

ADDIS ABABA UNIVERSITY FACULTY OF LAW
SCHOOL OF GRADUATE STUDIES

Individuals' Gateway to the COMESA Court of Justice: Prospects and Challenges

Thesis Submitted in Partial Fulfillment of the Requirements for the Award of Master of Laws Degree (LL.M) in Public International Law at Addis Ababa University

-By-

Hamid Kassa Ali

GSR3286/07

Advisor

Martha Belete

(Assistant Professor)

November, 2016

Declaration

I, undersigned, declare that this thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used for the thesis have been duly acknowledged.

Hamid Kassa

November, 2016

This thesis is submitted for examination with my approval as an advisor to the candidate.

Martha Belete (Assistant Professor)

November, 2016

Dedicated to my beloved Families. Especially to my Parents, my wife and my little angel daughter.

Acknowledgment

First is Praise to the almighty, ‘Allah’ who has done all these to me and giving me the patience to go through this thesis and indeed to accomplish my Post Graduate study Successfully.

I am very grateful to my advisor, Mrs. Martha Belete to her invaluable scholastic, insightful and constructive comments and suggestions throughout the study. It is really worthy for me to work under her guidance and receive her comments and advice.

It is also my pleasure to express my deepest gratitude to my family and friends. What presently I am is indeed an outcome of their deed. A simple thanks won’t convey my appreciation.

Finally, I should owe gratitude to my little baby as she since her birth, ignite my internal moral and motivation to work hard.

Abbreviations

DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
COMESA	Common Market for East and Southern Africa
CCOJ	COMESA Court of Justice
EAC	East African Community
EACJ	East African Court of Justice
ECJ	European Court of Justice
EEC	European Economic Community
EU	European Union
FTA	Free Trade Area
MACRA	Malawi Communications Regulatory Authority
MML	Malawi Mobile Limited
PTA	Preferential Trade Area
RECs	Regional Economic Communities
RTAs	Regional Trade Agreements
SADC	South African Development Community
SADCC	Southern African Development Coordination Conference
WTO	World Trade Organization

The place and concern given for Individual access to the court under the treaty could be taken as a revelation for the contemporary trend that Regional integration arrangements are going beyond interstate obligations and establish a legal regime which has to provide for the protection of private parties. This trend has been largely displayed in community laws of regional economic integrations. However, irrespective of the general feature of community law, most of African RECs are found reluctant to implement the establishing Treaty of their respective regional organizations in a way it will allow Individuals' participation. Apparently, for a long time to date the judicial organ of these organizations, starting from the EACJ, CCOJ to the suspended SADC tribunal are involved in another business than what they are established for.

It is very recent development and indeed a positive progress that the CCOJ accept cases from private parties and decide on matters related to trade and service. This development of the CCOJ with all its challenges is believed to shift the existing paradigm of community laws and its effect to the domestic laws of member States and their nationals as well.

This study examine the influence created and must to create by the COMESA's legal regime over member States and other regional economic blocs. In addition, apart from the progress, factors responsible for low rate of individuals participation in the legal system also be assessed.

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Chapter 1: Introduction

1.1 Background

Traditionally access to international courts was designed to serve state interests, providing a formal and law-based alternative to diplomatic means of dispute settlement. Among the theories of International relations, realism and regime theory boldly advocate a state centric approach. While the liberal theory of International relation emphasis on the actors behind the mask of the state, looking at how the state is organized and who has power, in order to understand the motivations and interactions of states in the international realm.¹ In this regard, individual access provision in various aspects of international law has emerged. Of these, International trade agreements having regional application adopt provisions allowing individuals of member states to enjoy rights under these agreements that ultimately foster its objective.

Most of the regional trading agreements (RTAs) contain provisions establishing procedures for resolving disputes among their signatory members. The means of dispute settlement mechanism (DSM) may in the form of diplomatic means, ad hoc panel or judiciary system. Different RTAs employ one or another approach of these DSM. In examining dispute resolution in RTAs adopting the judiciary means of dispute settlement, the European system which is celebrated by its arrangement of deeper regional integration is taken as a model for the development of individuals' access to the tribunals established by their respective RTAs since the European Union (EU) gives the way for natural and legal persons to enjoy standing before the European Court of Justice.

In African context though not as effective as the European system, some of the Regional Economic Communities (RECs) have inserted access provision in the dispute settlement mechanism. Among these RECs, the Common Market for East and Southern Africa (COMESA) treaty establishing its court of justice entitled private actors a standing to file actions on the legality of any act, regulation, directive, or decision of the Council or of a Member State on the

¹ A.K. Schneider, "Democracy and Dispute Resolution: Individual Rights in International Trade Organizations Symposium on Linkage as Phenomenon: An Interdisciplinary Approach," University of Pennsylvania Journal of International Law, Vol.19J.Int'l L.587(2014). Available at <http://scholarship.law.upenn.edu/jil/vol19>, accessed on April 25th, 2016

grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the treaty.

The COMESA Court of Justice (here in after the CCOJ) is the judicial organ established by the COMESA treaty charged with ensuring the adherence to law in the interpretation and application of the treaty. The court aims to be independent, efficient, accessible and fair adjudication of disputes arising from the interpretation and application of the COMESA treaty.

This study will assess the position of the COMESA treaty to the individuals' right of member states towards the treaty emphasized on the extent of individuals' involvement with in the CCOJ and its significance for the treaty to achieve its objective.

1.2 Statement of the Problem

The International as well as regional trade organizations established by the wish and whims of States are expected to reflect accurately the needs and concerns of the citizens of the member states. One of the mechanism ascertaining whether such needs is served by the organization may be through enhancement and promotion of individuals' participation within the system of the organization particularly through leave a room of standing in the dispute settlement mechanism per se. This pattern of trade agreements is thought to be more expedient to contribute for the realization of the purpose and objective for the establishment of that trade agreement as witnessed under the EU. The same logic goes to COMESA as it established a court as an organ responsible to ensure the adherence to law in the interpretation and application of the treaty and allows for natural and legal persons of the residents of member states to refer the case to the court.

However, under the context of COMESA, though the existing provision of the treaty provides the possibility of reference of cases by persons to the attention of the court, it apparently eviscerated by various conditions attached to it, the likes of exhaustion of local remedy, only against unlawful and infringement acts of member states rather than non-fulfillment of the treaty obligation which is a ground for member States and the Secretary general to refer the case to the court even without defining the difference between the two.

Moreover, despite the court having been operational for almost 18 years now, looking on the docket of the court reveals that it is almost full of cases between the COMESA and its employees than a pure trade matters. Put bluntly, it seems an employment tribunal unlike other neighbor RECs tribunals such as the East African Community (here in after EAC) and the Southern African Development Community(here in after SADC) that stretch their jurisdiction to Human Rights issues. The COMESA treaty is silent as to whether that community of law has direct effect to individuals of the member states which enables them to rely on rules of the COMESA law before their national court and this coupled with another gap that it has not yet adopted independent protocol that clearly define the jurisdiction and procedure of the court particularly in relation to individuals unlike that of other RECs tribunal, hampers the realization of individuals right to access to the court and redress their claim as it should be. On top of that, individuals from member states are totally precluded to bring complaints of alleged human rights violations since the CCOJ does not have general competence to hear such violations.

The heart of this study is therefore to assess the role of CCOJ in promoting and protecting access right of individuals with in member states and examines whether it realizes the purposes and objectives of COMESA and strengthened the application of the treaty. In doing so the pragmatic experience of the court together with its legal regime will thoroughly discussed.

1.3 Theoretical Framework

Since this research aspired to attain legal development to the CCOJ as an international actor, its foundation is based on the law and development area of legal discourse. The study assesses the participation of individual actors in the dispute settlement mechanism with in the COMESA and as to how this contributes for the realization of the objective of the integration thereof. The study focused to show that the CCOJ has experienced legal lacuna in its contribution to maintain a rule based governance of trade integration in the region in respect to attracting individual actors to the dispute settlement mechanism of the organization.

Treaties aiming for economic integration be that international or regional, between States are basically supposed to deal with trade and transactions though not in its entirety. If that is the case, there would be a room for other entities than the States involved in the market under the

auspices of such arrangement. Hence, it is pivotal that such treaty has to consider the interests of those entities, i.e business communities (legal or natural persons) in reacting to any embarrassment faced with in the system against the same. Given the significant role of such individual entities for the promotion and realization of the objective of the treaty, many regional economic communities including the COMESA contain provision allow private parties to access in to the dispute settlement organ of the treaty whenever dispute arises due to the interpretation or application of the treaty as the case may be.

It is therefore the theory suggests for the development of the jurisdiction of and individuals' *locus standi* to the CCOJ to be able to foster the objective of the community law. The study looks the details as to how the treaty has examined the issue in point. It further examines as to how it would be important for access provisions to realize the object of the treaty as witnessed from some other RECs.

1.4 Literature Review

Given its time of establishment and the role it has been contributed for economic integration between States with in the region, academic writings have not sufficiently transcribed about the COMESA jurisprudence on dispute settlement mechanism particularly about jurisdiction of and *locus standi* to its adjudicatory organ, the CCOJ. Even some of the written works on COMESA and its tribunal mainly depict at the institutionalized arrangement of the dispute settlement mechanism with in the community. Nonetheless, the essence of this research is to examine the way how individuals' access to the court is treated under the treaty and how it can assist to realize the objective of the latter. In this regard, the following review gazes the available literature dealing with COMESA in general and its dispute settlement arrangement in particular in terms of historical background and current development, and the jurisprudence with in the CCOJ in relation to individuals' access to the dispute settlement procedure with in the institution.

The main objective of this section is to bring in research findings of different international as well as regional scholars and academics to familiarize readers about relevant issues on the dispute settlement with in the COMESA and general outlooks regarding individual access to the judicial organs of RECs in general and the CCOJ in particular.

The legitimacy and democracy of International organizations in general and International trade organization in particular depend on the ability of private actors to enforce rules once they are enacted. Accordingly, the increasing individual involvement in dispute resolution by granting private actors rights and standing under these organizations is an appropriate way to increase the legitimacy of International trade organizations. Similar to Human right issues, private actor involvement is particularly appropriate in international trade matters.

