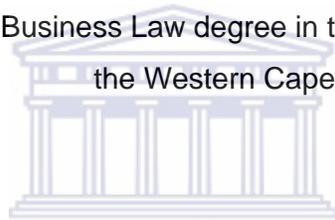


The importance of an effective institutional framework for the realisation of regional economic integration objectives: A case study of the East African Community (EAC).

Mini-dissertation submitted in partial fulfilment of the requirements for the LL.M:
Trade, Investments and Business Law degree in the Faculty of Law, University of



the Western Cape

By

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May 2009

DECLARATION

I certify that *The importance of an effective institutional framework for the realisation of regional economic integration objectives: A case study of the East African Community* is my original work and it has not been previously printed or submitted elsewhere or for any other purpose. Works of others cited or referred to are accordingly acknowledged.

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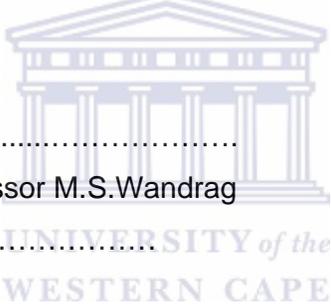
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This mini-thesis has been submitted for examination with my approval as University Supervisor.

Signed:

Professor M.S.Wandrag

Date:
The logo of the University of the Western Cape, featuring a classical building with columns and a pediment, with the text "UNIVERSITY of the WESTERN CAPE" below it.

DEDICATION

This work is dedicated to my wife, Kokubanza Jonisia, for her love, friendship and constant encouragement, to my kids Patrick, Kate and Gloria for understanding and bearing my absence from home, and my parents for their care and guidance.

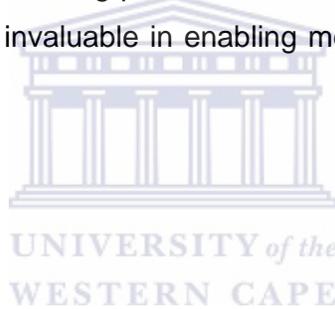


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Last by no means least, I extend my deepest sincere thanks and appreciation to the Carnegie Foundation for providing part of the funds that supported my LLM studies. Their funding has proved invaluable in enabling me to undertake and complete my studies.



ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACP	African, Caribbean and Pacific
ADB	African Development Bank
AIDS	Acquired Immune Deficiency Syndrome
AEC	African Economic Community
AGOA	African Growth Opportunity Act
APEC	Asia-Pacific Economic Co-operation
ANZCERTA	Australia-New Zealand Closer Economic Relations and Trade Agreement
ASEAN	Association of South East Asian Nations
ARF	Asean Regional Forum
AU	African Union
BNLS	Botswana, Namibia, Lesotho, Swaziland
CACM	Central American Common Market
CAN	Andean Community of Nations
CARICOM	Caribbean Community
CET	Common External Tariff
CFI	Court of First Instance
CJ	Chief Justice
CFSP	Common Foreign and Security Policy
COMESA	Common Market for Eastern and Southern Africa
COREPER	Committee of Permanent Representatives
CRF	Consolidated Revenue Fund
CRP	Common Revenue Pool
CRTA	Committee on Regional Trade Agreements
CTG	Council of Trade in Goods
CTD	Committee on Trade and Development
CU	Customs Union
DFID	Department for International Development
DRC	Democratic Republic of Congo
DSG	Deputy Secretary-General
EAC	East African Community

EACA	Eastern Africa Court of Appeal
EASCO	East African Common Service Organisation
EAHC	East African High Commission
EACJ	East African Court of Justice
EADB	East African Development Bank
EBA	Everything But Arms
EABC	East Africa Business Council
EALA	East African Legislative Assembly
ECB	European Central Bank
ECJ	European Court of Justice
ECHR	European Court of Human Rights
ECDPM	European Centre for Development Policy Management
ECOMOG	Economic Community of Western African States Monitoring Group
ECPHR	European Convention on the Protection of Human Rights and Fundamental Freedoms
ECSC	European Coal and Steel Community
ECOSOCC	Economic, Social AND Cultural Council
EDF	European Development Fund
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Area
EDF	European Development Fund
EP	European Parliament
EPA	Economic Partnerships Agreement(s)
EPF	EAC Partnership Fund
ESA	Eastern and Southern Africa
EU	European Union
EUROTOM	European Atomic Energy Community
FTA	Free Trade Area
FDI	Foreign Direct Investment
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GNP	Gross National Product

GSP	General System of Preferences
HIV	Human Immunodeficiency Virus
IEPA	Interim Economic Partnership Agreement(s)
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monetary Fund
JICA	Japan International Co-operation Agency
KANU	Kenya African National Union
LEGCO	Legislative Council
LDC	Least Developed Country
LPA	Lagos Plan of Action
LVFO	Lake Victoria Fisheries Organisation
MERCOSUR	Common Market of the South
MFN	Most Favoured Nation
MP	Member of Parliament
MTEF	Medium Term Expenditure Framework
NAFTA	North American Free Trade Area
NDP	National Democratic Party
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NTB	Non-Tariff Barriers.
OAU	Organisation of African Unity
ODA	Official Development Assistance
ODI	Overseas Development Institute
PTC	Permanent Tripartite Commission
REC	Regional Economic Community
R&D	Research & Development
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordination Conference
SCF	Structural and Cohesion Fund
SEATINI	Southern and Eastern African Trade Information and Negotiations Institute
SAGCH	Southern Africa Global Competitiveness Hub

SATUCC	Southern Africa Trade Union Co-ordination Council
SG	Secretary-General
SSA	Sub-Saharan Africa
TEC	Treaty of the European Community
UEMOA	West African Economic and Monetary Union
UN	United Nations
UNCTAD	United Nation Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNESC	United Nations Economic and Social Council
UK	United Kingdom
US	United States
USD	United States Dollars
WTO	World Trade Organisation
PTA	Preferential Trade Area
RTA	Regional Trade Agreement
WB	World Bank
WCSDG	World Commission on the Social Dimension of Globalisation



