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**Friends, Persons, Citizens: Comparative
Perspectives on *Locus Standi* and the Access of
Private Applicants to Sub-Regional Trade
Judiciaries in Africa**

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[T]here can be no economic community or successful regional trade outside the people. [These individual and non-State persons] are the vessels through which trade is pursued and integration enhanced. An integration process which is pursued by politicians without the [people's] active involvement . . . suffers from inertia. It becomes an institutional edifice with no meaningful impact on the lives of the people¹

INTRODUCTION

A significant aspect that figures prominently in Africa's recent history is the emergence of sub-regional economic communities.² These communities came about with the realization that individual States stood very little chance at effectively competing in the liberalized structure of the mainstream world trading system.³ The earliest efforts that were made towards sub-regional economic integration in post-independence Africa are traceable to the 1960s;⁴ many of these efforts focused primarily on geo-political and economic integration.⁵ Similar trends were also evinced in other continents of the world, for instance, the establishment of the

¹ Richard Frimpong Oppong, *Integration Through Law: An Examination of the Jurisprudence of Regional Economic Integration Judicial Bodies in Africa*, in 7 MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK, 203, 209–10 (Anton Bösl et al. eds., 2007).

² See FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 488 (2007).

³ Rene N'Guettia Kouassi, *The Itinerary of the African Integration Process: An Overview of the Historical Landmarks*, 1 AFR. INTEGRATION REV., no. 2, 2007 at 1, 1 (“It was the political and economic reactions to these adverse effects [Africa's balkanization] that triggered the establishment of a large number of intergovernmental agencies operating in the field of integration, to enable African countries to speak with one voice and to ease the constraints linked to the limited size of national markets.”); Thoko Kaime, *SADC and Human Security: Fitting Human Rights into the Trade Matrix*, 13 AFR. SEC. REV. no. 1, 2004 at 109, 109; William N. Mwanza, *Africa's Continental Integration Agenda: Suggestions for African Countries and Regions*, in SUPPORTING REGIONAL INTEGRATION IN EAST AND SOUTHERN AFRICA—REVIEW OF SELECT ISSUES 50, 50 (Alta Schoeman ed., 2010); Dirk Hansohm & Rehabeam Shilimela, *Progress in Economic Integration Within SADC*, in 6 MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK 6, 7 (Anton Bösl et al. eds., 2006).

⁴ Oliver C. Ruppel, *Regional Economic Communities and Human Rights in East and Southern Africa*, in HUMAN RIGHTS LAW IN AFRICA: LEGAL PERSPECTIVES ON THEIR PROTECTION AND PROMOTION 275, 275 (Anton Bösl & Joseph Diescho eds., 2009); Kouassi, *supra* note 3, at 1.

⁵ Colin McCarthy, *Is African Economic Integration in Need of a Paradigm Change? Thinking Out of the Box on African Integration*, in 7 MONITORING REGIONAL INTEGRATION IN SOUTHERN AFRICA YEARBOOK 6, 6 (Anton Bösl et al. eds., 2007).

European Union,⁶ the North Atlantic Free Trade Area, the Association of South East Asian Nations, and the Caribbean Community.⁷ The early moves towards economic integration in Africa resulted in the proliferation of a number of sub-regional economic communities with each being established under individual constitutive treaties. In July 2006, the African Union Assembly officially recognized the following⁸: the African Maghreb Union (AMU),⁹ the Community of Sahel-Saharan States (CEN-SAD),¹⁰ the Common Market for Eastern and Southern Africa (COMESA),¹¹ the East African Community (EAC),¹² the Economic Community of Central African States (ECCAS),¹³ the Economic Community of West African States (ECOWAS),¹⁴ the Intergovernmental Authority on Development (IGAD),¹⁵ and the Southern African Development Community (SADC).¹⁶ Although not explicitly recognized in the African Union

⁶ Kurt Riechenberg, *The Merger of Trading Blocks and the Creation of the European Economic Area: Legal and Judicial Issues*, 4 TUL. J. INT'L & COMP. L. 63, 63 (1995).

⁷ See Henry Onoria, *Locus Standi of Individuals and Non-State Entities Before Regional Economic Integration Judicial Bodies in Africa*, 18 AFR. J. INT'L & COMP. L. 143, 144 (2010).

⁸ Ruppel, *supra* note 4, at 276.

⁹ Treaty Instituting the Arab Maghreb Union, Feb. 17, 1989, 1546 U.N.T.S. 160 [hereinafter AMU Treaty] (establishing the African Maghreb Union).

¹⁰ Treaty on the Establishment of the Community of Sahel-Saharan States, Feb. 4, 1998 (establishing the Community of Sahel-Saharan States).

¹¹ Treaty Establishing the Common Market for Eastern and Southern Africa, *opened for ratification* Nov. 5, 1993, 2314 U.N.T.S. 265 (entered into force Dec. 8, 1994) [hereinafter COMESA Treaty] (establishing the Common Market for Eastern and Southern Africa and replacing the Preferential Trade Area of 1981 [hereinafter PTA]).

¹² Treaty for the Establishment of the East African Community, Nov. 30, 1999, 2144 U.N.T.S. 255, (entered into force July 7, 2000) (amended Dec. 14, 2006 and Aug. 20, 2007) [hereinafter EAC Treaty] (establishing the East African Community).

¹³ Treaty Establishing the Economic Community of Central African States, Oct. 18, 1983 (entered into force Dec. 18, 1984) [hereinafter the ECCAS Treaty] (establishing the Economic Community of Central African States).

¹⁴ Treaty Establishing the Economic Community of West African States, May 28, 1975, 35 I.L.M. 660 (revised June 3, 1993) [hereinafter ECOWAS Treaty] (establishing the Economic Community of West African States).

¹⁵ Agreement Establishing the Inter-Governmental Authority on Development, Mar. 21, 1996 [hereinafter IGAD] (establishing the Inter-Governmental Authority on Development).

¹⁶ Treaty of the Southern African Development Community, Aug. 17, 1992, 32 I.L.M. 116 [hereinafter SADC Treaty] (establishing the Southern African Development Community).

(AU) Assembly decision, there is also the Central African Economic and Monetary Community (CAEMC).¹⁷

The constitutive treaties for these sub-regional economic communities also establish their own judicial bodies and, furthermore, outline the conditions under which specific entities are legally entitled to refer matters before them. These judicial institutions, which are constituted as either sub-regional tribunals or courts, are mandated with the interpretation and application of treaty provisions, as well as the resolution of disputes.¹⁸ The sub-regional trade judiciaries on the African continent, which have been established under regional trade treaties with the above jurisdictional mandate, include the Court of Justice of the Arab Maghreb Union (AMU Court),¹⁹ the Common Market of Eastern and Southern Africa Court of Justice (COMESA Court),²⁰ the East African Court of Justice (EAC Court),²¹ the Economic Community of Central African States Community Court of Justice (ECCAS Court),²² the Economic Community of West African States Community Court of Justice (ECOWAS Court),²³ and the Southern Africa Development Community Tribunal (SADC Tribunal).²⁴

The establishment of sub-regional trade judicial bodies is an important step as it provides a mechanism through which private applicants, including individuals and non-State entities, may challenge the procedural and substantive legality of State action under the relevant community law.²⁵ This Article focuses on the *locus standi* and access provisions, particularly those of private applicants, under the constitutive regional integration treaties in Africa. It seeks to appraise, from a comparative perspective, the manner in which the sub-regional trade judiciaries in Africa have handled the issue of the

¹⁷ Treaty Establishing the Central African Economic and Monetary Community, Mar. 1994 [hereinafter the CAEMC Treaty] (establishing the Central African Economic and Monetary Community).

¹⁸ Ruppel, *supra* note 4, at 281–82.

¹⁹ AMU Treaty, *supra* note 9, at art. 13.

²⁰ COMESA Treaty, *supra* note 11, at art. 7(1)(c).

²¹ EAC Treaty, *supra* note 12, at art. 23.

²² ECCAS Treaty, *supra* note 13, at arts. 6(1)(c), 15.

²³ Protocol A/P.1/7/91 on the Community Court of Justice, July 6, 1991 [hereinafter ECOWAS Protocol].

²⁴ SADC Treaty, *supra* note 16, at art. 9; VILJOEN, *supra* note 2, at 505

²⁵ Solomy Balungi Bbosa, *A Critique of the East African Court of Justice as a Human Rights Court*, in THE PROTECTORS: HUMAN RIGHTS COMMISSIONS AND ACCOUNTABILITY IN EAST AFRICA 284, 285 (Chris Maina Peter ed., 2008); Oppong, *supra* note 1, at 209–10.

locus standi and access of private applicants. Drawing from the emerging jurisprudence of the sub-regional trade judiciaries in Africa, this Article compares the relative extent to which the *locus standi* and access of individuals and non-State entities has been addressed.

I

LOCUS STANDI AND ACCESS: THE PROCEDURAL STATUS OF PRIVATE APPLICANTS BEFORE AFRICAN SUB-REGIONAL TRADE JUDICIARIES

An applicant's *locus standi* before a judicial body speaks to one's status from a procedural perspective. In this regard, the procedural status of private applicants denotes their legal capacity to refer matters to these judicial bodies. The access of private applicants to sub-regional trade judiciaries is contingent on the *locus standi* provisions in their constituent treaties. This means that the rules governing *locus standi* determine and regulate the access of private applicants to sub-regional trade judicial bodies.

The *locus standi* provisions under the sub-regional trade treaties in the African region are intimately linked with the jurisdictional mandate of the respective judicial bodies.²⁶ The jurisdictional mandate of these sub-regional judicial bodies includes, *inter alia*: i) the interpretation, application and enforcement of community law;²⁷ ii) the settlement of disputes involving member States;²⁸ iii) the judicial review of a member State action which is alleged to be in contravention of the community law;²⁹ iv) addressing the non-compliance with, or breaches of, member States' obligations under the community law;³⁰ v) ensuring the respect and observance of

²⁶ Onoria, *supra* note 7, at 145–46.

²⁷ COMESA Treaty, *supra* note 11, at art. 19; EAC Treaty, *supra* note 12, at arts. 23, 27(1), 33(2); ECCAS Treaty, *supra* note 13, at arts. 16(2), 16(3)(c); ECOWAS Treaty, *supra* note 14 at, arts. 15, 76; ECOWAS Protocol, *supra* note 23, at art. 9; SADC Treaty, *supra* note 16, at arts. 9, 16; Protocol on Tribunal and the Rules of Procedure Thereof, art. 14, Aug. 7, 2000 [hereinafter SADC Protocol].

²⁸ ECOWAS Treaty, *supra* note 14, at art. 76(2); ECCAS Treaty, *supra* note 13, at art. 83.

²⁹ SADC Protocol, *supra* note 27, at art. 14; EAC Treaty, *supra* note 12, at art. 28(3); COMESA Treaty, *supra* note 11, at arts. 24(2), 26; ECCAS Treaty, *supra* note 13, at art. 16(3).

³⁰ EAC Treaty, *supra* note 12, at arts. 28(1), 29(1); ECCAS Treaty, *supra* note 13, at art. 9(2)(k); COMESA Treaty, *supra* note 11, at arts. 24(1), 25(1).

human rights, democracy, and the rule of law,³¹ and vi) the rendering of advisory opinions.³²

The constitutive treaties (and protocols thereto) establishing sub-regional trade blocs with their respective judicial bodies make provisions for the access and *locus standi* of specified entities to present applications arising from matters within the jurisdictional competence of the concerned judicial body.³³ Applications before these sub-regional judicial bodies may be made by: i) State parties;³⁴ ii) institutions and organs of the sub-regional trade entity;³⁵ and iii) natural and legal persons.³⁶ In this regard, it has been observed that regional trade judiciaries in Africa “entertain a broad range of disputes from an extremely broad category of litigants.”³⁷

It is interesting, however, to note that the generous provisions of *locus standi* and access to the sub-regional trade judiciaries in Africa have only begun to be utilized relatively recently.³⁸ This makes for a rather odd, but nevertheless interesting, set of circumstances to get one’s mind around, considering that some of these sub-regional trade communities were established as early as the late 1970s (ECOWAS) and the early 1980s (COMESA). An examination of the history of the various judicial bodies of sub-regional trade entities in Africa reveals a slow institutional start-up. For instance, the adoption of the Protocol establishing the SADC Tribunal and its pertinent rules of procedure only occurred in 2000—ten years after the adoption of the constitutive treaty.³⁹ Moreover, the SADC Tribunal only received its first case in 2007.

³¹ SADC Protocol, *supra* note 27, at art. 14; EAC Treaty, *supra* note 12, at art. 27(2); ECOWAS Treaty, *supra* note 14, at art. 9.

³² SADC Treaty, *supra* note 16, at art. 16(4); SADC Protocol, *supra* note 27, at art. 20; ECOWAS Treaty, *supra* note 14, at art. 15, 76; ECOWAS Protocol, *supra* note 23, at art. 10; ECCAS Treaty, *supra* note 13, at arts. 9(2)(L), 16(3)(d); EAC Treaty, *supra* note 12, at art. 36.

³³ Onoria, *supra* note 7, at 146.

³⁴ SADC Protocol, *supra* note 27, at art. 15, 17; EAC Treaty, *supra* note 12, at art. 28; COMESA Treaty, *supra* note 11, at art. 24; ECOWAS Protocol, *supra* note 23, at art. 9(2).

³⁵ SADC Protocol, *supra* note 27, at art. 15, 17; EAC Treaty, *supra* note 12, at art. 28; COMESA Treaty, *supra* note 11, at art. 24; ECOWAS Protocol, *supra* note 23, at art. 9(2).

³⁶ SADC Protocol, *supra* note 27, at art. 15, 18; EAC Treaty, *supra* note 12, at art. 30; COMESA Treaty, *supra* note 11, at art. 26; Supplementary Protocol to the Protocol on the ECOWAS Community Court of Justice, art. 10, Jan. 1, 2005, [hereinafter ECOWAS Supplementary Protocol].

³⁷ James Thuo Gathii, *The Under-Appreciated Jurisprudence of Africa’s Regional Trade Judiciaries*, 12 OR. REV. INT’L L. 245, 245 (2010).

³⁸ Oppong, *supra* note 1, at 203; Onoria, *supra* note 7, at 146.

³⁹ *Supra* note 24.

Similarly, the ECOWAS Court had its first judges appointed in January 2001—ten years after its establishment under a protocol—and received its first reference only in 2004.⁴⁰ Whilst the EAC and COMESA Courts have fared relatively better than their above-mentioned counterparts, their institutional start-up progress similarly proffers little to write home about. The EAC Court was inaugurated in December 2001, its rules of procedure were adopted in 2004, while its first reference was received a year later, in 2005.⁴¹ For its part, the COMESA Court had its first judges appointed in June 1998 and heard its first cases in 2002.⁴²

This remarkable disjunction between the time of a sub-regional entity's establishment and the operation of its respective judicial body—a curiosity which figures similarly across many of Africa's sub-regional economic integration entities—is attributable to the failure to expeditiously constitute the relevant judicial bodies and to adopt the pertinent enabling procedural rules. Another reason for the disjunction lies with a technical aspect of the initial sub-regional economic integration treaties, whereby the treaties had been drafted to defer the establishment of a judicial body to a subsequent putative future protocol.⁴³ A notable cause for concern with these prospective formulations is the fact that they do not impose an obligation on the State parties to the constitutive sub-regional economic integration treaties to ratify the protocols establishing the respective judicial bodies.⁴⁴ Illustrative in this regard are the examples of sub-regional trade judiciaries in Africa including the SADC Tribunal⁴⁵ and the ECOWAS Court.⁴⁶ It is noteworthy that in the *Mike Campbell (Pvt) Ltd* case brought before the SADC Tribunal, the government of Zimbabwe sought to exploit this technical flaw by arguing, *inter alia*, that it was not bound by the Tribunal's decision as it had not ratified the SADC Protocol.⁴⁷

⁴⁰ Adewale Banjo, *The ECOWAS Court and the Politics of Access to Justice in West Africa*, 32 AFR. DEV., 69, 69 (2007); Onoria, *supra* note 7, at 146.

⁴¹ Onoria, *supra* note 7, at 147.

⁴² *Id.* at 146.

⁴³ *Id.* at 147.

⁴⁴ *Id.*

⁴⁵ SADC Treaty, *supra* note 16, at art. 9.

⁴⁶ ECOWAS Treaty, *supra* note 14, at art. 15(2).

⁴⁷ Press Release, Zimbabwe Human Rights NGO Forum, Status and Meaning of Ratification of SADC Treaty and Tribunal Protocol (Aug. 20, 2009), available at <http://www.hrforumzim.org/pressreleases/status-and-meaning-of-ratification-of-sadc-treaty-and-tribunal-protocol/>.

It is discernible from the above presentation of the timelines of the establishment and subsequent operation of these judicial bodies that there exists a remarkable disjunction with regard to the utilization of these bodies. Even more notable is the fact that these judicial bodies have hardly been used to resolve trade disputes, even though many are specified as trade judiciaries.⁴⁸ Yet, there are valid reasons to be found within the African system of sub-regional economic integration for this apparent oddity. First, the constitutive treaties for sub-regional economic integration do not proffer adequate provisions in respect of the settlement of disputes arising between sub-regional trade organs or institutions and States.⁴⁹ For instance, no provision regarding the settlement of a dispute arising between a sub-regional trade organ and a state is made under either the EAC or COMESA treaties.⁵⁰ Particularly telling in this regard is the *Calist Mwatela* case where individual members of the East African Legislative Assembly (EALA), rather than EALA itself, brought an application challenging the alleged overreaching of the EAC Council of Ministers into an area which fell within the legislative competence of the EALA.⁵¹

Moreover, in most instances, even when such provision is made, for example under Article 17 of the SADC Protocol, it is characterized by limitations. This is well illustrated by the EAC and COMESA Treaties. In spite of the fact that both treaties confer referral rights to their respective judicial bodies upon the Secretary Generals, the execution of this function is subject to the further authorization of other sub-regional organs.⁵² The *James Katabazi* case provides an indication of the EAC Court's jurisprudential recognition of the potentially significant, if contingent, role of the Secretary General in this regard.⁵³

Secondly, the sub-regional trade judiciaries that were subsequently established were utilized very rarely, owing to States' preference for diplomatic, as opposed to judicial, avenues of dispute settlement.⁵⁴ This apparent priority of non-judicial dispute resolution finds support

⁴⁸ William J. Davey, *The Soft Drinks Case: The WTO and Regional Agreements*, 8 *WORLD TRADE REV.* 5, 15 (2009); VILJOEN, *supra* note 2, at 502–06.

⁴⁹ Onoria, *supra* note 7, at 147.

⁵⁰ *Id.*

⁵¹ Onoria, *supra* note 7, at note 34 (citing *Mwatela v. E. African Comty.*, EACJ Reference No. 1/2005).

⁵² EAC Treaty, *supra* note 12, at art. 29; COMESA Treaty, *supra* note 11, at art. 25.

⁵³ *Katabazi v. Sec'y Gen. of the E. Afr. Cmty.*, Reference No. 1 of 2007, 24–25 (E. Afr. Ct. of J. 2007), <http://www.saflii.org/ea/cases/EACJ/2007/3.html>.

⁵⁴ Onoria, *supra* note 7, at 147.

in the provisions of most African sub-regional trade treaties. These treaties require that disputes arising from the interpretation or application of the respective treaties first be addressed through amicable means; if amicable means fail, parties “may” then proceed by judicial means.⁵⁵ The use of the word “may” in these provisions is particularly telling as it suggests that recourse to a judicial solution in such disputes is optional. Moreover, the structuring of the enabling provisions which allows for the referral of disputes by the political organs of the sub-regional trade entities to their respective judicial bodies is highly restrictive. A remarkable example in this regard is Article 8(3)(k) of the AEC Treaty which requires an ‘absolute majority’ vote within its political organ before the dispute resolution authority is ceded to the AEC Court. The *only* inter-State dispute in a temporal period spanning forty-odd years where a judicial solution was sought before a sub-regional judiciary is *Ethiopia v. Eritrea*.⁵⁶ Given the apparent aversion to judicial solutions to arising disputes, a plausible explanation emerges regarding the under-utilization of these judicial bodies.

For a long time the limited role of sub-regional trade judiciaries in Africa has been mirrored in the restricted participation and scant involvement of individuals and non-State entities in the economic integration efforts.⁵⁷ This, in turn, engendered a direct and adverse knock-on effect on the presentation of references arising in respect of legal disputes involving a State party, by natural and legal persons. These were conspicuously missing. This was due, in large part, to limited—or absent altogether—provisions in the majority of sub-regional trade treaties conferring legal capacity upon private applicants, including individuals and non-State entities, to bring references before the relevant judicial bodies.

Incrementally, however, natural and legal persons began taking on increasingly prominent roles in the sub-regional economic integration process, most notably within the context of the European Community⁵⁸ and the World Trade Organization.⁵⁹ The gradual

⁵⁵ ECOWAS Treaty, *supra* note 14, at art. 76; ECCAS Treaty, *supra* note 13, at art. 83; Treaty Establishing the African Economic Community, art. 87(1), June 3, 1991 [hereinafter AEC Treaty].

⁵⁶ *Ethiopia v. Eritrea*, Ref. No. 1 of 1999, (Common Mkt. E. & S. Afr. Ct. of J. 2001), <http://www.worldlii.org/int/cases/COMESACJ/2001/1.html>; Onoria, *supra* note 7, at 148.

⁵⁷ Onoria, *supra* note 7, at 148.

⁵⁸ It is significant to note that some of the landmark decisions issued by the European Court of Justice were in respect of matters in which the applicants were individual persons. *See, e.g.*, Case 26/62, *Van Gend en Loos v. Nederlands Administratieve der Belastingen*,

expansion of the role and *locus standi* of private applicants before sub-regional trade judiciaries may be partly attributed to the emerging prominence of human rights within the context of supranational trade and the subsequent extension of the jurisdictional mandate of sub-regional trade judiciaries in this regard.⁶⁰ Indeed, in Africa there has been a remarkably exponential use of sub-regional trade judiciaries to address issues of human rights, which are arguably well beyond their treaty defined jurisdictional bases.⁶¹ The role of individuals and non-State entities in litigation before sub-regional trade judiciaries is vital as it provides a welcome avenue for private enforcement to complement public enforcement mechanisms of community law.⁶² The multiple benefits of the increasing role of private applicants litigating before sub-regional trade judicial bodies to the broader process of economic integration has been succinctly captured thus:

Direct individual [and non-State entity] access to regional courts increases the number of persons that may potentially bring cases, provides a means for overcoming the traditional reluctance of [S]tates to sue each other, performs the constitutional function of limiting the power of governments to decide which disputes are worth litigating, minimizes governments' control over which claims can be brought, and potentially guarantees greater governmental compliance with community law since governments are aware that breaches will not go uncontested.⁶³

With particular reference to the situation in the African context, it was only until the 1990s that individuals and non-State entities began playing any meaningful role in the broader process of regional integration. A notable example is the COMESA Treaty which inaugurated in 1991 the provision of *locus standi* for individuals to present references before its Tribunal.⁶⁴ This, in effect, made for a

1963 E.C.R. 1; Case 6/64, *Costa v Enel*, 1964 E.C.R. 585. *See generally*, ALBERTINA ALBORS-LLORENS, *PRIVATE PARTIES IN EUROPEAN COMMUNITY LAW: CHALLENGING COMMUNITY MEASURES* (1996).

⁵⁹ Onoria, *supra* note 7, at 148–49.

⁶⁰ Solomon T. Ebobrah, *Litigating Human Rights before Sub-regional Courts in Africa: Prospects and Challenges*, 17 *AFR. J. INT'L & COMP. L.* 79, 80 (2009); *See* VILJOEN, *supra* note 2, at 502–06.

⁶¹ *See* Katabazi, *supra* note 53 (The EAC Court observed in its dicta that even though it did not have an express human rights mandate deriving from Article 27 of the EAC Treaty, it would “not abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the Reference includes allegations of human rights violation.”); Gathii, *supra* note 37, at 245.

⁶² Opong, *supra* note 1, at 210.

⁶³ *Id.*

⁶⁴ COMESA Treaty, *supra* note 11, at art. 26; Onoria, *supra* note 7, at 149.

more enabling environment for individual participation in the broader economic integration process. The primary reason for the delay in individual and non-State entity participation was because the initial treaties on regional and sub-regional economic integration were silent regarding their *locus standi* and access to the respective judicial bodies established under these treaties. However, through amendments and supplementary provisions including protocols and the adoption of new treaties altogether, much more accommodating provisions for the access and *locus standi* of private applicants were made.⁶⁵

Under the regime of the SADC Treaty, the *locus standi* of individuals was provided for by way of a protocol adopted in 2000. In contrast, the regime of the EAC Treaty granted, from the onset, *locus standi* to individuals and non-State applicants to bring references before the EAC Court.⁶⁶ The recognition of the *locus standi* of private applicants before the ECOWAS Court was unlike that of other sub-regional judicial systems.⁶⁷ The most unique aspect about it lies in the fact that the adoption of its *locus standi* provisions was the direct result of the decision of the ECOWAS Court in *Afolabi Olajide*, in which the Court ruled that the legal competence of individuals before the Court was subject to a member State nexus.⁶⁸ In accordance with the international law rule of diplomatic protection, it was ruled that applications could only be made before the Court by a State, on behalf of its nationals, against another State.⁶⁹

The ruling in the *Afolabi Olajide* case resulted in the 2005 adoption of a supplementary protocol to the 1991 Protocol establishing the ECOWAS Court.⁷⁰ Article 10(d) of the resulting ECOWAS Supplementary Protocol, which expressly confers *locus standi* upon individuals, is a welcome departure from the hitherto position in which only disputes arising between member States could be referred to the Court.⁷¹ On the whole, these supplementary protocols and

⁶⁵ Onoria, *supra* note 7, at 149.

⁶⁶ EAC Treaty, *supra* note 12, at art. 30.

⁶⁷ Nneoma Nwogu, *Regional Integration as an Instrument of Human Rights: Re-conceptualizing ECOWAS*, 6 J. HUM. RTS. 345, 349 (2007).

⁶⁸ *Olajide v. Nigeria*, Case No. ECW/CCJ/APP/01/03 (Econ. Cmty. of W. Afr. Sts. Ct. of J. 2004), http://www.courtecowas.org/site/index.php?option=com_content&view=article&id=98&Itemid=6&lang=en.

⁶⁹ Banjo, *supra* note 40, at 71; Onoria, *supra* note 7, at 149.

⁷⁰ See Solomon T. Ebobrah, *Human Rights Developments in Sub-regional Courts in Africa During 2008*, 9 AFR. HUM. RTS. L.J. 312, 318 n. 31 (2009); See also Banjo, *supra* note 40 at 71.

⁷¹ Ebobrah, *supra* note 60, at 86.

amendments have made for a more enabling environment with regard to the participation of individuals and non-state entities in the regional integration process in the African continent.

II LEGAL FRAMEWORK FOR *LOCUS STANDI* AND THE ACCESS OF PRIVATE APPLICANTS BEFORE SUB-REGIONAL TRADE JUDICIARIES

The rules governing the *locus standi* and access of private applicants, specifically individuals and non-State entities, to sub-regional judicial bodies are found in each of the constituent treaties and protocols that create the judicial bodies themselves. Discernible from these treaties and their protocols is the fact that varying provisions are made for the *locus standi* and access of private applicants to their respective judicial bodies. These provisions vary between those that are narrow and restrictive on one end of the spectrum, to those that are broad and permissive on the other.

The access provision under the ECOWAS Treaty regime is enshrined in Article 10 of the ECOWAS Protocol, which provides that access to the Court is open to:

- c) individuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;
- d) individuals on application for relief for violation of their human rights; the submission of application for which shall:
 - i) not be anonymous; nor
 - ii) be made whilst the same matter has been instituted before another international Court for adjudication.⁷²

It is notable that although ECOWAS is a sub-regional trade organization, under the above Protocol the provision of *locus standi* for private applicants before the ECOWAS Court is such that it entertains applications arising from the violation of human rights.⁷³ However, the jurisprudence of the ECOWAS Court, as is well illustrated by the *Moussa Léo Kéïta* case,⁷⁴ indicates that such broadened access by private applicants is only available in respect to

⁷² ECOWAS Supplementary Protocol, *supra* note 36, at art. 10.

⁷³ Ebobrah, *supra* note 58, at 86.

⁷⁴ See *Kéïta v. Mali*, Case No. ECW/CCJ/APP/05/06 (Econ. Cmty. of W. Afr. Sts. Ct. of J. 2007), http://www.courtecowas.org/site/index.php?option=com_content&view=article&id=78&Itemid=6&lang=en.

specifically identified human rights violations. Another important point to be noted with regard to the ECOWAS Protocol is the fact that its provision on the access and *locus standi* of private applicants is not unqualified—it is subject to an additional admissibility precondition. It is a requirement that the subject matter of the reference should not have been submitted before any other international dispute settlement procedure. While, on the one hand, this requirement is positive as it excludes forum shopping among private applicants,⁷⁵ a demerit attributable to it lies in the fact that this aspect blocks any opportunity for appeal.

The provision for the *locus standi* of private applicants with regard to human rights as a subject matter compares favorably with Article 30 of the ACJHR Protocol. Article 30 provides:

The following entities shall also be entitled to submit cases to the Court on any violation of a right guaranteed by the African Charter, by the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the States Parties concerned . . .

- e) African National Human Rights Institutions;
- f) Individuals or relevant Non-Governmental Organizations accredited to the African Union or to its organs,⁷⁶ subject to the provisions of Article 8 of the Protocol.

However, it is noteworthy that while Article 28 of the ACJHR Protocol extends the jurisdiction of the African Court of Justice to disputes arising from “acts, decisions, regulations and directives of organs of the [African] Union,” there is no express provision for the *locus standi* of private applicants with regard to such disputes.⁷⁷

On the matter of the *locus standi* of private applicants, Article 30 of the EAC Treaty provides:

Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the

⁷⁵ See VILJOEN, *supra* note 2, at 502; see also Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 285 (1999).

⁷⁶ Article 30, African Charter on Human and Peoples' Rights (adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force 21 October 1986).

⁷⁷ Onoria, *supra* note 7, at 152.

grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.⁷⁸

Article 30 grants a liberal *locus standi* provision to individuals and non-State entities, a fact that is clearly indicated by the jurisprudence of the EAC Court.⁷⁹ It is of notable significance that Article 27 of the EAC Treaty places an additional requirement on the EAC Court's jurisdiction over references by private applicants. It requires that such references should entail the interpretation and application of the EAC Treaty. Another important observation is the fact that the EAC Treaty provides broad *locus standi* to residents of any of the Partner States. This bears enormous significance as it widens the bracket of persons who are entitled to bring references before the EAC Court by making it possible for non-citizens of the EAC to bring complaints against any of the Partner States.

Similar to the ECOWAS and ACJHR Protocols, both of which make provision for the *locus standi* and access of private applicants in respect to human rights violations, the SADC Protocol empowers the SADC Tribunal to entertain references brought by individuals and non-State entities pertaining to disputes with member States regarding violations of human rights, democracy, and the rule of law. The *Mike Campbell* case, which was brought by private applicants, illustrates the pragmatic application of the *locus standi* provision relative to alleged human rights violations under the SADC Protocol.⁸⁰ Article 15 of the SADC Protocol provides that:

1. The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States.
2. No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.
3. Where a dispute is referred to the Tribunal by any party the consent of other parties to the dispute shall not be required.⁸¹

An important point that is discernible from the above provision is the fact that references may only be brought by private applicants against member States. This precludes any application which may

⁷⁸ EAC Treaty, *supra* note 12, at art. 30.

⁷⁹ Standard Chartered Fin. Servs. v. Ct. App. for the Rep. of Kenya, Reference No. 4/2002 (Common Mkt. for E. and S. Afr. Ct. of J. 2002).

⁸⁰ See *Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe*, SADC (T) Case No. 2/2007 (S. Afr. Dev. Cmty. Trib. 2007), <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>.

⁸¹ SADC Protocol, *supra* note 27, at art. 15.

arise from a dispute between two or more private applicants.⁸² The emerging jurisprudence of the SADC Tribunal, particularly the *Albert Fungai* case⁸³ and the *Nixon Chirinda* case,⁸⁴ is supportive of this contention. Also noteworthy is the fact that Article 19 of the SADC Protocol makes further provision for the access and *locus standi* of a particular group of private applicants—employees of the SADC—particularly regarding the terms and conditions of their employment. The cases of *Bookie Kethusegile-Juru*,⁸⁵ *Ernest Francis Mtingwi*,⁸⁶ and *Angelo Mondlane*⁸⁷ are good examples of the enhanced grant of access by private applicants to the SADC Tribunal in this regard.

Another significant point to be noted regarding the *locus standi* and access of private applicants under the regime of the SADC Treaty is the priority of the rule on the exhaustion of local remedies. Under Article 15(2) of the SADC Protocol, the access of private applicants before the SADC Tribunal is qualified by a requirement that the available remedies at the national level be sought first.⁸⁸ Failure to satisfy this requirement deprives the prospective applicant of the requisite *locus standi* to bring a reference.⁸⁹ Noteworthy also, is the fact that, like under the EAC Treaty, it is a requirement that references by individuals or non-State entities should relate to the application and interpretation of a States' obligations under the SADC Treaty.⁹⁰

⁸² Oliver C. Ruppel & Francois-X. Bangamwabo, *The SADC Tribunal: A Legal Analysis of its Mandate and Role in Regional Integration*, in 8 MONITORING REGIONAL INTEGRATION IN S. AFR. YEARBOOK 179, 188 (Anton Bösl et al. eds., 2008).

⁸³ *Mutize v. Mike Campbell (Pvt) Ltd.*, Case No. SADC (T) 8/2008 (S. Afr. Dev. Comty. Trib. 2008), <http://www.sadc-tribunal.org/docs/case082008.pdf>.

⁸⁴ *Chirinda v. Mike Campbell (Pvt) Ltd.*, Case No. SADC (T) 9/2008 (S. Afr. Dev. Comty. Trib. 2008), <http://www.sadc-tribunal.org/docs/case092008.pdf>.

⁸⁵ *Kethusegile-Juru v. The S. Afr. Dev. Comty. Parliamentary Forum*, Case No. SADC (T) 02/2009 (S. Afr. Dev. Comty. Trib. 2009).

⁸⁶ *Mtingwi v. SADC Secretariat*, Case No. SADC (T) 01/2007 (S. Afr. Dev. Comty. Trib. 2007), <http://www.sadc-tribunal.org/docs/case012007.pdf>.

⁸⁷ *Mondlane v SADC Secretariat*, Case No. SADC (T) 07/2009 (S. Afr. Dev. Comty. Trib. 2009), <http://www.sadc-tribunal.org/docs/case072009.pdf>.

⁸⁸ SADC Protocol, *supra* note 27, at art. 15(2), "No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction."

⁸⁹ Ruppel & Bangamwabo, *supra* note 82, at 189; A.A. CACADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW I* (1983).

⁹⁰ SADC Treaty, *supra* note 16, at art. 14.

The access and *locus standi* provision for private applicants under the COMESA Treaty is similarly subject to the local remedies rule. Article 26 of the COMESA Treaty provides:

Any person who is resident in a Member State may refer for determination by the Court 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 this Treaty:

Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.⁹¹

A notable similarity between the above provision and the EAC Treaty is the *locus standi* provision under the COMESA Treaty which grants competence to all persons who are residents in a Member State.⁹² This grants fairly liberal access to non-citizens of the pertinent Eastern and Southern Africa States. Yet, similar to the SADC Protocol, it is important to note that such competence exists only to the extent that the private applicant has “first exhausted local remedies” that are available in the national judicial system.⁹³ It is also noteworthy that, like the SADC Protocol, Article 27 of the COMESA Treaty makes provision for specific references by the employees of the COMESA in respect of the terms and conditions of their employment. Examples of references which have been brought before the COMESA Court under this provision include the *Kabeta Muleya* case⁹⁴ and the *Martin Ogang* case.⁹⁵

⁹¹ COMESA Treaty, *supra* note 11, art. 26.

⁹² Onoria, *supra* note 7, at 152–53.

⁹³ *Id.* at 153.

⁹⁴ *Muleya v. Common Mkt. for E. and S. Afr.*, Ref. No. 1/2003 (Common Mkt. for E. & S. Afr. Ct. of J. 2003).

⁹⁵ *E. & S. Afr. Trade and Dev. Bank v. Ogang*, Ref. No. 1B/2000 (Common Mkt. for E. & S. Afr. Ct. of J. 2002), http://www.worldcourts.com/comesacj/eng/decisions/2002.04.26_PTA_Bank_v_Ogang.htm.

III
COMPARATIVE APPROACHES OF AFRICAN SUB-REGIONAL TRADE
JUDICIARIES TO THE *LOCUS STANDI* AND ACCESS OF PRIVATE
APPLICANTS

A. The Notion of Direct and Conditional Access to Judicial Bodies

The extent of the jurisdictional reach of sub-regional trade judiciaries in Africa to address applications brought by individuals and non-state entities is contingent on the access provisions contained in the respective constituent economic integration treaties. The provisions for access to the various sub-regional trade judiciaries in Africa vary from liberal at one end of the spectrum to restrictive at the other end. The access of individuals or non-state entities to these judicial bodies arises through one of two ways: direct access or conditional access. In the following section, these methods of access to judicial bodies are discussed.

1. Direct Access

Direct access to judicial recourse mechanisms refers to the type of access that precludes any additional conditions. Under direct access, individuals and non-state entities may automatically bring references before sub-regional trade judicial bodies without necessarily fulfilling other supplementary requirements, such as exhausting local remedies. It is noteworthy, however, that the direct access of private applicants to supranational judicial forums is a mechanism that is unpopular with most States, and has even been deeply contested in some instances.⁹⁶ Reasons for the suspicion with which States regard direct access to supra-natural judicial bodies range from reputational⁹⁷ and sovereignty⁹⁸ concerns on the one hand, to concerns of efficiency⁹⁹

⁹⁶ Aksoy v. Turkey, App. No. 21987/93, Eur. Ct. H.R. paras. 51, 80 (1996).

⁹⁷ Malawi Afr. Ass'n v. Mauritania, Comm. Nos. 54/91, 61/91, 98/93, 164/97 and 210/98 ¶ 80 (Afr. Comm on Human and Peoples' Rights 2000), http://www.achpr.org/english/Decison_Communication/Mauritania/Comm.%2054-91....pdf (The local remedies rule enables a State to "save its reputation, which would be inevitably tarnished if it were brought before an international jurisdiction."); Amnesty Int'l v. Sudan, Comm. Nos. 48/90, 50/91, 52/91, 89/93, ¶ 32 (Afr. Comm on Human and Peoples' Rights 1999), available at http://www.achpr.org/english/Decison_Communication/Sudan/Comm.48-90.pdf; Chidi Anselm Odinkalu, *The Role of Case and Complaints Procedures in the Reform of the African Regional Human Rights System*, 1 AFR. HUM. RTS. L.J. 225, 242 (2001).

⁹⁸ Free Legal Assistance Group v. Zaire, Comm. Nos. 25/89, 47/90, 56/91, 100/93, ¶ 36 (Afr. Comm on Human and Peoples' Rights 1995), http://www.achpr.org/english/Decison_Communication/DRC/Comm.%2025-89,47-90,56-91,100-93.pdf ("[A sovereign] government should have notice of a human rights violation in order to have the

and the need to avoid contradictory judgments at national and international levels on the other.¹⁰⁰ Nonetheless, examples of direct access to sub-regional trade judiciaries in Africa are found in the ECOWAS and EAC treaty regimes. Both treaties are silent with regard to the requirement of exhausting local remedies before individuals and non-state entities bring references to their respective judicial bodies.¹⁰¹ As a result of this silence, the ECOWAS and EAC Courts have been inclined to interpret their respective treaties as presiding over the immaterial nature of fulfilling the requirement of exhausting local remedies.¹⁰²

In searching for the trends that serve as representations of the bold approach adopted by some sub-regional trade judiciaries in Africa towards the development of jurisprudence on direct access, the contribution of the ECOWAS Court merits notable mention. In the *Hadijatou Manu Koraou* case, a citizen of Niger brought a reference against Niger on the premise that the State had failed to protect her right not to be subjected to slavery, a condition under which she had laboured and endured for most of her life.¹⁰³ The ECOWAS Court found in favour of the direct access of the individual applicant by ruling that exhaustion of local remedies was inapplicable.¹⁰⁴ Moreover, the local remedies rule was held to be irrelevant as a precondition for admissibility—more so in respect to a human rights complaint.¹⁰⁵ The ECOWAS Court similarly dismissed objections on the grounds of admissibility which were raised in the preliminary stages of the *Prof. Etim Moses Essien* case. These objections were

opportunity to remedy such violations before being called before an international jurisdiction.”); Frans Viljoen, *Admissibility under the African Charter*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS: THE SYSTEM IN PRACTICE* 76, 77 (Malcolm Evans & Rachel Murray eds., 2002) (As an admissibility requirement, the local remedies rule “places a further divide between sovereign States and international supervision.”).

⁹⁹ *Akdivar v. Turkey*, 23 Eur. Ct. H.R. 143 (1996); Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AM. J. INT’L L. 1 2003 (2003).

¹⁰⁰ *Soc. & Econ. Rights Action Ctr. v. Nigeria*, Comm. No. 155/96, AHRLR 60 ¶ 37, (Afr. Comm on Human and Peoples’ Rights 2001).

¹⁰¹ Onoria, *supra* note 7, at 153.

¹⁰² *Id.* at 156.

¹⁰³ Peter Walker, *Niger Guilty in Landmark Slavery Case*, THE GUARDIAN, Oct. 27, 2008.

¹⁰⁴ *Koraou v. Niger*, ECW/CCJ/APP/08/08 (Econ. Cmty. of W. Afr. Sts. Ct. of J. 2008), http://www.worldcourts.com/ecowasccj/eng/decisions/2008.10.27_Koraou_v_Niger.htm.

¹⁰⁵ *Id.* at ¶ 40, 49.

essentially premised on the non-fulfillment of the rule on exhaustion of local remedies.¹⁰⁶

The decisions of the ECOWAS Court in the cases of *Hadijatou Manu Koraou* and *Prof. Etim Moses Essien* represent a clear departure from the established African human rights jurisprudence on the exhaustion of local remedies rule, particularly that of the African Commission.¹⁰⁷ In this regard, the Court indicated that despite the fact that the ECOWAS Treaty regime refers to the African Charter, this was only a provision making the African Charter part of the applicable law.¹⁰⁸ Hence, this does not necessarily imply that the conditions for access and admissibility should be the same ones provided for under the African Charter.¹⁰⁹

Direct access is also provided for under the EAC Treaty regime, which, as is the case under the ECOWAS Treaty regime, is silent on the need for individual and non-State applicants to fulfill the requirement of exhausting local remedies. In this regard, in the *Anyang' Nyong'o* case, the EAC Court interpreted the provisions of Article 30 of the EAC Treaty as 'creating a cause of action,'¹¹⁰ thus conferring upon individuals and non-State entities resident in East Africa the 'right of direct access to the Court.'¹¹¹ Proceeding from this point of departure, the Court then reasoned that the conferment on applicants of the right of direct access to the EAC Court precluded the relevance of the rule on the exhaustion of local remedies.¹¹²

2. Conditional Access

Conditional access to judicial bodies established under sub-regional economic integration treaties is premised on the rule of the exhaustion of local remedies, the *épuisement des voies de recours internes*.¹¹³ This rule has been described as requiring that "a State . . . be given the opportunity to redress an alleged wrong within the

¹⁰⁶ *Essien v. Gambia*, Case No. ECW/CCJ/APP/05/05 (Econ. Cmty. of W. Afr. Sts. Ct. of J. 2007), http://www.worldcourts.com/ecowasccj/eng/decisions/2007.03.14_Essien_v_Gambia.htm.

¹⁰⁷ African [Banjul] Charter on Human and Peoples' Rights, art. 56, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

¹⁰⁸ *Koraou*, ECW/CCJ/APP/08/08 at ¶ 41.

¹⁰⁹ *Id.* ¶¶ 42–43; Onoria, *supra* note 7, at 156.

¹¹⁰ *Anyang Nyong'o v. Att'y Gen. of Kenya*, Reference No. 1/2006. ¶ 18 (E. Afr. Ct. of J. 2007), http://www.worldcourts.com/eacj/eng/decisions/2007.03.30_Nyong_o_v_Attorney_General_Kenya.htm.

¹¹¹ *Id.* ¶ 54.

¹¹² *Id.*; Onoria, *supra* note 7, at 156.

¹¹³ Udombana, *supra* note 99, at 3.

framework of its own domestic legal system before its international responsibility can be called into question at [the] international level.”¹¹⁴ The local remedy has been clarified as specifically entailing “remedy sought from courts of a judicial nature.”¹¹⁵ Hence, other remedies sought in forums of a non-judicial nature, for instance those of quasi-judicial entities, will not suffice.¹¹⁶ Additionally, the remedies must be “available, effective and sufficient.”¹¹⁷ Thus, the exhaustion of local remedies rule requires that, as an initial course of action, the individuals or non-State entities who eventually bring references before supranational judicial bodies must have engaged those remedies that are available under the judicial structure within the concerned State party.¹¹⁸ This implies a duty on States to ensure the existence of such remedies locally.¹¹⁹

The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.¹²⁰

¹¹⁴ Ruppel & Bangamwabo, *supra* note 82, at 1.

¹¹⁵ Cudjoe v. Ghana, Comm. No. 221/98 ¶ 31 (Afr. Comm on Human and People’s Rights 1999).

¹¹⁶ See VILJOEN, *supra* note 2, at 83–84.

¹¹⁷ Jawara v. Gambia, Comm. 147/95, 149/96, ¶ 31 (Afr. Comm on Human and Peoples’ Rights 2000); J. G. v. Neth., Rep. of the Human Rights Council, 39th Sess., July 9–27, 1990, U.N. GAOR, 45th Sess., Supp. No. 40, A/45/40, at 180 (Oct. 4, 1990); Pratt and Morgan v. Jamaica, Rep. of the Human Rights Council, 35th Sess., Mar. 20–Apr. 7, 1989, U.N. GAOR, 44th Sess., Supp. No. 40, A/44/40, at 222 (Sept. 29, 1989); Van Droogenbroeck v. Belgium, 50 Eur. Ct. H.R. (ser. A) at 30 (1982); Steel v. United Kingdom, 28 Eur. Ct. H.R., 603 (1999); De Jong v. The Netherlands, 8 Eur. Ct. H.R., 20, 33 (1986); Hashman & Harrup v. United Kingdom, 30 Eur. Ct. H.R., 241 (2000); Vernillo v. France, 13 Eur. Ct. H.R. 880, 885 (1991).

¹¹⁸ 2 GERALD FITZMAURICE, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE* 686 (1986). It is noteworthy that this rule requires applicants to adduce *prima facie* evidence outlining the steps which they have taken in their attempt to exhaust the available local remedies. See Dumbaya v. Gambia, Comm. No. 127/94 (Afr. Comm on Human and Peoples’ Rights 1994–1995); Ceesay v. Gambia, Comm. No. 86/93 (Afr. Comm on Human and Peoples’ Rights 1994–1995).

¹¹⁹ SERAC v. Nigeria, Comm. 155/96, ¶ 37 (Afr. Comm on Human and People’s Rights 2002) (“Where a right is not well provided for in domestic law . . . there cannot be effective remedies, or any remedies at all.”); Recontre Africaine pour la Défence de Droits de l’Homme v. Zambia, Comm. No. 71/92, ¶ 12 (Afr. Comm on Human and People’s Rights 1996–1997); Velásquez Rodríguez, Preliminary Objections, 1 Inter-Am. Ct. H.R. (ser. C), ¶ 88 (1987).

¹²⁰ Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe, SADC (T) Case No. 2/2007, 20 (S. Afr. Dev. Cmty. Trib. 2007), available at <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>.

It is noteworthy that the rule on the exhaustion of local remedies figures prominently as a precondition for admissibility under most international human rights treaties,¹²¹ and moreover, it has since come to be regarded as a general principle of international law.¹²² In certain jurisdictions, it has even been found to be a rule of customary international law.¹²³ Under the SADC Protocol, the local remedies rule restricts the capacity of natural or legal persons to bring a reference against a member State “unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.”¹²⁴ However, it is important to note that the precondition of fulfilling the requirements of the exhaustion of local remedies rule under the SADC Protocol, as is the case under other supranational regimes, is not absolute.¹²⁵ On the contrary, under certain circumstances, notably in references brought against the organs or institutions of the Community, the rule does not apply.¹²⁶

The *Mike Campbell (Pvt) Ltd* case presented the SADC Tribunal with an opportunity through which the rule on the exhaustion of local remedies could be addressed. The applicants in this case, individuals as well as non-State entities, were disenfranchised land owners. They brought a reference seeking to challenge the lawfulness of Zimbabwe’s compulsory land acquisition program, under which agricultural land was expropriated by the State and redistributed to

¹²¹ International Covenant on Civil and Political Rights art. 41(1)(c), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Optional Protocol to the International Covenant on Civil and Political Rights art. 2, 5(2)(b), Dec. 16, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), Apr. 11, 1950, C.E.T.S. No. 005; American Convention on Human Rights art. 46(1), Nov. 22, 1969; African Charter, *supra* note 75, at art. 56(5); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), at ¶ 159 (1979); Udombana, *supra* note 99, at 2; A.O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 HARV. INT’L L.J. 1, 1 (1977).

¹²² Udombana, *supra* note 99, at 3, 13; C.F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 6 n.12 (1990) (“[The] development of the rule [on the exhaustion of local remedies] in recent years has been dependent almost entirely on judicial or quasi-judicial determination by international tribunals or organs.”).

¹²³ Interhandel (Switz. v. U. S.), Preliminary Objections, 1959 I.C.J. 6, 27 (1959) (“The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law.”); Finnish Shipowners (Fin. v. Gr. Brit.), 3 R.I.A.A. 1479, 1499 (1934); Ambatielos Claim (Gr. v. U.K.), 12 R.I.A.A. 83, 119 (1956); Jost Delbrück, *The Exhaustion of Local Remedies Rule and the International Protection of Human Rights*, in DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG 213, 217 (Jürgen Jekewitz et al. eds., 1989).

¹²⁴ SADC Protocol, *supra* note 27, art. 15(2).

¹²⁵ Constitutional Rights Project v. Nigeria, Comm. No. 148/96, 10–11 (Afr. Comm on Human and Peoples’ Rights 1999).

¹²⁶ SADC Protocol, *supra* note 27, at art. 15(2); Onoria, *supra* note 7, at 154.

other persons.¹²⁷ The initial application made by the applicant, a legal person, sought for an interim measure of protection to restrain the Zimbabwean government from evicting them from their land.¹²⁸ In response, the respondent State sought to discredit the applicants' *locus standi* by arguing, *inter alia*, that the applicants had not exhausted all the available local remedies owing to the fact that there was a case pending before the Supreme Court of Zimbabwe.¹²⁹ However, for its part, the Tribunal ruled that the exhaustion of local remedies rule was inapplicable with respect to preliminary applications for interim measures.¹³⁰ Moreover, it was held that the invocation of the rule on exhausting local remedies against the applicants was premature since the appropriate time lay much further ahead during the litigation on the merits. The court provided:

[T]he issue of [the] failure to exhaust local remedies by the applicants . . . is not of relevance to the present application but that it may only be raised in the main case. It may not be raised in the present case in which the applicants are seeking an interim measure of protection pending the final determination of the matter. Thus, the Tribunal need not consider the issue of whether or not the applicants have exhausted local remedies.¹³¹

Upon reaching the merits stage, the SADC Tribunal was confronted with the question concerning whether it had jurisdiction or not,¹³² particularly taking into consideration the alleged reason of the non-exhaustion of the applicants' available local remedies.¹³³ Arguing on the merits of the case, the applicants sought to challenge an Amendment to the Constitution of Zimbabwe¹³⁴ through which the jurisdiction of Zimbabwean Courts was ousted in respect of cases relative to the compulsory acquisition of agricultural land by the State.¹³⁵ The ouster clause in Section 16(B)(3)(a) of the amendment provides that "a person having any right or interest in [compulsorily

¹²⁷ *Supra* note 120.

¹²⁸ *Id.*

¹²⁹ Ruppel & Bangamwabo, *supra* note 82, at 180.

¹³⁰ Onoria, *supra* note 7, at 154–55.

¹³¹ Case No. SADC (T) 2/2007, at 6–7 cited in Onoria, *supra* note 7, at 155.

¹³² Mike Campbell (Pvt) Ltd. v. Republic of Zimbabwe, SADCT Case No. 2/07, (S. Afr. Dev. Cmty. Trib. 2007), available at <http://www.saflii.org/sa/cases/SADCT/2008/2.pdf>.

¹³³ Mike Campbell (Pvt) Ltd. V. Minister of Nat'l Sec. Responsible for Land, Land Reform and Resettlement, Judgment No. SC 49/07 (Zim. Sup. Ct. 2008); Onoria, *id.*, at 155.

¹³⁴ Constitution of Zimbabwe Amendment (No. 17) Act 2005.

¹³⁵ *Mike Campbell (Pvt) Ltd*, SADCT Case No. 2/07 at 1; Onoria, *supra* note 7, at 155.

acquired] land . . . shall not apply to a Court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge.”¹³⁶ Under these circumstances the applicants were effectively rendered unable to institute proceedings under the domestic jurisdiction.¹³⁷ This position was confirmed by the Zimbabwean Supreme Court’s decision.¹³⁸ Hence, in coming to its decision, the SADC Tribunal reasoned that the rule on the exhaustion of local remedies did not apply owing to the ouster of jurisdiction of the available national avenues for securing judicial recourse.¹³⁹ This resonates well with other jurisdictions whose interpretation of the local remedies rule is informed by the right to a fair trial and requires, *inter alia*, that the victim of the alleged violation have access to judicial mechanisms at the national level that are capable of adequately addressing and, where appropriate, redressing the complaint.¹⁴⁰

¹³⁶ *Mike Campbell (Pvt) Ltd.*, SADCT Case No. 2/07 at 12. The above provision bears an unsettling resemblance to Decree No. 41 adopted by the then Nigerian military government which ousted the jurisdiction of Nigerian Courts from entertaining applications seeking to challenge the annulment of the 1993 presidential election. It provided, in relevant part:

Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, the African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act or any other enactment, no proceeding shall lie or be instituted in any court for, or on account of any act matter or thing done or purported to be done in respect of this Decree.

¹³⁷ Ruppel & Bangamwabo, *supra* note 82, at 181: ‘[The Constitutional amendment] deprives affected landowners of their right to seek remedy within domestic courts.’; For a comparative perspective from other jurisdictions, see Commission Nationale des Droits de l’Homme et des Liberté v. Chad, Comm. No. 74/92 (Afr. Comm on Human and Peoples’ Rights 1995–1996); Modise v. Botswana, Comm. No. 97/93, ¶¶ 20–21 (Afr. Comm on Human and Peoples’ Rights 1996–1997); Organisation Mondiale Contre la Torture v. Rwanda, Comm. Nos. 27/89, 46/91, 49/91, 99/93 (Afr. Comm on Human and Peoples’ Rights 1996–1997); Cubas v. Uruguay, Comm. No. 70/1980, UN Doc. CCPR/C/OP/1 (1985).

¹³⁸ *Mike Campbell (Pvt) Ltd.*, SADCT Case No. 2/07 at 1; Ruppel & Bangamwabo, *supra* note 82, at 181.

¹³⁹ *Mike Campbell (Pvt) Ltd.*, SADCT Case No. 2/07 at 23 (“[T]he Legislature had unquestionably enacted that such an acquisition shall not be challenged in any court of law. The Supreme Court, therefore, concluded that there cannot be any clearer language by which the jurisdiction of the courts has been ousted.”).

¹⁴⁰ Stögmüller v. Austria, 9 Eur. Ct. H.R. 42, (1969); Klass v Germany, 28 Eur. Ct. H.R. 29, ¶¶ 33–34, at 64 (1978); Jawara v. Gambia, Comm. Nos. 147/95, 149/96, ¶ 32, (Afr. Comm on Human and Peoples’ Rights 2000); Constitutional Rights Project v. Nigeria, Comm. Nos. 140/94, 141/94, 145/95, ¶ 28, (Afr. Comm on Human and Peoples’ Rights 1999); Constitutional Rights Project and Civil Liberties Org. v. Nigeria, Comm. Nos. 143/95, 150/96, ¶ 18 (Afr. Comm on Human and Peoples’ Rights 1999); SERAC v. Nigeria, Comm. No. 155/96, ¶ 47 (Afr. Comm on Human and Peoples’ Rights 2001); JOHN DUGARD, INTERNATIONAL LAW—A SOUTH AFRICAN PERSPECTIVE 293 (2005);

Similar to the SADC Protocol, the COMESA Treaty provides for the access of individuals and non-State entities to the COMESA Court in respect of disputes involving the actions or omissions of the Council or a member State which are in violation of the Treaty. Moreover, as is also the case with the SADC Protocol, such access is qualified by an additional requirement of the exhaustion of local remedies. The pertinent provision in the COMESA Treaty reads:

[W]here the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.¹⁴¹

The *Coastal Aquaculture* case presented the COMESA Court with an opportunity to address the question of the exhaustion of local remedies rule.¹⁴² The applicant, Coastal Aquaculture, a corporate legal person incorporated under Kenyan laws, sought to restrain the Kenyan government from compulsorily acquiring its land.¹⁴³ The applicant alleged that such acquisition was in contravention of the law, as the government had failed, *inter alia*, to pay compensation for the land so acquired.¹⁴⁴ In response, the respondent State subsequently filed an interlocutory application seeking to have the Court set aside the initial reference made by Coastal Aquaculture on the grounds of the absence of *locus standi* on the part of the applicant.¹⁴⁵ In coming to its determination, the Court first sought to verify whether the applicant had a legal right to file a reference. This was subsequently found in the affirmative since the applicant was a “legal person resident in a Member State.”¹⁴⁶

The next step, then, was for the Court to determine whether the applicant had fulfilled the other requisite condition: exhausting all available local remedies.¹⁴⁷ While the applicant had made an attempt to engage the locally available avenues for securing judicial recourse

Nsongurua J. Udombana, *Between Promise and Performance: Revisiting States' Obligations Under the African Human Rights Charter*, 40 STAN. J. INT'L L. 105, 105 (2004); EVELYN A. ANKUMAH, THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 67 (1996).

¹⁴¹ COMESA Treaty, *supra* note 11, art. 26.

¹⁴² Republic of Kenya v. Coastal Aquaculture, Ref. No. 3/2001, (Common Mkt. E. & S. Afr. Ct. of J. 2002).

¹⁴³ Onoria, *supra* note 7, at 153.

¹⁴⁴ *Id.* at 153–54.

¹⁴⁵ Onoria, *supra* note 7, at 154.

¹⁴⁶ *Coastal Aquaculture*, Ref. No. 3/2001 at 277.

¹⁴⁷ *Id.*

at the national level, midway in the course of litigation it withdrew the civil action which it had instituted seeking a remedy of compensation in damages against the State.¹⁴⁸ After the withdrawal of the civil suit, the applicant brought the reference before the COMESA Court. Although the Court expressed its sympathy over the protracted process through which the applicant had attempted to secure local remedies,¹⁴⁹ the Court determined that the withdrawal by Coastal Acquaculture of the civil suit did not “constitute an exhaustion of [its] legal remedies in the municipal courts of the Republic of Kenya such as to grant [it] a *locus standi* to commence this [r]eference.”¹⁵⁰ Noteworthy is the fact that the Court’s reasoning in this regard is remarkably similar to that of the African Commission in the *Civil Liberties Organisation* case¹⁵¹ where a complaint was ruled inadmissible since “a claim had been filed but not yet settled by the courts of the respondent state.”¹⁵²

Interesting comparisons may be drawn between the relatively similar set of circumstances witnessed in the merits stage of the *Mike Campbell (Pvt) Ltd* case and that of the case of *Coastal Acquaculture*. In both cases the decisions of the respective national courts excluded the viability of judicial remedies at the national level. More specifically, in the *Coastal Acquaculture* case, the Kenyan Court had declared itself to be lacking in sufficient competence to rescind the order of compulsory acquisition, which had been issued by the Minister.¹⁵³ Unlike the merits decision in the *Mike Campbell (Pvt) Ltd* case, however, the COMESA Court ruled that owing to the fact that the civil suit in respect of the compulsory acquisition of the respondent’s parcels of land was pending before the Kenyan Court, Article 26 of the COMESA Treaty precluded Coastal Acquaculture from commencing a reference before the COMESA Court.¹⁵⁴

It is, however, important to note that under the COMESA and SADC treaty regimes, the rule on the exhaustion of local remedies

¹⁴⁸ It is noteworthy that this withdrawal came after an eight-year long unsuccessful engagement with the domestic judicial process. See Onoria, *supra* note 7, at 165.

¹⁴⁹ Oppong, *supra* note 1, at 213.

¹⁵⁰ *Coastal Acquaculture*, Ref. No. 3/2001 at 277.

¹⁵¹ *Civil Liberties Org. v. Nigeria*, Comm. No. 45/90, (Afr. Comm Human and Peoples’ Rights 1994).

¹⁵² Chidi Anselm Odinkalu & Camilla Christensen, *The African Commission on Human and Peoples’ Rights: The Development of its Non-State Communication Procedures*, 20 HUM. RTS. Q. 235, 256 (1990).

¹⁵³ COMESA Reference No. 3/2001 [2003] 1 EA 277.

¹⁵⁴ *Coastal Acquaculture*, Ref. No. 3/2001 at 277.

applies only with regard to references that are brought by individuals and non-state entities against a member state of the Common Market or the Community.¹⁵⁵ This lends credence to the contention that the rule on the exhaustion of local remedies is not absolute. Support for this view is found in the jurisprudence of the SADC Tribunal. For instance, the Tribunal ruled in the *Mike Campbell (Pvt) Ltd* case that the inability of a private applicant to proceed under domestic jurisdiction rendered the ordinarily requisite exhaustion of local remedies rule inapplicable.¹⁵⁶ In this regard, the SADC Tribunal lucidly held:

[W]here the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Further, where . . . ‘the procedure of achieving the remedies would have been unduly prolonged,’ the individual is not expected to exhaust local remedies.¹⁵⁷

The case of *Luke Munyandu Tembani* is yet another instance in which the exhaustion of local remedies rule under Article 15(2) of the SADC Protocol was held to be inapplicable because the jurisdiction of Zimbabwean Courts to address claims arising from the compulsory acquisition of agricultural land had been excluded by way of a constitutional amendment.¹⁵⁸

B. Access to Judicial Bodies and the Nature of Legal Interest in the Litigation

The access of individuals and non-state entities to supranational judicial bodies invariably raises questions regarding their *locus standi* to present such references.¹⁵⁹ In many instances the decisive aspect will turn on the nature of the legal interest of the concerned individual or non-State entity in a particular legal dispute. This means that the access of private applicants to sub-regional judicial bodies will be conditioned to a significant extent by the nature of the applicant’s legal interest in the dispute at hand. Hence, the competence and ability of individuals and non-state entities to participate meaningfully in litigation before sub-regional trade judiciaries depends largely on the nature of their legal interest.

¹⁵⁵ COMESA Treaty, *supra* note 11, art. 26; SADC Protocol, *supra* note 27, art. 15.

¹⁵⁶ *Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe*, SADCT Case No. 2/07, 21 (S. Afr. Dev. Cmty. Trib. 2007).

¹⁵⁷ *Id.*

¹⁵⁸ *Tembani v. Republic of Zimbabwe*, Case No. SADC (T) 07/2008 (2008).

¹⁵⁹ Onoria, *supra* note 7, at 157.

The *locus standi* requirement which grants individuals and non-State entities access to sub-regional economic integration judicial bodies varies across the African continent. On the one hand, the access provisions may be broadened by virtue of a *locus standi* requirement which accommodates *actio popularis* applications, (public interest litigation).¹⁶⁰ On the other hand, access may be limited by a restrictive *locus standi* provision requiring that a private applicant demonstrate a personal interest in the *ratione materiae* of the legal dispute.¹⁶¹ The *locus standi* provisions for the access of individuals and non-state entities to the EAC and COMESA Courts are broad and permissive as references may be presented by “any person who is resident” in the member or partner state respectively.¹⁶² The use of the phrase “any person” is particularly telling of the generosity of the respective constitutive treaties’ access provisions since this phrase is wide enough to incorporate individuals and non-state applicants. In the case of natural persons, it confers wide access to individuals who are not necessarily “citizens” of any of the respective member states.

Moreover, there is nothing in these provisions to indicate the requirement of proving a personal interest in the subject matter of the application on the part of the concerned private applicant. This contention finds support in the decision rendered in the *Anyang’ Nyong’o* case where the EAC Court ruled that the access provisions under Articles 28, 29, and 30 of the EAC Treaty require neither that the private applicants demonstrate that a personal right or interest has been infringed, nor that some damage was occasioned as a result of the impugned conduct.¹⁶³ A notable difference between the EAC and COMESA Treaties, however, lies in the fact that under the latter there is an additional *locus standi* condition—the exhaustion of local remedies in respect to references against member states.¹⁶⁴

The burgeoning jurisprudence of the EAC Court provides further clarification on the extent of its broad and accommodating access provisions. In elaborating on the *locus standi* requirement under the EAC Treaty, the Court has clarified that the demonstration of personal interest by the applicant is irrelevant. In the *East African*

¹⁶⁰ See EAC Treaty, *supra* note 12, arts. 28, 29, 30.

¹⁶¹ Onoria, *supra* note 7, at 157.

¹⁶² EAC Treaty, *supra* note 12, art. 30; COMESA Treaty, *supra* note 11, art. 26.

¹⁶³ *Anyang’ Nyong’o v. Att’y Gen. of Kenya*, Ref. No. 1/2006, ¶¶ 16–17 (E. Afr. Ct. of J. 2007), http://www.worldcourts.com/eacj/eng/decisions/2007.03.30_Nyong_o_v_Atorney_General_Kenya.htm.

¹⁶⁴ Onoria, *supra* note 7, at 157.

Law Society case the Court affirmed the *locus standi* of the applicants, legal persons, in bringing the reference.¹⁶⁵ More specifically, in coming to its decision, the Court reasoned that since the applicants were genuinely interested in an alleged contravention of Treaty law, exercising the “duty to promote adherence to the rule of law” conferred upon them the requisite *locus standi*.¹⁶⁶ The implication of this decision to the shaping of the Court’s future jurisprudence is far reaching. It not only affirms the Court’s liberal views on private applicants’ *locus standi* and access, but also provides acknowledgment for public interest litigation as a legitimate “cause of action” and a basis for *locus standi*.

The *locus standi* provisions for the access of individuals and non-State entities to the ECOWAS Court and SADC Tribunal are also fairly liberal, albeit to a relatively lesser extent compared to those under the EAC and COMESA Treaties. Under the ECOWAS Treaty regime, access to the Court is largely dependent on a demonstration, on the part of the applicant, of a personal interest in the concerned legal dispute.¹⁶⁷ The requirement for applicants to demonstrate their personal interest greatly restricts the avenues through which private applicants may bring references to the ECOWAS Court. Even so, the increasingly expanding jurisdictional reach of sub-regional trade judiciaries to include a human rights mandate bears the capacity to effectively circumvent this limitation. Similar to the cases of the African and other regional systems of human rights protection, a fairly high number of the litigation before the ECOWAS Court is brought under *actio popularis* applications on behalf of the victims and other affected persons.¹⁶⁸

Indeed, the expanding human rights mandate of the ECOWAS Court has provided a welcome mechanism through which the restrictive *locus standi* requirement of the demonstration of personal interest can be skirted. The expanded human rights mandate of the ECOWAS Court has been matched by an increase in public interest applications, particularly by non-State entities. Illustrative in this regard is the *SERAP* case which was brought by a legal person, a human rights NGO, against the government of Nigeria for human rights violations, namely failure to ensure the right to education

¹⁶⁵ East Afr. Law Soc’y v. Att’y Gen. of Kenya, Reference No. 3/2007 (E. Afr. Ct. of J. 2007).

¹⁶⁶ *Id.* at 7.

¹⁶⁷ ECOWAS Treaty, *supra* note 14, art. 10.

¹⁶⁸ Onoria, *supra* note 7, at 159.

through Nigeria's ineffective implementation of the Basic Education Act and the Children's Rights Act.¹⁶⁹ It is especially significant to note that in response to the Nigerian government's assertion that the ECOWAS Court lacked jurisdiction in respect to alleged human rights violations, the Court reaffirmed its jurisdiction in this regard with express reference to Article 4(g) of the ECOWAS Treaty, Article 9(4) of its Protocol, and Article 17 of the African Charter.¹⁷⁰ Instructive also, is the *Chief Ebrima Manneh* case in which the applicant brought the reference through authorized representation on behalf of a detained Gambian journalist.¹⁷¹

With regard to access to the SADC Tribunal, references may similarly be presented by individuals and non-State entities on behalf of putative victims of an alleged contravention of the Treaty. This may arise by way of the victim's express authorization and also in the event of the victim's incapacity to personally file a reference.¹⁷² Moreover, the procedural provision of the SADC Protocol is indicative of the Tribunal's liberal approach to access since it additionally entitles legal or natural persons to bring references as an agent.¹⁷³ However, the Tribunal's decision in the *Chirinda* case did not faithfully reflect this liberal approach. In its response to an individual's application seeking to intervene as a third party in the case of *Mike Campbell (Pvt) Ltd*, the Tribunal disallowed the application on the basis of, *inter alia*, the applicants' failure to demonstrate they were vested with "an interest of a legal nature" in the initial reference.¹⁷⁴ Nonetheless, subsequent decisions of the SADC Tribunal are indicative of an increasing inclination towards a generous grant of *locus standi*, which more accurately represents the liberal approach to the access of private applicants contemplated in the SADC Treaty regime.¹⁷⁵

¹⁶⁹ Gathii, *supra* note 37, at 266.

¹⁷⁰ *Id.* at 267.

¹⁷¹ *Manneh v. Gambia*, Case No. ECW/CCJ/JUD/03/08 (Econ. Cmty. of W. Afr. Sts. Ct. of J. 2008), <http://www.chr.up.ac.za/index.php/browse-by-subject/306-the-gambia-manneh-v-the-gambia-2008-ahrlr-ecowas-2008.html>.

¹⁷² Onoria, *supra* note 7, at 159.

¹⁷³ SADC Protocol, *supra* note 27, rule 33.

¹⁷⁴ *See Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe*, SADCT Case No. 2/07, 21 (S. Afr. Dev. Cmty. Trib. 2007).

¹⁷⁵ For subsequent jurisprudence in this regard, *see Theron v. Republic of Zimbabwe*, Case No. SADC (T) 3/08 (S. Afr. Dev. Cmty. Trib. 2008), <http://www.sadc-tribunal.org/docs/case022008.pdf>; *Stidolph v. Republic of Zimbabwe*, Case No. SADC (T) 4/08 (S. Afr. Dev. Cmty. Trib. 2008), <http://www.sadc-tribunal.org/docs/case022008.pdf>;

Discernible from the above discussion is the fact that access to sub-regional economic integration bodies is determined, to a large extent, by the nature of the legal interest of which the applicant is possessed. While the *locus standi* requirements under the EAC and COMESA Treaties are permissive since they obviate the need for demonstrating a direct personal interest, hence making provision for wider access by individuals and non-State entities, the opposite is the case under the treaty regimes of the SADC and ECOWAS. However, as has been shown above, the progressive jurisdictional developments of sub-regional trade judiciaries on the front of human rights may alleviate this access limitation.

C. Extended Avenues for Access: Amici Participation and Third-Party Intervention

Other important avenues through which individual and non-State entity applicants may access economic integration judicial bodies and thereby take an active part in litigating the alleged violation of rights or contraventions of sub-regional trade treaty laws are through *amici* participation and third-party intervention. In the following sections, these extended avenues for access to sub-regional trade judiciaries are examined.

1. Access by way of Amici Participation

Amici participation usually entails the active involvement of public interest groups in filing *amicus curiae* briefs before sub-regional trade judiciaries with a view to litigate matters of public interest so as to shape and enhance the progressive development of jurisprudence.¹⁷⁶ It is noteworthy that the access of private applicants, particularly public interest groups, to supranational judicial forums through *amici* participation is a well established practice in most regional and international judiciaries.¹⁷⁷ Yet, generally, the participation and influence of public interest groups in Africa's economic integration processes has been minimal.¹⁷⁸

Angelsea Farm (Pvt) Ltd v. Republic of Zimbabwe, Case No. SADC (T) 6/08 (S. Afr. Dev. Comty. Trib. 2008), <http://www.sadc-tribunal.org/docs/case022008.pdf>.

¹⁷⁶ Opong, *supra* note 1, at 214.

¹⁷⁷ Marco Frigessi di Rattalina, *NGOs Before the European Court of Human Rights: Beyond Amicus Curiae Participation?*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLAINT BODIES 57, 57 (Tullio Treves et al. eds., 2005).

¹⁷⁸ Mariama Deen-Swarray & Klaus Schade, *Perception of Business People and Non-State Actors on Regional Integration: A SADC-wide Survey*, in MONITORING REGIONAL

With regard to references brought before sub-regional trade judiciaries in Africa, the East African Law Society has been a notable *amici* participant. The first *amici* participation by the East African Law Society was in the *East Africa Law Society* case.¹⁷⁹ That case came in the wake of the issuance by the EAC Court of an interim order in the *Anyang' Nyong'o* case preventing the appointment of Kenyan representatives to the East African Legislative Assembly and the subsequent decision of the Court in favor of the *locus standi* of Kenyan citizens seeking to challenge the appointment of these representatives.¹⁸⁰ These bold and independent decisions by the Court elicited strong criticism from the EAC Council which responded by making adverse recommendations to the EAC Summit for an amendment leading to the limitation of the Court's power.¹⁸¹

Consequently, in the *East Africa Law Society* case, proceeding under Article 30 of the EAC Treaty, the East African Law Society challenged the procedural legality of the Treaty amendment under Article 150.¹⁸² An important point which arose concerned whether there is room for judicial control of decisions made by political organs of the EAC. One of the respondents, the Attorney General of Kenya, contended that since the contested amendments to the EAC Treaty were decisions of the EAC Summit, they were not subject to judicial review under Article 30.¹⁸³ It is noteworthy that the above argument comes across as being valid, even persuasive, since Article 30 of the EAC Treaty does not make any express provision for the possibility of challenging the legality of an action of an organ of the Community; in this case the EAC Summit. Yet, in a flash of judicial innovation, the EAC Court took a broad and purposive approach to interpreting the EAC Treaty in this regard. It ruled that, in spite of the silence of Article 30 in respect to the organs of the Community, a restrictive interpretation which would exclude the applicability of this Article in instances where an organ of the EAC is alleged to have violated the Treaty would be self-defeatist.¹⁸⁴ The Court stated:

INTEGRATION IN SOUTHERN AFRICA YEARBOOK 51, 51 (Anton Bösl et al. eds., 2006); Oppong, *supra* note 1, at 213.

¹⁷⁹ East Afr. Law Soc'y v. Att'y Gen. of Kenya, Reference No. 3/2007 (E. Afr. Ct. of J. 2007).

¹⁸⁰ EACJ Reference No. 1/2006; *see also* Oppong, *supra* note 1, at 208.

¹⁸¹ *Id.* at 3–4.

¹⁸² *Id.* at 13.

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.* at 16.

The alleged infringement is the totality of the process of the Treaty amendment, which amendment was, and can only be made by the parties to the Treaty, namely the Partner States, acting together through the organs of the Community. It follows that if in the amendment process the Treaty was infringed, it was infringed by the Partner States. The reference therefore cannot be barred on the ground that its subject matter are decisions and actions of organs of the Community.¹⁸⁵

The significance of this decision in the context of the broader process of economic integration under the EAC Treaty regime cannot be underestimated. This decision bears considerable implications for the development of principles which will act as precepts for shaping the EAC Court's future jurisprudence on, *inter alia*, its jurisdictional competence with regard to judicial review of executive action. Moreover, especially important to the expanding role of individuals and non-State entities in the process of sub-regional economic integration is the fact that the Court ruled against the procedural propriety of the Treaty amendments made by the Summit. It held, additionally, that the amendment contravened the provisions of Articles 5(3)(g), 7(1)(a), and 150 of the EAC Treaty primarily because the action of the EAC Summit excluded the participation of individuals and non-State entities.¹⁸⁶ In this regard, the Court clarified the Community law regarding the criticality of the role of individuals and non-State entities in the broader process of sub-regional economic integration. There is a strong likelihood that the above decision will have an abiding effect in shaping not only the burgeoning jurisprudence of the EAC Treaty regime, but also the broader process of sub-regional economic integration. This contention finds support in the Courts decision in the *East Africa Law Society* case where it was held that "after this clarification of the law on the matter, the infringement is not likely to recur."¹⁸⁷

The East African Law Society also appeared under an *amicus curiae* application in the *Calist Mwatela* case before the EAC Court. While delivering its decision on the matter, the Court made special mention of the contribution of the East African Law Society for its "very useful and helpful submissions" with which the Court was "guided accordingly."¹⁸⁸ The conduct of the East African Law Society in the *Calist Mwatela* case was commendable as the Society lived up

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 31.

¹⁸⁷ *Id.* at 43–44.

¹⁸⁸ *Mwatela v. E. Afr. Comty.*, Ref. No. 1/2005, 24 (E. Afr. Ct. of J. 2005).

to its duly acknowledged role as a friend of the Court by objectively and conscientiously providing the Court with the much needed assistance “without any attempt to side with any other party in the reference.”¹⁸⁹

2. Access through Third-Party Intervention

Access by way of third party intervention is a mechanism through which interested persons who are non-parties to a legal dispute may seek leave from a judicial body to take part in the proceedings.¹⁹⁰ Most sub-regional economic integration treaties in Africa make provision for third-party interventions as an avenue through which interested individuals and non-State entities may access their respective judicial bodies.¹⁹¹ Moreover, the enabling procedural provisions which have been adopted under these respective sub-regional economic integration judiciaries affirm the right of third-party intervention by interested private applicants.¹⁹² It is noteworthy that the third-party intervention regime bears remarkable similarity to the class action regime under municipal law; the common rationale of both regimes is to foster the consolidation of applications with similar facts and whose applicants bear similar legal interests with a view to exclude the redundancy and duplicity of effort which would otherwise occur.¹⁹³

With regard to the practice of third party interventions as a basis for access to sub-regional trade judiciaries in Africa, the relatively recent nature of these judicial bodies and their limited jurisprudence dictates that only few instances can be identified. The few notable instances that are identifiable have been addressed by, *inter alia*, the SADC Tribunal and the EAC Court. One such instance is the *Christopher Mtikila* case where the third-party intervention was sought in respect to a reference seeking to challenge the election of two Tanzanian representatives in the East African Legislative Assembly.¹⁹⁴ In the *Anyang Nyong'o* case, third parties were similarly

¹⁸⁹ *Id.*

¹⁹⁰ Onoria, *supra* note 7, at 160.

¹⁹¹ ECOWAS Protocol, *supra* note 23, at art. 21; COMESA Treaty, *supra* note 11, at art. 36; SADC Protocol, *supra* note 27, at art. 30; EAC Treaty, *supra* note 12, at art. 40.

¹⁹² ECOWAS R. P. art 89; SADC Protocol, *supra* note 27, at rule 70; EAC Ct. R. P. 35.

¹⁹³ Comité Culturel pour la Démocratie au Bénin v. Bénin, Comm. Nos. 16/88, 17/88, 18/88, ¶ 3 (Afr. Comm on Human and Peoples' Rights 1995); Udombana, *supra* note 90, at 19.

¹⁹⁴ *Mtikila v. Att'y Gen. of the United Republic of Tanzania*, Ref. No. 2/2007 (E. Afr. Ct. of J. 2007), <http://www.saflii.org/ea/cases/EACJ/2007/4.pdf>.

allowed to intervene in a reference challenging the election of nine Kenyan representatives in the East African Legislative Assembly.¹⁹⁵ On the part of the SADC Tribunal, a third-party intervention came about in the *Chirinda* case where leave was sought to intervene in the ongoing *Mike Campbell (Pvt) Ltd* case. However, in the *Chirinda* case, the Tribunal disallowed the third-party intervention by ruling that the applicant had not demonstrated an ‘interest of a legal nature’ as is expressly required under Article 70(2)(d).¹⁹⁶ An additional procedural flaw with the third-party intervention application being sought in the *Chirinda* case, as was observed by the Tribunal, was that it was filed as a separate cause rather than the correct approach which would have been filing it prior to the hearing of the original reference.¹⁹⁷

Notwithstanding the initial failure of the *Chirinda* case, subsequent third-party intervention applications before the SADC Tribunal registered a far more encouraging success rate. These include the applications of *Gideon Stephanus Theron*,¹⁹⁸ *Andrew Paul Rosslyn Stidolph*,¹⁹⁹ and *Anglesea Farm (Pvt Ltd)*,²⁰⁰ all of which sought leave to intervene in the *Mike Campbell (Pvt) Ltd* case and which were additionally filed in remarkably quick succession. The applicants were not only given leave to intervene, but were also granted injunctive reliefs similar to those given in respect of the original reference.²⁰¹ The allowance of these third-party interventions by the SADC Tribunal is reflective of the practice of the African Commission where communications dealing with similar fact situations can be consolidated.²⁰²

D. Primacy of Sub-regional Trade Judicial Decisions vis-à-vis the Sovereignty Question

The formation of supranational organizations, including sub-regional trade blocs, presides over the invariable concession of some

¹⁹⁵ Onoria, *supra* note 7, at 160.

¹⁹⁶ *Chirinda v. Mike Campbell (Pvt) Ltd.*, Case No. SADC (T) 9/08, 6 (S. Afr. Dev. Comty. Trib. 2008), <http://www.sadc-tribunal.org/docs/case092008.pdf>.

¹⁹⁷ *Id.* at 5.

¹⁹⁸ See sources cited *supra* note 161.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Onoria, *supra* note 7, at 161.

²⁰² See *Comité Culturel pour la Démocratie au Bénin v. Bénin*, Comm. Nos. 16/88, 17/88, 18/88, ¶ 3 (Afr. Comm on Human and Peoples’ Rights 1995) (regarding communications concerning alleged false imprisonments).

sovereignty by individual member States to these organizations. Consequently, the enforcement of sub-regional economic integration treaties, likewise with many other international treaties, entails a delicate balancing act between the sovereign prerogatives of member States and the primacy of Community or Common Market law. In the *Anyang' Nyong'o* case, the EAC Court described this challenge as involving the “balancing [of] individual state sovereignty with integration” imperatives.²⁰³ Executing this balance presents a daunting yet surmountable obstacle which—as an essential precondition for long-term success—all economic integration processes must hurdle over. Thus, striking the right balance on this score is crucial to the entire enterprise of economic integration.²⁰⁴

Judicial bodies of sub-regional treaty provenance are amongst the key institutions through which sub-regional trade law is enforced, and also where the tussle for power between States and organs of the respective economic integration body is most keenly felt. Indeed, the execution by sub-regional trade judiciaries of their mandates has often been met by the affected States' unwillingness to surrender their sovereignty to a supranational judicial body, particularly once the practical implications of what they agreed to become apparent. This reluctance is informed by the fact that by exercising their jurisdiction, sub-regional trade judiciaries may generate legal norms capable of altering the position of States.²⁰⁵ Sub-regional trade judiciaries are thus faced with the challenge of mediating the relationships among the organs of the economic integration bodies and the member States.²⁰⁶ In this regard, in rendering its decision in the *Anyang' Nyong'o* case, the EAC Court observed that “[W]hile the Treaty upholds the principle of sovereign equality . . . by the very nature of the objectives they set out to achieve, each partner State is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role.”²⁰⁷

²⁰³ *Anyang Nyong'o v. Att'y Gen. of Kenya*, Ref. No. 1/2006, ¶ 37 (E. Afr. Ct. of J. 2007), http://www.worldcourts.com/eacj/eng/decisions/2007.03.30_Nyong_o_v_Attorney_General_Kenya.htm.

²⁰⁴ Oppong, *supra* note 1, at 222.

²⁰⁵ ROBERT ALEXY, *THEORY OF CONSTITUTIONAL RIGHTS* 149–59 (2002).

²⁰⁶ Oppong, *supra* note 1, at 222; Bruno De Witte, *The Role of Institutional Principles in the Judicial Development of the European Union Legal Order*, in *THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATIONS* 83, 83 (Francis G. Snyder ed., 2000).

²⁰⁷ Oppong, *supra* note 1, at 222.

The emerging jurisprudence of economic integration in Africa strongly indicates that the sub-regional trade judiciaries have been trying to strike the right balance between the various competing interests. A clear indication of this is found in the *Calist Mwatela* case where the EAC Court stated that: “[T]he competence of the Community is restricted to matters which are within its jurisdiction. Any matter which is still under the exclusive authority of the Partner States is beyond the legislative competence of the Community”.²⁰⁸ Hence, it is fair to observe that the legitimacy of sub-regional trade judiciaries and the effectiveness of their redress mechanisms are key components for the sustainability of economic integration in Africa.²⁰⁹

The EAC Treaty makes express provision for the priority of Community law over domestic law.²¹⁰ On the other hand, the SADC Treaty regime contains no provision on the relationship between Community law and domestic law.²¹¹ Nevertheless, in the absence of express provision resort may be had to Article 21 of the SADC Treaty.²¹² Moreover, Article 16(5) of the SADC Treaty and Article 24(3) of the SADC Protocol enshrine the finality clauses, according to which the Tribunal’s decisions and rulings are final and binding.²¹³

The greatest challenge yet, not only to the primacy of sub-regional trade judiciaries over national judicial decisions, but also to the very legitimacy of sub-regional economic integration judicial bodies, has come in the wake of decisions against States. Subsequent to the EAC Court’s decision in the *Anyang’ Nyongo* case, in which an injunction was issued against the election of some Kenyan members to the East Africa Law Assembly, the Partner States of the EAC amended Articles 27 and 30 of the EAC Treaty, severely limiting the jurisdiction of the Court.²¹⁴ A similar case is that of the SADC Tribunal in the *Mike Campbell (Pvt) Ltd* case, where in a brazen show of disregard for the SADC Tribunal’s decision and in one of the most intriguing, if unfortunate, exhibition of political posturing under the guise of national sovereignty, the government of Zimbabwe

²⁰⁸ *Mwatela v. E. Afr. Cmty.*, Ref. No. 1/2005, 24 (E. Afr. Ct. of J. 2005).

²⁰⁹ Ruppel & Bangamwabo, *supra* note 82, at 179.

²¹⁰ EAC Treaty, *supra* note 12, at arts 8(4), 33(2).

²¹¹ Ruppel & Bangamwabo, *supra* note 82, at 18.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Henry Onoria, *Botched-Up Elections, Treaty Amendments and Judicial Independence in the East African Community*, 54 J. AFR. L. 74, 86 (2010).

vigorously refused to comply with the decision of the Tribunal.²¹⁵ The respondent government argued, *inter alia*, that it had not ratified the SADC Protocol and therefore was not bound by the Tribunal's decision.²¹⁶ Another similar instance arose when Gambia declined to comply with the decision of the ECOWAS Court in the *Ebrima Manneh* case in respect of the unlawful detention of a journalist.²¹⁷

The above discussion reveals the institutional oversight in the architectural design of sub-regional economic structures in Africa which may contribute towards significantly undermining their effectiveness in the longer term. An examination of the constitutive economic integration treaties in Africa shows that the structures of their respective economic integration organizations are reflective of an entrenched State-centricity. This is clearly brought out by the manner in which the drafting of the treaties allows States to retain a firm foothold on the making of determinative decisions which shape the administration of the economic integration process. In this regard, the priority of States over other entities is almost certainly assured.

IV

THE EMERGENCE OF PRIVATE APPLICANTS IN ECONOMIC INTEGRATION REGIMES: CHALLENGES AND PROSPECTS

A crucial feature in every legal system, including those of sub-regional trade, is the presence of mechanisms through which the substantive as well as procedural legality of measures adopted by its institutions may be tested.²¹⁸ Through such mechanisms, individuals and non-State entities may move to challenge actions or omissions of States which contravene the relevant sub-regional law. The above discussion has highlighted the emerging role of private applicants in shaping the burgeoning jurisprudence of sub-regional trade judiciaries. However, not all indications are suggestive of States' support for this development. Quite to the contrary, States have in some instances resorted to curtailing the power of sub-regional trade judiciaries in the wake of decisions rendered by these judicial bodies

²¹⁵ Lucia Makamure, *Government Defies SADC Tribunal Ruling, Charges Farmers*, ZIM. INDEP., Dec. 18, 2008, available at <http://www.theindependent.co.zw/local/21734-govt-defies-sadc-tribunal-ruling-charges-farmers.pdf>.

²¹⁶ Gathii, *supra* note 37, at 275.

²¹⁷ Case No. ECW/CCJ/JUD/03/08 (2008).

²¹⁸ Ewa Biernat, *The Locus Standi of Private Applicants Under Article 230(4) EC and the Principle of Judicial Protection in the European Community* (Jean Monnet Working Paper No. 12/03 2003), available at <http://centers.law.nyu.edu/jeanmonnet/papers/03/031201.pdf>.

against their favor. Particularly illustrative in this respect is the case of the EAC Treaty, which was amended by Member State governments in disapproval of the EAC Court's decision in the *Anyang' Nyong'o* case, and subsequently limited, *inter alia*, access to the Court.²¹⁹ Moreover, even where the *locus standi* of non-State applicants has been acknowledged, the possibility of a further grant in this regard appears very slim. Hence, States' recalcitrance in the face of sub-regional trade judicial decisions remains a formidable challenge to the wider participation by individuals and non-State entities in the broader process of regional integration.

Nonetheless, the increased grant of *locus standi* to private applicants and the subsequent broadening of their access to sub-regional judicial bodies, especially under the umbrella of effective protection of human rights, holds considerable promise for the prospect of the continued prominence of individuals and non-State entities in the broader process of economic integration. The jurisprudence of the ECOWAS Court illustrates this point particularly well.²²⁰ The centrality of private applicants in this regard, significantly empowers the "people" by raising the platform for their mainstream popular participation in economic integration, including the private enforcement of the rule of law.²²¹ Importantly also, it ushers in the era of anthropocentric (people-centered) approaches, as opposed to State-centric approaches, to the broader process of economic integration.²²² Moreover, featuring as a positive implication of the increased role of private applicants in sub-regional litigation is their innovative possibility to circumvent States' aversion to instituting claims amongst themselves as well as the disinclination of sub-regional trade institutions and organs to institute references against States. Hence, it is fair to observe that although there are some challenges, it appears—and is certainly desirable—that individuals and non-State entities stand to play a continuing vital role in the broader process of economic integration in Africa.

²¹⁹ Gathii, *supra* note 37, at 246; Onoria, *supra* note 198, at 83.

²²⁰ Socio-Economic Rights and Accountability Project v. Federal Rep. of Nigeria, ECW/CCJ/APP/08/09, (Econ. Cmty. of W. Afr. Sts. Ct. of J. 2009); *see also* A.O. Enabulele, *Reflections on the ECOWAS Community Court Protocol and the Constitutions of the Member States*, 12 INT'L COMM. L. REV 111, 115 (2010).

²²¹ Onoria, *supra* note 7, at 161.

²²² *Id.*

CONCLUSION

The principal concern of this Article has been to analyze the access and *locus standi* of private applicants, specifically individuals and non-State entities, before sub-regional trade judiciaries in Africa. Its discussion of the nascent decisions of these sub-regional trade judicial bodies indicates that the respective judiciaries have started exercising jurisdiction over trade disputes as well as human rights issues. The sub-regional trade judicial bodies which formed the basis of this examination included, *inter alia*, the EAC Court, the SADC Tribunal, the COMESA Court and the ECOWAS Court. As has been shown, in marked departure from the hitherto state of under-utilization, sub-regional trade judiciaries have gradually and steadily begun to evince the increasing participation of private applicants in litigation. The case of the ECOWAS Court whose jurisdiction was extended in 2005 to cover human rights complaints as a result of references brought before it by individuals illustrates this point well.²²³ The result of the increased participation of individuals and non-State entities in litigation before these judicial bodies has been the emergence of a burgeoning amount of sub-regional jurisprudence which was hitherto inexistent. This is an encouraging development.

However, it is important to note that these progressive steps towards the development of a robust and organic sub-regional jurisprudence in Africa have not been unattended with difficulty. On the contrary, State parties have at times been non-committal, and in some notable cases even duplicitous, in their support for the increasing access and *locus standi* of individuals and non-State actors to sub-regional trade judiciaries.²²⁴ The ECOWAS and EAC Treaty regimes are notable examples of member States' dogged attempts at, and in some cases success in, curtailing the access of private applicants to the respective judicial bodies. Moreover, most sub-regional trade judicial bodies in Africa have been operating under increasingly straitened circumstances owing to the failure by member States to honor their funding commitments. Nonetheless, it is encouraging to note that the exponential development of jurisprudence has not been completely hobbled by these challenges. In this regard, it is noteworthy that remarkably bold rulings have been issued by the SADC Tribunal and the EAC Court despite the fact that they were likely to ruffle the feathers of the concerned member States.

²²³ Enabulele, *supra* note 202, at 116–19.

²²⁴ Onoria, *supra* note 7, at 163.

This is strongly indicative of the clarity of these judicial bodies' principled resolve, their steadfast independence and tenacious resilience even in the face of near-certain potential backlash from the chagrined member States.

This Article's discussion of the access and *locus standi* of private applicants, and the critical role that they play in the broader process of sub-regional economic integration makes it apparent that individuals and non-State entities figure prominently not only in the judicial process, but also in the wider economic integration process in the African continent. Additionally, it is arguable that all indications point to the continuing prominence of the role of private applicants in the sub-regional economic integration regimes in Africa. Also discernible is the fact that there remain far more unexplored avenues through which individuals and non-State entities may seek the remedies available under the respective sub-regional trade regimes. Hence, the most appropriate course of action for individuals and non-State entities would be for them to seek innovative methods to exploit these remedies and other available opportunities under the sub-regional economic integration treaty regimes. This will engender the twin benefits of ensuring the effective remedy for infractions of sub-regional law as well as the progressive development of jurisprudence to which other bodies may return to with considerable profit.