To this end, treaties in relation to trade and economic integration require that states do not take actions that would adversely affect private actors. Furthermore, in examining the impact of individuals' involvement in the dispute resolution when State's act adversely affects the interest of the former, private actors play important function for private enforcement agents as such they can themselves ensure that the law is being followed rather than relying on states or an oversight body to bring a case.²

The contemporary international law has been experienced changes in the traditional classic thought on the role of individuals and non-state actors before international tribunals. The perfecting of human freedoms and rights, like the parallel expansion of free market economies in trade, services and investment is responsible to the change in the traditional thought of standing before international courts. In addition to this, the development in the law of Human rights marks for the rise of individuals' access to international bodies.³ Despite the change in the international law phenomena regarding the role of individuals in international judicial organs, the legal system of some international/regional organizations is far from being a legal system providing certainty and predictability due to the lack of effectiveness of the dispute settlement mechanism of the respective organizations. It is therefore recommended for the establishment of privatized system of dispute resolution by which individuals and other non-State actors may realize their international legal personality.⁴

COMESA is among RECs that determine the possibility of individuals to refer the case to the judicial organ of the common market by its treaty. The Historical background and development

² Ibid

³ F.O.Vicuna, "Individuals and Non-State Entities before International Courts and Tribunals" in J.A Frowein and R.Wolfrum (eds.) Max Planck yearbook of United Nations Law,(2001), Vol.5, p.53-66

⁴ Ibid

of the CCOJ is rooted from its predecessor, the Preferential Trade Area for Eastern and Southern Africa (here in after the PTA) tribunal whose function had been to insure the proper interpretation of the provisions of the PTA treaty and to adjudicate only in dispute between member States. The CCOJ provides important role for the development of the community law and as a judicial organ of the common market, is the backbone of the entire legal system in the COMESA. The court has wide jurisdiction that enable it to adjudicate upon disputes to which Member States, the Secretary General, residents of Member States (include individuals and legal persons) may be parties.⁵

The place and concern given for individual access to the court under the treaty could be taken as a revelation for the contemporary trend that regional integration arrangements are going beyond interstate obligations and establish a legal regime which has to provide for the protection of private parties. And for this reason those integrations has to accommodate private parties in order to achieve the very objective thereof. In this regard, however most of the African RECs are characterized by their repulsive behavior towards individual parties when national practices and conduct of any member State infringe the obligations under the treaty. And this consequently endanger legal certainty and predictability of the system.

Nevertheless , the CCOJ has shown improvement in maintaining the predictability and certainty of the community law in terms of protecting the interest of non-state actors (both natural and legal persons) to uphold standing before the court. To that end the 2012 ruling of the court's first instance division on 'Mauritius vs. Polytol paints' case is mentioned as a mile stone that assure the interest of non-state actors as party to the dispute regarding the community law.⁶

Despite the decent development on access for non-state actors to the judicial organ of the COMESA, there has been practical challenges for its proper realization. In this regard though individual standing has been generally provided under the treaty, numerous grey areas and inconsistent provisions are existed the likes of the requirement attached to access provision to persons in to the court under the treaty is the heart for the confusion in a way it questions the

⁵ F.Maonera "Dispute Settlement under COMESA", Tralac Working Paper, Stellenbosch: Trade Law Centre for Africa (2005)

⁶ G.Erasmus "The COMESA Court of Justice: Regional agreements do protect private parties", Tralac Trade Brief, Stellenbosch: Tralac. (2013)

competence of the court. In this context the court of justice lacks formal legal regime guarantying supremacy of the COMESA law over national laws since it fails stipulating that in the event that there is a conflict between COMESA law and any national law, COMESA law shall prevail. Due to this omission ‘the court will have to be activist in ordaining its supremacy much in the same vein as the European Court of Justice has done.’⁷

More on the court’s function and its jurisdiction, it shares lots of similarities with other African sub-regional courts. Although it is established as a regional trade court, it has barely handled any trade cases. However, the main difference rests that the court confined itself to primarily resolving employment disputes and the court does not use its interpretive authority expansively to adjudicate Human rights issues unlike the East African Court of Justice.⁸ In general, the fact that governments do not litigate against each other and that private sector groups do not sue governments in these courts with a view to promote trade integration strongly proscribe that these courts do not enjoy the legitimacy of governments and the private sector.

1.5 Research Focus and Objective

The main objective of this research is to analyze the CCOJ, its development and the status quo, with special emphasis to its jurisdictional application over individuals of member states. Comparative analysis with other regional economic communities having similar dispute settlement mechanisms will be undertaken. And to indicate possible legal solutions to the inadequacies of the court that will make it an effective regional court and will assist the COMESA in the realization of its objectives through maximizing individuals’ participation in the system.

⁷ P.Kiplagat “Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience”, North Western Journal of International Law and Business, vol.15 (1995),p. 456

⁸ J.Gathii, “Sub-Regional Court or Employment Tribunal? The Legacy and Legitimacy of the COMESA Court of Justice”, Loyola University Chicago School of Law, Public Law & Legal Theory Research Paper, No. 201 5-012 (2015),p. 17

1.6 Research Question

Based on the mentioned problem and objective of the research, the main question of the study is:

- Whether the COMESA law is enforceable to the individual citizens of member states?

To address this, the research will focus on the following sub-questions:

- Whether individuals can rely on rules of COMESA law before the national Courts of member States.
- Whether Individuals' of member States can bring any kind of cases to the CCOJ?
- What is the role of access provision to Individuals to the CCOJ in attaining the objective of the COMESA treaty?

1.7 Methodology and Methods

This study adopts the doctrinal, library research. Because it primarily analysis the law under which the CCOJ is established and the rulings of the Court in relation to individuals access to the court, the main enquiry of the study will be the COMESA treaty, the rule of procedure of the court and cases disposed by the court. In addition to this, information will be collected through internet searches and different publications.

1.8 Chapter Breakdown

Including the proposal of the research that displays under chapter one, the paper will have five Chapters. Chapter two will cover general overview of the COMESA and its Dispute settlement organ, the CCOJ. This chapter basically traces the integration experience from its inception to the realization of the present economic community. In addition the Dispute Resolution regime of the organization will be explored. Moreover, the structure and jurisdiction of the CCOJ emphasized to its jurisprudence on non-State complaints will be examined. Under chapter three the experience of some other economic community tribunals in connection with access provision will be traced as a benchmark for comparison to the experience of the COMESA. Chapter Four will present the pragmatic capability of person (individuals and legal person) to access in to the

CCOJ. Available cases in this regard will be explored. Furthermore, this chapter enriches readers with the contemporary application of the access provision, its role to enable the COMESA to achieve its establishing purpose and the existing setbacks thereof. Chapter five, addresses concluding remarks and possible recommendations.

Chapter 2: General Overview on COMESA and the Dispute Settlement Mechanism

2.1 Introduction

It was in the mid of 1960s that the inception of COMESA was traced back. The 1965 meeting between the then newly independent states of Eastern and Southern Africa held in Tanzania, Lusaka under the promotion of the United Nations Economic Commission for Africa (ECA) paved the way for the establishment of a mechanism to promote a sub-regional integration. To this end the meeting recommended for the creation of an Economic Community of Eastern and Central African states.⁹ In 1978 the meeting was held in Lusaka that adopted the "Lusaka Declaration of Intent and Commitment to the Establishment of a PTA for Eastern and Southern Africa" and created an Inter-governmental negotiating team on the treaty for the establishment of the PTA.¹⁰ It was then on December 21st of 1981 that the treaty establishing the PTA was signed and came in to force on 30th September 1982. As part of the progressing process of the PTA, the COMESA succeeded in 1994 after the treaty establishing the same was signed on 5th November 1993 in Kampala, Uganda.

The COMESA is composed of eight organs that perform their functions and act within the limits of the powers conferred upon them by the establishing treaty. These include the Authority; the Council; the Court of Justice; the Committee of Governors of Central Banks; the Intergovernmental Committee; the Technical Committees; the Secretariat; and the Consultative Committee.¹¹ The Authority is the supreme policy organ of the common market responsible for designing the general policy and direction of the institution. In addition, it controls the performance of the executive functions of the Common Market and the achievement of its aims and objectives. The organ consists Heads of State or Government of the Member States.¹² The Council of ministers is composed of ministers designated by each of the member states. The Council is responsible among other things to make regulations, issue directives, and take decisions, make recommendations and give opinions in accordance with the provisions of the treaty. It makes recommendation on matters of policy to the authority and gives direction to all other subordinate organs except the CCOJ while exercising its jurisdiction. The Committee of

⁹ See <http://au.int/en/recs/comesa>, accessed on May 20,2016

¹⁰ Available at the official website of the COMESA, www.comesa.int/demosite3/index.php/history-of-comesa/ accessed on May 20,2016

¹¹ COMESA treaty, 1994, Art.7

¹² Id Art 8

Governors of Central Banks is responsible to design development programs and action plans in the financial and monetary affairs of the COMESA.¹³ While the Intergovernmental Committee is in charge of similar responsibility to the Governors of Central Banks, the former does not deal with the finance and monetary sector.¹⁴

Another organ of the COMESA is the technical committee that composed of twelve sub committees. Each of these committees have their own responsibilities and share responsibilities in common as provided under Article 16 of the treaty.

The Secretariat, headed by the Secretary-General who is the chief executive officer of the common market is responsible to provide service and assist the organs of the Common Market in the performance of their functions. In addition s/he serves as the secretary to the Authority and the Council.¹⁵

The Consultative Committee is composed of representatives of business communities and other interest group from member States whose main responsibility is serve as the protector of the interest of business communities in the decision of other organs. The composition of the committee is determined by the Secretary General.¹⁶

The Court of Justice is the judicial organ of the COMESA responsible to maintain the ‘adherence to the law’ of the COMESA. It is a machinery where disputes arising out of the treaty are going to be settled. Furthermore, the court aims to uphold and maintain the rule of law in the interpretation and application of the COMESA treaty that helps to the furtherance of the integration process.¹⁷

Looking at the inter-relationship between the organs of the COMESA, it is hierarchically constructed. Though not provided explicitly, according to the treaty, the authority stand at the apex followed by the Council of ministers and the remaining organs except the court of justice are supervised by the council of ministers.

¹³ Id Art 13

¹⁴ Id Art 14

¹⁵ Id Art 17

¹⁶ Id Art 18

¹⁷ See the Mission of the COMESA Court of Justice available at www.comesacourt.org, accessed on June 10, 2016

2.2 Evolution of Dispute Settlement Mechanism in COMESA

In the contemporary International treaties in general and International trade agreements in particular dispute settlement provisions have become a sine qua-non for most of the PTAs. Similarly, dispute settlement mechanism has placed integral part of the COMESA treaty. It is indeed the evolution and development of DSM under the Common market is seen in tandem with the evolution and development of the institution itself. The treaty establishing the PTA had instituted three judicial organs responsible to resolve disputes between member states. These include the PTA Tribunal, The PTA Administrative Appeals Board and The PTA Centre for Commercial Arbitration.¹⁸ Following the transformation of the PTA in to the COMESA, the later established under Article 7 of the treaty a court responsible to ensure the adherence to law in the interpretation and application of the treaty thereof¹⁹ and it took over the responsibilities of the above mentioned judicial organs that had existed under the PTA. The relative functions and responsibilities of the court under the PTA regime and the COMESA will be discussed later on.

2.3 Approaches on Dispute Settlement Mechanism

Dispute has been evident for long through now in international trade transactions as part of the business. Due to this, trade agreements in international and regional level set a mechanism to resolve disputes and regulate the interaction through their respective agreements. Accordingly, DSM in RTAs in different region of the world is classified in to three categories.²⁰ These categories include political or diplomatic dispute settlement, referral to an ad hoc arbitral panel, and systems administered by a standing tribunal.²¹ Each of the models have its own characteristics. Before looking at the manner and mode of DSM under COMESA, it is noteworthy to underscore the characteristics of each of the models as follows.

The political or diplomatic dispute settlement mechanism consists of settling of disputes by negotiation and agreement that gives the parties to a PTA maximum flexibility. It applies in RTAs that meet any of the features that ‘have no dispute settlement provisions at all’, in RTAs

¹⁸ Supra note 5, p.2

¹⁹ COMESA Treaty, Art.19

²⁰ These categories of DSM in RTAs is studied by Amelia Porges in her writing “Dispute Settlement”. In addition the WTO Economic Research and Statistical Division have recognized such classification as it conducted a systematic classification of the DSMs of the 226 RTAs notified to the WTO through the end of 2012.

²¹ A.Porges, "Dispute Settlement", in Jean-Pierre Chauffour and Jean-Christophe Maur, Preferential Trade Agreement Policies for Development,(2011), p. 467-497

that proclaim for the exclusive settlement of disputes through consultation and/or referral to political organ for resolution, and to those RTAs that invoke to refer the dispute to third party adjudicator but reserve to RTA members a right to veto such referral.²²

In ad hoc arbitral panel model of DSM, also called the quasi-judicial model, automatic right of access to third party is possible at some stage of the dispute process. In addition, where there is no an explicit right accorded to RTA members to block the referral of a dispute to a third-party adjudicator and the majority of RTA-DSM that fall within this category provide for ad hoc²³ adjudication. This model of DSM shares some common features with the judicial model though the latter is distinctively characterized by its greater degree of independence and institutional permanence.

The judicial model is characterized by its emphasis on private rights relating to standing. This model also considers that of direct effect, that is, the ability of individuals to invoke RTA law before national courts. Further, to the extent that the majority of RTA-DSMs under the judicial model allow for RTA bodies to bring claims before respective standing tribunals, these courts operate within a highly institutionalized environment in which treaty bodies, as opposed to Governments of Member States, have administrative interest in the treaty's effective implementation.²⁴

From the foregoing considerations on models of DSM it suggests that for the most part of it the COMESA follows the judicial model as those features of the latter echoed in the treaty (will discuss at the latter). Furthermore, the staff working paper of the WTO prepared by its Economic Research and Statistics Division categorizes the COMESA model DSM as judicial model.²⁵ In addition the treaty provides “Any dispute concerning the interpretation or application of the

²² Claude Chase, Alan Yanovich et al., Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?, (World Trade Organization (WTO)), Staff Working Paper ERSD-2013-07,p.11

²³ The term “ad hoc” according to the WTO Economic Research and Statistics Division is to mean that the adjudicating body is established for purposes of resolving the specific dispute and dissolved once it has issued a decision. See the Staff Working Paper ERSD-2013-07. P.11

²⁴ Supra note 22, p.12

²⁵ According to the statistics of WTO Economic division, Among Intra-Regional RTAs with in the Sub-Saharan countries in addition to the COMESA, ECOWAS, CEMAC, EAC, and WAEMU use the judicial model while the remaining two SADC and SACU use the quasi-judicial model.

Treaty or any of the matters referred to the COJ.... shall not be subjected to any method of settlement other than those provided for in the Treaty.”²⁶

2.4 Jurisprudential Fundamentals

With regard to the issue of Dispute Settlement, the COMESA has come up with a new fashion that significantly reduced the influence of political elites in the operations of the integration process comparing to the old regime of the PTA where disputes were recognized only between political elites.²⁷ In the latter case in addition to the limited jurisdiction bestowed to the tribunal, the fact that member States were not accustomed with tendency of prosecuting one another with in the integration, the majority of disputes were resolved through the informal negotiation without litigation being initiated. However, coming to its new version, the COMESA pursues its aims exclusively through a body of law which is independent, separate from and yet superior to national law.²⁸ As is the case in other RTAs, the Court of Justice, as the judicial organ of the Common Market, is the pillar to enforce and develop this body of law and ultimately serve for the realization of the objective of the organization.

Be that as it may, legally speaking, the fundamental concern of international and/or regional trade and economic integration agreements is to avoid or at least minimize obstacles in the free flow of people, transaction of goods and provision of services aiming to attain sustainable development. In connection with this, within the sphere of the integration it is undisputable that the body of law governing such organizations should emphasis to the market and has respond according to Kiplagat “to a substantial degree, to the anxieties of the business community.”²⁹ With the same token, if States intend to ratify regional trade agreements to encourage private actors participating in international trade and contribute for the wellbeing of their nations, those treaties allow individuals to take part in the system such as the dispute settlement mechanism so that States do not take advantage of the treaty and take actions that would adversely affect their interest.

²⁶ COMESA Treaty, Art. 34(1)

²⁷ See Art. 40, Treaty for the Establishment of the Preferential Trade Area for Eastern and Southern African States, Dec. 21, 1981, the provision clearly provides “Any dispute that may arise among the member States...” that shows disputes are recognized as long as between member States only.

²⁸ Supra note 24

²⁹ Supra note 7, p.448

Unlike the jurisprudence of the World Trade Organization Dispute Settlement Understanding (WTO DSU) that give direct standing in the Dispute Settlement Body (DSB) only for Member States, the COMESA, similar to other African RTAs judicial organ conferred right to any person either natural or legal to claim the operation of CCOJ even against his/her country up on the fulfillment of the required conditions under the treaty, the likes of being resident of member States, claim on grounds of unlawfulness of or infringement of the treaty including exhaustion of local remedies.³⁰ Moreover, COMESA expands the playing ground of its judiciary organ to persons even not a party to the dispute but want to intervene at the latter stage provided that s/he should a resident of a member State and should secure court leave even if the intervention is limited to evidence supporting or opposing the arguments of a party to the case.³¹

As far as the court's decision is concerned, the court is empowered to pass compulsory judgment with no possibility of appeal of the same to any other courts than the appellate division of the CCOJ. The judgment of the court may be subject to revision up on discovery of new facts having decisive impact on the determination of the case by the party claiming it or on account of some mistake or error on the face of the record.³² In addition to compulsory judgment, the court is also entitled by the treaty to give advisory opinion regarding questions of law arising from the provisions of the treaty affecting the Common Market upon the request of the Authority, the council or a member state.³³

2.5 Institutional Framework

The CCOJ is one of the eight organs of the common market established in 1994 under the COMESA treaty and became operational in 1998 at the third Summit of the COMESA authority in Kinshasa, Democratic Republic of Congo.³⁴ The court is established to perform its duty independent from intervention of any other institution of the COMESA. Even the Council, the highest organ of institution which is responsible to guide the functions of the institutions of the COMESA institutions is deprived the same on the function of the work. By this the treaty ensures the independence of the court under Article 9 (2) (c) as it provides that the Council shall

³⁰ COMESA Treaty, Art 26

³¹ Id. Art. 36

³² Id. Art. 31

³³ Id. Art. 32

³⁴ 'Reports and Decisions: Seventeenth Meeting of the COMESA Council of Ministers Report, 4-5 June 2004, Nile International Conference Centre, Kampala, Uganda', at Supra note 8

give directions to all other subordinate organs of COMESA other than the Court in the exercise of its jurisdiction. Moreover, the treaty also tries to guarantee the institutional independence of the court in conferring power to adopt its own code of conduct in conformity with the provisions of the treaty that enable the court to regulate its detailed conduct of business.³⁵

Structurally, the court was initially established with a first instance division. However, the Seventh Summit of the COMESA Authority held May 23-24, 2002 in Addis Ababa passed decision to create an Appellate Division divided the Court into a First Instance and an Appellate Division. While the First Instance Division that contains seven judges one of whom is the principal judge (one of whom is the principal judge), functions as a trial court, the Appellate Division, on which five judges sit (one of whom is the judge president), serves as an appellate court over decisions of the First Instance Division.³⁶ However, unlike the first instance division, the appellate division is not a trial court. The appellate division is to hear the appeals of decisions made by the first instance division. In addition, it is responsible for delivering advisory legal opinions. Since 2004 Sudan agreed to host the court in its land, and the court is now resides in the capital Khartoum.

2.6 Jurisdictional Matters

The jurisdiction of the CCOJ as envisaged under the treaty, in terms of bases could be seen in to three perspectives: Jurisdiction by reference, Jurisdiction over Claims by Common Market Employees and Third Parties against the Common Market or its Institutions, and Jurisdiction under Arbitration Clauses and Special Agreements. It has general and compulsory competence to adjudicate on all matters which may be referred to it pursuant to the treaty.³⁷ Within this general competence of the court, cases are referred to the court by different entities for determination. In connection with this cases may be referred to the attention of the court initiated by member States, the Secretary General and individual and legal persons.

Member States are entitled to refer cases to the court on two grounds. First when another member State or the Council failed to fulfill an obligation under the treaty or infringed a

³⁵ COMESA Treaty, Art.20

³⁶ Supra note 8, p. 4

³⁷ COMESA Treaty, Art.23

provision thereof.³⁸ Secondly, they may refer the case for determination by the Court on the legality of any act, regulation, directive or decision of the Council on the grounds that such act, regulation, directive or decision is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.³⁹

The reference made by the Secretary General to the court seems prolonged and is not directly brought to the court of justice. Rather the case is brought to the attention of the court through the bureau of the Council. According to the treaty, the Secretary General first inform to the State against which the case is referred due to the latter's failure to fulfill the obligation and infringement of provisions of the treaty about its findings and it is when the State fails to submit its observation about the findings or observation is not satisfactory that the Secretary General refer to the Bureau of the Council which decide whether the matter shall be referred by the Secretary-General to the Court immediately or be referred to the Council.⁴⁰ In this circumstance, the writer would say the Bureau of the Council also has a dispute settlement role as it recommend the secretary general to refer the case to the court alternative to handling the case by itself. This is more revealed under Art.25 (3) of the Treaty that connotes, it is where the council fails to resolve the matter that the latter would direct the Secretary General to refer the matter to the court.⁴¹

Apart from the above two, access provision to natural and legal persons to the court, which is a new development for the community law has stipulated under the treaty. Accordingly, so long as the requirements mentioned in the treaty are fulfilled any person (natural or legal) can initiate and refer the case to the court. The expected requirements set for persons able to refer the case includes, the person should be resident of one of the member States to the treaty, the matter should be in relation to the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the Treaty and as mentioned above exhaustion of remedies

³⁸ Id Art 24(1)

³⁹ Id Art 24(2)

⁴⁰ Id Art 25(1&2)

⁴¹ Id Art 25(3)

in the local tribunals.⁴² The nitty-gritty on the matter will be discussed in detail under chapter four.

Furthermore, the court has competence to entertain cases related to claims of the employees of the common market and third parties against the common market and its institutions.⁴³ In this regard, the report made by the COMESA Council of Ministers reveals that the largest portion of the docket of the COMESA Court of Justice are employment disputes. According to the 2014 report of the council of ministers, since the start of its operation the court determined on 26 staff and employment cases out of the total 48 cases that have got the determination by the court.⁴⁴ In connection with this the Court has jurisdiction to adjudicate claims made by individuals against COMESA as a result of the actions of COMESA's employees done in their capacity as employees of COMESA.⁴⁵ The Court may also hear and determine matters arising as a result of arbitration clauses contained within a contract that gives the Court jurisdiction to hear the matter, where COMESA or its institutions is a party, or issues that arise as a result of disputes between the Member States as to the Treaty, where the dispute is submitted to the Court "under a special agreement between the Member States concerned".⁴⁶

What is important to mention in this point of time regarding jurisdiction of the CCOJ is its relationship with the jurisdiction of national courts of member States. In connection with this, the reading of Article 29(1) suggests the possibility that National courts may have jurisdiction over matters where COMESA is a party unless the COMESA Court of Justice is explicitly given jurisdiction under the Treaty for that particular issue. However, regarding the decision of the court in the interpretation of the COMESA treaty, it will have precedence effect against national courts of the member States.⁴⁷ With the same fashion, The Court is allowed to render preliminary rulings on questions of the application or interpretation of the Treaty if the court or tribunal of

⁴² COMESA Treaty, Art 26

⁴³ Id Art 27

⁴⁴ The Report of the Thirty Second Meeting of the COMESA Council of Ministers, Kinshasa, Democratic Republic of Congo, 22-24 February, 2014 Doc. CS/CM/XXXII/2(February, 2012) at paragraph 373 on page 91', available at www.trademarksa.org/publications, accessed on June 20, 2016

⁴⁵ COMESA Treaty, Art 27(2)

⁴⁶ Id Art 28

⁴⁷ Id Art 29(2)

the Member State that is raising the question believes such a ruling will be necessary for it to come to a decision.⁴⁸

⁴⁸ Id Art 30

Chapter 3: Benchmarks

3.1 Introduction

RTAs are becoming more likely to establish their own sophisticated enforcement regimes with dispute settlement mechanisms. As pointed out by Marceau and Wyatt, the revolution brought about by the Uruguay Round of 1986–1994 transformed trade law's dispute settlement system from an archetype of unenforceable, politically dominated dispute settlement to a legally rigorous, de facto compulsory, well-functioning and enforceable system.⁴⁹ Consequently, some RTAs establish their own enforcement regimes with obligatory dispute settlement mechanism of a two-tiered first instance and appellate review structure. However, the ever increasing number of RTAs and the steady proliferation of the dispute settlement mechanism established by those agreements widen the scope of the latter and incline to handle matters completely beyond the rationale for their establishment, i.e. trade.

On the other hand, owing to the increasing importance of non-state actors (natural and legal persons) in the international and regional trade activities, RTAs are trying to facilitate access to adequate dispute settlement arrangement for those entities. In this context the enforceability and applicability of the community law, the attached requirements to bring the claim, and even the type of claim brought by those entities may not similar in all RTAs irrespective of the common agenda behind their establishment.

What follows is an examination of some RECs that adopt a judicial mode of dispute settlement mechanism. For this purpose the East African Court of Justice and the South African Development Community Tribunal from African RECs equivalent to the COMESA in one hand and the judicial organ of the EU on the other hand will be examined to provide comparative studies and experiences on the operations and workings of regional courts. The standard to select these tribunals is the basic similarity in approach with the judicial organ of the COMESA and because of the fact that the COMESA in general and its judicial organ in particular has largely exhibited its model in case of the EU. Hence, the manner of treatment of individuals while bringing cases to the respective tribunals and other related issues will be presented.

⁴⁹ G.Marceau and J.Wyatt, "Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO", *Journal of International Dispute Settlement*, Vol. 1, No. 1 (2010), p. 68

3.2 The East African Community

The treaty establishing the East African Community (EAC) was signed on 30 November 1999 and entered into force on 2000.⁵⁰ The Community consists of six independent member States (Kenya, Tanzania, Uganda, Burundi, Rwanda and South Sudan) of these the first three were original members while Burundi and Rwanda became members in 2007.⁵¹ The 17th ordinary summit of the EAC heads of State accept South Sudan as the newest addition to the community in 2016.⁵²

According to the EAC establishment treaty, the community aims at developing policies and programs aimed at widening and deepening of integration in the political, economic, social and cultural fields, research and technology, defense and security, legal and judicial affairs for the mutual benefit of the Partner States.⁵³ The treaty established eight internal organs⁵⁴ that contribute for the achievement of its objectives. Among these organs the East African Court of Justice (here in after the EACJ) is the judicial organ of the community responsible to ‘ensure the adherence to law in the interpretation and application of and compliance with the treaty.’⁵⁵ The court has not permanent seat and it is now temporarily located in Arusha, Tanzania.⁵⁶ In its inception the court was formed only with first instance division and the 2007 amendment to the EAC treaty reconstituted the court to have both the first instance and appellate division.⁵⁷

Regarding Jurisdiction, similar to the CCOJ, the treaty gives the EACJ general jurisdiction over interpretation and application of the treaty law.⁵⁸ However, unlike the CCOJ, the EAC treaty has stipulated for the extension of the court’s jurisdiction to cover other original, appellate, human rights and other jurisdiction as will be determined by the council provided that member States shall conclude a protocol to its operationalization.⁵⁹ In addition to its ‘initial’ jurisdiction to interpretation and application of the Treaty, the Court has competence to determine the following

⁵⁰ This one is the newly formed EAC. The former EAC was established in 1967 and later dissolved in 1977.

⁵¹ J. Gathii, *African Regional Trade Agreements As Legal Regimes*, (2011), p.181

⁵² See Communiqué: 17th Extra-Ordinary Summit of Heads of State of the EAC, available at www.eac.int/statements, accessed on 20th October, 2016

⁵³ The Treaty for the Establishment of the East African Community, 1999, Art. 5, as amended in 2007, Art.5

⁵⁴ Id Art.9(1)

⁵⁵ Id Art.23(1)

⁵⁶ http://www.eacj.org/?page_id=22, accessed on 5th September, 2016

⁵⁷ Ibid

⁵⁸ The Treaty for the Establishment of the East African Community, 1999, Art.27(1)

⁵⁹ Id Art.27(2)

matters within the region. These include disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations⁶⁰; ‘disputes between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement; disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the Court to which the Community or any of its institutions is a party; disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.’⁶¹

The EACJ like its CCOJ counterpart handle cases referred by the partner States, the Secretary General and natural and legal persons. The manner and conditions of referral by these entities in EAC is as similar as provided under the COMESA mentioned above. In this regard what is the striking point of difference between the two is in case of referral by legal and natural persons while the latter requires exhaustion of local remedies in addition to being resident to member States, the requirement of exhaustion of local remedy is not envisaged under pertinent provision of the EAC treaty on the issue.⁶²

Regarding the jurisdictional interaction of the EACJ with the national laws and courts of the partner States, the EAC Treaty states that the decisions of the EACJ on interpretation and application of the treaty have precedence over the decisions of the national courts.⁶³ However the legitimacy of the treaty is in question in its relation with the national laws of the partner States since there is no a clear cut provision that envisage the superiority of the treaty over national laws.

Like the CCOJ the EACJ docket is characterized by its absence of trade cases. This is mainly due to the fact that the private sectors in the region including natural and legal persons are found to be detestable to the court and prefer administrative mechanism than the judicial model. The court is rather predominated by Human Rights litigation. Among the reasons for private actors to opt for administrative dispute settlement mechanism than the EACJ is lack of standing to private

⁶⁰ Id Art.31

⁶¹ Id Art 32

⁶² Id Art 30(1)

⁶³ Id Art 33(2)

parties to sue each other because private parties' access is limited to suing governments and institutions of the EAC.⁶⁴

What has been unique to the EACJ is regarding its extended jurisdiction on Human Rights issues. In this context, notwithstanding the Council's failure to formally extend its jurisdiction on Human Rights as conditioned under the treaty, Human Rights groups persuaded judges of the EACJ that the court has jurisdiction over Human Rights.⁶⁵ Moreover, this jurisdiction of the court hardened its authority among those interested group in the protection of Human Rights and most importantly to Individuals whose rights are arbitrarily violated by their governments.

Advocates of the Human Rights jurisdiction of the EACJ argue that the source for assuming such jurisdiction is emanating from the treaty itself. Accordingly, the objectives and foundational principles provided under the treaty specially Article 5(1) and Article 6(d) of the treaty declares that:

“The objectives of the Community shall be to develop policies and programs aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit.” And

“good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.” respectively.

Accordingly, the mandate given to the EACJ to handle Human Rights issues is raised neither from the explicit words of the treaty and independent protocol nor the decision of the council enabling the court to extend its jurisdiction to that effect. It is rather the general objective and principles of the community law and the responsibility of the EAC's institutions to serve for those objectives and principles of the community law that enable the court entertain Human Rights issues.

⁶⁴ The Treaty for the Establishment of the East African Community, 1999, Art 31

⁶⁵ J. Gathii, “Variation In the Use of Sub-regional Integration Courts Between Business and Human Rights Actors: The Case of The East African Court of Justice,” *Loyola University Journal of Law and Contemporary Problems*, Vol. 79:37, (2016), p. 54

The COMESA should borrow such scenario to inculcate and extend its jurisdiction to Human Rights issues driven from its similar objectives and principles with that of the EAC. Most importantly, in addition to the above rationales, it is good experience of the EACJ to litigate Human Rights issues because on one hand it protect the fundamental rights of individuals in the region from arbitrary government actions and trade have a close link with the factors that surround the concept of human rights on the other hand. On top of that it is the most feasible leeway to encourage individuals' access to RTAs tribunals' justice.

3.3 The South African Development Community

The establishment of Southern African Development Community (SADC) is preceded by its forerunner the Southern African Development Coordination Conference (SADCC) established in 1980 by governments of nine Southern African States such as Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe.⁶⁶The treaty that established SADC was signed between fifteen member States in 1992.⁶⁷

Similar to other African regional integrations, the SADC treaty aims integration of the member states in specified areas, most notably the economic and political agendas. Specifically, the SADC has the object of fostering the economic, social and political integration of the southern African region which spelt out under the Treaty.⁶⁸ The treaty established eight institutions with under the auspices of SADC. These institutions include the Summit of Heads of State or Government (Summit), the Organ on Politics, Defense and Security Co-operation, Council of Ministers (Council), Integrated Committee of Ministers, a Standing Committee, the Secretariat, the Tribunal and national committees.⁶⁹

In common with COMESA and EAC, the parties to the SADC Treaty established an institution, responsible for the resolution of dispute. The Tribunal, SADC's judicial organ, is established under Article 16 of the SADC Treaty. It is situated in Windhoek, Namibia and became operational in 2005. The tribunal is mandated to ensure adherence to and the proper interpretation of the treaty's provision and other subsidiary sets of instruments, and to adjudicate upon such

⁶⁶ F.Zenda, *The SADC Tribunal And The Judicial Settlement Of International Disputes*, thesis for degree of doctor of Law, University of South Africa, 2010, p.9

⁶⁷ The member States are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe

⁶⁸ The Treaty of Southern African Development Community, 1992, Art.5, as amended in 2008, Art. 5

⁶⁹ Id Art.9

disputes as may be referred to the court.⁷⁰ The Treaty empowered the SADC Summit to adopt a protocol for the purpose of setting out the composition, powers and procedures of the Tribunal⁷¹ and in 2000 the Protocol of the Tribunal and the Rules of Procedure ('the Protocol') was adopted.⁷² The protocol sets out the function and Jurisdiction of the Court. Similar to the treaty, the protocol specifies the Tribunal's competence that it has jurisdiction on matters relating to the interpretation and application of the Treaty, the interpretation, application or validity of subsidiary legal instruments of SADC and acts of SADC institutions, and matters specifically agreed on by the states conferring jurisdiction on the Tribunal.⁷³ However, this protocol has ceased to be operational since 2010 as the tribunal itself has been without function. And the summit recommend for the change of the protocol and that a new tribunal should be negotiated. As a result, the 2014 SADC summit adopted a new protocol though it is still not come in to force that requires thirty days after the deposit of the instruments of ratification by two-third or ten of member States.⁷⁴ However, it has only be signed by nine Member States⁷⁵ so far and no country has ratified it.⁷⁶

The main difference between the two protocols lies primarily on the involvement of legal and natural persons (Individuals) approaching to the tribunal. While the previous protocol allows access to the court for individuals, the new protocol narrow down the jurisdiction of the tribunal only in the interpretation of the SADC treaty and protocols relating to disputes between Member States and abolished individuals' access to the tribunal. Because the new protocol has not come in to force and the previous not officially repealed, the following analysis is given based on the 2000 protocol.

As far as the scope of jurisdiction is concerned, Article 15 of the Protocol provides that the Tribunal shall deal with disputes between member states, and between private persons and states so long as the former exhausted all available remedies, or unable to proceed through national

⁷⁰ Id Art.16(1)

⁷¹ Id Art.16(2)

⁷² F.Cowell, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction", *Human Rights Law Review* 13:1, Oxford University Press, 2013, P.156

⁷³ Protocol on SADC Tribunal and the Rules of Procedure thereof, 2000, Art.14

⁷⁴ G.Erasmus, "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law", *Tralac Working Paper*, No. US15WPO1/15, January 2015, p.1

⁷⁵ These countries are: Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, South Africa, Zambia, Zimbabwe, Tanzania

⁷⁶ See www.sadc.int/about-sadc-institutions/tribun/, accessed on 10th October 2016

courts. Articles 17 through 19 extend the scope of jurisdiction to include disputes between the Community on the one hand, and states, private persons, and SADC staff, on the other hand.

Similar to the EAC, the Protocol on SADC tribunal is not explicitly mentioned about jurisdiction on Human rights disputes between individuals and Member States. However, It was solely because of Human rights allegation against States that individuals could uphold access to the tribunal. Irrespective of the absence of explicit competence of the tribunal, a Human rights mandate was constructed by the tribunal by reading Article 14 of the protocol in tandem with the Treaty's preamble and Article 4(c), thereby making Human rights either a treaty principle or a matter on which jurisdiction is conferred for adjudication. This meant that the human rights mandate of the tribunal was on a fragile political footing- it was dependent on the tribunal using a particular interpretation of its own mandate as the basis for judgments against state parties.⁷⁷

The SADC experience confirmed that like the EACJ and CCOJ, individuals make use of the tribunal. Prior to its purported suspension, the tribunal received 30 cases and finalized 24 cases, all instituted by individuals.⁷⁸ Of these, Zimbabwean farmers were able to apply for an order preventing state forces proceeding with the removal of farm land under a government land redistribution program that was being executed against mainly white landowners, depriving them of their property without compensation. In its determination of the case, the tribunal has determined in the 2008 Campbell(pvt) Ltd and Others Vs Republic of Zimbabwe case that the respondent state was in breach of its obligations under the Treaty in that it discriminated against the applicants in the matter on the basis of their race.⁷⁹

Despite the decision of the court, the government of Zimbabwe challenged its enforcement and the legitimacy of the tribunal as well. This has been the immediate cause for the SADC summit announced that there would be a review of the tribunal. Due to this announcement, the summit taking a backward step by taking away the powers of the tribunal to hear Human rights cases and cases from individuals. With the same token, if the new protocol is ratified, Individuals residing in the SADC member States will be deprived of a competent tribunal for attaining remedy against violations by States over Individuals. This would be against the purpose of community

⁷⁷ Supra note 72, p.157

⁷⁸ See Statement of the Participants in a Round Table on the Restoration of the SADC Tribunal held at Center for Human Rights, Faculty of Law, University of Pretoria, 28-29, August 2014, Available at http://www.kas.de/wf/doc/kas_38707-1522-2-30.pdf accessed on 10th October 2016

⁷⁹ Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (Case no. SADC T: 02/07, SADC Tribunal, 2008)

laws since the tribunal have been totally inactive without individuals' access that ultimately fails to meet the purpose and objective of the community law.

3.4 The COMESA Court and the European Court of Justice

Regional integration rules in Africa in general and the COMESA in particular and the relative attendant dispute settlement provision is hugely transplanted from Europe. A comparison of the COMESA Treaty provisions establishing the COMESA Court and those establishing the Court of Justice of the European Communities, reveals that those establishing the COMESA Court are almost the same as those establishing the latter.

The European Court of Justice (here in after the ECJ) is the judicial organ of the EU established in 1952 in Luxemburg. The Court is responsible for interpreting the EU law and settle legal disputes primarily between national governments and EU institutions. It can also, in certain circumstances used by private parties such as individuals and companies to take action against the EU institutions⁸⁰ if they infringe the formers' right.⁸¹ The court of first instance has the jurisdiction to hear and determine cases except an act of the community provides otherwise.

The European Court of Justice has jurisdiction to hear and determine direct actions brought before it, to give preliminary rulings and to deliver opinions when requested. In this regard the jurisdiction to determine direct actions by the ECJ depend on entities allowed to approach the court and on the matters upon which such entities may approach the court. Direct actions to the ECJ lie from the following scenarios.⁸²

The first scenario is Failure to fulfill an obligation under the European Union law. In this scenario, the Commission can initiate these proceedings if it has reason to believe that a Member State is failing to fulfill its obligations under the EU law. The proceedings may also be initiated

⁸⁰ The Institutions of EU include: The European Parliament, European Council, Council of European Union, European Commission, European Central Bank, European Court of Auditors, European External Action Service, European Economic and Social Committee, Committee of the Regions, European Investment Bank, European Ombudsman, European Data Protection Supervisor, Inter Institutional bodies.

⁸¹ European Union, Court of Justice of the European Union (CJEU), available at <https://europa.eu/european-union/about-eu/institutions-bodies/court-justice>, accessed on 30th July, 2016

⁸² A guide to Information Sources on the Court of Justice of the European Union (CJEU), with hyperlinks to further sources of information within European Sources Online and on external websites, 2013, p.8, available at http://aei.pitt.edu/74891/1/Court_of_Justice.pdf, accessed on 30th July, 2016

by another Member State. In either case, the Court investigates the allegations and gives its judgment.⁸³

Proceedings for annulment is another situation that attract jurisdiction of the ECJ. According to the provision, if any of the Member States, the Council, Commission or Parliament believes that a particular EU law is illegal they may ask the Court to annul it.⁸⁴ These 'proceedings for annulment' can also be used by private individuals who want the Court to cancel a particular law because it directly and adversely affects them as individuals.⁸⁵ If the Court finds that the law in question was not correctly adopted or is not correctly based on the treaties, it may declare the law null and void.

The EU Treaty requires its institutions such as the European Parliament, the Council and the Commission as well as the European Central Bank to make certain decisions under certain circumstances. If they fail to do so, the Member States, the other EU institutions and individuals or companies can lodge action for failure to act with the Court so as to have this violation officially recorded.⁸⁶

Over and above the foregoing matters the court has further jurisdiction to hear such direct actions concerning; Application for compensation for damage arising from the non-contractual liability of the community;⁸⁷ Disputes between the community and its servants;⁸⁸ Applications concerning contractual liability.⁸⁹ These however are pursuant to an arbitration clause in a contract concluded by the community. Without such an arbitration clause, jurisdiction lies with the national courts;⁹⁰ Jurisdiction conferred by the member states to the ECJ by a special agreement, on a subject matter of the Treaty.⁹¹

Another responsibility of the ECJ like that of the CCOJ is to give preliminary rulings when courts and tribunals of member states require for the interpretation of the union law or validity of

⁸³ Treaty Establishing the European Economic Community, 1957, as amended by the Lisbon Treaty, 2007, Art. 258-259

⁸⁴ Id Art 264

⁸⁵ Id Art 263

⁸⁶ Id Art 265

⁸⁷ Id Art 268

⁸⁸ Id Art 270

⁸⁹ Id Art 272

⁹⁰ Id Art 274

⁹¹ Id Art 273

acts adopted by the institutions of the union.⁹² This is driving from the responsibility imposed on national courts of each EU members for the uniform application and interpretation of EU law in their countries. And to maintain this uniformity in the interpretation and application of the union's law, the treaty confers upon the ECJ the jurisdiction to give preliminary rulings concerning the validity and interpretation of community law as may be requested by the national courts of the member states.