KEY WORDS

Council of Ministers

Customs Union

East African Community

East African Court of Justice

European Community

East African Legislative Assembly

Institutional Framework

Regional Economic Integration

Regional Integration

Secretariat



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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND

The East African Community (EAC) was re-established on 30 November 1999 by the Republics of Kenya and Uganda and the United Republic of Tanzania¹ signing the Treaty for the Establishment of the East African Community (the Treaty). The Treaty came into force on 7 July 2000.² The Republics of Burundi and Rwanda acceded to the Treaty on 18 June 2007 and became full members of the EAC with effect from 1 July 2007.³ The EAC was formed with the major aim of widening and deepening co-operation among the Partner States in political, economic, social and cultural fields⁴ that would lead to equitable economic development in the region.⁵ The Treaty envisages the formation of a political federation as the ultimate goal of the EAC, after having passed through the stages of a Customs Union, a Common Market and a Monetary Union.⁶

The re-establishment of the EAC was realised after a painful experience for the region resulting from the collapse of the former EAC⁷ which existed for ten years, from 1967 to 1977, but which barely functioned during the last five years of its existence. It was preceded by the East African Common Services Organisation (EASCO) which was itself superseded by the East Africa High Commission (EAHC). An insight into the functioning of these predecessor institutions is crucial in order to understand the institutional framework underpinning the existing EAC, since its achievements will, to a great extent, depend on how the institutional framework is organised to carry out the mandate under the Treaty in a more efficient and effective manner.

¹ See "Welcome to EAC" < <http://www.eac.int/index.php/about-eac.html> > accessed on 10 September 2008.

² See "RTAs notified to the WTO and in force" < <http://docsonline.wto.org-WT/COM TD/25/Add.1> > accessed on 10 September 2008.

³ See "Welcome to EAC" op. cit.

⁴ Article 5 (1) of the Treaty.

⁵ Article 5 (3) (b) of the Treaty.

⁶ Article 5 (2) of the Treaty.

⁷ See "History about EAC" < <http://www.eac.int/index.php/about-eac/eac-history.html?showall=1> > accessed on 10 September 2008.

1.2 RESEARCH OBJECTIVES

The research traces the history of economic integration in the region by taking a look at the predecessor institutions to the re-established EAC that is, EAHC, EASCO and the former EAC. The reasons that led to the collapse of the former EAC and their impact on the formation of the existing institutions are analysed.

A legal analysis of the institutional framework of the EAC is undertaken to see whether it supports the realisation of the EAC's objectives. The study examines whether the institutional framework in place is effective and robust enough to sustain the EAC in the event of problems, such as those that led to the demise of the former institutions. A specific focus is placed on key institutions, such as, the Summit, the Council of Ministers (the Council), the Co-ordination Committee (the Committee), the East African Court of Justice (EACJ), the East African Legislative Assembly (EALA), and the Secretariat.

Recommendations for improvement of the institutional framework are made to ensure that the EAC lives to fulfil its mandate and the aspirations of the people of East Africa.

1.3 PROBLEM STATEMENT

The regional integration process in the East African region has undergone different phases which resulted in the establishment and demise of various institutions before and after independence. The issue under examination is whether the EAC in its current format can sustain itself, and effectively support the realisation of its objectives.

1.4 RESEARCH HYPOTHESIS

The research examines the assumption that the current institutional framework of the EAC is not effective enough to achieve its objectives.

1.5 SIGNIFICANCE OF THE RESEARCH

The importance of regional economic blocs in the socio-economic and political development of the Partner States can not be overemphasised.

Given the size of the individual economies of the states, it is imperative that these countries put their resources together to harness the advantages of economies of scale. Moreover, an integrated global economy is inevitable given the advent of globalisation. The EAC, is therefore, an important vehicle in shaping the nature, and realising the benefits, of the integrated economy of the member states. However, this can only be done with an effective institutional framework which is robust enough to withstand the challenges of integration, and move the region forward.

1.6 RESEARCH METHODOLOGY

The research examines the Treaty, together with the relevant Protocols, Community Acts, and Policy Decisions, with particular emphasis on key institutions. Reference is made to cases decided by the EACJ on matters pertaining to the functioning of the EAC. Examples of institutions are drawn from the best available functioning institutional framework models suitable to the region.

1.7 LITERATURE REVIEW

Venter argues that regional economic integration achieves additional gains from the free flow of goods and services between the countries in a specific geographical area or region⁸. However, successful regional economic integration is premised on a number of preconditions, such as, the existence of domestic peace and security in the individual countries, political and civic commitment to create mutual trust among countries, need for a minimum threshold of macro-economic stability, and good financial management and sufficient broad national reforms to open markets.⁹

The United Nations Economic Commission for Africa (UNECA)¹⁰ states that while the fundamental role of institutions in providing the right framework for regional integration has been widely acknowledged, the reality in Africa raises

⁸ Venter, D, et al (2006) "Economic integration" as cited in Venter, D, et al (2007) *Regional Integration -Economic Partnership Agreements for Eastern and Southern Africa* pg 7.

⁹ Kritzinger-Van, L. N (2005) "Regional integration: concepts, advantages, disadvantages and lessons of experience" as cited in Venter, D, et al, op. cit. pg 11.

¹⁰ UNECA II (2006) *Assessing Regional Integration in Africa: Rationalising Regional Economic Communities* < <http://www.uneca.org/eca-programme/nrid/docs/pppOutcomeJuly2008.pdf> > pg 21 accessed on 12 September 2008.

questions as to whether institutions have played their expected role. Integration in general, and the contribution of regional economic communities as part of the institutional framework in particular, have been hampered. Africa needs to build and strengthen its institutions to sustain development. This includes the institutions related to regional integration.¹¹

Streatfeild observes that the failure of the first EAC confirmed the importance of maintaining an equitable distribution of economic benefits, and avoiding welfare losses that arise from interrupted trade flows. Economic and political co-operation need to be promoted through a regional policy framework with common macro-economic policies, as well as basic regional infrastructure.¹²

Mvungi points out that the basic institutions of the EAC should be tailored to reflect the supra-national character of the organisation, and the need to respond flexibly to the objectives of the EAC without trading off effectiveness against low cost.¹³ Nangale contends that the estranged relationship between different organs of the EAC challenges the integration promotional role of these organs.¹⁴ Ojienda further contends that these organs of the Community must earn and command the respect and confidence of not just the states, but also the people, of East Africa, as their decisions have a direct impact on individuals and corporations in the region.¹⁵

1.8 CONCLUSION

The topic under examination will be discussed in five chapters. This chapter is an introduction to the paper comprising of the background and objectives. It also sets out the context of the research in terms of identifying the problem and outlining the methodology. The chapter ends with a review of some of the literature that has been used in this paper.

¹¹ Ibid.

¹² Streatfeild, J.E.J (2003) "An examination of regional trade agreements: a case study of the EC and the East African Community" (Tralac Working Paper no. 11/2003) < www.tralac.co.za/scripts/content/php?id=2240 > pg 2 accessed on 17 September 2008.

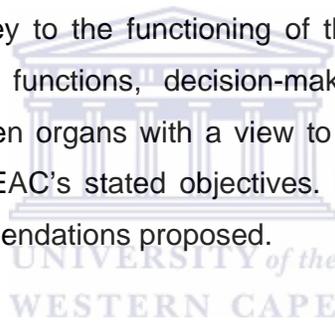
¹³ Mvungi, S.E.A (2002) *The Draft Treaty for the Establishment of the East African Community: A Critical Review* pg 91.

¹⁴ Nangale, G (2006) *The Politics of Partnership: A Reflection of Living Life in a Legislative Assembly and other Organisations* pg 69.

¹⁵ Ojienda, T.O "Understanding the East African Court of Justice" (2003) 4 *The East African Lawyer* pg 25.

Chapter 2 gives insight into understanding the concept of regional economic integration. This includes an in-depth discussion of the various facets of regional economic integration covering types and configuration of regional integration agreements and reasons pushing countries to participate in regional integration. The chapter also looks at the importance of regional integration to Africa.

The historical background to the regional economic integration process in the East African region, both before and after independence, is examined in Chapter 3. The chapter traces some of the initiatives and efforts that have shaped and informed that process, whereas Chapter 4 discusses the new EAC and its objectives. This chapter establishes the centrality of institutional arrangement as key to the functioning of the EAC. Analysis is focused on organs, structure, functions, decision-making processes, and the inter-relationship between organs with a view to evaluating their effectiveness in realisation of the EAC's stated objectives. In chapter 5 conclusions will be drawn and recommendations proposed.



CHAPTER TWO

THE CONCEPT OF REGIONAL ECONOMIC INTEGRATION

2.1 CONCEPTUALISATION

The term 'regional economic integration'¹⁶ is sometimes used interchangeably with other terms, such as, 'regional integration arrangement', 'regional integration agreement', 'regional trading agreement', 'regional trading arrangement', 'regional trading blocs', 'regional trade integration', 'economic integration agreements', etc. These terms will be referred to interchangeably in this paper.

Asante contends that regional economic integration is a process where two or more countries in a particular area voluntarily join together to pursue common policies and objectives in matters of general economic development, or in a particular economic field of common interest, to the mutual advantage of the participating states,¹⁷ under the auspices of the regional organisation. A regional organisation, according to Bennett, is a segment of the world bound together by a common set of objectives based on geographical, social, cultural, economic or political ties, and possessing a formal structure provided for in formal intergovernmental agreements. A regional organisation is intended to appeal only to a specified category of states, and is less than global in nature.¹⁸ Blaisdell observes that the test of international organisation is whether or not its activities are transnational.¹⁹ It is further observed that organisations are a characteristic feature of today's societal world.²⁰

Venter defines economic integration as a grouping of countries in trade blocs by agreement or treaty, usually on a regional basis. Such trade blocs secure benefits for the participating member states through the tariff-free or tariff-

¹⁶ See Regional trading blocs < <http://www.oecd.org> > accessed on 11 September 2008.

¹⁷ Asante, S. K. B (1997) "Regionalisation and Africa's Development: Expectations, Reality and Challenges" as cited in Akokpari, J, et al (eds) *The African Union and its Institutions* pg 87.

¹⁸ Bennett, A.L (1988) *International Organization: Principles and Issues* (4ed) pg 350.

¹⁹ Blaisdell, D. C (1966) *International Organisations*, pg 5.

²⁰ Blaisdell, D. C, op. cit. pg 3.

reduced cross-border movement of goods, services, capital and labour between them.²¹

United Nations Economic Commission for Africa (UNECA) states that a regional integration arrangement is a preferential (usually reciprocal) agreement among countries that reduces barriers to economic and non-economic transactions.²² Such an arrangement can take several forms, differing in the way discrimination is applied to non-members and in the depth and breadth of integration.²³ Preferential trade areas (PTAs)²⁴ and free trade areas (FTAs)²⁵ allow members to set commercial policies and offer them preferential tariff reductions. Customs unions (CUs) set commercial policies uniformly.²⁶ Common markets and economic unions synchronise product standards and harmonise tax and investment codes. Some arrangements are restricted to trade in goods, others extend to factors of production and trade in services.²⁷

All formal regional integration arrangements reduce barriers, such as, tariffs to trade, among member countries. It is predicted that free trade will improve welfare by enabling citizens to procure goods and services from the cheapest sources, leading to re-allocation of resources based on comparative

²¹Venter, D, et al (2007) *Regional Integration-Economic Partnerships Agreements for Eastern and Southern Africa* pg 8.

²² UNECA I (2004) *Assessing Regional Integration in Africa, UNECA Policy Research Report* pg 9 < www.uneca.org> accessed on 17 September 2008

²³ See also Hoekman, B.M, et al (2001) *The Political Economy of the World Trading System: The WTO and Beyond* pg. 347 where it is observed that the specifics of each regional integration agreement vary greatly from case to case, but they all have one thing in common- the reduction in trade barriers between members and consequent discrimination against trade with other countries.

²⁴ See also De Burca, G, et al (eds) *The EU and the WTO: Legal and Constitutional Issues* pg 187 where it is recounted that by liberalising trade among members preferentially, PTAs create new trade between members and divert trade from low-cost, non-member suppliers to high cost, member suppliers. Since this change is trade diversion, it is commonly viewed as imposing a welfare cost on the PTAs and on the world as a whole.

²⁵ Ibid. The authors contend that in FTAs as opposed to CUs, goods destined for a high tariff member may enter through a low tariff member. To avoid trade deflection, when a low tariff country imports a product in almost finished form, adds a small amount of value to it, and then exports it to the high tariff country duty-free, as FTAs usually include rules of origin according to which products receive duty-free status only if a pre-specified proportion of value added in the product originates in the member countries.

²⁶ See also Lanjouw, G.J (1995) *International Trade Institutions* pg 56 where it is provided that CUs have the additional feature of a common trade policy vis-à-vis third countries, particularly in the form of tariff, that is, the tariffs on imports from outside the union.

²⁷ UNECA I, op. cit. pg 8.

advantage.²⁸ It is thus tempting to conclude that regional integration arrangements will generate welfare gains.²⁹ But because they involve preferential reductions of trade barriers, regional integration arrangements are both trade creating and trade diverting. Trade creation³⁰ increases welfare. But trade diversion³¹ reduces it. Regional integration arrangements generate welfare gains only when trade creation dominates trade diversion—an outcome that can not be determined in advance.³² It is stated that trade diversion hurts those outside the agreement; therefore Regional Trade Agreements (RTAs) that are generally more trade creating are usually considered beneficial, and those that are generally more trade diverting are considered harmful.³³ Viner, though, offers a practical caveat on customs union and preferential arrangements.³⁴

Venables argues that RTAs, if formed among low income countries, are likely to harm the lowest income member due to trade diversion. Unless there is at least one high income member, convergence to high income level is not possible.³⁵ Earlier findings by Bhagwati and Panagariya demonstrate the growing significance of trade diversion from non-members and least-cost

²⁸ See also Lanjouw, G.J, op.cit. pg 24 where the author explains the paradox of free trade being touted as so beneficial but at the same time facing much resistance in practice. He further explains that it is because the benefits and costs are shared in different ways between the different groups in society, and these groups try to defend their interests by influencing trade policy decisions. An industry in danger of losing its protection, such as in the World Trade Organisation (WTO) negotiations, has a definite interest in preserving it.

²⁹ *UNECA I*, op. cit.pg 11.

³⁰This is the displacement of higher cost domestic production by lower cost production from partner countries due to lower barriers within regional integration arrangements.

³¹It is the displacement of lower cost production from non-members by higher cost production from partner countries due to lower barriers.

³²*UNECA I*, op. cit. pg 11.

³³Panagariya, A (2008) "The regionalism debate: an overview" as cited in Streatfeild, J.E.J, op. cit. pg 4.

³⁴ Viner, J (1950) "Customs Union Issue" as cited in Mathis, J.H, *Regional Trade Agreements in the GATT/WTO: Article XXIV and the Internal Trade Requirement* pg 2 where he states "Customs union, if it is complete, involves across the board removal of duties between the members of the union; since the removal is non-selective by its very nature, the beneficial preferences are established along with the injurious ones, the trade creating ones along with the trade diverting ones. Preferential arrangements, on the other hand, can be, and usually are, selective, and it is possible, and in practice probable, that the preferences selected will be predominantly of the trade diverting or injurious ones".

³⁵ Venables, A (1999) "Regional integration agreements: a force for convergence or divergence" as cited in Memis, E, et al "Assessing RTAs in the context of flying gees framework" pg 6 UNU-CRIS Occasional Papers No. 0-2006/18) < <http://www.cris.unu.edu/UNU-CRIS-Working-Papers.19.0.html> > accessed on 28 October 2008.

suppliers, and which is likely to reduce welfare not only to outsiders but also to participating countries.³⁶ Elevated trade and investment diversion is conceived as marginalising the 'weakest' countries.³⁷ Hoekman³⁸ points out that a study conducted in 1996 on the effects of announcement of the Single Market in the European Union (EU) in the late 1980s concluded that it had a significant negative impact on inward foreign direct investment (FDI) flows³⁹ into the European Free Trade Area (EFTA) countries. FDI only recovered after EFTA members applied for EU membership or had joined the European Economic Area (EEA).⁴⁰

Regional integration arrangements between low and high income countries can generate significant economic gains from increased market access, for much the same reasons as the wider process of globalisation.⁴¹ But as in this wider process, agreements between countries of different weight may result in unbalanced outcomes, such as, a more limited space for national development policies in lower income countries, or difficulties of economic adjustment that lead to job losses without resources to compensate those adversely affected.⁴² Braude⁴³ points out that prior to the EAC customs union's common external tariff (CET), Uganda's maximum external tariffs were only 15% while Kenya's and Tanzania's pre-CET tariffs stood at up to

³⁶ Bhagwati, J, et al (1996) "Preferential trading areas and multilateralism: strangers, friends and foes" as cited in Memis, E, et al, op. cit. pg 6.

³⁷ Crawford, J.A, et al (2005) "The changing landscape of regional trade agreements" as cited in Memis, E, et al, op. cit. pg 6.

³⁸ Hoekman, B.M, et al, op. cit. pg 352.

³⁹ See also Siddiqi, M "Global crunch presents stiff challenges to FDI despite new incentives" in "The Middle East", dated March 2009 pg 35 where FDI is described as the acquisition abroad (i.e. outside the home country) of physical assets, such as plant/equipment, real estate, or of a sizeable equity stake (usually exceeding 10% of shareholding). FDI involves both a long-term relationship and either full or partial managerial control of a productive asset in one economy by a strategic direct investor or a parent enterprise-a multinational or transnational corporation based in another country. FDI inflows comprise equity capital, reinvested earnings (i.e. profits not distributed as dividends by affiliates, or earnings not remitted to the direct investor) and intra-company loans. The latter includes soft loans provided by the parent company, which are usually rolled over, thus forming a part of the affiliate's capital base. Another form of inward investment is long-term credit. At one of the scale, FDI may simply consist of only licensing, management or subcontracting arrangements involving no equity participation.

⁴⁰ Hoekman, B.M, et al, op. cit. pg 352.

⁴¹ World Commission on the Social Dimension of Globalisation (WCSDG) (2004): *A Fair Globalisation: Creating Opportunities for All* pg 73.

⁴² Ibid. It further states that in the process of European integration significant resource transfers from richer to poorer regions have helped to reduce inequalities and facilitate adjustment, but such mechanisms face considerable political hurdles

⁴³ Braude, W (2008) *Regional Integration in Africa: Lessons from the East African Community* pg 6.

40%.⁴⁴ The CET top band is set at 25%. As a result, consumers and business sector in Uganda will face higher costs on non-EAC imports but the Ugandan government would benefit from higher tax revenue. The opposite applies in Kenya and Tanzania but the revenue loss may not be significant provided it is offset by increase in trade, efficiency, transparency and accountability.⁴⁵

However, there are many studies arguing that economic integration provides several possibilities for developing countries, such as, higher economies of scale with product differentiation. Also, higher division of labour, hence higher productive efficiency, is mentioned as another benefit of RTAs. Such discussions basically indicate a recognition of possible impacts of RTAs on productivity and growth.⁴⁶

Kritzinger-Van Niekerk⁴⁷ argues that regional integration arrangements can be defined along three dimensions: the geographic scope, illustrating the number of countries involved in an arrangement (variable geometry), where membership of a regional economic arrangement is a political choice of any one country whether based on social, political, geographic and /or economic considerations; the substantive coverage or width, that is, the sector or activity coverage, such as, trade, labour mobility, macro-policies, sector

⁴⁴ Ibid.

⁴⁵ Ibid.

See also Musoke, M, et al "Pressure mounts on Tanzania to chose" (2006) 2 *Procurement News* pg 22 where it is stated that the EAC-CET was set at 0% for raw materials; 10% for intermediate goods and 25% for finished items.

See also Stahl, H.M (2005) "Tariff liberalisation impacts of the East African Customs Union in perspective" (Tralac Working Paper No. 4/2005) pg 5 where it is noted that the East African Customs Union Protocol was signed on 2 March 2004, ratified end of December 2004 and came into force on 1 January 2005. thus only 5 years after the new EAC was established, Custom Union Protocol took effect. EAC disposed of the intermediate of first establishing a FTA < www.givengain.com/cgi-bin/giga.cgi?cmd=cause-dir-news-items&cause-id=16948news-id=5188285ca-id=1051 >accessed on 19 September 2009. See also Protocol on the Establishment of the East African Customs Union, 2004 < <http://www.eac.int/en/downloads/cat-view/110-eac-customs-union.html> > accessed on 28 April 2009. See also the Official Report of the Proceedings of the 16th Sitting of the Second EALA (2007) pg 2 for deliberations on the East African Trade Negotiations Bill, 2007 which is designed to complement the Protocol on Customs in trade relations co-ordination < <http://www.eac.int/en/downloads/cat-view50-east-african-legislative-assembly/54-hansard-report/61-hansard-reports-2007/84-december.html> > accessed on 28 April 2009.

⁴⁶ Memis, E, et al, op. cit. pg 6.

⁴⁷ Kritzinger-Van Niekerk, L. K. (2005) "Regional integration: concepts, advantages, disadvantages and lessons of experience" pg 4 < <http://www.sarpn.org.za/documents/d0002411/index.php> > accessed on 10 October 2008.

policies, etc; and the depth of integration to measure the degree of sovereignty the country is ready to surrender, that is, from simple co-ordination or co-operation to deep integration.

It is submitted that integration implies a higher degree of lock-in and loss of sovereignty and also tends to apply to a broader scope, although it could as well be limited to a specific market. It may imply more united markets for goods (free trade areas and customs union), free movement of goods, services, capital and labour (common markets) and a common currency such as in the EU.⁴⁸ The deepest form of integration is a federated union, such as, the United States, which includes political as well as economic integration, including infrastructure-related services (telecom, air transport).⁴⁹ Typically, a high degree of economic interactions – trade, investment, etc – could make integration more effective as opposed to simple harmonisation/co-ordination, as the opportunity cost of exit rises. Also the scope of integration and the concomitant complexity call for countries to relinquish sovereignty to a supranational agency, the purest form being a federal government.⁵⁰

It can, therefore, be deduced that Preferential Trade Areas (PTAs), Free Trade Areas (FTAs) and Customs Unions (CUs) belong to the shallow integration stage,⁵¹ whereas deeper integration involves a common market which covers provisions on movement of factors of production besides goods and services. And lastly, an economic union which includes national fiscal and monetary policies,⁵² including, potentially, tax policy and a common

⁴⁸Kritzinger-Van Niekerk, L. K, op. cit. pg 7.

⁴⁹ See also Hoekman, B.M, op. cit. pg 347 where it is observed that at their deepest, regional integration agreements deal with issues of economic regulation and political co-operation, and represent a step towards nation building.

⁵⁰ Ibid.

⁵¹Das, P (2001) "Regional trading agreements and the global economy: Asia-Pacific perspective" as cited in Memis, E, et al, op. cit. pg 4.

See also Southern Africa Global Competitiveness Hub (SAGCH) "Tough questions face COMESA as it prepares for the customs union" (2008) 12 *Inside Southern African Trade* pg 2 where it is suggested that because economies in the COMESA region are small and fragile and largely unable to trade among themselves, a customs union that ultimately succeeds is one that that adopts a development approach to regional integration, starting by building trade capacities of partner states, and gradually implementing liberalisation programmes consistent with the size of the economies.

⁵² See also Meadle, E, "Monetary integration: prospects for a changing world economy" (2009) XXX *Harvard International Review* pg 47 where the authors observe that a full fledged monetary union between two or more countries is the most ambitious, involving the creation of a new multinational

currency.⁵³ As it has been indicated, regional arrangements take many different forms.⁵⁴ Of the over 250 economic integration arrangements that have been notified to the World Trade Organisation (WTO),⁵⁵ the large majority are free trade areas. But there are many efforts at deeper regional integration, very often as a political project as much as an economic one.⁵⁶

Under current World Trade Organisation (WTO) rules, there are mainly two categories of principles related to RTAs. RTAs involving trade in goods are largely governed by Article XXIV of the General Agreement on Tariffs and Trade (GATT), whereas trade in services is governed by Article V of the General Agreement on Trade in Services (GATS) and the Enabling Clause.⁵⁷ RTAs are recognised as exceptions to the WTO system which is

currency, its substitution for members' national currencies, the establishment of a new multinational central bank, and the legal transfer of responsibility for monetary policy to the new supranational institution. This type of union requires not only great co-operation and co-ordination, but also necessitates the participatory countries to surrender individual sovereignty with respect to monetary matters.

⁵³ Memis, E, et al, op.cit .pg 4.

⁵⁴ WCDSDG, op. cit., pg 71.

⁵⁵ WTO (2003): *World Trade Report (Geneva, WTO, 2003)* as cited in WCDSDG, pg 71.

⁵⁶ WCDSDG, pg 71.

⁵⁷ Article XXIV of the General Agreement provide the basic rules and definitions on preferential arrangements covered trade in goods. For instance, a customs union (CU) or a free trade area agreement has to meet the condition, phrased as "substantially all the trade." This requires that duties and other restrictive regulations of commerce must be eliminated on "substantially all the trade" between the constituent territories of a CU or a free trade area in products originating in such territories. Besides the condition, "substantially all the trade," there is also a "stand still" condition: the duties and other regulations of commerce should not on the whole be higher or more restrictive than the general incidence of the duties and regulations of such commerce applicable in these countries prior to the formation of a CU or free trade area. And a reasonable length of time" condition: any CU or free trade area should be formed within "a reasonable length of time." This ambiguous term has lately been clarified to mean exceeding ten years only in exceptional circumstances. All RTAs and interim agreements must be notified to the Council for Trade in Goods (CTG) and be examined by the Committee on Regional Trade Agreements (CRTA) for their conformity to these criteria. In addition to these criteria, clarifications added on like all parties should liberalize their trade in products on a reciprocal basis. Article XXIV only covers RTAs "between the territories of contracting parties." In other words, any RTA involving a non-contracting party cannot be understood as an RTA in the terms of Article XXIV and, consequently, cannot be justified as an exception to MFN obligations. In order for RTAs involving non-members to be approved, the procedure is expected to be in accordance with Article XXIV:10.

The Enabling Clause legalized derogations from MFN obligations in favor of developing countries. The Enabling Clause covers regional or global arrangements entered into "amongst less-developed contracting parties" for the mutual reduction or elimination of tariffs and non-tariff measures "on products;". Trade arrangements among developing countries are designed not to raise barriers to or create undue difficulties for trade with any other contracting parties. Trade arrangements among developing countries shall not constitute an impediment to the reduction or elimination of tariffs and other restrictions to trade on an MFN basis;

established under the fundamental principle of non-discrimination.⁵⁸ RTAs were provided for since the inception of GATT to allow likeminded members willing to liberalise trade faster and deeper not to be held back by slow progress at the multinational level.⁵⁹ Considering that the Most Favoured Nation (MFN) liberalisation is proving increasingly hard to attain, and that certain trade policy areas that have become of crucial importance to several members are excluded from the multilateral agenda,⁶⁰ the appeal of RTAs becomes inescapable; these allow members to single out trade liberalisation with specific markets; they involve less burdensome negotiations than those at the WTO, especially if among like minded parties,⁶¹ and they allow the parties to such agreements to trade according to custom built regulatory aspects and trade policy disciplines.⁶²

Trade arrangements among developing countries are to be reported to the Committee on Trade and Development (CTD). {Adopted from Legal Frameworks for RTAs under WTO Rules as described by Memis, E, et al (2006) pg 14}.

⁵⁸ Memis, E, et al, op. cit. pg 13.

See also Farrell, M (1999) *EU and WTO Regulatory Frameworks: Complementary or Competition?* as cited in De Burca, G, et al (eds), op. cit. pg 153 where it is noted that non-discrimination is, alongside reciprocity, market access and fair competition, an essential ingredient of the WTO system.

⁵⁹ See also Hoekman, B.M, et al, op. cit pg 353 where it is observed that a political decision was made by GATT contracting parties in the late 1950s not to scrutinize the formation of the European Economic Community (EEC). The reason was that it was made clear by the EEC Member States that a finding that the Treaty of Rome was inconsistent with Article XXIV would result in their withdrawal from GATT. At the end of the day GATT blinked. Given that EEC most likely did not meet all the requirements of Article XXIV, this created a precedent that was often followed subsequently. As a result many regional integration agreements notified to GATT, and later WTO, embody many holes and loopholes.

See also De Burca, G, et al (eds), op. cit. pg 180 where it is argued that the application of Article XXIV was essentially a political issue, to be determined by the Committee on RTAs which is a subordinate body of the Ministerial Conference and the General Council.

⁶⁰ These include government procurement, competition policy, investment and trade facilitation.

⁶¹ See also Pahariya, N.C "Trans-regional trade agreements in South Asia" (2008) 4 *Trade Insight* pg 24 where the author observes that the various roadblocks that the WTO has faced in its efforts to liberalise trade and investment through multilateral negotiations have provided further much impetus to regionalism. Much of it is a very recent phenomenon. It has been estimated that 60 percent of global trade is taking place through regional/preferential trade agreements (RTAs/PTAs). Some of these RTAs/PTAs are on the "hub-and-spoke" pattern as the North American Free Trade Area (NAFTA), while others are manifesting a "spaghetti bowl" or, to use a more recent term, "noodle bowl", phenomenon, that is, a country is part of a number of overlapping RTAs/PTAs.

⁶² World Trade Organization (2007) "RTAs and WTO: A Troubled Relationship" pg 26 < http://www.wto.org/english/res_e/bookshop_e/discussion_papers12b_e.pdf > accessed on 28 February 2009.

See also Bhagwati, J, et al (1995) *The Dangerous Drift to Preferential Trade Agreements* as cited in Palmetier, D *The WTO as a Legal System* pg 140 where it is observed that: "Another reason for the move towards preferential arrangements is the "GATT-frustration factor". ... When the US began to embrace discriminatory arrangements, the multilateral system seemed sclerotic. Since multilateralism was hostage to the lowest common denominator, the argument went, countries interested in freer trade should move ahead bilaterally, letting the laggards catch up if they could".

However, Ruggiero, former WTO Director General, insists that the MFN implications of the regional arrangements must be checked⁶³ as the traditional link between trade liberalisation and non-discrimination, is challenged by the increasingly complex network of regional trade agreements generally and those of the European Union in particular.⁶⁴ Schott⁶⁵ opines that GATT/WTO permits discrimination but only in return for full liberalization. The core idea behind Article XXIV is that the trade creating effects of a regional economic co-operation organisation must be greater than its trade diverting effects.⁶⁶

See also Salacuse, J.W, et al "Do BITs really work?: an evaluation of Bilateral Investment Treaties and their grand bargain (2005) 46 *Harvard International Law Journal* where, among other things, it is argued that the willingness by many nations to conclude BITs other than joining multilateral agreements stems partly from the technical explanation that a bilateral treaty accommodates the interests of only two parties and is, therefore, far less complicated to negotiate than a multilateral global treaty, which must accommodate the interests of many countries.

⁶³ See Ruggiero, R (1997) "Regional initiatives, global impact: co-operation and multilateral systems" as cited in Mathis, J.H, op. cit. pg 132 where he observes: "First, we must ensure that the foundation of the trading system remains non-discrimination as embodied in the two fundamental principles of National Treatment and Most Favoured Nation. Regional agreements which are preferential by nature represent an exception to the Most Favoured Nation treatment".

⁶⁴ See De Burca, G, et al (eds), op. cit. pg 183.

See also Sutherland, P, et al (2004) *The future of the WTO: addressing institutional challenges in the new millennium* pg 23 where it is observed: "...five decades after the founding of the GATT, MFN is no longer a rule; it is almost the exception. Certainly much trade between the major economies is still conducted on an MFN basis. However, what has been termed as "spaghetti bowl" of customs unions, common markets, regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly the term might now be better defined as LFN, Least-Favoured-Nation treatment" <http://www.wto.org/english/thewto-e/10anniv-e/future-wto-e.pdf> > accessed on 6 May 2009. (This was a report by the Consultative Board to the former WTO DG Supachai Panitchpakdi, led by a former GATT DG Peter Sutherland).

See also "Supachai's Consultative Board: non-discrimination in trouble" < <http://www.globefish.org/?id=2338> > accessed on 6 May 2009.

See also Khumalo, N "Looking beyond the Doha Round: reforming the WTO negotiating process" (2009) 4 SAlIA Policy Briefing pg 1 where the author says: "*The proliferation of regional and bilateral trade agreements over the last few years is seen as a strong indicator that many key WTO members have lost patience with the institution. This has led to continued erosion of the key principle of non-discrimination, which is supposed to be the cornerstone of the rules-based multilateral framework*".

See also the case of *Turkey-Restrictions on Imports of Textile and Clothing Products*, Appellate Body Report WT/DS34/AB/R, 22 October 1999 where the Appellate Body (AB) commented that "we make no finding on the issue of whether quantitative restrictions found to be inconsistent with Article XI and Article XIII of the GATT 1994 will ever be justified by Article XXIV" as cited in De Burca, G, et al (eds), op. cit. pg 183.

⁶⁵ Schott, J.J (ed) (1996) *The World Trading System: Challenges Ahead* pg 45. He further argues that the price of violating MFN would be paid only if countries were willing to go "all the way". GATT requires, therefore, that such agreements cover "substantially all trade".

⁶⁶ Jackson, J.H (1996) "Foreword, perspectives on regionalism in trade relations" as cited in De Burca, G, et al (eds), op. cit. pg 137.

Recently changes have been witnessed both in the scope and the content of RTAs. Many of the new waves of RTAs involve provisions beyond tariff liberalisation, and include more intrusive obligations, especially as regards intellectual property rights, services, and investment.⁶⁷ More and more countries have recognised the fact that not only the removal of trade barriers, but also the elimination of non-tariff limitations, are required for effective economic integration.⁶⁸ For instance, Clapham⁶⁹ observes that an issue-related widening is under way in the Association of South East Asian Nations (ASEAN),⁷⁰ covering investment, cross border environmental protection, cross border crime control, meteorological research, natural disaster prevention and emergency relief. He further observes that the Asean Regional Forum (ARF) which provides the region with an institution for multilateral dialogue on security and for developing the concepts of



⁶⁷See also Hilpold, P (1999) “*Die EU im GATT/WTO-System*” as cited in De Burca, G, et al (eds), op. cit. pg 132 where it is observed that regional economic co-operation areas often make it possible for their members to pursue political goals of a non-economic nature, for example, environmental protection, human rights, democratisation and development.

See also Baert, F, et al (2008) “Deepening the social dimension of regional integration: an overview of the recent trends and future challenges in light of the recommendations of the report of the World Commission on the Social Dimension of Globalisation” (UNU-CRIS Working Papers W-2008/3) pg 8 where it is observed that bilateral investment treaties (BITs) and investment clauses in regional trade agreements have proliferated < <http://www.cris.unu.edu/fileadmin/workingpapers/w-2008-3.pdf> > accessed on 10 October 2008.

See also Greven, T (2005) “Social standards in bilateral and regional trade agreements: investments, enforcement, and policy options for trade unions” as cited in Baert, F, et al, op. cit. pg 7 where it is contended that, while the trade-labour linkage has been side-stepped at the multilateral level, labour standards are now increasingly incorporated in RTAs and bilateral FTAs, led by the US and the EU.

See also Salacuse, J.W. et al, op. cit., for a detailed discussion on the history and the three main goals of the BITs movement (that is, investment protection, investment and market liberalisation and investment promotion) and Guzman, A.T (1997) “Explaining the popularity of BITs: why LDCs sign treaties that hurt them” for an insight on the paradoxical behaviour of developing countries on BITs < <http://www.jeanmonnetprogram.org/papers/97/97-12.html> > accessed on 10 November 2008.

See also Obadina, T (2009) “Free trade, not ‘positive’ discrimination”, in “Africa Today”, dated March 2009 pg 29 where it is reported that Oxfam International, in its report titled *Signing Away the Future: How Trade and Investment Agreements between Rich and Poor Countries Undermine Development*, has accused rich countries of using bilateral and regional free trade agreements and investment treaties to compel poor countries to liberalise their economies to benefit rich-country exporters, but at the expense of poor farmers and workers. According to Oxfam, what developing countries need is special and differential treatment to enable them move up the development ladder.

⁶⁸Memis, E, et al, op. cit. pg 3.

⁶⁹Clapham, C, et al (eds) (2001) *Regional Integration in Southern Africa: Comparative International Perspectives* pg 167.

⁷⁰See Clapham, C, et al (eds), op. cit. pg 167 where it is stated that ASEAN was created in 1967. The founding members were Indonesia, Malaysia, the Philippines, Singapore and Thailand. Other countries which joined later are Brunei, Cambodia, Laos, Myanmar, and Vietnam.

confidence building, preventive diplomacy and conflict resolution in the region was introduced in 1994.⁷¹

In a similar vein, the current Economic Partnership Agreement (EPA) negotiations between the EU and African, Caribbean,⁷² and Pacific (ACP) countries involve a wide range of trade and trade related issues. The EPA negotiations cover trade issues in six clusters namely: development issues; market access; agriculture; fisheries; trade in services and trade related services as well as institutional framework for co-operation and the process for dispute settlement.⁷³ However, despite the seemingly wide coverage of issues under EPA negotiations, a common perception is that there is no coherence between the EPA agenda and the regional integration in Africa.⁷⁴

On 14 November 2007, in Brussels, Belgium, the representatives from EAC and EU, upon resolving that the EAC-EPA would indeed be negotiated separately, agreed that the framework Interim Economic Partnership

⁷¹ Clapham, C, et al (eds), op. cit. pg 167.

⁷² See Davies, R "Bridging the divide: the SADC EPA" (2008) 7 No.4 *Trade Negotiations Insight* pg 1 where it is noted that, as of the first quarter of 2008, the Caribbean was the only region to have signed a full EPA. A considerable number of ACP countries, including South Africa, had however, signed neither. Some of these have now to trade with the EU under the "Everything But Arms" (EBA) arrangement applicable to the Least Developing Countries (LDCs), some under specific arrangements, such as, South Africa's Trade, Development and Co-operation Agreement, while yet others will be obliged to trade under the less favourable terms provided for in the EU's General System of Preferences. He further notes that it is easy to suggest that seldom before in the history of the EU-ACP relations has a measure held out as a mechanism to enhance access to the EU market and strengthen development co-operation between the EU and the ACP, become so controversial and so divisive.

⁷³ See "Protecting health in the proposed Economic Partnership Agreement (EPA) between East and Southern Africa (ESA) countries and the European Union" < <http://www.sarpn.org.za/documents/d0002684/index.php> > accessed on 25 October 2008.

See also Munyuki, E "ESA-EC discuss EPAs" (2006) 9 SEATINI Bulletin.

⁷⁴ See Overseas Development Institute (ODI)/European Centre for Development Policy Management (ECDPM) "Interim EPAs in Africa: what's in them? And what is next?" (2008) 7 *Trade Negotiations Insight* pg 2. It is further observed that one particular concern has been that countries in the same economic region might liberalise different baskets of products and so create new barriers to intra-regional trade in order to avoid trade deflection. Only in the case of the EAC have all members joined the EPA and accepted identical liberalisation schedules. If these are implemented fully and in a timely way economic integration will have been reinforced.

See also SAGCH, op. cit. pg 2 where it is reported that in December 2007 four Common Market for Eastern and Southern Africa (COMESA) members- Burundi, Kenya, Rwanda and Uganda-signed an IEPA with the EU as the "EAC". Swaziland signed an IEPA as part of the "SADC EPA configuration". Five other COMESA countries- Mauritius, Madagascar, Comoros, Seychelles and Zimbabwe- signed as part of the "ESA grouping". Djibouti, Somalia, