion in Africa: How political actors created the ECOWAS Center for Renewable Energy and Energy Efficiency’ *5 Energy Research & Social Science* (2015): pp.105-115.

²⁰³ A case in point is the role that the Austrian Development Agency the operational unit of Austrian Development Cooperation, plays in providing support to civil society in ECOWAS. This support covers peacebuilding and conflict prevention. The support is also extended to cover shoring up economic and nutrition systems and the promotion of sustainable energy resources. With this goal in mind, the ECOWAS Centre for Renewable Energy & Energy Efficiency was established in Cape Verde. Austrian Development Cooperation with Africa (Austrian Development Agency) (no date) available at <https://www.entwicklung.at/en/countries/west-africa> (last visited 2 December 2020).

played a much less active role, several international organizations support ECREEE, most notably the UN Industrial Development Organization (UNIDO). UNIDO and UNDP (UN Development Program) had been working with ECOWAS for some time on white papers for energy development, with the financial support of Spain and Austria. UNIDO primarily provides technical assistance and may not have been key creator.

Opeyemi Akinyemi, Uchenna Efobi, Evans Osabuohien and Philip Alege in their study titled “Regional Integration and Energy Sustainability in Africa; Exploring the Challenges and Prospects for ECOWAS”²⁰⁴ explore the extent to which regional integration can be a viable tool in driving energy sustainability in the ECOWAS sub-region of Africa and vice versa. Their paper examines the existing opportunities and the attendant challenges for improved firm productivity in the region through the appraisal of the ECOWAS WAPP. In making their argument they use three measures of energy sustainability, namely energy security, energy equity and environmental sustainability. They assert that sustainable development continues to play a vital role and thus continues to occupy a top priority in policy making. As a model of development, the concept emphasizes a development strategy that integrates environmental concerns into economic and social objectives to ensure that future generations have sufficient resources for their development.

Contrary to concerns about sustainable development and how it prevents economies from growing, especially African economies, sustainable development provides an opportunity for economies to grow and develop while using resources in a sustainable manner that avoids atmospheric pollution, for instance. This is a very good paper which gives the audience a

²⁰⁴ Opeyemi Akinyemi, et al. ‘Regional Integration and Energy Sustainability in Africa: Exploring the Challenges and Prospects for ECOWAS’ 31 (4) *African Development Review* (2019), pp.517-528.

detailed importance of sustainability and energy sustainability. It also focuses on the WAPP, its importance and challenges as highlighted above by Edgard Gnansounou in his paper titled “Boosting the Electricity sector in West Africa.”

In their key findings and the policy implications of their work, the authors have noted that energy sustainability is a core component of sustainable development and an integral ingredient for infrastructural development for stronger regional integration. Regional integration can strengthen the energy sector through three main channels. This includes through human capital development, adoption of a common infrastructural network and institutions and, finally, through the development of a harmonized policy and regulatory framework for a smooth integration across the member countries.

Using the WAPP as a case study, their argument suggests that even though some progress had been recorded for this regional pool in these three areas for enhanced energy sustainability, there is still considerable room for improvement in meeting the targets set in the WAPP master plan. They assert that inadequate energy supply across ECOWAS continues to constrain manufacturing and industrial output in the region and this has a knock-on effect on the volume of trade across the region. This has implications for trade and energy policy. Therefore, effective collaboration, mutual trust, sufficient investment in human capital and technical expertise and creation of international frameworks to govern technical and legal issues of interconnections are crucial components in the success of regional integration for ensuring regional energy sustainability.

Karim Karaki’s paper on “Understanding ECOWAS Energy Policy”²⁰⁵ was a part of a series on the Political Economic Dynamics of Regional Organisations and it presents a political

²⁰⁵ Karim Karaki, *Understanding ECOWAS Energy Policy* (2017) (available at Google Scholar).

economy overview of ECOWAS and its role in promoting energy integration in the region. It focuses on the WAPP and ECOWAS efforts in promoting energy integration and creating a regional energy market. He also gives a good account of the origin and evolution of ECOWAS energy integration starting from the late 1960's.

In his paper Karaki stresses the need to harmonise and coordinate national energy policies among member states and promote integration programmes, projects, and activities and increase the collective energy autonomy of the sub region. He underscored energy as a significant component of the twelve priority sectors for achieving collective self-reliance and economic modernization within ECOWAS.

As noted above, Karaki is historical in his approach and in his paper he details how ECOWAS policy has stretched out over the years and in this process the ECOWAS energy policy has been translated into three key pillars; i.e. the creation of the WAPP, (regulated by the 2003 ECOWAS Energy Protocol); the development of West African Gas Pipeline which was first conceived in 1982, but for which implementation started in 2003 and the creation of the ECREEE in 2010. This paper is extremely good because it highlights the important sectors of energy and primarily talks and focuses on the West African Power Pool and the West African Gas Pipeline. However, its main shortcoming reinforces the significance of my thesis; it does not pay attention to the regulatory body ERERA, which is at the heart of my research.

Prof G. Bellantuono of University of Trento in his paper on energy raised a question whether energy policymakers and practitioners should avail themselves of comparative law?²⁰⁶

²⁰⁶ Nadia Ouedraogo, 'Energy and Economic Poverty: An Assessment by Studying the Causality Between Energy Consumption and Economic Growth in the Economic Community of West Africa States (ECOWAS)' (2011) (available at Social Sciences Research Network).

To clarify this point, he discussed three methodological aspects of comparative legal research firstly, what kind of selection criteria should be employed to decide on the scope of comparative research. Secondly, how the content of the comparative research should be identified and thirdly, how the mechanisms of legal change and its consequences should be assessed. For each aspect, a checklist is provided to help policymakers and legal professionals to evaluate the soundness of comparative legal research.

Nadia Ouedraogo in her paper in March 2011 titled; Energy and Economic Poverty; An Assessment by Studying the Causality Between Energy Consumption and Economic Growth in the ECOWAS. In this paper, she attempted to find the direction of the causal relationship between energy consumption and economic activity in ECOWAS. More specially, she investigated the long run relationship and causality between energy consumption, oil price and economic growth of the ECOWAS. She also explored the possibility of further information on the direction of causality by disaggregating energy consumption into its components of petroleum and electricity consumption.²⁰⁷

She stated that global warming and the production and consumption of energy are major issues affecting economies. The energy issue is not only related to the global warming issue, but also encompasses the aspects of energy security and income and therefore comprehensive understanding of these problems are essential. Ouedraogo is throwing light to the reader to look at the energy sector. She again stated the economic poverty is linked with energy poverty and the same time but at the same time, energy is an important sector for triggering economic development and for reaching the objectives of the future. She stated that the international;

²⁰⁷ Nadia Ouedraogo, 'Energy and Economic Poverty: An Assessment by Studying the Causality Between Energy Consumption and Economic Growth in the Economic Community of West Africa States (ECOWAS)' (2011) (available at Social Sciences Research Network).

community has long been aware of the close correlation between income levels and access to modern energy, countries with low income tend to have low energy access and a high proportion of the population relying on traditional biomass. This paper primarily focuses on the economic poverty which has a relationship with energy. It does not talk about the organs or ECOWAS or regulatory body.

3.10 RESEARCH METHODOLOGY

My research methodology cuts across various approaches to exploring the development of the ECOWAS electricity market. Methodology is an apparatus of the mind, a technique of thinking which helps its possessor to draw correct conclusions.²⁰⁸ This study adopts a qualitative research method to arrive at its conclusions. Qualitative research methodology stresses data collection from inter alia, primary, and secondary material.

My qualitative research sources include the following: electronic sites, mainly JSTOR, Social Sciences Research Network, Google Scholar, and Hein on Line. They host the main law journals needed for my study including the African Journal of International and Comparative Law, Journal of African Law, African Journal of Legal Studies, and the Global Comparative Law Journal. The law journals contain a wide range of papers on ECOWAS. These papers are relevant to understanding ECOWAS and the problems it faces, and the development of the ECOWAS system from its 1975 Treaty to its 1993 Revised Treaty. These electronic pages also host papers that deal with the European Union, particularly its Single Energy Market. These journals include Energy Policy, The Energy Journal, The Electricity Journal, Energy Research and Social Science, and Utilities Policy. Google Scholar is host to doctoral dissertations and

²⁰⁸ Ronald Coase, "The New Institutional Economics", 88 Am. Econ. Rev. (1998) 72, p.72 (papers and proceedings of the hundred and tenth annual meeting of the American economic association).

master's dissertations on ECOWAS. The ECOWAS home page is another electronic site which has the two ECOWAS Treaties, the protocols relevant to the ECOWAS energy policy. Also, the following libraries hold monographs and hard copies of material relevant to my research: the School of Oriental and African Studies, Institute of Advanced Legal Studies, London School of Economics and the UEL Learning Resources Centre

Derived from my qualitative methodology, the study takes several separate approaches but, which, drawn together will guide my thesis. Doctrinal approach to legal scholarship is the approach by the researcher to legal inquiry through the analysis of legal texts. In this instance my study explores the 2 ECOWAS treaties, ECOWAS Protocols and Decisions, and ECOWAS policy papers on the electricity market. These are the paramount primary texts the interpretation of which serves as an essential pillar of my thesis. The doctrinal approach is a productive line of inquiry for the study of ECOWAS. Several influential papers about ECOWAS are the product of doctrinal research.²⁰⁹ They describe key provisions of ECOWAS law and proffer suggestions to the persistent legal problems that ECOWAS continues to face.

The end goal of the doctrinal method tends to be proposals for redrafting law²¹⁰, how to overcome problems of compliance with ECOWAS law (this being a particular problem that

²⁰⁹ I. Salami, 'Banking Union Framework in the Economic Community of West African States (ECOWAS): a European Comparison' 17 (2) *West African Journal of Monetary and Economic Integration* (2015); Iwa Salami, 'Legal and Institutional Challenges of Economic Integration in Africa' 17 (5) *European Law Journal* (2011), pp. 667-682; Kofi Oteng Kufour, "Law, Power, Politics and Economics: Critical Issues Arising out of the New ECOWAS Treaty." 6 (3) *African Journal of International and Comparative Law* (1994), pp.429-448; Adedokun O. Ogunfolu, A Legal Appraisal of the West African Free Trade Area (2009).Cornell Law School Inter-University Graduate Student Conference Papers, Paper 19.

²¹⁰ Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, and Wibo van Rossum, 'Methodology of Legal Research: Challenges and Opportunities Methodology of Legal Research: Challenges and Opportunities' 13 (3) *Utrecht Law Review* (2017) pp.1-8.

impedes regional integration²¹¹). In sum the mix between the black letter approach and qualitative methodology is that this tends to influence the judicial wings of bodies like ECOWAS, helping them interpret ECOWAS law²¹², and it helps shape the reform of the overall ECOWAS architecture.²¹³

The qualitative/doctrinal approach has some built-in advantages. In using these approaches, the researcher is not restricted in where she can go with her inquiry; there is an unlimited range of materials available to the researcher. The aim is to extract as much information as possible from as many legal text, policy documents etc as possible. This fluidity allows for the research to respond to new circumstances that the researcher encounters.²¹⁴ The qualitative approach thus takes the researcher to a variety of intellectual treasure troves.

The doctrinal approach is not without its problems. Observers note that this approach is rather narrow. A doctrinal method of analysis assumes that the law exists in a vacuum, an objective one to be precise. Doctrinal scholars and their approaches thus tend to ignore the social framework or context within which law emerges. The doctrinal approach relies on plain meaning of law, completely disconnected from the context within which the law appears. On its face this seems to be one of the problems with research into ECOWAS.²¹⁵ My literature review suggests legal research has avoided the setting within which the law emerges. If we

²¹¹ Okechukwu Ibeanu, *Beyond Declarations: A report on the activities of Law Enforcement Officials that impede the full realization of ECOWAS Protocols on Free Movement of Persons and Goods in West Africa* (2007) Report Submitted to Cleen Foundation: Lagos, Nigeria.

²¹² Jerry Ukaigwe, *ECOWAS Law* (2016) Springer: Heidleberg, Germany.

²¹³ See *CEP Report*, supra.

²¹⁴ Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds.) *Oxford Handbook of Empirical Legal Research* (2010) Oxford University Press, p.5.

²¹⁵ As pointed out above Akinkugbe and Kufuor seem to have produced the main and dominant work on the interface between law and other disciplines in the study of ECOWAS: see Akinkugbe, *Revisiting the Economic Community of West African States: A Socio-Legal Analysis* and Kufuor, *The Institutional Transformation of ECOWAS*.

assume that law has importance for communities and not just a limited set of users, judges, teachers and law-makers then doctrinal research is lacking in impact somewhat.²¹⁶

My study is also informed by comparative research methodologies. Comparative law is mainly an instrument for improving domestic law and legal doctrine. Comparative law is an instrument of learning and knowledge as it provides researchers with information on different legal systems. Through this researchers and policy makers can add to the understanding of the problems their systems face this enabling a better path towards improvement of the same.²¹⁷

When choosing national legal systems to compare with, most (individual) researchers will make a choice based on their knowledge of languages, which explains why most comparative research in the Anglo-Saxon world is focusing on comparing common-law countries that still use English as their (main) official language. Comparative law as a practical study is about legal transplants, the desirability and practicality of borrowing from another legal system. What knowledge is needed or is appropriate for this comparative law is a separate issue which need not be treated here.²¹⁸

Comparative law as a discipline should lead to a theory about law and it tends to be primarily about historical relationships between legal systems. These relationships are the result of transplants; and borrowing is, in fact, the main way law changes. Comparative law teaches which transplants have taken place and-also of significance-which have not; the circumstances in which they occur; the modifications adopted at the time of borrowing and subsequently; when

²¹⁶ Salim Ibrahim Ali, Dr. Zuryati Mohamed Yusoff, and Dr. Zainal Amin Ayub, 'Legal Research of Doctrinal and Non-Doctrinal', 4 (1) *International Journal of Trend in Research and Development*, (2017) pp.493-495.

²¹⁷ Mark Van Hoecke, 'Methodology of Comparative Legal Research' *Law and Method* (2015), pp.1-35.

²¹⁸ Alan Watson, "Comparative Law and Legal Change",37 (2) *Cambridge Law Journal*, (1978), pp. 313-336.

how and why transplants are a success, partial success, or failure; and consequently when, how and why total innovations occur. As a result, any theory emerging from comparative law will be about legal change and about the relationship between legal structures and rules and the society in which they operate.²¹⁹

²¹⁹ Ibid., p.321.

CHAPTER 4

SHAPING THE ECOWAS ELECTRICITY MARKET

4.1 LAW AND THE DEVELOPMENT OF THE ECOWAS ELECTRICITY MARKET

Though set out in a legal framework, the ECOWAS electricity market cries out for interdisciplinary study. This is because of the assertion that law is not to be treated as a stand-alone discipline. Therefore, how can scholars from a range of disciplines study ECOWAS electricity market? Why has there been an exclusion of the same from the study. What role can such communities of scholars play?

This chapter therefore unpacks the origins of the electricity market. It also adds to the originality of my research by examining the role of an un-examined aspect of regional integration in ECOWAS – the role of so-called epistemic communities in the development of the ECOWAS treaty system in general and the electricity market in particular. My conclusion is that it is a bit difficult to trace the origin of the market to any identifiable set of actors, probably therefore, the ECOWAS electricity market is the product of interests within the ECOWAS machinery itself persisting with the so-called mimetic isomorphism that seems to be a common feature of the way ECOWAS functions to. Law represents the interests of powerful and influential forces in a society or organization. In some instances, law produces beneficial outcomes even for those not intended to be its targets. However, caution is needed as sometimes law, especially treaty law, is redundant since it reflects neither the interests of powerful forces or even to provide some beneficial legitimacy to an organization or society by attending to the needs of its disadvantaged members.

Trade flows within ECOWAS are persistently low. There has hardly been any significant upward movement since the Community was established in 1975. When the first ECOWAS

Trade Liberalization Scheme (TLS) was launched in 1983 it was noted that intra-ECOWAS trade flows stood at 11% of the members' total trade. Thirty years after the TLS, and its re-launch on 2003, intra-ECOWAS trade flows are still very low.²²⁰ This weakness then calls into question the rationale for the creation of a regional electricity market. The puzzle that requires attention is why has ECOWAS pressed ahead with creating and developing new market arrangements despite the failure to cultivate greater trade flows in goods (and services) this being the bedrock of the ECOWAS system? In search of the answer(s) to this question triggers the originality component of my thesis. I interrogate approaches to the creation of markets in general, and the ECOWAS electricity market in particular. I examine the unexplored role of knowledge networks, so-called epistemic communities to ascertain the role they have played (if any) in creating the regional electricity market.

Second, I explore the social dimension to the formation of markets. The assumption about market formation tends to be that they are the outcome of human rationality; in the case of ECOWAS, they reflect rational choice institutionalism. The electricity market reflects the role of efficient cooperation among members. If ECOWAS' members are to trade among themselves then it makes economic and legal sense to construct a framework of rules to ensure efficient collective action. The electricity infrastructure has its specific rules and regulatory body – ERERA. However, to assume markets reflect just human rationality is not the full picture as it pertains to human interactions. A large body of scholars have produced work on the social construction of markets, but this has not reflected in scholarship on ECOWAS market relations²²¹ as the bulk of the work continues to look at the market from the rationality

²²⁰ Intra-regional trade is limited, in fact, to around 10%. Rim Berahab & Abdelaaziz Ait Ali, *Trade Integration in the Economic Community of West African States: Assessing Constraints and Opportunities Using An Augmented Gravity Model*, (copy on file with me) (2019) p.5.

²²¹ Arguably the only comprehensive account on ECOWAS is Olabisi Akingube's doctoral dissertation submitted to the University of Ottawa. Here he argues that role of socio-legal relationships in

standpoint. This chapter seeks to draw attention to the social construction of markets and explore whether this applies in the case of the ECOWAS electricity market. The chapter also lays out the role of knowledge networks – epistemic communities and how they have served the creation of the electricity market – if at all. Again, this is an under-researched aspect on the ECOWAS treaty system and my thesis seeks to fill this gap too.

In his monograph on ECOWAS Kufuor argues that the Revised Treaty reflects what he called mimetic isomorphism – the claim that compacts between states, in this case ECOWAS, are explained by the tendency of developing countries to mimic the relative success of the EU model. Kufuor also sees the Revised Treaty as a product of path dependence. Path dependence is the assertion in legal theory that once a set of rules and ideas come together to create a framework for society it is difficult if not impossible to stray from the path. ECOWAS is the product of path dependence created by Edward Blyden and his agenda for West African unity. His programme has caged African rulers into accepting they need a united entity complete with a single market for goods and services – including the ECOWAS electricity market.²²²

Densua Mumford has made the claim that African regional organizations as a whole are trapped in the pan-African rhetoric.²²³ That Africa must unite seems to be accepted unquestionably and hence *regional* building blocks of this grand dream must include strong institutions that add to the governance structure of the anticipated future.²²⁴ It would seem from their work that

understanding the path ECOWAS has taken: Akingkuba, *Revisiting the Economic Community of West African States: A Socio-Legal Analysis*, supra. Kufuor has also mentioned social relations with regard formation of ECOWAS: Kufuor, *The Institutional Transformation of ECOWAS* (2006).

²²² See Kufuor, *The Institutional Transformation of ECOWAS*, supra

²²³ Densua Mumford, 'How Regional Norms Shape Regional Organizations: The Pan-African Rhetorical Trap and the Empowerment of the ECOWAS Parliament' 120/478 *African Affairs*, (2021) pp.1–25.

ECOWAS has sought to create a regional electricity market because it is the thing to do irrespective of whether there are actually actors and factors that demand the same.

The legitimization of international organizations depends to a large extent on the range of regional or international public goods²²⁵ that they provide, irrespective of whether the goods are in reality actually provided or whether there is a demand for them, or whether it is even realistic to contemplate providing them.²²⁶ Is it therefore plausible to assume that the ECOWAS electricity market has been created on the lines of theorized by Mumford and Kufuor? An initial set of conditions has fed into thinking for more than a century and this thinking draws further inspiration from the success of the EU. Or has the market emerged in response to a combination of actors and forces that have shaped the path ECOWAS has taken in this regard?

Notwithstanding the explanation for the emergence of the electricity market, its development has implications for law. Law is essential to market transactions. Law provides the necessary framework for creating and protecting wealth and the overall enhancement of economic life. In the absence of the protection of the law economic activity, whether spontaneous or planned might not come into existence or persist long enough for market actors to benefit and yield

²²⁵ Global public goods must meet two criteria. The first is that their benefits have strong qualities of publicness—that is, they are marked by non-rivalry in consumption and non-excludability. These features place them in the general category of public goods. The second criterion is that their benefits are quasi universal in terms of countries (covering more than one group of countries), people (accruing to several, preferably all, population groups), and generations (extending to both current and future generations, or at least meeting the needs of current generations without foreclosing development options for future generations). This property makes humanity the *publicum*, or beneficiary of global public goods.

²²⁶ Some regional bodies in Africa exist largely on paper with minimum impact: an example is the Mano River Union. See A. K. Bangura, *Using e-clustering to reinvigorate the Mano River Union*. *Georgia Institute of Technology* (2009) (available at Google Scholar. Others were created that never functioned until they collapsed: a case in point is the Union of African States

dividends from their investments. The consequences of market activity without law are very likely to be enormous.

If social forces have played a role in the construction of the electricity market, then here too we should note law plays role in structuring relationships and empowering actors. Non-state actors are using law to articulate their struggles and advance their socio-political agendas at the domestic and international level. As such, social movements use norms and institutions at multiple levels in framing their demands and engaging in action. For instance non-state actors in Africa used law to frame their demands for regional protection of human rights in the form of the African Charter on Human and Peoples'²²⁷ and the African Charter for Popular Participation in Development for Transformation.²²⁸ At the ECOWAS level the Revised Treaty continues to be shaped by the jurisprudence of the ECOWAS Court of Justice through the litigation of a number of Non-Governmental Organizations on a number of human rights issues.²²⁹

²²⁷ Kofi Oteng Kufuor, *The African Human Rights System: Origin and Evolution* (2010) Palgrave MacMillan: New York, chapter 1.

²²⁸ Kofi Oteng Kufuor, 'The African Charter for Popular Participation in Development and Transformation: A Critical Review' 18 (1) *Netherlands Quarterly of Human Rights* (2000), pp.7-22.

²²⁹ The Court also found that Nigeria violated articles 21 (on the right to natural wealth and resources) and 24 (on the right to a general satisfactory environment) of the African Charter on Human and Peoples' Rights by failing to protect the Niger Delta and its people from the operations of oil companies that have for many years devastated the region. According to the Court, the right to food and social life of the people of Niger Delta was violated by destroying their environment, and thus destroying their opportunity to earn a living and enjoy a healthy and adequate standard of living. The Court also said that both the government and the oil companies violate the human and cultural rights of the people in the region. The Court ruled that the government's failure to enact effective laws and establish effective institutions to regulate the activities of the companies coupled with its failure to bring perpetrators of pollution "to book" amount to a breach of Nigeria's international human rights obligations and commitments.

4.2 EPISTEMIC COMMUNITIES

To answer the questions posed above I first examine, as noted above, an unexplored area of ECOWAS institutional evolution and that is the role of epistemic communities in shaping the market. The concept of epistemic communities and their roles began to develop in academia on the back of the work by scholars working in the field on the 1960s and 1970s.²³⁰ They sought to look at the role of knowledge and policy experts in forging governance. While the initial focus was on domestic networks, over time, attention began to shift to epistemic communities at the international level.

Peter Haas has led the field in the application of the role of epistemic communities at the international level. Haas claims as follows:

An epistemic community is defined in the literature as a collective of knowledgeable professionals from a range of disciplines that produces policy-relevant knowledge about complex technical issues. Knowledge communities have several characteristics that set give them an information advantage over what can be described as ‘knowledge poor’ collectives or communities. Such communities embody a belief system around an issue which contains four knowledge elements:

- (1) A shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members;
- (2) shared casual beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes;
- (3) shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating

²³⁰ Peter M. Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’⁴⁶

(1) *International Organization* (1992), pp.1-35.

knowledge in the domain of their expertise; and (4) a common policy enterprise- that is, a set of common practices associated with set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.²³¹

We can thus infer from the work of Haas the following: epistemic communities are knowledge production systems that seek to influence national or transnational policies. Second, it seems obvious that central to the theory of the concept of epistemic communities is the role of human agency and the contention that institutions of any form develop from the life experiences, acquisition of knowledge, and world view of those who create them. This position flows from the claim by Douglass North that institutions do not suddenly appear from nowhere: they are the mental representations of those who wish to see them crystallize. Thus, ostensibly, North is correct when he says institutions are humanly devised constraints that shape human relationships.²³²

By developing and spreading ‘causal ideas and associated normative beliefs’, epistemic communities help decision makers identify their policy options and preferences in any given area for which a particular expertise is required. One can see the intersection between law and epistemic communities in the context of the Statute of the International Court of Justice. Article 38 of this statute lists the sources of international law to include scholarship by international jurists and decisions of international tribunals.²³³ There is a juncture between the work of

²³¹ Peter M. Haas, "Introduction: epistemic communities and international policy coordination" *International Organization* (1992), pp.1-35.

²³² Douglass C. North, 'Institutions' 5 (1) *Journal of Economic Perspectives* (1991) pp.97-112

²³³ Statute of the International Court of Justice (1945) available at <https://www.icj-cij.org/en/statute>, 38 (1) (d).

epistemic communities on the one hand and the work of jurists and the decisions of tribunals on the other hand. In this manner therefore, epistemic communities rely on law to give effect to the resolution of the global or regional problems they have identified and require resolution through international instruments.

Subsequent to Haas' generally accepted definition is the question how epistemic communities form and what is their impact if any, on the emergence of the law? In this instance, what impact have epistemic communities had on the development of the rules pertaining to the ECOWAS electricity market? The literature suggests that knowledge networks emerge naturally in response to, in our instance, when there is an identifiable transnational problem which calls for the creation of an epistemic community, a community which then provides some solutions.

As observed in the earlier parts of this thesis, ECOWAS faces an electricity supply problem. Removing barriers to the cross-border supply of electricity requires designing consequential rules for collective action. However, the history of ECOWAS, or to be more precise the history of regional integration in Africa is one of a gap between devising treaty rules and getting them to work.²³⁴ Hence networks of knowledge emerge to help devise rules and procedures to create law and ensure law delivers what it is supposed to do.

Epistemic communities would seem to fit into Harold Koh's assertion about transnationalism and the making of international law. Harold Koh makes the claim that compliance with

²³⁴ This is what was referred to in the CEP Report and formed the basis of the decision to adopt the Revised Treaty. The problem seems to have persisted: E.S. Nwauche, 'Enforcing ECOWAS Law in West African National Courts' 55 (2) *Journal of African Law* (2011), pp.181-202; and Richard Frimpong Oppong, 'The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment' 25 (1) *African Journal of International and Comparative Law* (2017), pp.127-132.

international law is explained partly, by the transnational legal process. Koh's claims build on the assertion by other scholars that compliance is an outcome of interest and identity. States conform to their treaty and customary law obligations because they have an interest in doing so and because it reflects their identity. Koh goes further by claiming that transnational legal process provides a more complete picture. According to Koh, transnational actors interact with the state and international bodies; they create patterns of behaviour and generate norms of external conduct which they in turn internalize. Included in these actors are the knowledge networks, the epistemic communities that are present at the formative stages of an international order.²³⁵ Thus a wide range of participants build and sustain international order and these participants include epistemic communities.

These communities tend to develop slowly, following normal patterns of academic behaviour. They are birthed through disciplinary conferences, academic papers, and monographs. As scholars and policy-makers produce more knowledge relating to a particular discipline, they create the necessary intellectual setting to help create the instruments needed for understanding and governing a particular problem. A second approach, however, is when governments or international organizations mandate the formation of epistemic communities. Thus, these networks can emerge when there is political direction that insists a community form to confront a particular problem.

Finding and assessing the emergence and impact of knowledge networks on ECOWAS is not that easy. Arguably, we can locate such a community in the University of Ghana Economics department. In 1963 this department instituted a research unit on 'The Economics of African Unity' as an indicator of a direct engagement by scholars with the pan-African movement. This was at a time when the more radical variant of pan-African thought had gained currency. The

²³⁵ Harold Hongju Koh, 'Transnational Legal Process' 75 *Nebraska Law Review* (1996), pp.181-207.

Casablanca Group was clashing with the Monrovia Group over the path African unity should take with the radical Casablanca members insisting on deeper, stronger, and supranational organizations. The main aim of the research group was ‘to make a contribution towards a better understanding of conditions and economic consequences of the political integration of Africa’ by addressing a sub-set of problems like

- a) General economic conditions of African integration
- b) Studies in the Structure of African Economies
- c) A comparative study of economic plans in West Africa
- d) Import Substitution in West African economies

The research team on ‘The Economics of African Unity’ comprised Jan Drewnowski, at the time director of the department, R. Bellamy, J. E. A. Manu, G. M. Adamu, P.P. Van der Wel, Reginald H. Green and Ann Seidman. This was a transnational collective of scholars. For instance, Jan Drewnowski was Polish²³⁶ Ann Seidman was American, Manu was Ghanaian and Green was British. An influential publication of this research team was the paper *Unity or Poverty? The Economics of Pan-Africanism*²³⁷, co-authored by Green and Seidman. The volume represents the most sophisticated version, from an economic point of view, of the call for African political and economic unification and continental planning. As it is claimed in the acknowledgments, the volume was truly the result of a co-operative team effort, with Drewnowski drafting the original prospectus, Van der Wel preparing ‘the first draft of the section on joint industrial location’, Manu was involved in drafting parts of the section on intra-

²³⁶ Jacek Luszniwicz, "Jan Drewnowski (1908-2000): An Economist in Public Service" 206 (3) *Gospodarka Narodowa/ Polish Journal of Economics*, (2006), pp.71-109.

²³⁷ Ann Seidman and Reginald Herbold Green, *Unity or Poverty? The Economics of Pan-Africanism* (1968) Penguin African Library, Harmondsworth: England.

African trade and transportation, and Adamu and Bellamy gave critical perspectives on different stages of writing.

However, following the presentation of a first draft as a background paper at the 1964 Cairo Heads of State Conference of the Organisation of African Unity, the paper was revised (most probably in response to comments and feedback at the Cairo Conference) and a refined version was the responsibility of Green and Seidman. The aim, as is alleged, of Green and Seidman was that they were engaged in the creation of a new theory of market integration in Africa and produce a series of policies which truly reflected the attributes characteristics and the needs of the African continent and at the same time could respond to the Casablanca Group's call (led by Nkrumah) for continental planning and political union.

Reginald Green's work in this community was an integral part of his views on the need for regional (or continental) economic co-ordination and market combination, Green was sensitive to the small size of the new African states in not only land mass but also in the economic sense smallness of African nations. Africa had very low national incomes and very few people. This had a major impact on their purchasing power for manufactured or processed goods, and the range of natural resources available for development is usually very limited. While Green conceded that these factors might change however, when he was researching and writing they were a big hindrance to Africa's development. Thus, African national economic boundaries had to be dissolved for the goal of the continent's economic development.²³⁸

Thus he posited that five areas in which institutional structures, could prove be of value are the exchange of economic information and forecasts on a broad range of projects; the co-ordination of external economic policies; intra-regional projects (e.g. transport), consultation, and

²³⁸ Reginald H. Green, "Multi-Purpose Economic Institutions in Africa", 1 (2) *Journal of Modern African Studies*, (1963), pp.163-184.

economic co-ordination (e.g., monetary controls); the harmonisation of development plans, especially in the industrial sector; and the establishment of joint institutions, to evaluate economic development programmes, and to secure and allocate increased extra-regional loans, grants, and technical assistance.²³⁹

The problem however is that this community of scholars had as a focus continental African unity and not West African unity. Influenced, if not directed by Nkrumah, it focused its attention on African unification and not West African unification and thus one could assume this was a community of scholars that influenced the formation of ECOWAS. Nkrumah had a particular aversion to sub-regional integration even though paradoxically, he had created the Union of African States with Guinea and Mali. He did note in his book *Africa Must Unite* that the biggest threat to Africa is the global neo-colonial economy which has as its primary tool the balkanization of Africa. Balkanization had to be rejected and replaced with a single African political and economic bloc in the form of the OAU. African unity for Nkrumah would have to be built from the top down he became an outspoken critic of regionalism.²⁴⁰

The above suggests even further that the role of epistemic communities in the development of the ECOWAS system has largely gone un-researched. In Gowon's thesis he traces the evolution of ECOWAS but in his narrative, he does not draw attention to any knowledge communities that provided the necessary epistemology for his project. Moreover, the 1975 ECOWAS Treaty emerged in a period where there was not that much academic or policy-relevant research prior to the formation of ECOWAS that identified the problem of barriers to trade within West Africa and, consequently, propounded on the need for an encompassing regional treaty. A few papers on regional integration had been published. Ann Seidman when

²³⁹ Ibid.

²⁴⁰ Kwame Nkrumah, *Africa Must Unite* (1963) Panaf Books: London, England.

working at the University of Ghana had produced work on trade within West Africa and the benefits of pulling down protectionist barriers.

The absence or minimal role of a knowledge community is stressed, even if inadvertently, by Gowon in his thesis. He observes the absence of opposition to his ECOWAS project from within Nigeria and in fact virtually all who expressed views were supportive of regional integration. He claims that Nigeria's West African policies encountered almost no opposition from public opinion inside Nigeria, where reactions from interested groups and from the public generally were mostly favourable – although he states that this acceptance was in response to the initiatives the Gowon administration these responses were published in Nigeria's national and local newspapers, which enjoyed a large circulation and a considerable degree editorial freedom. The issue of technical responses and deliberations were concentrated within the ranks of specialists, administrators, those responsible for government and others with a particular and direct interest in the outcome.²⁴¹

He does seem to concede some room for knowledge communities but even here a close reading of his work suggests the experts were under the tight rein of the government and were not really from independent policy institutes, universities etc. Gowon noted that although ECOWAS was not finally established until 1975, it emerged not as the result of a sudden inspiration, nor as the work of an individual, state or group of states, but as the product of a decade and more of patient debate and continuing discussion, in which each state and every leader in the region was, at one time or another, more or less closely involved. In addition to this large body of collective wisdom the West African governments also had the services of their own specialists

²⁴¹ Ibid, p.199.

and advisers, and the assistance and encouragement of bodies like the Economic Commission for Africa, one of many UN agencies active in the continent.²⁴²

Tentatively, therefore, I claim that it is hard to identify an epistemic community that formed specifically for the creation and functioning of ECOWAS. Apart from the Legon community, only Gowon, with his authoritative narrative, mentions, vaguely, some input by scholars into the development of the ECOWAS system. He does not mention any think tanks, university faculties or research institutes. Another scholar's account of ECOWAS emergence also reinforces my claim that knowledge communities were thin on the ground. Olatunde Ojo's account does not mention any knowledge networks. He gives a good explanation of the motivation behind ECOWAS, the dynamic and leading role of Gowon and the supportive role of Togo under General Eyedema.

The explanation for this lies in the following assumptions: the authoritative nature of post-colonial governments in West Africa did not grant enough scope for intellectual debate. The track record was one of suppressing freedom, including academic freedom and thus the general setting was not conducive to views that might not sit well with government opinions. Second, foreign policy was taken as being the preserve of government department – in fact the executive arm of government and its apparatus. Thus, foreign policy was not really of much concern to actors outside the executive apparatus – and this included academic departments. Third was the absence of what we might call a trade civil society, members of which could have fostered discussion on the creation of ECOWAS. Freedom of association was severely curtailed and where it did exist it was largely limited to domestic socio-economic issues. This is probably best reflected by the absence of any forum for non-state actors to participate in ECOWAS deliberations when it was created.

²⁴² See Gowon, *The Economic Community of West African States: A Study in Economic and Political Integration*, supra, pp.102-103.

A further explanation for the practical absence of epistemic communities in ECOWAS' formative years rests in the international relations theories of realism. Realist scholars make a few claims about the nature of international order. For our purposes we note the role of state power, rationality and disdain for institutions. Realists contend that the nature of anarchy in the international system causes states to be primarily concerned about relative gains, i.e. their position vis-à-vis other states in the system. As a result, states will be reluctant to enter into any agreement that leaves them in a worse position relative to others. States seek to advance their own interests under the umbrella of an international regime. Regimes are therefore created by dominant states known in international relations theory as hegemonic powers or hegemonic states.²⁴³

Hegemons provide stability; the hegemon has the resources to prop up the global (or regional) regime through financial, economic, military and other political incentives to participant states with lesser power even if the lesser states free ride on the benefits provided by the hegemonic power. In such instances the hegemonic power has very little regard for strong institutions built up from the base of society. Institutions are deliberately created as weak ones. State power and securing the interests of the hegemon are paramount.²⁴⁴

When the ECOWAS regime was being created Nigeria was emerging as the dominant power in West Africa and it sought to also use ECOWAS to secure its borders that had been threatened when Ivory Coast had recognized secessionist Biafra. The claim here then was to create a regional community to bring Francophone countries and Anglophone countries together.

²⁴³ Anne-Marie Slaughter Burley, "International Law and International Relations Theory: a Dual Agenda" 87 (2) *American Journal of International Law* (1993), pp.205-239.

²⁴⁴ Michael C. Webb and Stephen D. Krasner, "Hegemonic Stability Theory: an Empirical Assessment" 15 (2) *Review of International Studies* (1989), pp.183-198.

Gowon's thesis maps out Nigeria's use of its power to create ECOWAS. Realists see the state as a so-called black box in which the executive arm of government dominates decision making in international relations.²⁴⁵ There is very little room for the antithesis to Realism – Liberalism and its multitude of actors that fit into the framework constructed by Koh and other transnational theorists.

It seems obvious that at the heart of the concept of epistemic communities is the role of human agency and the assertion that institutions of any type emerge from the experiences, knowledge, and perceptions of those who create them. This position flows from the assertion that institutions do not suddenly appear from nowhere: they are the mental representations of those who wish to see them crystallize. Thus, it would seem that North is correct when he says institutions are humanly devised constraints that shape human relationships.²⁴⁶

4.3 EPISTEMIC COMMUNITIES AND THE REVISED ECOWAS TREATY

If we are unclear about an epistemic community forming to share knowledge and understanding about ECOWAS regarding the 1975 Treaty, did this repeat itself as a feature of the Revised Treaty, its expanded scope and, in particular, the electricity market? Epistemic communities gain even greater significance when there is uncertainty in an issue-area. Because policy-makers typically know little about subjects of a newly emerging issue-area, they need personnel

²⁴⁵ The black box theory in realism means that there is no relationship between domestic policy and foreign politics.

²⁴⁶ Olatunde JB Ojo, "Nigeria and the Formation of ECOWAS" *International Organization* (1980): 571-604.

informed of the new issue-area. Due to lack of such internal personnel, however, they rely on epistemic communities, whose information and advice become key sources for policy formulation. In addition, in times of uncertainty, policy-makers tend to be busy with the domestic impacts and do not have much time to consider the international ramifications of the new issue-area, so that epistemic communities are often influential in forming international regimes.

Second, the coherence among epistemic community members can be enhanced by the frequency of their meetings. Knowledge is produced and distributed on the back of repeated interactions among experts. It is through this mechanism that regional and international problems are identified and resolved. Epistemic communities as Haas has noted rely on consensus building and coherence. The conference processes, academic journals and other forums provide the setting for inter-personal relationships and the exchange of ideas.

The Revised Treaty was produced in a different setting. While still the regional hegemon, Nigeria's economic power had waned somewhat. Corruption and mismanagement had led to an economic contraction. Nigeria now sought to create a new regional order with stronger rules and wider opportunities for participation by non-state actors – a dynamic which orthodox realists reject. Second, transnationalism seemed to be gaining traction in policy circles at the national level and this was transferred to international bodies – including ECOWAS.²⁴⁷ West Africa, as part of the developing world was going through democratic transitions. The era of excluding citizens from decision making was going through a transformation and this

²⁴⁷ See Kufuor, Law, 'Power, Politics and Economics: Critical Issues arising out of the New ECOWAS Treaty' supra.

democratic re-birth was transposed to regional bodies. ECOWAS thus went from a relatively closed system to one that was more welcoming of popular participation and engagement.²⁴⁸

The adoption of the Revised Treaty however does not suggest a major impact of knowledge networks. While work on ECOWAS flourished in academic circles²⁴⁹, there does not seem to be a collective that evolved overtime, that was organized and funded for the purpose of identifying and reforming the 1975 Treaty order. Even in the wake of the problems and deficiencies of the 1975 Treaty system, we still cannot identify that cohesive body of scholars and policy-makers that organized conferences, secured grant funding, and worked as a systemic unit to proposed reform of the ECOWAS order. The closest to this was the ECOWAS-created CEP that produced a report on the problems of ECOWAS and the need for a new regional treaty order.

If the evidence for epistemic communities identifying a problem in the supply of electricity across ECOWAS and for which a regional market needs to be created is not immediately evident, then more orthodox explanations for the evolution of the market need to be explored. I focus on the role of social forces with a non-market agenda; the role of private, profit-making electricity suppliers, and the role of technocrats and decision-makers in the ECOWAS Commission. What roles have they played – if any at all in developing rules for the electricity market?

²⁴⁸ Kofi Oteng Kufuor 'Democracy and the New ECOWAS Treaty' 6 (1) *Oxford International Review* (1994), pp.60-64.

²⁴⁹ In particular Samuel Asante was a member of the CEP and so too were Jeggan Senghor and Adebayo Adedeji. Asante had published what is still regarded as the foremost work on the 1975 ECOWAS Treaty – *The Political Economy of Regionalism: a Decade of the Economic Community of West African States*. Senghor and Adebayo Adedeji were also published scholars in the field at the time. The point I make however is that they were not members of a funded organized collective with an institutional home and that were producing outputs relevant to ECOWAS, and which fed into the ECOWAS policy-making framework.

4.4 LAW, ECONOMIC RATIONALITY AND THE ECOWAS ELECTRICITY MARKET

Capital, irrespective of its volume, requires protection of the law to ensure stability and fidelity on the part of market actors. Is the ECOWAS electricity market the product of an intersection between law and market ambition by investors with surplus capital? With little evidence of knowledge communities identifying the need for a regional market to solve ECOWAS electricity dilemmas, we must turn to others probable factors and actors to ascertain whether we can trace the regional electricity market to them.

Following on from this I look to see if we can identify an economic class, a transnational capitalist class in ECOWAS that in pursuit of greater profits sought to go beyond their national borders in search of electricity rents. Can we impute rationality into the development of the electricity market? Is there evidence that economic actors, behaving rationally, have pressed for the expansion of electricity transactions beyond its national boundaries. If such evidence exists it would tie in with the basic assumption that market creators act to maximize their wealth. In its orthodox form rational choice theory sees human beings, including artificial human beings, as rational maximizers of their ends.

Whatever their preferences or goals are, rational maximizers will seek to attain those goals. A rational choice approach gives understanding to the electricity market structures. As this suggests, the rational choice institutionalists in political science drew fruitful analytical tools from the 'new economics of organization' which emphasizes the importance of property rights, rent seeking, and transactions costs to the operation and development of institutions. Especially influential is the assertion that the development of a particular organizational form can be explained as the result of an effort to reduce the transaction costs of undertaking the same

activity without such an institution. In a similar vein, Douglass North applied similar arguments to the history of political institutions.

Rational choice institutionalists employ a set of behavioural assumptions about humans. In general, they posit that the economic decision-makers have a fixed set of preferences or tastes; that they behave entirely instrumentally to maximize the attainment of these preferences and do so in a highly strategic manner that presumes extensive calculation. Following on from this the rationality assumption sees actors engaging in strategic interactions to influence political outcomes. They postulate, first, that an actor's behaviour is likely to be driven, not by impersonal historical forces, but by a strategic calculus and, second, that this calculus will be deeply affected by the actor's expectations about how others are likely to behave as well. Institutions, the laws, structure such interactions, by affecting the range and sequence of alternatives on the choice-agenda or by providing information and enforcement mechanisms that reduce uncertainty about the corresponding behaviour of others and allow 'gains from exchange,' thereby leading actors toward calculations and potentially better social outcomes. We can see that rational choice theorists take a classic 'calculus approach' to the problem of explaining how institutions affect individual action.²⁵⁰

Rational choice institutionalists have also developed a distinctive approach to the problem of explaining how law and organizations originate. Typically, they begin by using deduction to arrive at a stylized specification of the functions that an institution performs. They then explain the existence of the institution by reference to the value those functions have for the actors affected by the institution. This formulation assumes that the actors create the institution to

²⁵⁰ Rationality is normally part of the literature on politics, philosophy, economics and sociology. However legal academics have started to engage with rationality and a number of papers appearing in US law journals reflect this trend. The most meaningful one that I cite from is Cass R. Sunstein, Christine Jolls, and Richard H. Thaler, 'A Behavioral Approach to Law and Economics' 50 *Stanford Law Review* 50 (1998), pp.1471-1547.

realize this value, which is most often conceptualized, as noted above, in terms of gains from cooperation. Thus, the process of institutional creation usually revolves around voluntary agreement by the relevant actors; and, if the institution is subject to a process of competitive selection, it survives primarily because it provides more benefits to the relevant actors than alternate institutional forms. The assumption that agents are rational is central to much theory in the social sciences. Its role is particularly obvious in economic analysis, where it supports the useful corollary that no significant opportunity will remain unexploited.

While it is possible to invest in markets without international organizations supplying the legal instruments necessary for this, states still act through these bodies in anticipation of efficiency gains to be derived. International organizations normally aim for concentration of power in the organs provided in their treaties. It is usually the norm for an international organization to have a decision-making body, a dispute resolution system and a secretariat. These arrangements create stability in the organization's area of competence. States are the principal actors in world politics and that they use international organizations to structure relationships between themselves in pursuit of their shared goals and values.

The efficiency goals of international organizations enable the profit maximization aims of those forces operating within the framework created for the attainment of the organization's goals. The sheer size and scope of investment capital and physical capital to participate in cross-border electricity markets suggests this investment can be done only by what has been called a transnational capitalist class. Research in the 1970s introduced the so-called transnational capitalist class. Following on from this I look to see if we can identify an economic class, a transnational capitalist class in ECOWAS that in pursuit of greater profits sought to go beyond their national borders in search of electricity rents. The role of law here will be to clarify the economic and political rights and obligations of market participants. The law will be used to

bring participants together, ensure good faith in transactions and constrain the ability of governments to avoid their commitments.

Leslie Sklair has described what he calls a transnational capitalist class²⁵¹ and which has emerged and whose interests lie in the world economy. This class promotes and participates in a system of international private property which allows free movement of capital between countries; thus, there is a strong tendency for the most powerful segments of the capitalist class increasingly to see their future in the further growth of the world market rather than its curtailment". This class of actors is due to the spread of multinational corporations had spawned anew international corporate elite as the owners and managers of multinational enterprises are coming to constitute themselves as a powerful social class.

Given the transnational integration of national economies actors in this class have a decreasing allegiance to their national jurisdictions. Thus, a transnational capitalist class has emerged and that this class controls the levers of an emergent transnational state apparatus and of global decision making. It is so influential as to shape the law required for the protection of investments and the expansion of market activity. The question for my thesis then is whether this class of actors can be identified as a driving force behind the ECOWAS electricity market? Do we have a network of profit-maximizing actors, operating from the headquarters of transnational corporations that seek to derive greater profits by expanding the range of their activities?

²⁵¹ Leslie Sklair, "The Transnational Capitalist Class and the Discourse of Globalisation" 14 (1) *Cambridge Review of International Affairs*, (2000) pp.67-85. The transnational capitalist class can be analytically divided into four main fractions: they are: Owners and controllers of TNCs and their local affiliates, Globalising bureaucrats and politicians, Globalising professionals; and Consumerist elite's (merchants and media), p.69.

If we can find a transnational capitalist class operating within the ECOWAS region then we can start to interrogate its role in the design of the regional electricity market? However, a review of background reports, library resources, internet searches and published papers shows no evidence of this class of actors – organized and demanding protection of any excess capital that they have. At this stage therefore we must assume that the rationality, wealth-maximization explanation for the regional electricity market is not supported by the facts. Even if we extend the theory of a transnational capitalist class to include any State-owned Enterprises that supply electricity suppliers across West Africa, we still do not see any evidence of pressure by them for a regional market. Thus, law will be presented as mandated by the selfish proclivities of market man, it should constrain human action, yet it should not do so in a manner to prevent decision-makers from maximizing their preferences through interdependent economic activity.

4.5 RATIONALITY BEYOND THE STATE

The era of neoliberalism that has coincided with the dramatic restructuring of the ECOWAS system under the Revised Treaty (maybe even the cause of it) suggests a new role for the state in protecting the interests of its economic classes. On the one hand the neoliberal programme suggests a smaller state, reduced in size to prevent it from obstructing the development of market relations with its burden of regulations, high taxation etc. On the other hand, the state is used as a tool to pull down obstacles to the expansion of market activity including activity across borders. Through negotiations, treaties and the repeated meetings of decision-makers assigned responsibility under these treaties. ECOWAS, as noted, is no exception.

Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and

skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state must guarantee, for example, the quality and integrity of money.²⁵² It must also set up those military, defence, police and legal structures and functions required to secure private property rights and to guarantee, by force, if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary.

But beyond these tasks the state should not venture. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit. All these goals require a legal framework to direct the state in its obligations to investment capital.

The debt crises in Africa in the 1970s and 1980s set it up as a laboratory for the neoliberal prescriptions of the Bretton Woods Institutions. A series of programmes were initiated that required a restructuring of the state and the embrace of legal tools to facilitate the goals of the Bretton Woods Institutions and the strengthening of market activity. Through the Economic Recovery programmes and Structural Adjustment programmes, African governments were forced to accept measures which saw the state compelled to retreat from its traditional functions. Therefore, the continent became a welcoming ground for investment with the ECOWAS region no exception however, there is no evidence of foreign electricity firms

²⁵² John Williamson, 'What Should the World Bank Think About the Washington Consensus?' 15 (2) *World Bank Research Observer*, (2000), pp.251-264.

seeking economic advantage via ECOWAS and thus lobbying for the creation of a regional electricity market. The significance of neoliberal pressure, if it exists at all, for the ECOWAS electricity market is given greater importance by examining the development of the EU energy market and the role of major private sector actors in its development.

4.6 THE ROLE OF THE ECOWAS ORGANIZATION STRUCTURES

As I stated above one interesting feature of ECOIWAS is its tendency to copy the EU. Across the board ECOWAS has created organs that the EU has (Community parliament, court of justice) it has drawn on the legal theories of the EU (supranationalism) and it has plans for a regional single currency. The EU as an actor in European energy markets can be traced to the events in Europe after the Second World War when the six founding members of what is now the EU set up the European Coal and Steel Community in 1951 under the Treaty of Paris²⁵³. After this was the creation of Euratom in 1957 with its nuclear power objectives.²⁵⁴ Further developments are found in the 1957 Treaty of Rome which made provision for energy cooperation among the member states.

²⁵³ *Treaty Establishing The European Coal and Steel Community* (1951) Article 55 (1) provided that “The High Authority shall promote technical and economic research relating to the production and increased use of coal and steel and to occupational safety in the coal and steel industries. To this end it shall organise all appropriate contacts among existing research bodies” available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF55.1>.

²⁵⁴ *Consolidated Version of the Treaty Establishing the European Atomic Energy Community* (1957) 4 (1). The Commission shall be responsible for promoting and facilitating nuclear research in the Member States and for complementing it by carrying out a Community research and training programme. Available at https://europa.eu/european-union/sites/default/files/docs/body/consolidated_version_of_the_treaty_establishing_the_european_atomic_energy_community_en.pdf.

Energy supply issues were at the centre of European integration as the members hid behind protectionist walls to seal off their domestic energy markets and, also had to deal with the 1973 global oil shocks. It was these developments that caused the EU to seek solutions under the 1987 Single European Act (SEA) which aimed at, inter alia, eliminating barriers to cross-border energy trade. In the wake of the SEA the European Commission began to lead on creating a single energy market through the opening of the member states wholesale and retail electricity and gas markets to trade and competition across the single market area. A series of directives from the European Commission began to break down the monopolies that dominated energy markets. Except for Sweden, the UK and Norway that had freed up their electricity sectors and introduced competition across most of the EU, generation, transmission, distribution, and retail supply were mostly in the hands of incumbent domestic monopolists (such as EDF in France, or ENEL in Italy).

Cross border trade was controlled by bilateral monopolists on either side of the border, who were able to set cross-border tariffs and allocate cross-border transfer capacity. From 1996 on common rules for the internal market in electricity the EU moved its members towards a single market for energy giving consumers greater choice and, hopefully, lower prices. In 2009 the EU set up the Agency for the Cooperation of Energy Regulators with responsibility for resolving disputes between national regulators and the monitoring of cross-border competition.²⁵⁵ The consensus is that the Commission is the motor behind the single market.

Has ECOWAS followed the EU in the making of its electricity market laws? Is there evidence of the ECOWAS apparatus seizing the initiative and proposing the liberalization of energy trade and integration across the region? The probability of this being the case rests on the

²⁵⁵ Michael G Pollitt, 'The European Single Market in Electricity: An Economic Assessment', 55 *Review of Industrial Organization* (2019) pp.63–87, pp.64-65.

assumption that international organizations can act as supranational entrepreneurs – leading on the development of the rules to govern the relationships between members of the organization. A cardinal characteristic of such entrepreneurs is their ability to be dynamic leaders in a variety of ways; first they can shape the problem, they have agenda-setting powers, bring actors with an interest in the issue together and give some legitimacy or credibility to policy initiatives.

In the policy initiation phase, an organization's secretariat has considerable influence over legislative outcomes because its power to make proposals allows it to set the organization's agenda. In other words, from all the potential outcomes a secretariat can choose the proposal it favours and if the secretariat seeks deeper integration, then its proposal will move the body further down this path. A regional body's secretariat's role as the institutionalized initiator of policy is reinforced by the importance of what has been described as the necessary knowledge basis and good understanding based on experience, of the complex technical issues that are needed to make policies and drive the organization forward. Even if a secretariat is linked to external bodies as it requires their information input in the long-run and final analysis it is the organization's secretariat that determines which information it will use to help shape policy. Thus, an international organization's staff are normally at the heart of deciding what appears on its agenda for the development of the organization.

It is not a complete picture of supranational entrepreneurship to conclude that its activism is designed simply to improve the aims of the treaty that it guards. There is evidence to support the claim that supranational actors can also have organizational self-interest by reaching as far as possible to promote integration. They plan and support the promotion of new policies, in bringing new issues to the table and working to harmonize policy and practice across the regional body. This interpretation is also in line with the assertion that to understand organizations requires appreciation of the claim that their decisions are the product of

individual preferences no matter how they are formed or shaped. Thus, any understanding of organization decisions must factor in actor preferences.

4.7 SOCIAL FORCES AND THE ELECTRICITY MARKET

There is more to market activity than just wealth maximization. In some instances, scholars have identified social actors in making helping to construct markets. ECOWAS itself has always had a social dimension. From the 1975 Treaty onwards, ECOWAS has provided a framework for the free movement of persons across the region.²⁵⁶ Supranational systems seek to promote peace and thus create frameworks where persons of different ethnicities can easily interact across borders. This has been the aim of the European Union and has been followed by ECOWAS. Thus, even in the face of difficult economic consequences with its social agenda, ECOWAS has persisted with its rules on the right of free movement of persons, residence, and establishment.²⁵⁷ While the free movement dimension of ECOWAS has proven successful, we need to explore the role of social concerns and social actors in constructing the electricity market. Evidence from the Trans-Saharan-Trade suggests social forces play a role in creating markets. At its height the Trans-Saharan-Trade saw caravans moving across the continent and whose owners were guided not by state law but by custom of market traders and, also religious

²⁵⁶ Aims of the Community, Article 2.2: (d) the abolition as between the Member States of the obstacles to the free movement of persons, services and capital. To elaborate on this provision (and a similar provision in the 1975 Treaty) ECOWAS has also adopted a number of protocols on the right of free movement, residence and establishment of its nationals.

²⁵⁷ Kofi Oteng Kufuor, 'When Two Leviathans Clash: Free Movement of Persons in ECOWAS and the Ghana Investment Act of 1994' 6 (1) *African Journal of Legal Studies* (2013), pp.1-16.

norms – especially Islamic norms since the trade originated from the predominantly Muslim parts of Africa. These private norms helped cement the trade and sustain it for centuries.

The question then is whether in the rather narrow setting of the electricity market we can point out social forces and their role in creating this system? For a considerable period, regional and international decisions were taken by the executive arm of government. This is a consequence of the Peace of Westphalia from which a system for international decision-making was born. The power of international relations was now the monopoly of governments to the exclusion of non-state actors.

However, technological changes, globalization and the spread of ideas have empowered actors who were shut out of international decision-making. This has included shaping the powers and functions and dimension that international or regional bodies are taking. ECOWAS has acknowledged this power in its organs: it has opened its Court of Justice to litigation by social actors²⁵⁸, the Revised Treaty provides for an ECOWAS Economic and Social Council²⁵⁹ (although not yet constituted), it plans to have members of the ECOWAS parliament elected

²⁵⁸ ECOWAS established its Community Court of Justice in the 1990s but limited access to state parties. However, a protocol amended this and opened the door to non-state parties to bring complaints before the Court. Most of the complaints have been brought on human rights grounds. Karen Alter, Laurence Helfer and Jacqueline R. McAlister, “A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice” 107 (4) *American Journal of International Law* (2013) pp.737-779. Importantly, there seems to be no inter-state litigation before the ECOWAS Court. All cases are filed by private parties, and this of course strengthens the argument that they are at the heart of the integration process. The same argument plays out before the African Commission on Human and Peoples’ Rights were cases filed before it are filed solely by non-state actors.

²⁵⁹ See Revised Treaty, *supra*, article 6 (1) (d). 78. For these reasons, the Committee agreed to recommend the establishment in ECOWAS of a new institution to be known as the Economic and Social Council (ECOSOC), which shall be composed of representatives of socio-economic organisations and associations. The role of this ECOSOC shall be consultative. It shall be consulted on all proposals for a decision which affect the interest groups represented on it, and its opinion should be considered in arriving at a final decision. See *CEP Report*, *supra* p.24.

by direct suffrage²⁶⁰ and its peacekeeping operations have involved civilian, non-state actors. So powerful have social forces become in global law making that while scholars of the World Trade Organization (WTO) have come to appreciate how non-state actors are pressurizing decision makers and the ability to relatively swiftly conclude agreements.²⁶¹

Thus, it is reasonable to assume that within ECOWAS there are likely to be social forces that demand the creation of a regional electricity market to provide low-cost electricity, on the back of market competition, to the millions of ECOWAS citizens who do not have access to electricity at all, or who face regular power cuts because of costly and inefficient supply across the region. Moreover, the concept of sustainable development empowers social actors because it is mainly directed towards placing some limitation on excessive exploitation of natural resources for commercial profit.

The ECOWAS law on the electricity market and the provisions of its Revised Treaty both accept the role and importance of sustainable development and thus it is reasonable to assume that there is some social impact on the electricity market's rules. What provides even greater strength to this assumption is the existence of the West African Civil Society Forum

²⁶⁰ The ECOWAS Parliament has set up an ad hoc committee to propose mechanisms to make the election of its Members effective by direct universal suffrage. On Monday, 18 January 2021, the Parliament adopted the report of this committee during its 2020 Second Ordinary Session: [ECOWAS Parliament calls for Election of its Members by Direct Universal Suffrage](https://parl.ecowas.int/ecowas-parliament-calls-for-election-of-its-members-by-direct-universal-suffrage/) available at <https://parl.ecowas.int/ecowas-parliament-calls-for-election-of-its-members-by-direct-universal-suffrage/> (last accessed 6 January 2023).

²⁶¹ Robert O. Keohane and Joseph S. Nye Jr., *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* (February 2001) Paper prepared for the American Political Science Convention, Washington, D.C., August 31-September 3, 2000. Second, globalization has generated a proliferation of non-state agents, including business firms, business associations, labour unions, and NGOs, all clamouring to make their voices heard, and broadening the agenda of WTO from trade policy, p.8.

(WACSOFF) as an umbrella for non-state actors in ECOWAS.²⁶² Global forestry legislation reflects the power of social movements in constructing a legal regime for socially beneficial purposes. In the absence of an international timber agreement, the Forest Stewardship Council has emerged to provide a legal framework for creating sustainably managed forests.²⁶³

Similarly the concept of eco-labelling has emerged on the back of demands by social movements to protect rampant deforestation.²⁶⁴ African-specific bottom-up pressure for regulation can be found in the African Charter for Popular Participation in Development for Transformation²⁶⁵ and even in the early measures to adopt the African Charter on Human and Peoples' Rights.²⁶⁶ However, there again seems to be no evidence of civil society in ECOWAS advocating the creation of the market either on the grounds of sustainable development or

²⁶² The West African Civil Society Forum (WACSOFF), is the umbrella network of Civil Society Organisations from the 15 member states of ECOWAS. It is a partner and advisor to ECOWAS. Chukwuemeka B. Eze, 'Civil Society Organisations and the ECOWAS Peace and Security Agenda' in *Regional Economic Communities and Peacebuilding in Africa: Lessons from ECOWAS and IGAD* in Victor Adetula, Redie Bereketeab, and Cyril Obi First (2021) Routledge: Abingdon, Oxford, pp. 68-95; and Paul Andrew Gwaza, *Civil Society Organizations and Regional Integration: The ECOWAS Perspective* (2015) (copy on file with me)

²⁶³ Philipp Pattberg, "What role for private rule-making in global environmental governance? Analysing the Forest Stewardship Council (FSC)" *International Environmental Agreements: Politics, Law and Economics* 5.2 (2005), pp.175-189.

²⁶⁴ R. Piotrowski and S. Kratz, Eco-labelling in the Globalised Economy, in *Challenges of globalization* (2017) pp. 217-237) Routledge.

²⁶⁵ Kofi Oteng Kufuor, "The African Charter for Popular Participation in Development and Transformation: A Critical Review." *Netherlands Quarterly of Human Rights* 18.1 (2000): 7-22.

²⁶⁶ Kofi Oteng Kufuor, *The African Human Rights System: Origin and Evolution* (2010) Springer, chapter 1.

preventing the abuse of market power and thus raising the price of electricity to the detriment of low-income consumers.

In the face of this gap the demand for the market seems to be non-existent. This is not meant to suggest the irrelevance or redundancy of the regional electricity market. The early chapters of my thesis exposed the problems with low electricity coverage and electricity costs for consumers across ECOWAS. Thus cross-border trading should be ideal and, consequently, a legal framework in place to protect investments and enable cheap power for consumers is essential. The problem remains as to where is ECOWAS in this? Is the electricity market created with no demanders and thus there is no real role for ECOWAS law in this regard? The possible answer to this question is likely to be found in the subsequent chapters of my thesis.

Chapter IV tries to answer my research question about the demand for market creation. The norm for the explanation of a market is in the economic benefits for the parties involved in the transaction. Markets can be simple relationships (such as taking a taxi ride to a destination or making a low-priced purchase from a shop) or they can be complex phenomena with multiple actors making costly purchases, investing in costly capital goods, and demanding long-term contracts. This latter depiction reflects the ECOWAS electricity market. What is interesting about this market is the seeming lack of a demand for it. Chapter IV finds it hard to locate any clamour for cross-border market relations by either firms searching for profits, social activists hoping for available electricity for their poor constituents; or a class of academics who see political, economic, or other benefits in market creation. Chapter IV concludes that this instance of electricity supranationalism is borne out of the tendency towards so-called mimetic isomorphism in ECOWAS – where its decision-makers copy the EU because the EU represents a successful and ideal model of integration.

APPENDIX 1

In searching for evidence of reports by epistemic communities and their role in the formation of the electricity market I searched the following library databases. I selected these sites based on a combination of the size of their collections, the reputation of the institutions and the fact that some of them being African universities might carry reports I require. I also searched the ECOWAS website and the Social Sciences Research Network Homepage

Yale University	13 April 2021
SOAS	16 April 2021
Harvard University	2 May 2021
Greenwich University	14 May 2021
Oxford University	19 May 2021
Cambridge University	9 June 2021
Ibadan University	13 June 2021
Nnamdi Azikwe University	15 June 2021
Benin University	3 July 2021

Obafemi Awolowo University 16 July 2021

Kwame Nkrumah University 19 July 2021

University of East London 7 August 2021

Queen Mary University 10 August 2021

Hein Online 15 August 2021

Social Science Research Network 20 August 2021

ECOWAS Website 20 August 2021

CHAPTER 5

SUSTAINABLE DEVELOPMENT AND THE ECOWAS ELECTRICITY MARKET

5.1 INTRODUCTION

The ECOWAS electricity market is central to the UN Sustainable Development Goals (SDGs). A collection of 17 goals the SDGs are designed as a "shared blueprint for peace and prosperity for people and the planet, now and into the future". Drafted by the UN General Assembly in 2015 the aim is for the SDGs to be attained by 2030.²⁶⁷ SDG 7 has significance for electricity. It states that the UN and its members commit to "Ensure access to affordable, reliable, sustainable and modern energy for all". Despite achievements, access to electricity Sub-Saharan Africa is still at the bottom of the access deficit.

The UN goal has five targets that are to be achieved by 2030. Progress towards the targets is measured by six indicators. Three out of the five targets are "outcome targets": Universal access to modern energy; increase global percentage of renewable energy; double the improvement in energy efficiency. The remaining two targets are "means of achieving targets": to promote access to research, technology, and investments in clean energy; and expand and upgrade energy services for developing countries. In other words, these targets include access to affordable and reliable energy while increasing the share of renewable energy in the global energy mix. In particular, SDG target 7.1 calls for universal access to affordable, reliable, and modern energy services. Reliability and affordability remain challenging elements in many

²⁶⁷ Resolution adopted by the General Assembly on 25 September 2015 available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 6 January 2023).

countries, even as the number of household connections increases.²⁶⁸ The reliability aspect is relevant here since in 2017, one-third of access-deficit countries faced more than one weekly disruption in electricity supply that lasted over four minutes.

Markets play a dominant role in allocating resources and incentivizing firms. Markets also help protect the environment. The case for market intervention, when necessary, was made by Hardin in his Tragedy of the Commons. Hardin saw some form of sustainable use in market activity. By the state allocating property rights over resources to market players, there was the likelihood of some form of sustainable exploitation as rights holders seek to preserve and protect their assets. Following on from this line of thought, some international environmental treaties acknowledge market activity in environmental conservation and protection.

The task here is to explore public interest and non-market participatory provisions in with the goal of ascertaining ECOWAS sustainable development provisions in its electricity regulations. The chapter does this for two reasons. First this approach comports with the broad thrust of my thesis, it seeks to add to scholarship on ECOWAS. Second, to what extent does the electricity market system provide citizen and non-market actors scope for shaping the ECOWAS electricity market and, therefore, attain the sustainable development goals embedded in the ECOWAS provisions on electricity transactions.

²⁶⁸ For instance, Ghana went through a serious power crisis with regular and prolonged interruptions to electricity supply; a similar problem persists in Nigeria. Mohammed Amin Adam, 'The Politics of Power Crises in Ghana—Chronology of Government Responses and Lessons for Ending the Current Crisis', *Energy Forum* (2015), pp.8-11; and Ikuobase Emovon, Olusegun David Samuel, Chinedum Ogonna Mgbemena, and Michael Kanisuru Adeyeri, 'Electric Power Generation Crisis in Nigeria: A Review of Causes and Solutions' 10 (1) *International Journal of Integrated Engineering* (2018), pp.47-56.

5.2 THE ROLE OF INTERNATIONAL ORGANIZATIONS

Abbott and Snidal have made the case that states establish and use international organizations for 2 main purposes: the centralization of their activities and the independence of the organizations themselves. Both seem to be aimed at reducing the cost of doing business in the international sphere. The difficulty states would face if they had to negotiate, draft, and monitor their multiple international agreements with the myriad number of states is minimized, if not overcome, by the centralization of these functions in a single body - the international organization.²⁶⁹ This seems to extend Ronald Coase's conception of transaction costs from the national level to the international level.²⁷⁰

The second function of international organizations is their independence. The independence of the international organization is related to the first function. To attain the goals of the organization, and the treaty that brings it into existence requires an administrative apparatus with some degree of independence from its member states lest it be subject to the politics, especially the power politics of the states that have created it.²⁷¹ One consequence of member control at the expense of the organization is that the treaty and organization, might fail to attain their goals and the very behaviour of states they should moderate is unchecked.²⁷²

²⁶⁹ Kenneth W. Abbott and Duncan Snidal, "Why States act through Formal International Organizations' 42 (1) *Journal of Conflict Resolution* (1998), pp.3-32.

²⁷⁰ RH Coase, The Problem of Social Cost 3 *Journal of Law and Economics* (1960) pp.1-44, p.17.

²⁷¹ This aim is claimed to be at the heart of the concept of supranationalism. Granting supranational power to a treaty organ while noted as the 'rational by-passing of democracy' also helps to disconnect decision-making from the passions and instability of domestic political factions capable of derailing the treaty's goals. Alexander Somek, 'On Supranationality' 3 *Florida Coastal Law Journal* (2001), p.23.

²⁷² For instance, the World Bank is firmly under the control of the US government which negotiates, with the governments of other major capitalist powers, the policies to be followed within the World Bank, and under its leadership. It has frequently failed to make the effort to reach a consensus with its principal partners and it imposes its views directly on the Bank. Ngaire Woods, 'The United States and International Financial Institutions: Power and Influence within the World Bank and the IMF' in *US*

The importance of organizational independence, in this instance ERERA, is that there is the potential for the ECOWAS electricity system to be exploited by the large commercial interests that will deliver cross-border. Thus, notwithstanding any ostensible provisions on the socially beneficial or public interest thrust of the ECOWAS electricity system, there remains the probability of electricity transactions favouring moneyed interests over the wider citizenry. This probability flows from the following observations of bureaucratic behaviour and the relationship between bureaucracies and business interests.

The theory of regulatory capture therefore can apply to an international organization. This theory has its roots in work on regulation by George Stigler. The state - the machinery and power of the state - is a potential resource or threat to every industry in the society. With its power to prohibit or compel, to take or give money, the state can and does selectively help or hurt a vast number of industries. The central tasks of the theory of economic regulation are to explain who will receive the benefits or burdens of regulation, what form regulation will take, and the effects of regulation upon the allocation of resources.²⁷³

Regulation may be actively sought by an industry, or it may be thrust upon it. A central thesis of this paper is that, normally firms seek regulation with the aim of excluding potential rivals, normally new entrants into the industry. In this regard, regulations are burdensome.²⁷⁴ Stigler's

Hegemony and International Organizations (2003) Rosemary Foot, S. Neil McFarlane and Michael Mastanduno (eds.) Oxford University Press, pp.92-114.

²⁷³ George J. Stigler, 'The Theory of Economic Regulation', 2 (1) *Bell Journal of Economics and Management Science*, (1971), pp.3-21

²⁷⁴ *Ibid.*

thesis is contrary to the view that regulation (and the bureaucracy) is instituted primarily for the protection and benefit of the public at large or some large subclass of the public.

The assumption behind governmental regulation is that it serves to protect the public, the less powerful mass of citizens that are not organized or cohesive enough to resist the manipulation of the state in a manner that more powerful actors can do. Private interests' private interests use governmental regulation for rent seeking; they can secure legislation that excludes rivals from entering a market they seek to dominate. Through lobbying, campaign contributions, influence (through radio, newspapers, and other forms of media) large commercial interests can secure protection from competition and thus extract maximum rents from markets with no concern for consumer interests in this particular case no concern for sustainable development. Thus, a theory of administrative behaviour is that the administrative or bureaucratic arm of the state is probably neutral yet is open to pressure or capture by special interest groups with the ability to do so. The second possibility is that the state and its organizational arm exist to protect the public interest. It guards citizens against predatory behaviour of large and powerful firms.²⁷⁵

There is some literature on international bodies to reinforce this claim that they can fall prey to powerful states – and the powerful corporations whose interests their parent or host states seek to project and protect. This is in line with the liberal theory of international law and organization. There are three main theories of international law – Realist theory, Institutionalist theory, and Liberal theory. Realists posit that international law is not law. This is because there is no international sovereign to enforce compliance with law. Thus, international law really

²⁷⁵ Jørgen Grønnegaard Christensen, *Public Interest Regulation Reconsidered: From Capture to Credible Commitment*, Paper presented at "Regulation at the Age of Crisis", ECPR Regulatory Governance Standing Group, 3rd Biennial Conference, University College, Dublin, (June 17-19, 2010), pp.4-5.

depends on a nation's own strength. Also, international law reflects the preferences of the decision-makers in the state apparatus, and it is this that is projected into the international level. Institutionalist on the other hand assert that international law is really law, and the role of international organizations is to serve as a forum where law is made, and any selfish behaviour of states is modified by the repeated interactions of state decision-makers when they meet in these international bodies. The third position is that put forward by liberal theorists who argue that international law is really law as there is an intention by international actors to be bound by it.

Furthermore, international law is not solely the product of state executives such as Presidents and Ministers for Foreign Affairs. Instead, the set of actors is expanded to cover domestic interest groups that seek to shape their national foreign policy through international organizations. Thus, international law reflects the preference of the range of domestic civil society and business groups.²⁷⁶

From the liberal perspective therefore, the international secretariats are open to capture by organized interests and governments use international bodies to articulate and carry out the goals of their domestic supporters. I should preface my argument here by restating the value of international organizations; they make international agreements possible as noted above, through their centralization and independence. These functions place international organizations within the framework of public interest bodies working towards attaining the benefits for all that are set out in the respective treaties that create them and, in this instance, access to cheap and efficient electricity. The significance of my position in this chapter of my

²⁷⁶ Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' 87 (2) *American Journal of International Law*, (1993), pp. 205-239, pp.226-228.

thesis is the seeming assumption in Africa that African international organizations exist solely for the public interest.

The literature on international law and organization reflects the possibility of capture by powerful states and corporations. This analysis on international law seems to be a rather recent development although increasingly scholars are producing work on this perception on the role of international law. Rule-making is open to capture by the interests of narrow groups, so the public interest role of an international treaty is regulated to second place – behind the profit seeking forces that use the state as a shield for their interests. Scholars have identified three instances when capture can or does occur. Capture can occur because international organizations rely on information that businesses have. Information is essential to the functioning of international organizations. International bodies need information to develop new legislations. Second, the space international organizations have created for socio-economic interests have allowed for the representation of business interests. A third factor is the donations made by businesses to international organizations.²⁷⁷

Cases of capture have been examined by scholars working in this field. The World Health Organization (WHO) guidelines on sugar intake as part of measures to combat a range of diseases were influenced by commercial interests with a stake in profits from the sugar trade. Large multinational firms such as Coca Cola and McDonalds played a role in blunting the force of the WHO guidelines. Again, the WHO is an example of how decision making in its respective organs can enable treaty capture. It is not extraordinary for members of the WHO to include representatives drawn from outside the framework of the state apparatus. WHO relies

²⁷⁷ Ayelet Berman, 'Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors' *European Journal of International Law* (forthcoming).

on experts appointed by the Director-General or those from the private sector to provide expert advice which of course impacts WHO decisions. Big business has also funded WHO. A WHO report released in 2000 revealed substantial infiltration and manipulation by the tobacco industry which had an active and deliberate plan to engage with and disrupt WHO research and recommendations.²⁷⁸

The EU Commission in some instances exhibits features of regulatory capture. As noted, expertise is central to the delivery of the EU's mandate. Given the expansion of the Commission's scope and powers²⁷⁹, there has emerged a huge regulatory burden for the EU Commission making it expedient to engage with expertise and technical know-how from outside the EU itself for policy advice. The problem of understaffing and pressures of time

²⁷⁸ Ayelet Berman, 'Industry, Regulatory Capture and Transnational Standard Setting' 111 *American Journal of International Law* (2017) pp.112-8. However, this claim is a contested one and some scholars insist international organizations cannot be captured by special and organized corporate interests. Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik, 'Democracy-Enhancing Multilateralism', 63 (1) *International Organization* (2009) pp.1-37, pp.6-7.

²⁷⁹ Due to its right of initiative, the Commission has acted as the driving force in European integration and the Commission is often called the "motor" or the "beating heart of the community". The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. Apart from the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving inter-institutional agreements.

2. Union legislative acts may only be adopted based on a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted based on a Commission proposal where the Treaties so provide.

compound the burden on the EU Commission in the delivery of its mandate.²⁸⁰ Of the Commission's different ways of obtaining outside expertise, so-called expert groups are 'by far the mode of consultation most frequently used by the European Commission. While expert group members very often include officials from national governments as well as individual experts, they also frequently include powerful business interests, trade unions, professional associations and large NGOs representing their own interests at the EU level.'²⁸¹

The goals of the ECOWAS electricity system include sustainable development in the operation of the regional electricity market. The Supplementary Act establishing ERERA²⁸² provides the framework for the public interest goals of cross-border electricity transmission and trading by asserting that one function of the market, if not the paramount one, is the increased access to energy by ECOWAS citizens.²⁸³ While these instruments do not specifically mention sustainable development, they cannot be read in isolation from the ECOWAS Energy Protocol²⁸⁴ which states that the Protocol pursues the concept of sustainable development and thus members should be conscious of this construct in international law as they execute their energy obligations²⁸⁵ and to take account of environmental considerations throughout the formulation and implementation of their energy policies.²⁸⁶

²⁸⁰ Adam William Chalmers, 'Getting a seat at the table: Capital, Capture and Expert Groups in the European Union' 37 (5) *West European Politics* (2014) pp.976-992, p.976.

²⁸¹ *Ibid.*, p.977.

²⁸² *Supplementary Act A/SA.2/1/08 establishing The ECOWAS Regional Electricity Regulatory Authority* (18 January 2008).

²⁸³ *Ibid.* para.8.

²⁸⁴ *ECOWAS Energy Protocol A/P4/1/03/05*.

²⁸⁵ *Ibid.*, 19 (1).

²⁸⁶ *Ibid.* para (a).

5.3 CAPTURE AND AFRICAN REGIONAL ORGANISATIONS

Despite the apprehensions about capture of international organizations, there does not seem to be much literature on the probability of African regional organizations falling prey to vested domestic interests who manage to use these organizations to advance their narrow objectives. African regional organizations are deemed to be there for the good of the regional commonweal. Robustly proposed by Nkrumah and other radical pan-Africanists, their very provenance, and the ideological setting in Africa at the time did not make any space for outside influence or lobbying by powerful interest groups. African organizations were to champion the last stages of decolonization²⁸⁷, provide a platform for collective goals of African states²⁸⁸ and in the extreme provide a framework for the creation of a single African or regional state.²⁸⁹

On the assertion that these goals required African governments alone to act, no African regional organization permitted citizen participation via a regional parliament or economic and social body. Moreover, African regional organizations were constructed on lines like what prevailed in their domestic jurisdictions where there was hardly any room for popular participation in domestic politics. Not surprisingly therefore, from the OAU downwards, the entire decision-making system was monopolized by the executive arm of African governments.²⁹⁰

There are however some scholars who have looked at African regional organizations with a more critical eye. Rasul Shams argues that African regional organizations are created to just

²⁸⁷ OAU Charter Article 1 (d).

²⁸⁸ Ibid., Preamble and article 2 (1) (b)

²⁸⁹ See Nkrumah, *Africa Must Unite*, supra.

²⁹⁰ Densua Mumford has provided greater insights into this in relation to regional integration in Africa. Densua Mumford, *The Power of Experts: Why Non-Democracies Create Regional Parliaments* (2018) Thesis submitted in partial fulfilment of the requirements for the degree of DPhil in International Relations in the Department of Politics and International Relations at the University of Oxford

satisfy the interests of white-collar elites²⁹¹ and this explains why there was never any real commitment to citizen participation in regional integration; Kufuor who has dissected the first ECOWAS TLS as a ECOWAS goal that fell prey to domestic interests in Ghana and Nigeria²⁹², and Ishiodu who has examined the ECOWAS Commission with a critical eye but has concluded that while external influences shape the ECOWAS Commission, it still retains some independence.²⁹³ Moreover, capture might not be only by economic interests. Some traces of capture are reflected in the political backlash in the Southern Africa Development Community (SADC) when political interests in Zimbabwe, responding to the decision by the SADC Tribunal in the Campbell case, managed to secure the disbanding of the Tribunal and its later reconstitution as a body that could not hear cases brought to it directly by private litigants.²⁹⁴

Nevertheless, ECOWAS is still a potential venue for regulatory capture. As it expands the range of its activities and increases the depth of its powers due to its supranationalism, ECOWAS, has made space for inputs from economic interests in the delivery of its mandate. While the 1975 Treaty might have been the product of the political and economic aims of General Gowon and General Eyadema of Togo²⁹⁵, the Revised Treaty indicates a wider scope of interests played a role in bringing the Treaty into existence.²⁹⁶ Further, the Community Parliament allows for powerful commercial interests to use ECOWAS parliamentarians to further their commercial agenda. Third, the ECOWAS Economic and Social Council, when

²⁹¹ Rasul Shams, *The Drive to Economic Integration in Africa*, (2005) HWWA Discussion Paper No.315, p.4-5.

²⁹² See Kufuor, 'Public Choice Theory and the ECOWAS Trade Liberalization Scheme' *supra*.

²⁹³ See Ishiodu, *The ECOWAS Commission as a Tool of Regional Governance*, *supra*.

²⁹⁴ Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' 35 (4) *Human Rights Quarterly* (2013), pp.870-892.

²⁹⁵ See Gowon, *The Economic Community of West African States: a study in political and economic integration*, *supra*.

²⁹⁶ See CEP Report, *supra*.

created, to represent business interests²⁹⁷ although a further rationale for creating the ECOSOC was grounded in democratic terms²⁹⁸ and its role in the effective implementation of ECOWAS law.²⁹⁹

Capture theory therefore suggests that ERERA can serve only large-scale energy interests at the expense of consumers. The cost of electricity supply is immense however, as at writing there is yet to be any cross-border supplier taking advantage of the ECOWAS market rules. This makes it difficult to estimate the cost of supply and the profit margins and loss margins suppliers could enjoy or incur. Nevertheless, I assume market players will seek to maximize their profits in this market as most firms do. I extend this assumption to public corporations in member countries. The literature suggests electricity in Ghana, for example, although supplied by public corporations, reflects a market-based order instead of the old state subsidized corporation that did not seem to have profit-maximization as its goals.³⁰⁰

²⁹⁷ The CEP noted the 1975 Treaty excluded any role for interest groups in the decision-making process and that these lacunae needed filling in the Revised Treaty. The CEP went further to note that this was a common feature across African regional groupings and the Central African Customs and Economic Union went as far as stating that its decisions were made wholly at the inter-governmental level. *Ibid.*, para 74. The CEP noted that on the other hand, Latin American regionalism was characterized by provision for the formal involvement of representatives of professional and socio-economic interest groups in their decision-making process. *Ibid.*, para. 75.

²⁹⁸ The CEP noted in this regard that the essence of democracy demanded a consultative role for citizens in designing measures that impact their economic well-being. *Ibid.*, para. 77.

²⁹⁹ Besides, some of the Community decisions must be implemented either directly or indirectly by these socio-economic operators and other interest groups. Their commitment, in this regard, could be enhanced if they have been associated with the evolution of these decisions and their views, based on their practical experience as operators on the ground, have been brought to bear on the outcome.

³⁰⁰ Ghana's power sector reform program in the 1990's adopted a competitive wholesale electricity market to encourage private investment and improve efficiency. The program developed policies that removed the monopolistic tendencies and market dominance of the VRA. An independent transmission service operator was established which provides equal and open access to all the power generating companies to provide power economically. In furtherance of transforming the electricity market, the wholesale electricity market that facilitates the trading of wholesale electricity has been

With this hypothesis of firm behaviour, it is reasonable to deduce that electricity providers will seek to acquire as much of the market as possible. Firms tend to pursue several lines of action to dominate markets. For instance, firms can engage in dumping of products or services to eliminate their rivals from markets and then when they emerge dominant, they raise their prices to recoup their losses.³⁰¹ Another approach is to lobby decision-makers for favourable regulatory barriers that keep out future market entrants. Regulatory barriers can impose administrative and financial costs to deter competition.³⁰² Another approach is for existing firms to secure financial subsidies as a means of lowering their cost of production vis-à-vis firm that do not have subsidies.³⁰³

I note here further that it is not only firms that are resistant to assuming environmental responsibility in the form of sustainable development. Resistance to sustainable development as it plays out in other environmental treaties has come largely from state, arguing on behalf of their domestic business, that sustainability places constraints on national economic development. For instance, political interests in Brazil have always resisted the development

established. All generation companies supply consumers through the wholesale market which is regulated by the state institutions. The dispatch of a generating plant is largely determined by economics, availability, and the requirements of the grid. Ancillary services such as black start capabilities, reactive power generation, and system balancing requirements, and associated compensations are provided by the national interconnected system. The wholesale market also sets out the framework for contracts between wholesale suppliers and bulk consumers and provides rules for spot market contracts for demands that may not be met by the contracted arrangements. The Ghana Grid Company derives authority from the electricity regulations Act of 2008 to develop market rules to serve as primary guidelines in the wholesale market. John Ansu Gyabaah and Paul Owusu-Afriyie, 'A Review of Electricity Market Reforms and Regulations in Ghana' 5 (11) *International Journal of Innovative Science and Research Technology* (2020), pp.332-339, p.336.

³⁰¹ This practice is guarded against in GATT and ECOWAS law: GATT Article VI; and *Revised ECOWAS Treaty* Article 20.

³⁰² World Trade Organization, Trade Cost Index (2001) available at <http://tradedcosts.wto.org/> (last visited 11 December 2022).

³⁰³ See GATT *supra* and *Revised ECOWAS Treaty*, *supra*.

of a global treaty on deforestation.³⁰⁴ The same applies to Japan and its objection to the Whaling Convention's protocols on banning commercial whaling.³⁰⁵ Governments also have reservations about sustainable development. The United Nations Framework Convention on Climate Change (UNFCCC) reflects state reservations about sustainable development. Parties to the UNFCCC and its subsequent Protocols and Agreements are concerned about the impact of the sustainable development in the interest of tackling climate change on the one hand, and their industrial and agricultural industries on the other hand.

The quest for profits can collide with the goal of sustainable development. While proponents of sustainable development argue that the concept need not necessarily restrain market activity, interests that rail against sustainable development insist that adhering to its core concept of environmental responsibility automatically leads to restraints on profit maximization. It is this that causes me to state here that within the ECOWAS electricity market, a search for profits might clash with the concept of sustainable development as firms defer consideration for environment in the interests of short-term profits.

5.4 THE IMPORTANCE OF SUSTAINABLE DEVELOPMENT FOR THE ECOWAS ELECTRICITY MARKET

The significance of sustainable development for the ECOWAS electricity market lies in the consequences of energy extraction, processing and use for environmental quality. Energy use has serious implications for the environment, and this reinforces the importance of sustainable

³⁰⁴ Leticia Soares Peixoto Aleixo, Mauro Kiithi Arima Junior, *Deforestation and Climate Change in Brazil: Legal and Policy Gaps* (2022) OECD Watch: Amsterdam, The Netherlands.

³⁰⁵ Anders Blok, 'Contesting global norms: Politics of identity in Japanese pro-whaling countermobilization' 8 (2) *Global Environmental Politics*, (2008) pp.39-66, pp.7-8.

development in this context. To extract, process and use energy has the potential to undercut environmental quality. This link is now well established in the scientific literature and is increasingly recognized in policy circles. Atmospheric releases from fossil fuel energy-systems comprise 64% of global anthropogenic carbon dioxide emissions from 1850 to 1990, 89% of global anthropogenic sulfur emissions from 1850 to 1990 and 17% of global anthropogenic methane emissions from 1860 to 1994. Fossil energy combustion also releases significant quantities of nitrogen oxide; in the US, 23% of such emissions are from energy use. Power generation using fossil fuels, especially coal, is a principal source of trace heavy metals such as mercury, selenium, and arsenic. These emissions drive a range of global and regional environmental changes, including global climate change, acid deposition and urban smog.³⁰⁶ Upstream energy sectors also have significant local impacts on the environment. Coal mining disturbs vast areas of natural habitat. In the US, for every ton of coal mined, 6 additional tons of overburden and waste are generated.

In terms of sustainable development, energy extraction, processing and use are major sources of environmental stress at global, regional, and local levels. Although the potential of global climate change resulting from the excessive use of fossil fuels is the most dramatic and obvious of such concerns, the environmental impacts of energy use are broader than just fossil fuel use and global climate change. At a minimum, then, sustainable development policy must reflect the environmental stress resulting from the energy choices made by nations, corporations and even individuals on the global, regional, and local environments.

³⁰⁶ Cutler Cleveland, *Energy and Sustainable Development at Global Environmental Summits: An Evolving Agenda Environment*, 5 *Development and Sustainability* (2003), pp.117–138.

Agenda 21 of the UN Conference on Environment and Development³⁰⁷ stressed the intersection between energy and the environment. While it does not have a specific chapter on Energy a number of chapters do have implications for energy and what environmental damage can happen if energy exploitation is disconnected from sustainability. For instance, in chapter 9 that commits states to protection of the atmosphere, the focus here is on global climate change the burning of fossil fuels, and cleaner sources of energy. Agenda 21 also calls on states to address consumption patterns³⁰⁸ and sustainable agriculture both of which have implications for energy use.³⁰⁹

Sustainability in the interests of consumers and greater access for those denied electricity will depend on provisions for participation by a wider set of actors in the ECOWAS electricity setting. While as I have pointed out above governments dominate regional integration over time, we have seen a shift towards citizen participation. However, my assertion is that this participation should be within the members of ECOWAS and not at the intergovernmental or supranational level.

5.5 CONSUMER ACTIVISM AND THE ECOWAS ELECTRICITY MARKET

Consumer associations should play a role in decision-making. Through their work they can enhance sustainable development and the attainment of the UN SDGs. This is by advocating for and securing access to cheap electricity. I focus on consumer rules on two levels. The rules provided by ECOWAS for consumer rights and roles, and consumer law and policy at the level

³⁰⁷ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992 AGENDA 21.

³⁰⁸ Ibid. chapter 4.

³⁰⁹ Ibid.

of the member states. Consumerism is not well-entrenched in the ECOWAS region. Senegal, for instance, as at writing does not have a comprehensive consumer protection act. To ensure consumer safety and rights requires going through several acts of parliament. This makes for difficulty in assembling in particular what protection is out there for consumers as the specific legislation deals only with specific issues and not consumer rights as a whole.³¹⁰ The Gambia adopted its first consumer law in 2014³¹¹ and Sierra Leone did so in 2020.³¹² Thus both countries consumerism is still in their infancy and both frameworks are yet to be properly tested to see if they are robust enough to provide a platform in which to build strong consumer advocacy, including advocacy for electricity consumers.

A survey in Nigeria about consumerism and consumer rights yielded interesting insights about the level of awareness by citizens. Thus, in Nigerian consumer legislation³¹³ exists but it is “very ironical most of the laws that are to be enacted are already in existence only that people are not aware of it or lack of implementation.” In the survey a few participants were of the view that citizens had little appreciation of their consumer rights as a response to exploitation in the marketplace. The Nigerian survey noted further that most consumers were unaware there is a national consumer body. Citizens were unaware that in Nigeria, consumers in addition to

³¹⁰ Jean Karim Coly and Luis Alexandre Winter Carta, ‘Consumer Law in Senegal and What Potential Threats to the Welfare of Consumers in the ECOWAS Region’ in *Innovation and the Transformation of Consumer Law* (2020) Springer: Singapore, pp.443-451.

³¹¹ Consumer Protection Act (2014).

³¹² The Consumer Protection Act (2020).

³¹³ The principal legislation which regulates and protects the rights of consumers in Nigeria is the *Federal Competition and Consumer Protection Act, 2018*.

ignorance about consumer protection legislation were also unaware about existing consumer structures.

Complicating this ignorance is that those aware of consumer rights and legislation were ignorant about the existing avenues for complaints and redress. This lack of awareness is found even among the educated elites.³¹⁴ Very few people had an idea of the existence of certain agencies of government like the Legal Aid Council, or like the Consumer Protection Council Bodies charged with sensitization only compound weak consumerism as the research suggests consumer protection agencies have made very weak efforts to raise their profile. Regarding consumers in Nigeria's electricity sector research suggests the lack of awareness of the role the Nigerian Electricity Regulatory Commission can serve as the regulator of the electricity industry.

Granted consumerism as the national level is not fully developed, ECOWAS decision-makers have oppressed ahead with the development of region-wide rule and standards on consumer protection. ECOWAS is developing a regional competition policy framework for its members. As the principal contributor behind innovation and growth in productivity, effective competition among firms in the ECOWAS Common Market must be seen as one of the key elements of a successful strategy to build up a competitive Community and reinvigorate the regional integration strategy. Although the ECOWAS Treaty does not explicitly mention "competition policy" as an area to be regulated at the regional level, the goals of the ECOWAS Treaty can be more fully and meaningfully accomplished by the creation of a common competition framework that can ensure that both private and public actors do not engage in activities, agreements or relationships that alter, undermine and ultimately frustrate the goals

³¹⁴ Dahiru Jafaru Usman, Nurli Yaacob, and Aspalella A Rahman. 'Lack of consumer awareness: A major challenge for electricity consumer protection in Nigeria' 11 (24) *Asian Social Science* (2015), pp.240-251, pp.244-246.

and benefits of trade liberalization in the region. In other words, competition policy is a necessary complement to trade policy and as such should be a central part of the ECOWAS system.

A well designed and vigorously enforced regional competition regulation framework will help to concretely deliver on the goals of the ECOWAS integration strategy, by reducing the risk of trade disputes and policies of trade defences, contributing to increased productivity and economic growth, and ultimately raising the standard of living of the citizens of the Community. Furthermore, the development of a region-wide competition policy and regulation will enhance the Community's ability to confront and address anti-competitive behaviour by foreign firms, provide a basis for involvement and cooperation on negotiations regarding competition matters at the multilateral level, and establish a basis for the development of institutional competence on competition law for the region.³¹⁵

5.6 CITIES, ECOWAS ELECTRICITY AND SUSTAINABLE DEVELOPMENT

Cities are of growing importance in international law and, subsequently in developing and implementing the concept of sustainable development. While cities are hotbeds of market activity this does not render them irrelevant for non-market activity including sustainable development. Thus, it is possible to include cities in the framework of actors seeking to enhance sustainable development. Moreover, a range of international treaties that seek to protect the environment underscore an important role for cities. The importance of cities is further reinforced by the fact that a sustainable future requires profound structural changes in

³¹⁵ ECOWAS, *Regional Competition Policy Framework* available at <https://ecotis.projects.ecowas.int/wp-content/uploads/2020/08/2.Regional-Competition-Policy-Framework-final-P-1.pdf> pp.5-6.

institutional arrangements. Population expansion and massive rural-urban flows, especially in Africa are sharpening the role of cities and thus urban governance is an essential component in national and international environmentalism to include sustainable development.³¹⁶

The significance on new institutional arrangements for energy governance was at the centre of Agenda 21.³¹⁷ The drafters noted that by the turn of the century, almost half the world will live in urban areas - from small towns to huge megacities. The world's economic system is increasingly an urban one, with overlapping networks of communications, production, and trade. This system, with its flows of information, energy, capital, commerce, and people, provides the backbone for national development. A city's prospects - or a town's - depend critically on its place within the urban system, national and international. So does the fate of the hinterland, with its agriculture, forestry, and mining, on which the urban system depends.

These human flows have one major consequence – the rise and importance of sub-national governments, especially cities. However, the institutional and legal structures of local government in most developing nations are inadequate for these purposes. In most African and Asian nations, the structure of urban government goes back to the colonial period and was designed to deal with predominantly rural and agricultural societies. It was never intended to cope with rapid urbanization or to manage cities of several million inhabitants. Newly independent governments inherited a framework of laws and procedures totally inappropriate to deal with the urban processes they were about to confront. Yet in many nations, this inherited

³¹⁶ For these trends on West Africa see Eva Dick and Benjamin Schraven, *Rural-Urban Migration in West Africa: Contexts, Trends, and Recommendations* (February 2021) Knowledge Partnership on Migration and Development, Policy Brief 13.

³¹⁷ See Agenda 21, supra (115)/167.

framework remains largely in place.³¹⁸ The result is growing centralization and continuing weaknesses at both the central and local level. Instead of doing a few things well, central authorities end up doing too many things, none of them well. Human and financial resources get stretched too thin. Local governments do not gain the expertise, authority, and credibility needed to deal with local problems.³¹⁹

However recent shifts in law and politics suggest that cities have become significant actors in global environmental governance: They have actively engaged in global climate change issues in their own jurisdictions, and they have formed transnational networks to address climate change in international arenas. The role of cities (and other sub-national units of the state) reflects what is known as paradiplomacy. The concept of paradiplomacy, as contrasted with formal diplomacy, is a process whereby the sub-parts of a sovereign state manage to forge their own diplomatic interactions and relationships with another state or its constituent units resulting in the city practically carving out its own foreign policy. This is a further shift from orthodox international law and relations which, cast in the Westphalian framework sees only the state as the actor in international relations.³²⁰ While cities have exploited this breakdown of the old Westphalian order, it is driven by globalization with its technology, the diffusion of ideas and the empowerment of previously constrained forces.³²¹

In the wake of this shift in international affairs, the significance of cities is reinforced even more in the context of how they consume natural resources and have the potential to despoil the commons. Cities that house more than half of the global population are both the

³¹⁸ This persistence of the status quo reflects the concept of path dependence in law where had law or policy persists because the interests and ideas behind it are strong enough to keep the old order in place even if more beneficial outcomes can emerge in the wake of changes to the law.

³¹⁹ See Agenda 21, *supra*, para 38.

³²⁰ Rakhahari Chatterji and Swagata Saha, 'Para-diplomacy: Concept and the Context' 73(4) *India Quarterly* pp.375–394, pp.375-376.

³²¹ *Ibid*, p.377.

predominant sources of greenhouse gas emissions and vulnerable to the negative effects of climate change. Almost 70 percent of anthropogenic GHG emissions are generated from urban areas, which account for only two percent of the Earth's surface area. Thus, city governments engage climate change issues by setting GHG emission reduction targets, implementing comprehensive climate change policies, and monitoring and disclosing their performance. In addition, cities and municipal governments have formed and participated in cooperative networks such as the C40 Cities Climate Leadership Group³²², the Covenant of Mayors³²³, and the ICLEI-Local Governments for Sustainability's Cities for Climate Protection program.³²⁴ Finally, as norm sustainers, states and cities can demonstrate the feasibility of climate actions in a way that lays the groundwork for national policy.

Sustainable development in the ECOWAS electricity system requires multiple actors. To limit decision-making to the state easily creates a situation that benefits capture by big businesses. Agenda 21 of the UNCED stresses the need to avoid this by casting a wide net over actors and decision-makers. Agenda 21 notes that decision-making processes are at the heart of implementing the UNCED goals. This demands mechanisms to create room for all social

³²² The C40 Cities Climate Leadership Group is a group of 97 cities around the world that represents one twelfth of the world's population and one quarter of the global economy. Created and led by cities, C40 is focused on fighting climate change and driving urban action that reduces greenhouse gas emissions and climate risks, while increasing the health, wellbeing and economic opportunities of urban citizens.

³²³ The Covenant of Mayors is a European co-operation movement involving local and regional authorities. Signatories of the Covenant of Mayors voluntarily commit to increasing energy efficiency and the use of renewable energy sources on their territories.

³²⁴ ICLEI – Local Governments for Sustainability is a global network of more than 2500 local and regional governments committed to sustainable urban development. Active in more than 125 countries, the network influences sustainability policy and drive local action for low emission, nature-based, equitable, resilient and circular development.

groups in decision-making.³²⁵ Expanding further, Agenda 21 states that a pre-condition for sustainable development is broad public participation in decision-making.³²⁶ The process should include the need of individuals, groups, and organizations to participate in environmental impact assessment procedures. There seems to be a right to information as critical to this as Agenda 21 further stresses that individuals, groups, and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.³²⁷

The significance of sustainable development for the ECOWAS electricity market lies in the consequences of energy extraction, processing, and use. Energy use has serious implications for the environment, and this reinforces the importance of sustainable development in this context. To extract, process and use energy has the potential to undercut environmental quality. There is a considerable body of literature on this link. The Intergovernmental Panel on Climate Change (IPCC) has noted that atmospheric releases from fossil fuel energy-systems comprise 64% of global anthropogenic carbon dioxide emissions from 1850 to 1990; 89% of global anthropogenic Sulphur emissions from 1850 to 1990, and 17% of global anthropogenic methane emissions from 1860 to 1994. Fossil energy combustion also releases significant quantities of nitrogen oxide; in the US, 23% of such emissions are from energy use. Power generation using fossil fuels, especially coal, is a principal source of trace heavy metals such

³²⁵ Ibid, Agenda 21, *supra*, 23.1.

³²⁶ Ibid, 23.2.

³²⁷ Ibid.

as mercury, selenium, and arsenic. These emissions drive a range of global and regional environmental changes, including global climate change, acid deposition and urban smog.³²⁸

While Agenda 21 strictly speaking does not have a chapter on electricity or energy, we can extract an electricity and energy thrust by looking at the content and wording of its various chapters. Agenda 21 (which has a total of 40 chapters) does not have a chapter on Energy. However, one can identify energy and electricity issues in the following chapters: chapter 9 which deals with 'Protection of the Atmosphere' has a focus on global climate change and related issues of fossil fuel use. In addition, the chapters on changing consumption patterns,³²⁹ promoting sustainable human settlements development,³³⁰ and promoting sustainable agriculture and rural development³³¹ also have significant discussions on the energy issue.

Following on from the Agenda 21 injunction on participation to achieve sustainable development, a fourth site is through the West African Civil Society Forum (WACSOF). WACSOF is a platform for the aggregation of civil society agency, interests, and interventions across the ECOWAS members. It was founded in 2003 with the sole purpose of channelling civil society energies towards complimenting the regional integration and development agenda of the ECOWAS institutions. The organization has passed through different stages of developments in its internal organizational processes and programmatic experiences. The idea of creating the WACSOF was based on the need to create an institutionalized dialogue between sub-regional civil society and ECOWAS.

³²⁸ Adil Najam and Cutler J. Cleveland, 'Energy and Sustainable Development at Global Environmental Summits: An Evolving Agenda' 5 *Environment, Development and Sustainability* (2003), pp.117–138.

³²⁹ See Agenda 21 *supra*, chapter 4.

³³⁰ *Ibid*, chapter 7.

³³¹ *Ibid*, chapter 14.

Thus, although ECOWAS adopts a state-centric process of policy making as it is a state led organization, it acknowledges the need for inclusive and participative processes.³³² It recognizes the role of non-state actors in connecting states and citizens. This is reflected in the ECOWAS treaty and several versions of its strategic documents, including the 2010 Community development plan³³³, the 2011–2015 regional strategic programme³³⁴ and the current community strategic framework of 2016–2020.³³⁵ These ECOWAS protocols are derived from the provisions of the Revised Treaty that commit ECOWAS to forging links with regional civil society actors. Article 81 and 82 of the revised ECOWAS treaty describes the relations between the Community, regional NGOs and regional socio-economic organizations and associations, aimed at ensuring their involvement in regional integration processes.³³⁶ Following on, the Revised Treaty asserts that non-state actors are seen as essential to promoting regional integration, and these actors include socio-economic organizations and associations such as producers, university teachers, professional organizations and associations.

WACSOFF is drawn from the context of social forums that have recently emerged to provide a framework for the mobilization of counter-hegemonic forces. An orthodox example is the World Social Forum (WSF) which emerged as a response by civil society to the World Economic Forum in 1999. The WSF has become a social space where resistance to corporate globalization is articulated, and members advocate for greater social justice where members

³³² Amanda Bisong, 'Invented, Invited and Instrumentalised Spaces: Conceptualising Non-State Actor Engagement in Regional Migration Governance in West Africa', 48 (12) *Journal of Ethnic and Migration Studies*, (2022) pp.2945-2963, pp.2950-2951.

³³³ ECOWAS 2010 Community Development Plan available at

file:///C:/Users/USER/Downloads/ecowas-community-development-programme.pdf

³³⁴ ECOWAS 2011–2015 Regional Strategic Programme, available at <https://ecodocs.ecowas.int/wp-content/uploads/2016/04/COMMUNITY-STRATEGIC-FRAMEWORK.pdf>

³³⁵ See *Economic Community of West African States Community Strategic Framework*, supra.

³³⁶ See *Revised ECOWAS Treaty*, supra.

seek to arrive at a consensus on relevant issues. The WSF enables the discovery and debate of new ideas and the affirmation of previously agreed positions on globalization against neoliberalism and its main institutions such as the World Trade Organization, the World Bank, the International Monetary Fund and Transnational Corporations.³³⁷

WACSOF is an ideal forum for bringing together interests that are keen on attaining ECOWAS sustainable development goals as they relate to its electricity market. Using modern technology, actors can exchange ideas, coordinate positions, and press for the interests of electricity consumers. Through this method social forces within the region can serve as a counterweight to the power of large electricity firms with their ability to lobby governments and ECOWAS itself for the purpose of achieving market dominance.

³³⁷ Marlies Glasius and Jill Timms, 'The Role of Social Forums in Global Civil Society: Radical Beacon or Strategic Infrastructure' in *Global Civil Society* Helmut K Anheier, Mary Kaldor, Marlies Glasius (eds) (2005/6), pp.190-238.

CHAPTER 6

CONCLUSION

This is my concluding chapter. It does the following: I return to my research questions; I return to my hypothesis; I reflect on the gap my work has filled; I reflect on what I have learned through my supervisory sessions with my Director of Studies; and I raise some issues that I hope can form the basis for research by scholars and students undertaking research on the ECOWAS electricity market.

However, before doing so, it is pertinent to point out that there is an overarching problem cutting through ECOWAS which, though not the focus of this thesis, and ignored in the literature, is essential for understanding the difficulty in animating ECOWAS law in general and the electricity market. The assumption of unity of purpose across ECOWAS tends to overlook its ethnic heterogeneity. The members demonstrate a diversity that has the potential to continue to stymie the development of the strong bonds needed for unity and thus compliance with ECOWAS laws. There does not seem to be any research on this issue and how it impacts ECOWAS ability to function in a manner such that it attains its goals. Nevertheless, some scholars have started to draw attention the issue of ethnicity and how it impacts regional integration. The issue is that the artificial colonial and post-colonial states are simply reproduced at the ECOWAS level.³³⁸ For ECOWAS to achieve cooperation requires it to overcome a myriad of complexities arising out of a heightened clash of ethnicities. There would

³³⁸ For instance, Nigeria has an estimated 371 ethnic groups. Ghana has an estimated 70 ethnic groups.

seem to be no way for ECOWAS to circumvent this problem of cooperation, save a powerful hegemon imposing its will on the other members and compelling them to bend to the will and aims of the ECOWAS treaty system.

At the start of the dissertation, I posed the question as to why the ECOWAS electricity market has been created and to answer I proceeded first to describe the market's framework. Regional electricity markets are essentially the interconnection of already existing national electricity markets. The main pursuits of a regional electricity market can be identified as enhancing the security of supply and reduce costs. Their impact is increased as the national electricity markets become liberalized. While regional markets have existed for decades, they have become more important in recent times due to the benefits they provide in the integration of variable renewable energy sources by developing locational and temporal synergies.³³⁹

I have outlined how through treaty provisions and protocols ECOWAS has provided protection, for investors and other actors who seek to extend the reach of their electricity activity beyond their national markets and into other ECOWAS member's jurisdictions. Further to this is the question who or what actors are behind the law? While markets emerge spontaneously³⁴⁰, they

³³⁹ European Commission, Electricity market design available at https://energy.ec.europa.eu/topics/markets-and-consumers/market-legislation/electricity-market-design_en (no date).

³⁴⁰ A spontaneous order in economic theory is the view that commerce between two or more persons emerges through their voluntary actions and not because of government action or instructions. This view is central to the classical liberal and free market tradition. Adam Ferguson, in his *Essay on the History of Civil Society* used the phrase (later taken up by FA Hayek) "the result of human action, but not the execution of any human design":

Men, in general, are sufficiently disposed to occupy themselves in forming projects and schemes: But he who would scheme and project for others, will find an opponent in every person who is disposed to scheme for himself. Like the winds that come we know not whence, and blow whithersoever they list, the forms of society are derived from an obscure and distant origin; they arise, long before the date of philosophy, from the instincts, not from the speculations of men. The crowd of mankind are directed in

still need a framework to enable the transactions and protect the gains from transactions. Thus, the ECOWAS legal framework for electricity trade reflects the need to build a modern and new regional legal system. This system differs from what preceded before the various protocols and the treaty. In the absence of a regional overarching framework electricity trades across the respective borders are likely to vary in their content depending on each member's legal system. Creating an ECOWAS legal system seems to be an attempt to disconnect the new law from the chains the member states legal frameworks for electricity trading. This is a new rational order, as the law and development discipline asserts, it is purposively constructed to achieve a particular aim. While law is essential it is necessary that it has some organized force behind it to enhance its effectiveness. This suggests the need some bureaucratic organized force for law's viability or else the law will be unable to hold in check conflicts that will frustrate collective goals.

The ECOWAS electricity market reflects this line of thinking; for modernization, affordable and cheap electricity for consumers and economic activity in ECOWAS, there needs to be an over-arching legal framework that frees ECOWAS from the pull of its component states and their different legal regimes.³⁴¹ With its supranationalism, electricity entrepreneurs have the

their establishments and measures, by the circumstances in which they are placed; and seldom are turned from their way, to follow the plan of any single projector. Every step and every movement of the multitude, even in what are termed enlightened ages, are made with equal blindness to the future; and nations stumble upon establishments, which are indeed** the result of human action, but not the execution of any human design' available at <https://oll.libertyfund.org/collection/collection-spontaneous-order>

³⁴¹ The ECOWAS electricity market is supposed to be embedded in a wider continental market. The AU has started to take steps towards this goal. In 2016 the AU adopted the Strategy and Action Plan for a Harmonized Electricity Market in Africa. If it comes to fruition, it will become probably the largest single electricity market. George Kyriakarakos, 'Harmonizing the Electricity Markets in Africa: An Overview of the Continental Policy and Institutional Framework towards the African Single Electricity Market' 14 (17), *Sustainability* (2022).

right of residence and establishment in any of the members, protected by the ECOWAS Revised Treaty, the protocols on free movement of persons, within ECOWAS³⁴² and the array of ECOWAS electricity legislation

However, if this role of law is accepted as given, what is puzzling is that I discovered no material where it is recorded that there was a demand for law as a means of protecting economic interests. It is reasonable to assume that there will be a request or demand for protection by the economic actors that are behind the market. However, as just stated after 4 years of researching the ECOWAS electricity market I have not found any concrete evidence to point at a group of actors that lobbied for an ECOWAS created framework for market protection through law.

First, I examined the literature to determine if I could locate any lobbying for legislation from electricity firms in West Africa. Firms look for outlets to invest their excess capacity or capital, and their desire to increase their profits. Therefore, firm behaviour suggests a quest for new markets lest capital or profits remain idle. Hence it stands to reason to assume that with its mass of people and their electricity deficits, a West African market is a lucrative setting for investments with the Revised Treaty providing a broad protective framework. I looked at Nigeria as the regional hegemonic power with its history of creating and sustaining ECOWAS, yet the literature reveals no such market-creating behaviour from within, sought for and propelled by powerful economic interests. This contrasts with the role of firms in shaping the ECOWAS Trade Liberalization Scheme (TLS) and their demand that the TLS be tailored to

³⁴² Article 3 of the Revised Treaty states that

- d) the establishment of a common market through;
- iii) the removal, between Member States, of obstacles to the free movement of persons, goods, services and capital, and to the right of residence and establishment;

suit their interests, even if this was not consistent with the interests of consumers who were also supposed to be beneficiaries of the TLS.

I then turned my attention to whether I could find demand for a regional electricity market in pressure from non-state actors. While electricity supply is motivated by profits this is not the only reason why markets might emerge. I have asserted in my thesis that evidence suggests regional integration is also the product of social and historical dynamics. Thus, a broader and more rigorous study of ECOWAS and other regional integration bodies should go beyond the narrow confines of economics and seek an understanding of treaties and protocols by examining the social contexts within which these laws are placed, as well as economic forces. This line of inquiry did not yield any results. Despite commitment to cheap and accessible energy across ECOWAS, this being suggestive of ECOWAS' commitment to some form of social responsibility, I was not able to find any material that pointed to civil society demanding cheap electricity. This is probably explained by the weak nature of civil society in 1975 when the ECOWAS Treaty was first adopted and the plausible position that by 1993 with the Revised Treaty, there had not been that much of a shift towards openness and transparency in ECOWAS member states as most members were still lacking in constitutional democracy. Thus, the provisions on sustainable development and access to cheap electricity, while laudable and in service of the SDGs seem not to have come from a constituency of social justice activists.

In pursuit of the answer to my question I then turned to see if there were any epistemic communities in existence at the time the market was in its formative stages and the possibility of their impact on the ECOWAS electricity market. Epistemic communities, networks of experts are deemed to have a role in the study of climate change and the adoption of international instruments such as the UN Framework Convention on Climate Change. However apart from the group of scholars gathered in the University of Ghana to explore the economics of pan-Africanism there is no evidence of scholarly input from institutions of higher learning

shaping the ECOWAS electricity market. I uncovered no funding to study ECOWAS electricity regionalism, no institutes set up in any university specifically to drive this process etc. It is in such settings that scholars can share knowledge by organizing conferences and workshops at the national and regional level. Epistemic communities do not just exist for the early stages of the formation of an international legal order. The networks persist, conferences, institutes, securing grants for studies, publishing scholarly papers and monographs, and producing reports on relevant matters.

So, finally, I formed the conclusion that the following answers my research question: the ECOWAS electricity market is the product of the political and technocratic tendency within ECOWAS to mimic the EU. This mimicry is not necessarily connected to the viability of a given regional project or even the demand for it. This skepticism flows from those scholars who are unconvinced of the inclination to transplant EU models into developing country regionalism – including ECOWAS.³⁴³ Legal transplants reflect the tensions and disconnect between law in the books and law in action. Law is usually a reflection of the history and customs of a society. It is this method of understanding legal transplants that skeptics of supranationalism in ECOWAS have used to make the case for a closer and more critical look at the viability of too much faith in the EU model in regionalism. The claim here is that the EU is shaped by historical processes that have virtually compelled the creation of the EU after a number of unsuccessful efforts. Such forces are not at play in ECOWAS and hence its failure to match the EU for relevance, durability, and acceptance.

³⁴³ It is not only ECOWAS that admires and copies the EU. Other regional bodies in Africa such as the East African Community also have embraced on paper at least, EU supranationalism. Anne Pieter van der Mei, 'The East African Community: The Bumpy Road to Supranationalism-Some Reflections on the Judgments of the Court of Justice of the East African Community in Anyang' Nyong'O and Others and East African Law Society and Others' *Maastricht Faculty of Law Working Paper* 2009-7 (2009).

My research methods were as follows: I employed history as a method to understand the electricity market. This approach is linked to the problems with legal transplants, but it also tries to contribute to the claim that European integration is not a sudden development from the 1950s. In this vein I identified the role of national electricity technocrats seem to be ignored in the literature on the ECOWAS electricity market. I researched European electricity market formation and noted that engineers explored the feasibility of interlocking electricity systems across the continent long before the EU was formed.

It does seem in the literature that electricity integration was essential as part of the structures for peace in Europe after the First World War. By compressing electricity infrastructure into an integrated whole there was the hope that this will help bring the nations of Europe together, make them so dependent on each other and contribute to creating a European identity. This, it was hoped, will help prevent war breaking out again. At this stage in West Africa, colonial authorities never saw the need to tie their colonies together. Their focus was on unifying their colonies, creating a cohesive administrative and political unit, and providing the supporting infrastructure for economic development. History helps make the difference between the two regional groupings and the pace of development and their need for deeper and stronger integration and the need for the kind of treaty and protocols to achieve integration goals.³⁴⁴ As

³⁴⁴ Interestingly a collection of technocrats is appearing to help shape the proposed African electricity market. Africa Forum for Utility Regulators (AFUR) AFUR was established in November 2001 as a formal association of national regulators. Its objectives derive from Clause 110 of the NEPAD Framework Document which recognizes the establishment of AFUR and the regional regulatory associations. The objects include active assistance towards effective regulation through facilitating harmonization and sharing lessons among regulators in addition to capacity building.

Association of Power Utilities in Africa (APUA) Launched in 2012, APUA is a club of chief executives and managing directors of the power utilities responsible for the generation, transmission and distribution of electrical power in Africa. Formerly known as the Union of Producers, Transporters and Distributors of Electricity in Africa (UPDEA), it was first established in 1970 to facilitate, through cooperation and joint efforts, the accelerated provision of electricity services to their people.

useful a tool history is, it is still rarely used as a research method by law researchers working on ECOWAS. Hopefully my thesis can help in the call to scholars to turn their attention to history as a method of analysis and incorporate this in their research.

My other method of research that gives me cause to reflect on my work is the comparative method that I adopted. As I have just pointed out above, I began with the assumption that ECOWAS and EU were rather similar in goals and the creation of their respective electricity markets. This method of analysis helped cast light on my flawed conjecture that I brought to the research table at the start. The comparative method did however help build up my knowledge in the field about the problems one encounters in assuming ECOWAS can simply copy the EU, enjoying the benefits associated with this body, yet on the path to this ECOWAS will not have to encounter the tortured path the EU travelled; it helped me improve information gathering (search engines, libraries, journal papers) about the role of comparative legal analysis and applying this to regionalism in the EU and ECOWAS.

Headquartered in Abidjan, the organization boasts of a membership of 53 utilities from a total of 43 countries across the continent. The re-launch in 2012 was to help the organization re-focus on its objective and improve governance. APUA is also coordinating the forum of the power pools.

African Electrotechnical Standardization Commission (AFSEC) AFSEC was established in 2008 as a subsidiary body of AFREC, to promote everything related to electro-technical standardization aiming to support the electro-technical industrialization of Africa. AFSEC is part of the Pan-African Quality Infrastructure (PAQI) initiative under the AUC Department of Trade and Industry along with the African Accreditation Cooperation (AFRAC), the Intra-Africa Metrology System (AFRIMETS) and the African Organization for Standardization (ARSO). Kyriakarakos, 'Harmonizing the Electricity Markets in Africa: An Overview of the Continental Policy and Institutional Framework towards the African Single Electricity Market', *supra*, p.11.

6.2 CONTRIBUTION TO KNOWLEDGE

My contribution to knowledge is on the following levels. First my work is an exposition of law and electricity regionalism. There is an impressive body of legal scholarship on ECOWAS, but the electricity field is yet to be tackled as thoroughly as trade or military relations. This, I assume, is not because of the lack of interest in the field but is rather probably down to the fact that since the intervention by ECOWAS in the Liberian civil war, the bulk of scholars have focused on ECOWAS war powers and conflict resolution. Trade relations form the bedrock of ECOWAS and its intervention in Liberia was probably a seminal moment in regionalism across Africa. The consequence, I claim, is that these two aspects of regionalism have overshadowed other areas of inquiry, including electricity relationships.

Second, I as noted above, I have drawn attention to a gap in the literature on ECOWAS as a whole – the role of epistemic communities in helping to forge regional law. That impact of a collective of persons with heightened knowledge and expertise in a given area of policy seems to be missing from the volume of ECOWAS legislation going back to 1975. My work has cast some light on these networks in the shaping of international law and policy. On the assumption that this thesis will become available to scholars and policy-makers, then the hope is that it will point this class of persons in the direction of the role epistemic communities can play in the making of regional legal orders, including ECOWAS.

Third, my work also directs scholars to another gap, arguably the largest in the literature, and the role of cities in regional governance. In my research I never came across the concept of paradiplomacy. It is arguably understandable when reading the work of Gowon and other early research on ECOWAS. Dissertations and other scholarly works that emerged in the wake of

Gowon's thesis were published when the Westphalia order persisted in its pristine form. Perhaps it was on its last legs, but this was not evident and studies about ECOWAS focused mainly on the role of national governments in regional governance. Nevertheless, scholarship in the era of globalization has also avoided para diplomacy and ECOWAS.

It is hard to understand why this is the case: I can only assume that this is the consequence of a disconnection between law and politics. Academic lawyers have probably not reached out to scholars in the field of politics; they might have failed to appreciate the significance of interdisciplinary approaches to ECOWAS. Inter-disciplinary scholarship creates a rich mine of materials to help understand paths towards a firmer, more inclusive, and more participatory and transparent regional governance. What I also discovered is that ECOWAS member states have created space for paradiplomacy. Their cities (and other subnational units) have engaged with delegations from other cities, they have called for investments; they have lobbied on matters relevant to the ECOWAS TLS.

I acknowledge that my work stands on the broad shoulders of other scholars in the field who have written about ECOWAS. The study of discipline began in the 1980s³⁴⁵ and since then a body of rigorous research has been produced that has provided the foundation of my dissertation. However, my originality lies in attention to an area that has escaped the attention of academics and doctoral scholars. My originality then is in pointing to gaps in the literature on ECOWAS and its electricity laws and trying to fill the gaps.

³⁴⁵ These works are Asante, *The Political Economy of Regionalism: A Decade of the Economic Community of West African States*, supra; Gowon *The Economic Community of West African States: a study in political and economic integration* supra; and Ojo, 'Nigeria and the Formation of ECOWAS' supra.

6.3 REFLECTION ON MY WORK

First, I came to this project like a lot of naïve and hot-headed postgraduate students of African legal issues who just did not understand why regional bodies like ECOWAS did not function as effectively and as smoothly as the EU functioned. Having followed issues relating to ECOWAS and also Africa unification, I failed to understand the slow pace of ECOWAS and the (AU) when compared to the EU, Why couldn't Africans just latch onto the words of pan-Africanists such as Kwame Nkrumah, Sekou Toure³⁴⁶ and others and with the necessary

³⁴⁶ Sekou Toure advocated for the African unity and opposed the French Balkanisation (Fragmentation) on the continent that brought the Africans together. He opposed the French federation of bringing the French colonies. He helped to create Ghana- Mali union and this was a gesture towards the integration of African countries. He was a strong supporter of the Casablanca bloc to form the United States of Africa that later became the OAU.

'Have the peoples of Europe, Asia and America who have constituted continental units, adopted the same customs, the same ways of life, the same political and social system? Do they speak the same language? Are their economic systems the same? We do not think so. Their merit lies precisely in the political fact which has enabled them to transcend the diversity characterizing their political economic and social systems by establishing larger communities within which the coordination of their activities for the purpose of rapidly and harmoniously developing their personality and their common values is consistently assured. Why should Europe be able to build European unity, adopt political, economic and social objectives assuring the equality of its nations with each other and the respect of the institutions and personality of each one of its nations? Why should the American countries, which have different institutions and languages be able to build up vast political, economic and cultural communities, and why should Africa be incapable of such a feat? To conclude that African Unity is impossible to achieve is tantamount to justifying the unjust and humiliating convictions of Africa's enemies who throughout history, have tried to convince humanity that there are superior and inferior peoples.'

political will, just comply with the treaties they had drafted, and embrace the ideals that they had upheld. Surely African decision-makers had to be aware of the early pan-Africanists who set the stage; the Liberian Edward Blyden³⁴⁷, the Gold Coaster Joseph Casely Hayford³⁴⁸ and the Nigerian Ladipo Solanke³⁴⁹ who were advocating for social, political, and economic integration of West Africa during the colonial period in Africa. In addition, they can see the EU and its benefits so why not just follow suit?

I went through a shift from my un-researched, pre-judged, simplistic assumption that ECOWAS members can wave their magic wands and bring into existence a functioning integrated region with a single electricity market, to a critical and rigorous dissection of how difficult it is to break down what is arguably the ultimate and most durable legal construct- sovereignty. Through reading and supervisory sessions, I have realized, as my Director of Studies said in my early encounters with him, that legal revolutions are so rare as to be virtually non-existent and that this extends to state sovereignty. Changes do happen, but they are slow with marginal adjustments taking place until after decades of pressure a new legal form comes

H.E. Sekou Toure, *Speeches & Statements Made at the First Organization of African Unity (OAU) Summit* (May 1963), African Union: Addis Ababa pp.54-61, pp.57-58.

³⁴⁷ Blyden is the father of pan-Africanism and was the first to make the case in the late 1800s for a united West Africa. Hollis Lynch, "Edward W. Blyden: Pioneer West African Nationalist." 6 (3) *Journal of African History* (1965), pp.373-388.

³⁴⁸ Casely Hayford was the driving force behind the National Congress of British West Africa. While an association of elites and designed to achieve greater economic opportunities for the West African merchant classes during the colonial era. While the NCBWA had economic goals it did all the same talk about a vision of a future united West Africa. G.I.C. Eluwa, 1971 'The National Congress of British West Africa: a Study in African Nationalism' 77 (3) *Présence Africaine*, pp.131-149.

³⁴⁹ Ladipo Solanke was one of the pioneers of the West African Students Union (WASU) which aimed at securing independence from Britain and then proceeding to form a united West African nation Hakim Adi, and Marika Sherwood, *Pan-African History* (2003) London: Routledge, pp.174-176.

into existence. As far as state sovereignty is concerned this is more likely to be centuries, if not a millennium before a state peacefully surrenders its sovereignty entirely to a supranational body.

The law is designed to be slow. Common law judges rely on precedent to decide their judgments³⁵⁰; the law-making process is complex; and once legislation is in place its fundamental tenets remain intact and any changes are piecemeal. Having been 'educated' I then came to appreciate a more critical approach to studying law. Law does not appear in a vacuum. It comes from a range of forces and factors that come together to produce the rules that govern socio-economic relationships. Law also encounters resistance, especially in jurisdictions where the state machine is weak. Law represents history, culture, economic forces, and the ideology of the elite. Therefore, I came to realize that the path to a single electricity market, as part of a single economic, political, and legal entity called ECOWAS, is a difficult one.

My work, as noted, adds to the body of scholarship on ECOWAS. Reflecting on the almost 4-year endeavour, I sharpened my research ability, I developed an unprecedented ability to exercise patience in my work. I learned so much from my Director of Studies in the regular supervisory sessions I had with him over the years as we discussed my chapters, my research methods, issues of pan-Africanism and issues of African and global political economy. Thus, this thesis has sharpened my intellectual development and widened my outlook as I went beyond the black letter methodologies of my undergraduate studies and embraced a more intricate method of analysis. Therefore, looking back my thesis has sharpened my ability to

³⁵⁰ Oona A. Hathaway, 'Path dependence in the law: The Course and Pattern of Legal Change in a Common Law System' 86 *Iowa Law Review* (2000), pp.601.

understand and digest material from social science disciplines that go beyond law, and it has also improved my personal qualities.

My Director of Studies did not limit me to the narrow study of ECOWAS and even narrower setting of its electricity law and policy. Throughout the period of study, I was introduced to concepts that my director insisted will sharpen my perception of law and how it shapes relationships in general. So, I was acquainted with the New Institutional Economics (NIE) School and their interpretation of law; how the scholars in this School see the bureaucracy and other administrative organs of national and international bodies etc. If study of the ECOWAS electricity market is going to continue, then perhaps scholars can focus on the role of secretariats. The electricity regulatory body EREERA is yet to be studied. It hardly gets any mention in the scholarship. This might be because it is still in its formative stages, and thus yet to make an impact on the market.³⁵¹ My research exposed a gap here. Machineries are important for treaty development. They are essential to the success of a treaty. However, this seems to have slipped past the excellent scholarship produced on ECOWAS. The significance of this gap and call for study lies in the following observations about secretariats set up under international treaties.

An international organization cannot remain inert, unresponsive to changes in the area it is mandated to govern. In Africa this is sometimes a problem as treaties give birth to organizations that are so weak that they do nothing to inject dynamism into their areas of jurisdiction. One scholar has placed organizations in 3 categories: Very active, lethargic, and completely dead. The fortunes or strength of an organization depends on the secretariat. Here is where life is breathed into a treaty.³⁵² How will the EREERA function and what relationship will it have with

³⁵¹ This was pointed out to me by a source I was cultivating as I expected to carry out fieldwork.

³⁵² Julia Gray, 'Life, Death, or Zombie? The Vitality of International Organizations' 62 *International Studies Quarterly* (2018) pp.1–13.

the ECOWAS secretariat? The NIE scholars insist that secretariats have built in advantages to make them powerful. They have a wealth of knowledge that other organs and actors do not have. They are also the most permanent and durable. While persons in, for instance the ECOWAS highest decision-making organ, the AHSG will always be fluid, with a rather high turnover³⁵³, it is easy for staff in a bureaucracy to remain at post for much longer periods of time. This gives them knowledge above what other organs have. It also makes staff much more cohesive with a sense of camaraderie that lets them function with a common purpose. These factors make secretariats powerful, and they can use this power to energize their treaties.³⁵⁴

Two further factors are in play that ERERA can take advantage of. First, international organizations and their secretariats are far removed from the jurisdictions of the member states. So even if a legislative assembly in a member or party to a treaty wants to control a secretariat this is difficult to do. Their work is not reported in the mainstream news and parliaments tend to focus more on matters of domestic importance. Thus, there is a cloak of ignorance and while scholars are critical of this, secretariats can exploit this cloak to advance policies to benefit the public good but could not do so if they are always concerned by domestic political forces. Second, there is the tendency of bureaucracies to expand their turf and seek to take on policies that while beneficial might be difficult to adopt if the treaty system had to wait for the parties to agree to adopt them.

³⁵³ This is the result of elections, military interventions or just retirement from office in the era of the Revised Treaty. With the acceptance of liberal democracy in Africa, this turnover is a regular feature as compared to the era of the 1975 Treaty where heads of state remained in office for much longer periods.

³⁵⁴ Roland Vaubel, "A Public Choice approach to International Organization" 51 (1) *Public Choice* (1986), pp. 39-57; and R. Vaubel, (2006). Principal-agent problems in international organizations, 1(2) *The Review of International Organizations*, pp.125-138.

6.4 CLASH OF COURTS

There are 2 forums for the resolution of power disputes, and this presents potential for a clash of dispute settlement systems. On the one hand is the ECOWAS Court of Justice with its powers laid out in the Revised Treaty and subsequent protocols and on the other hand is the WAPP dispute settlement mechanism that allows for dispute resolution between the parties. One advantage that the ECOWAS Court has currently is that it is open to non-state actors whilst the WAPP procedures seem to exclude them. However, this might only be a short-term deficiency and that the WAPP panels can resolve this problem on its own through creative interpretation of their mandate and the law. The EU was faced with a similar deficiency where in the members assumed that the ECJ was to hear only inter-state disputes. In the case of *Van Gend en Loos*, the Court destroyed this assumption and asserted that a new legal order had been created which allowed private parties to bring disputes directly to the Court. Thus, this possible judicial uncertainty between two lawfully constituted tribunals has the potential to be problematic.³⁵⁵ Either ECOWAS resolves the matter on its own by revising the power of the WAPP tribunals to make it clear that is subordinated to the ECOWAS Court, or it sits back and watches each court try to outdo the other by making favourable decisions on electricity and related matters.

³⁵⁵ Some observers have pointed out the clashes between the ECOWAS Secretariat on the one hand and the ECOWAS Fund for Cooperation, Compensation and Development on the other hand. The ECOWAS Fund was established under Article 50 of the 1975 Treaty as an ECOWAS organ designed to play a role in finance projects, provide compensation for lost income, guarantee investments mobilise financial resources and promote development projects. The Fund staff held the view that they were an autonomous body that was not below the ECOWAS secretariat in the organizational hierarchy. Patrick Edobor Igbinovia, 'Personnel Discord and Turbulence in African Economic Blocs: The Experience of the East African Community (EAC) and the Economic Community of West African States (ECOWAS)' 36 (2) *Pakistan Horizon* (1983) pp. 67-98, p.92.

My work has its limitations: the Covid-19 pandemic and travel restrictions-imposed travel constraints on me. For this reason, I was unable to examine the electricity market's administrative machinery. While the formal law is extremely important for any endeavour, the machinery established to monitor compliance is just as essential. I am therefore left to just contemplate on the role the electricity bureaucracy plays. The ECOWAS framework of course grants supreme power to the AHSG and considerable power to the Council of Ministers. Yet there are other structures that on the surface they do not have too much power and yet in practice they can have a major impact on the working of ECOWAS.

There is a further area where both ECOWAS courts can clash with a third court, the domestic jurisdictions of the members. In interpreting ECOWAS electricity law, the ECOWAS courts can easily come up against the courts of their respective members. Although there is yet to be a jurisdictional and even jurisprudential struggle, the Ghana Supreme Court has made it plain that it is the highest court of the land in Ghana and no other court is above it.³⁵⁶ Thus this is an issue further down the line for academic inquiry.

My Dissertation supervisor, as noted above, encouraged me to be critical, maybe even skeptical, of the ECOWAS goal of political union that is expected to spring from its move towards supranationalism. From this position he pointed me in the direction what he claimed was the best place to identify successful initiatives towards regionalism devoid of the tendency to claim this can only be attained by top-down directed regionalism. On the contrary an equally important setting is the domestic jurisdiction, and it is from here that pressures for deeper and stronger regionalism can build up.

³⁵⁶ Abdul Rashid Thomas, 'Ruling of the African Court on Human Rights rejected by Ghana's Supreme Court' Sierra Leone Telegraph (30 November, 2017).

Another issue for the future that is drawn out from some tangential aspects of my research is the future role of the ERERA. Reading up and in supervisory sessions led me to the NIE School. NIE started as a research program in the 1930s in which scholars sought to explain economic success, or failure, from the standpoint of the assertion that institutions matter. The initial focus was on transaction costs, the non-market costs of doing business but, overtime, the field has expanded to embrace a wider range of issue areas. NIE has extended its reach to the interpretation of bureaucratic behaviour. It explores the plausible interpretation of organization or agency behaviour by holding bureaucrats out as self-interested actors seeking their own goals instead of public-spirited actors who take decisions in the interest of wider society. This method of analysis thus questions the “romantic” view of international (and national) decision-makers. It has not been used that frequently in dissecting ECOWAS law and organization, also the one main problem raised with this approach is that it has a very narrow approach to human behaviour, treating public decision-makers as if they are market actors. The ECOWAS Commission has been subjected to this method of analysis and the field cries out for further study through these analytical tools. Thus, as my research describes the ERERA, I think research into this body from the NIE standpoint is another future line of inquiry for scholars as this will help enrich the understanding of the regional electricity market.³⁵⁷

6.5 THE WEST AFRICAN ELECTRICITY MARKET BEFORE ECOWAS

³⁵⁷ NIE methods are rather rare as applied to ECOWAS; Kufuor seems to have started with his paper on Public Choice theory and ECOWAS in *World Competition: Law and Economics Review*. He has maintained this method of analysis and has recently been joined in this method by Ishiodu in her thesis on the ECOWAS Commission.

This study has focused on efforts to construct a framework for electricity trading under the Revised Treaty. However, this should not lead to the assumption that cross-border electricity markets did not exist before ECOWAS was established. Cross-border sale of electricity in West Africa predates ECOWAS. Before the ECOWAS electricity market was contemplated in the 1970s, there were several attempts to reactivate the Bui project in Ghana, but it was hard to justify, as Ghana was then selling its surplus electricity to Togo and Benin

The following are further examples of cross-border electricity trading before the ECOWAS electricity market came into existence. Ghana's Volta River Authority (VRA) has been supplying electrical power through the *Communaute' Electrique du Benin* (CEB) to the neighboring countries of Togo and Benin since December 1972 under an international power exchange agreement signed in August 1969.

There have been bilateral electricity exchange agreements, involving Cote d'Ivoire and neighbouring countries: The Ivory Coast *Compagnie Ivoirienne d'Electricite'* (CIE) and its predecessor have been exporting electrical energy to VRA since 1984. The early agreements were on a rolling yearly basis yet since 1999 both VRA and Ivory Coast have been committed to longer-term contracts.³⁵⁸ Thus, international power pools are simply an example of the opening to trade of a previously non-traded commodity. The initial situation in many developing countries is that there are monopoly electricity suppliers in each country each charging below cost to stimulate electricity intensive economic activity. If trade were to raise prices in one country but not in another that would affect the distribution of electricity intensive industry between the two countries.

³⁵⁸ Roger Gocking, 'Ghana's Bui Dam and the Contestation over Hydro Power in Africa 64 (2) *African Studies Review* (2021), pp. 339–362, pp. 340-341.

Of course, this effect is tempered by the fact that commercial and industrial electricity consumers value the reliability of electricity supply as well as its price and hence if trade were to improve supply reliability and increase price at the same time in a particular country then it is possible that more electricity intensive industry would be attracted to that country.³⁵⁹

6.6 DUMPING OF ELECTRICITY IN ECOWAS

Although this dissertation is about electricity markets, and this market has an obviously beneficial goal of electricity access for all, like all international markets there is the potential for harm being caused to competitors. High-cost market actors will be forced to confront low-cost suppliers of electricity services and goods. What is of added importance is the ECOWAS Treaty Most Favoured Nation (MFN) clause. As is well established under the jurisprudence of the WTO this clause in a trade treaty is designed to prevent discriminatory treatment among trading partners.³⁶⁰ To reinforce this is the National Treatment clause which locks government into their trade liberalization commitments by denying in this case, ECOWAS members the

³⁵⁹ Musiliu O. Oseni and Michael G. Pollitt, *Institutional Arrangements for the Promotion of Regional Integration of Electricity Markets International Experience* The World Bank: Washington, DC (2014) p.6.

³⁶⁰ In *Canada – Autos*, in support of its interpretation of Article I:1 (the MFN clause of the GATT), the WTO Appellate Body explained that the object and purpose of Article I "is to prohibit discrimination among like products originating in or destined for different countries". In *EC – Seal Products* the Appellate Body explained that "Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994. The obligation set out in Article I:1 has been described by the Appellate Body as 'pervasive', a 'cornerstone of the GATT', and 'one of the pillars of the WTO trading system'." 4. In *Canada – Autos*, the Appellate Body reviewed the Panel's finding that the Canadian import duty exemptions granted to motor vehicles originating in certain countries were inconsistent with Article I:1. The Appellate Body found the prohibition of discrimination under Article I:1 to include both de jure and de facto discrimination. In *EC – Bananas III*, in support of the proposition that Article II of GATS prohibits de facto discrimination as well as de jure discrimination, the Appellate Body noted that GATT Article I applies to de facto discrimination.

right to grant preferential treatment to their firms at the expense of firms from other ECOWAS member states.³⁶¹

With this expression of how trade liberalization works, and as the ECOWAS electricity market progressively evolves³⁶² what will probably be a further issue is the use of protectionist tools to ring-fence members from low priced competition. Firms seek to maximize their profits. They also seek to expand the scope of their economic activities, and this leads to so-called dumping of goods and services in overseas markets. However, this can cause ‘material injury’ in overseas markets and the Revised Treaty allows it members to act if there is a complaint that because of the trade liberalization goal of the ECOWAS their firms are suffering material injury.³⁶³ This is through antidumping orders and such orders can have a chilling effect on

³⁶¹ In examining the consistency of the Japanese taxation on liquor products with Article III, the Appellate Body in *Japan – Alcoholic Beverages II* explained the purpose of Article III in the following terms:

"The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures "not be applied to imported or domestic products so as to afford protection to domestic production"'. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. '[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given'."

³⁶² In January 2006, ECOWAS published ‘The White Paper for a Regional Energy Policy’ which is geared towards the increase and expansion of access to energy services for rural and peri-urban populations in the Member states. In this regard the members have as their focus the Millennium Development Goals’. This energy policy is designed by the AHSG, and it discusses the barriers to energy policies across ECOWAS (and UEMOA, 2006). The policy cuts across so many issues including energy control policy, (comprising energy efficiency, renewable energy), and social regulation regarding pricing of electricity and fuels as the responsibility of ECOWAS (and UEMOA). The White paper is a complement to other existing regional energy policies, and it reflects the inclination towards expanding ECOWAS’ electricity remit.

³⁶³ See Revised Treaty, *supra* Article 20.

international trade. While protection from dumped goods and services can provide relief to domestic import-competing firms, they are inimical to the interests of consumers. As the ECOWAS electricity market unfolds this possibility is an issue for further consideration and research.

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