Where a question as to the interpretation of the treaty, the validity and interpretation of the acts of institutions of the community, or of statutes of bodies established by an act of Council is raised before national court of a member state, and where that court considers the determination of such a question necessary for the judgment of the case, then that national court may and sometimes must ask the Court of justice to give a ruling thereon.⁹³ Far from achieving uniformity in the application of community law, the preliminary ruling jurisdiction also ensures the unity of the community legal order and the coherence of the system of judicial remedies established under the Treaty. It can also and actually does play an important role in facilitating access to justice. Citizens of the member states can enforce their community rights in the national courts, through the principles of direct effect and primacy of community law.⁹⁴

A comparison of the COMESA Treaty provision establishing the CCOJ and those of the European Court of Justice from the exposition above reveals a lot of similarities in the formulation and functioning of the two courts. The ECJ having grown over time offers, with the benefit of longevity, some useful insights which may be of importance for the CCOJ. The jurisdiction of the ECJ is purposely wide and allows for judicial reviewing of the actions of the community institutions. The ECJ unlike the CCOJ, has since 1992, the power to enforce its own judgment and to ensure compliance thereof. It may impose a lump sum or a penalty payment on a member state who does not comply with its judgment.

To conclude, what has been noticed from the experience of the ECJ in relation to Individuals' access to the court and the enforceability of the latter's judgment in association to the COMESA treaty, the former clearly and specifically grant for Individual citizens of member States to invoke the European law before national courts and, if necessary before the ECJ against the EU

⁹² Id Art 19(3,b)

⁹³ Id Art 267

⁹⁴ See Supra note 81

institutions. In addition, unlike the COMESA treaty, the treaty of EU does not attach the requirement of being resident to one of the member States since it entitles access to the court to any citizen of the member States. This shows that the ECJ in effect applies the principle of “direct effect”, by virtue of this principle, any individual may ask the judge of her/his national court to apply the European law whether or not it has been incorporated into national law. More in this point, the ECJ passed a remarkable judgment in the case of Van Gend en Loos Vs Nederlandse Administratie Der Belastingen. In this case, the applicant, transport company, Van Gend Loss imported a type of plastic from Germany in to the Netherlands. Upon arrival, Dutch customs authority demanded custom duty on the import to be paid. The company objected against the application of the duty argued that the imported product was in another category duties that implies 3% tax rather than the category specified by the custom authority that implies 10% tax. The court deliver judgment on the issue whether the applicant rely on EU law in order to refuse to pay the import duty, and whether Article 12⁹⁵ of the EEC treaty has direct application with in the territory of a member state. the Court referred the direct applicability of the provision. It stressed that the main objective of the EEC treaty was to create the common market, which implies that the treaty is more than a simple mutual agreement with obligation between the State. Furthermore, the court held that:

“The ... Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.....according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing

⁹⁵ It provides the prohibition of states from introducing as between themselves any new customs duties on importation or exportation or charges, and from increasing such duties or charges as they apply in their commercial relations with each other.

direct effects and creating individual rights which national courts must protect”⁹⁶

In addition to the foregoing, application for annulment by individuals against the decisions, regulations or directive of the EU institutions so long as s/he proves directly and personally affected by those measures, reveals the extent that how economic relations reaches advanced levels of integration because of a greater degree of participation by individuals. And this to the great extent should be borrowed by the COMESA treaty.

⁹⁶ Van Gend en Loos Vs Nederlandse Administratie Der Belastingen (Case no 26/62, the European Court of Justice, 1963)

Chapter Four: Pragmatic Cases

4.1 Introduction

The COMESA treaty envisaged standing right to entities in addition to member States before its judicial organ. The treaty mentions persons generically enjoy standing before the court of justice. Nevertheless, since the formation of the CCOJ as the successor of the PTA tribunals, only two cases are brought before the court referred by persons though not from natural persons. These cases are arguably celebrated by different legal scholars and jurists as the manifestations for the existence of rule based integration in the COMESA legal system. These cases have important implications for the progressive development of community law in COMESA. In 2013 the first breakthrough ruling in the case of *Polytol Paints vs. Mauritius* was delivered. In addition to this the court in its latest ruling of 20 November 2015, has further clarified its jurisdiction over References brought before it as provided for by the COMESA Treaty. In both cases the court of justice passes rulings among other things about issues of the jurisdiction of the court, requirements to invoke standing before the court by persons, and on the enforceability of the COMESA rule within member States.

4.2 The *Polytol Paints & Adhesives Manufacturers Co. Vs. The Republic of Mauritius*⁹⁷

The judgment by the First Instance Division of the COMESA Court of Justice in *Polytol Paints & Adhesives Manufacturers Co. Ltd (Applicant) versus The Republic of Mauritius (Respondent)* has far-reaching implications for rules-based regional integration in East and Southern Africa.⁹⁸ The court of Justice accepted for the first time, an application by a private party to enforce an international agreement and to protect the trade related rights of a private firm. *Polytol Paints Company*, resides in Mauritius brought a case before the court against the Government of Mauritius on 15 February 2012. The Government of Mauritius lodged an appeal to the Appellate Division of this Court; which has now been withdrawn. On 6 February 2015 the Court issued a final order that the matter has been settled between the parties; after having received a letter to that effect.

⁹⁷ *The Polytol Paints & Adhesives Manufacturers Co. Vs. The Republic of Mauritius*, (Case No 1, COMESA Court of Justice 2012)

⁹⁸ Gerhard Erasmus, “The Polytol Judgment of the COMESA Court of Justice: Implications for Rules- based Regional Integration”, *tralac Trade Brief*, No. US15TB04/2015 July 2015, p.3

4.2.1 The Facts and the Legal Arguments of the Case

The Polytol Paints Company in its application requested a court order instructing Mauritius to give effect to the obligations on tariff liberalization in force in COMESA; of which Mauritius is a member. The complaint of the applicant company was due to the fact that the Government of Mauritius has denied to refund a company that it paid the duties as the government imposed a customs duty of 40% on its imports of Kapci paints from Egypt from 16 November 2001 up to 20 November 2010. Further, on 29 October 2000, the COMESA Council of Ministers issued a legal notice requiring member States to issue legal or statutory instruments by 31 October 2000 to put into effect the elimination of customs duties and other charges required by Article 46.

In compliance with Article 46 of the Treaty, on 1 November 2000 the Republic of Mauritius eliminated customs duties on products originating in Member States of COMESA. However, on 16 November 2001 the Republic of Mauritius amended the Customs Tariff Regulation of 2000 to introduce a 40% customs duty on specific products imported from the Republic of Egypt, including Kapci paint products. The Applicant claimed that same or like products from Member States other than Egypt were not subject to customs duties by the Republic of Mauritius.

The Applicant challenged the reintroduction of the levy of customs duty principally on the basis that imposition of duty on Kapci products was in violation of the provisions of the Treaty. In its letter dated 25 August 2005 to the Ministry of Finance, Polytol urged the authorities to remove the duty in order to comply with Article 46 of the COMESA Treaty.⁹⁹ Following this, in April 2008 Polytol sought a remedy before the national courts for alleged infringement of the Treaty and brought an action before the Supreme Court of Mauritius for leave to apply for judicial review of the Respondent's decision to levy the duty on Kapci products in the relevant period. On 15 April 2009, the Supreme Court delivered its decision against Polytol's application for leave to seek judicial review on two grounds. First, the Court found that the application made in May 2008 for leave to apply for judicial review was well outside the required time limit as the duty had been re-introduced in 2001. Secondly, the Court found that it could only take cognizance of the provisions of the COMESA Treaty to the extent that they have been incorporated into the municipal law which at the time was the First Schedule to the Customs Act

⁹⁹ This Article requires member states to eliminate Customs duty and other charges eligible for common market tariff treatment by the year 2000. And the prohibition of member states to impose any new customs duty and taxes or increase existing ones in respect of products traded within the Common Market within the specified year.

as repealed and replaced by Customs Tariff Act (Amendment of Schedule) (No.4) Regulations 2006. In this regard the court asserted that it can only consider the validity of the regulations against the backdrop of the Customs Tariff Act and the Constitution. In the absence of any such legislation to that effect, non-fulfillment by Mauritius of its obligations, if any, under the COMESA Treaty is not enforceable by the national courts.

The company aggrieved by the decision of the supreme court of Mauritius filed a reference to the CCOJ under Article 26 of the COMESA Treaty on 15 February, 2012. The company alleged the breach of various Articles of the Treaty and seeking remedies from the Court. The parties to the dispute presented their respective arguments to the court amongst other things on issues whether the government of Mauritius failing to implement some obligations under the COMESA Treaty, whether the COMESA treaty is directly enforceable to individuals residing in member States, and whether the measure taken by the government of Mauritius is consistent with the Treaty when it introduced a customs duty on imports of the car paints from Egypt. Specific to the respondent, as a preliminary objection opposed the Polytol's application by arguing, that the applicant lacked the necessary *locus standi* and therefore could not bring this claim and it had not established a valid basis for invoking the jurisdiction of the COMESA Court of Justice. The Court of Justice passed decision against the preliminary objection brought by the respondent in relation to jurisdiction of the court. The court found that the applicant had *locus standi* and the court had jurisdiction to hear the reference on the basis of Article 23 and 26 of the treaty.

4.2.2 Non-Fulfillment of the Obligation Vs Infringement of the Treaty

The terms non-fulfillment and infringement are almost similar with a delicate difference. The Black's law dictionary define infringement as a 'breaking into, a trespass or encroachment upon; a violation of a law, regulation, contract, or right.' While Non-fulfillment is 'a failure to fulfill or carry out something.' As it provided under the COMESA treaty, it is in the first case that individuals can bring case before the CCOJ; whereas States and the Secretary General in the second situation.

The distinction on the consequences of non-fulfillment and infringement is also appreciated by the CCOJ in the polytol vs Mauritius case. Accordingly, the court held that non-fulfillment of obligation occurred where a member state has made certain undertakings, such as the

undertaking to incorporate the treaty in to national law, but has not gone ahead to implement such an undertaking. On the other hand, infringement of the treaty is seen as a situation where a member State may or may not have implemented certain obligation such as the requirement to reduce tariff to zero, but goes on to implement measures that run contrary to provisions of the treaty.

In this regard, the Applicant's main argument is that the respondent breached the Treaty by imposing customs duties on imports from the Republic of Egypt after the date of elimination of the same, contrary to the provisions of the Treaty. Specifically, the applicant alleged failure by Mauritius to implement the Treaty within its domestic legislation, failing to give the Treaty force of law and failing to give its national Courts jurisdiction to deal with matters concerning the application and interpretation of the Treaty. According to the applicant, by reinstating the customs duty on certain products originating from a Member State (Egypt), from November 2001 to November 2010 the Respondent was in breach of the Treaty particularly Article 46. In addition to this, the applicant alternatively contended that the acts and measures of the respondent imposing customs duty on the import of products including Kapci from Egypt affect the applicant and should amount to infringement of the Treaty.

With regard to the allegation of the applicant against respondent's failure to fulfill its treaty obligation specified under Article 46 that referred to the court based on Article 26 of the treaty, the court held position that according to the Article under which the applicant based its reference, the legal or natural person is only permitted to bring to court matters relating to conducts or measures that are unlawful or an infringement of the Treaty but not the non-fulfillment of a Treaty obligation by a member State. The responsibility of bringing a matter relating to non-fulfillment of obligations under the Treaty is reserved for member States and Secretary General. Consequently, the court held that the applicant has no right to refer the case to the attention of the court for determination and need not to decide on questions relating to non-fulfillment of the obligation.

In addition to the above allegation, the applicant brought to the court that the respondent's acts and measures that impose customs duty to import products is in violation of Article 46 of the COMESA Treaty. And this is a clear infringement and breach of the treaty that affect the applicant's interest. In this regard the respondent argued that the measure was taken based on

consensual agreement with Egypt to have duties applicable only between themselves and this should not amount to breach of the Treaty. Moreover, the respondent argued that the provisions of the treaty regarding customs union are flexible and intended to facilitate the process rather than being rigid rules. In support of its argument the respondent presented the decision of the council of ministers of the COMESA which allowed certain countries to postpone joining the Free Trade Area (FTA). According to the respondent, even the objectives of the COMESA demonstrates the FTA is a process and progressive irrespective of the time frame established under the treaty. The court addressed the questions raised by the respondent as follows.

Regarding the respondent's argument on the mutual bilateral agreement between itself and Egypt, the court held that the bilateral agreement is contrary to the purpose and objective of the treaty. To justify its judgment in the issue at hand, the court referred Article 18 and 41 of the Vienna Convention on the law of treaties which prohibit an agreement between two or more States in multilateral treaty that affect the object and purpose of the multilateral treaty and that affect the effective enforcement of the purpose and object of the treaty at large respectively. In view of this, the court concluded that the bilateral agreement between Mauritius and Egypt was a derogation from the provision of the treaty on elimination of customs duty and incompatible with the object and purpose of the free trade area. The court therefore held that the bilateral agreement raised by the respondent does not relive the same from the consequence of its breach of the treaty.

As far as the respondent's argument on flexibility of joining customs union is concerned the court held that the decision of the council of ministers does not connote a situation that member States are free to join the custom union whenever they choose too. It rather emphasizes that Member States must comply with the deadline in order to benefit from FTA otherwise they will be left out. On the other hand the court also seen the same issue in line with interpretation of the Treaty provision in a way that Article 46 of the Treaty should be read in its ordinary meaning of the word since it is clear and unambiguous in the context of the purpose and objective of the Treaty. The court found out on the issue that the respondent has breached the alleged Article 46 of the Treaty by imposing duties after the expiry of the time limit prescribed under the Treaty.

4.2.3 Enforceability of the COMESA Treaty on Individuals residing within Member States

The Applicant argues that the Treaty is clear on this issue that as long as the treaty in black and white allow individuals to refer the case before the court, any resident of the Member States can have provisions of the Treaty directly enforced.

The respondent, through its representing lawyer also counter argued on the issue and asserted that in spite of Article 26 of the Treaty which gives individuals the right to bring an action to the Court in some cases, this does not necessarily mean the Treaty gives them an enforceable right. The respondent further argued that ‘the fact that the national legislation does not comply with the undertakings taken by the State cannot *de facto* give a right to an individual or legal entity as contrasted to an obligation imposed on the State to comply with its obligations’. To corroborate this, the respondent quoted the opinion of Advocate General Karl Roamer presented to the European Commission, arguing that his argument has been jurisprudence in International courts. The respondent further argued that because of the existing differences in the legal systems of Member States on their positions regarding the status of Treaties *vis-a-vis* the domestic laws, such scenario of giving citizens of the Members States an enforceable right results in a disparate effect to the Treaty.

The court’s ruling on the issue at hand reads as:

“The content of Art. 26 (reference by legal & natural persons) shows the extent the signatories of the COMESA Treaty have committed themselves to give some space in the COMESA territory not only to the Member States but also to individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between Member States. It also gives enforceable rights to citizens residing in the Member States”.

The court further asserted that the argument of the Respondent that the Treaty is not directly enforceable in some jurisdictions, including Mauritius, and therefore the individuals cannot have

rights emanating from the Treaty is misconceived. According to the court, it is indeed true that there are differences in legal systems regarding their position towards the domestication of international law. In some Member States that follow the monist system, Treaties become directly applicable; and in others who follow dualist system require another domestic legal instrument for their incorporation. However, irrespective of the differences in domestic legal systems the Treaty objectives can be achieved when all Member States fulfill their obligations under the Treaty. Any Member State that acts contrary to the Treaty cannot, therefore, plead the nature of its legal system as a defense when citizens or residents of that State are prejudiced by its acts with the same fashion as provided under the Vienna Convention on the Law of Treaties.¹⁰⁰ The court therefore holds that residents of COMESA Members States likewise have an enforceable right before this Court whenever they establish that they have been prejudiced by an act of the Council or of a Member State that contravenes the Treaty. The Court also finds that this right was breached by the respondent as a result of the imposition of the duty. The Applicant has paid duties which it should not have. This constitutes a prejudice which is a direct consequence of the respondent's breach.

4.3 Malawi Mobile Limited Company vs. Government of the Republic of Malawi and Malawi Communications Regulatory Authority¹⁰¹

Another land mark case on the COMESA community law system is held between The applicant Malawi Mobile Limited(MML), a company incorporated under the laws of Malawi against the first respondent, the Government of the Republic of Malawi, and the second respondent the Malawi Communications Regulatory Authority (MACRA).

4.3.1 Facts and Legal Arguments of the Case

The case was brought to the Court based on a License Agreement dated 19th April 2002 between MML and MACRA, through which the company was to provide mobile telephone services in Malawi for a period of 15 years. According to the agreement, MML was required to roll out its network within 12 months from the time the license was granted. It is understood that by January 2005, MML had not rolled out its network and requested an extension from MACRA for up to

¹⁰⁰ See Art.27, The Vienna Conventions on the Law of Treaties, 1969

¹⁰¹ Malawi Mobile limited company vs Government of republic of Malawi and Malawi Communications Regulatory Authority (reference no.1, the COMESA Court of Justice, 2015)

31 October 2005. According to the allegation of the applicant, MACRA, induced by the Government of Malawi revoked the license in April 2005. Consequently, the company sued Government of Malawi and MACRA for breach of a prior agreement reached with the company in the High court of Malawi. which extended the roll out period as had been requested. The main contentious issue around this was the claim by the Government of Malawi that it had suspended the Board of MACRA by the time the said extension was granted. Upon hearing the matter, the High Court of Malawi ruled in favor of MML and awarded it US\$66,850,000 for loss of profit. The respondents aggrieved by the decision of the high court The successfully appealed to the Malawi's Supreme Court which overturned the ruling of the High Court. The company then brought the matter to the COMESA Court of Justice, seeking that the judgment of the Supreme Court be set aside, and that the damages awarded by the High Court be reinstated with interest.

4.3.2 Preliminary Applications

At the initial stage of the case, the CCOJ received preliminary applications from all the three parties in the dispute regarding whether the court has Jurisdiction, whether the court has competence to rule on national laws of Member States and whether reference would brought against corporates. Similar to the above case, what follows is the bird eye looking of the arguments of each parties to the dispute and the respective ruling of the court in the issues.

I. Malawi Government's objection on the Jurisdiction of the Court

The Government of Malawi argued that the Court does not have jurisdiction to entertain the reference because the alleged breach of contract with MML was not an unlawful act under the Treaty, but was rather an issue covered under Malawi's national laws. It opined that the jurisdiction of the Court only allows it to consider matters relating to the Treaty and community law such as directives and decisions of various organs of COMESA and not the national laws of a Member State. It also contended that MML had not litigated on the alleged breach of the Treaty in the national court process and hence it had not exhausted local remedies as stipulated by Article 26 of the Treaty. Secondly, the Government of Malawi sought the removal of MACRA as a respondent in the matter. The emphasis of the Government's argument in support of the Preliminary Application was the definition of the term "unlawful" as stated in Article 26 of the Treaty. According to the Government, that term in Article 26 only refers to breaches of the Treaty or of any community law such as regulations and directives of organs of the common

market under the Treaty rather than the national laws of Member States. That accordingly, the alleged act of the alleged inducement by the Government for MACRA to allegedly breach the irrevocable agreement was not unlawful as stated in Article 26 of the Treaty. another justification brought by the government of Malawi to bolster its argument was that since the applicant's allegation on the issue had not passed through and litigated before the national courts of Malawi, the reference of the applicant should be precluded on the basis of failure to exhaust local remedies against Article 26 of the Treaty.

In response to government's argument, the company asserted that its reference was permitted under Article 26 because MML was a juristic person resident in Malawi and that it had exhausted the local remedies as required under Article 26.

The court analyzed the argument and held in this regard that Article 26 does not as argued by the respondent restrict parties approaching the court to only rely on infringement by the Organs of the Common Market as argued by the Government. It does, however, provide that any alleged infringement of the Treaty would afford this Court jurisdiction.

II. MACRA's Complaint not to Subject of Reference to the Court

MACRA sought that it should be removed from the Reference. It argued that although MML could bring the matter to the Court as a legal person, MACRA itself (also a legal person established under the laws of Malawi) could not stand as a respondent in a case before the Court because the Treaty provides that it is only the COMESA Council and Member States that can stand as respondents. MACRA therefore argued that it could not be the subject of this reference because MACRA was neither Council nor a member State as stated in Article 26. Opposed to the application of MACRA, MML argued the fact that MACRA was a party during the proceedings before the Malawi courts, and this was because it can sue and be sued as provided under Communication of the Laws of Malawi. The court on its part accepted the application and upheld that MACRA could not stand as a defendant in the case because it was neither the COMESA Council nor a Member State as provided for in Article 26 of the Treaty. Hence, it ordered that MACRA be removed from the reference, and that the Malawi Government would appear on its own behalf and on behalf of its corporate organ, MACRA.

III. Application of the Malawi Mobile Limited to set aside the decision of the Supreme Court

As it mentioned above, the MML sought the setting aside of the judgment of the Supreme Court of Appeal of Malawi and the reinstatement with interest of the judgment of the Malawi High Court due to the fact that the Supreme Court had been irregularly constitute. The government of Malawi opposed the applicant's claim stated that MML filed an application based on hypothesis, assumptions, and opinions, and not based on facts. Moreover, MACRA submitted, similar to the Government, that MML had an alternative remedy of review of the judgment of the Supreme Court of Appeal and therefore MML's preliminary application did not conform to the Rules.

The Court in this regard determined the dismissal on MML's preliminary application for the nullification of the judgment of the Supreme Court of Appeal of Malawi on the grounds that it had been irregularly constituted. The court agreed with Malawi Government and MACRA that the matters raised by MML relate to the substance of the case and so could not be considered at this stage.

4.4 Prospects and Challenges

From the foregoing rulings of the court, it has been noticed that the wide interpretation of the court in both cases that involve trade in goods in the first case and Service in the second one enable to reinforce the right of private parties to access the Court on a varied number of issues. By this the court plays as mentioned in its ruling an important role in furthering the objectives and fundamental principles of the COMESA treaty in respective member States.

The court stressed that community laws are expected to maintain the uniform application of that law to the member States alike. This is of course the sole reason for the establishment of a single court having ultimate authority to decide questions raised based on the law and whose jurisdiction extends over the whole Community.

Another prospect on the rulings of the court is regarding the supremacy of the Community Law over national laws of member States. In this regard, though the COMESA treaty have so far been silent on supremacy, the CCOJ has established through interpretation the doctrine of supremacy of the Community law in the polytol paints company vs. Mauritius case. Furthermore, as to how the relationship between the COMESA law and the national laws of member States looks like,

the court's position that it is the duty of a national court to give full effect to the Community provisions and not to apply any conflicting provisions of national legislation also grant the primacy of the COMESA law on issues concerning the treaty.

Beyond these, what is unique in the COMESA experience in these cases and actually would serve for the next coming similar cases before the court is the court's insight on direct effect of the COMESA law. This meant that Community law could, under certain conditions, create rights for individuals of the Member States that were to be protected by national courts. If individuals would be deprived of the right to invoke Community law before these courts and authorities then they would not be able to invoke their individual rights.

The justifications for attributing direct effect to articles in the Treaty were the necessity to ensure the effectiveness and uniform application of Community law in the Member States and legal integration in the community. This is in fact the extension of the object of the treaty to secure uniform interpretation of the treaty by national courts and tribunals. By this, the court has confirm that member states have acknowledged the Community law has an authority which can be invoked by their nationals before those national courts and tribunals.

Thus, the CCOJ has demonstrated the important role that it have played and will continue to play in upholding rights and obligations created by COMESA legal instruments and indeed the progressive development of community law with in the COMESA.

It would be however misrepresentation if the impression were created that the CCOJ is without challenge in respect to individuals' access thereto. Though the treaty has given individuals direct access to it, several factor interplay to challenge that access to individuals. It is only the above two cases brought by private parties against States concerning measures taken on trade in violation of the COMESA treaty since the establishment of the CCOJ. These challenges are attributed to different factors that may emanated from the treaty itself, member states, and other physical factors.

The member States' reluctance and lack of commitment to implement the treaty uniformly irrespective of their own constitutional order to receipt international agreements in general and the community law in particular highly contribute for lack of individuals' access to the CCOJ. This is more aggravated by failure of the treaty putting provision explicitly to govern its

relationship in status with domestic laws and institutions of member states. Due to these factors, the direct effect of the community law with citizens of member states is compromised. And this in effect jeopardize individuals' interest to lodge cases and avail themselves of the COMESA laws to redress allegations before domestic courts.

Absence of publicity conferences and seminars with in each of member States results for the ongoing lack of knowledge and awareness with citizens of member States on the possibility to bring cases to CCOJ by individuals. The stationary location and distance of the court could also be mentioned as a challenge that militate against the individuals utilization of the court.

In addition to the above factors to challenge Individuals' access to the court, failure to handle Human Rights issues by the CCOJ neglect different NGOs through which Individuals can lodge cases against violations of this kind by their governments. However, had the court been handled such matters, the number of cases brought by individuals would have increased and meet the objective and fundamental principles of the Common market in its fullest manner.

4.5 Implications for Ethiopia

The effectiveness and application of international law with in the domestic legal system of a particular state has great reliance with the approach followed by a state in the reception of international law. Theoretically, the traditional approaches(monist and dualist) to the reception of international law in to the national legal system have been posited.¹⁰² This determines the extent to which individuals can rely on international law for the justification of their rights with in the national legal system.

A look at to the Ethiopian context, the FDRE constitution shows that all international agreements ratified by Ethiopia are treated as integral part of the law of the land and becomes applicable before national authorities so long as the agreement has been incorporated into the laws of Ethiopia through an act of Parliament (the legislature).¹⁰³ The COMESA treaty since it is signed between independent sovereign States, categorized as international agreement and fall under the realm of Article 9(4) of the constitution.

¹⁰² M.N Shaw, International Law 5th ed., 2003, p.120

¹⁰³ The FDRE Constitution, 1995, Art.9(4)

Ethiopia is one of the founding member States of the COMESA since the establishment of its predecessor, the PTA in 1981. Even if Ethiopia has not yet conceded to the FTA, The Ethiopian government is finalizing instruments and expediting internal consultations for the accession to FTA.¹⁰⁴ The accession of Ethiopia into the COMESA FTA results in more market opportunities for domestic industries and individual investors towards their interaction with other member States. This in turn higher-up the country's responsibility to fulfill the treaty obligation including harmonize its domestic legal system to the community law so that individuals can allege against an infringement based on that community law.

Apart from this, the decision of the CCOJ on the above cases though its immediate beneficial effect will be limited to the parties concerned, it will have its own insinuation for Ethiopia and other member States to the common market. Most importantly, the decision underscored that direct applicability of COMESA treaty may not necessarily be a precondition for its provisions to produce direct effect in the national territories of its member states. In other words where a provision of the COMESA treaty is clear and without any conditions, an infringement of such a provision can be challenged by individuals irrespective of incorporation of the COMESA treaty in to the respective member states.

Accordingly, the fact that the FDRE constitution requires the domestication of international agreements in order for them to have national effect, and the COMESA treaty is not directly enforceable within the Ethiopian territory should not be invoked in order to deny the protection extended by the treaty to individuals and to get access to the judicial organ of the common market as well.

¹⁰⁴ Lucy Kassa, "Ethiopia Eases Towards COMESA Free Trade Area", Addis Fortune, April 6, 2015, p.14

Chapter 5: Conclusion and Recommendations

5.1 Conclusion

Regional Economic Communities are formed by the wish and whims of sovereign independent States aiming to attain the desired overall development within the region through political and economic integration among themselves. The instrument that establish the integration, the Treaty, is obviously expected to be operational and bind to adhered by the signatory member States of the region. These member States are however not stand alone entities. They are the sum product of individuals who participate in different trans-boundary business activities which may be affected by measures taken by governments of member States to the regional integration. It is in this situation through which the link between Individuals and the community law has been established; that regional economic integration won't effective in its purposes and objective unless it serves for the interest of those individuals.

The measure of RECs towards protecting the interest of individuals with in member States may be demonstrated by different conducts. Of these is through letting them engaged in the DSM with in the Economic Communities. It is one of the characteristics of effective regional integration accommodating private parties in order to achieve the very objective of its establishment, and to prevent the uncertainty and costs which will result from fragmented and ad hoc national actions. For this to happen the court or tribunal in question must provide the necessary jurisdiction; as is the case to the CCOJ.

Now a time Community laws are essentially shift legal order of international law for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only member States but also their nationals. This study revealed the situation of Individuals' participation in the COMESA community law. The CCOJ is the judicial organ of COMESA whose core function is to adjudicate upon all disputes between member States that would arise from the interpretation and application of the COMESA treaty.

In case of COMESA, the absence of express provision for direct applicability of the treaty coupled with the existing difference in constitutional order of member States regarding the approaches in reception of international agreements, challenges its essence of community law. This further affects the community law to be legally relevant for individuals at the national level.

The study found that the COMESA has relatively develop jurisprudence open for individuals on a pure trade matters compared to other African RECs and this may be taken as positive developments and also be of help for the realization of the objective of the COMESA. However, it is still in the grass root level that the court contributed to the objective of COMESA and different factors are contributing for the challenges against the function of the court.

The study further established that while claims on trade related rights were referred by private parties to the CCOJ better than its counterparts such as the EACJ and the SADC tribunal, the COMESA jurisprudence is still characterized by lack of similar cases. The CCOJ since its inception has been underutilized by Individual business community. Only two references have been filed under the provision on natural and legal persons against member States or State institutions. As far as is known the Polytol Vs Mauritius government and the Malawi Mobile Limited Company Vs Government of the Republic of Malawi and Malawi Communications Regulatory Authority (MACRA) cases are the only of this kind to which the court has made a land mark judgments.

The study examined that the main positive from the Court's ruling on the preliminary applications in both cases is its wide interpretation of its jurisdiction as provided by the treaty. This wide interpretation reinforces the right of private parties to access the Court on a varied number of issues, including those that are associated with furthering the objectives and fundamental principles of treaty in respective Member States.

Moreover, the study found out that while the EACJ and SADC adopt expansionist interpretation to handle Human Right issues irrespective of express provision within the treaty to that effect, the CCOJ exceptionally has no deal with such issues.

Despite the positive developments asserted on the basic community law feature of the COMESA treaty on the above two judgments of the court, the study found out that this development is not without challenges. The difference in constitutional order of member State to the treaty, lack of awareness with individuals reside within the region, absence of primacy clause in the treaty provision and physical inaccessibility of the court in terms of location are among the challenges that hinder individuals to easily access the court observed under the study. In addition the study underscored that reluctance to adopt expansionist interpretation by the court regarding Human Right matters hamper individuals' gateway to the court.

5.2 Recommendations

To enhance individuals' access to the court of justice, each of the stakeholders need to discharge their respective responsibilities. Specifically, the study suggest the following recommendations:

- The COMESA treaty should be amended in a way that it expressly provide for the direct applicability of the community law, and insert supremacy clause in its relation to domestic laws and institutions of member States.
- The common market must create and fund a legal aid, encouraging different bar associations to promote the practice of pro bono litigation by legal practitioners and the creation of sub-registries of the court in member States to facilitate filing of application by litigants.
- Awareness program through publicity seminar with in the member States must be in place. And the court should engage in various sensitization activities to governments and business communities of member States on the role of the court in deepening regional integration.
- Jurisdiction of the court should be extended to the extent that cases related to Human right violations are eligible to the court's competence.
- Member states have to be accountable each other in the fulfillment of their respective obligations, especially where individual business communities face difficulties in the markets of another member state due to such non fulfillment, and in this case allow them to utilize the region's judicial organ.

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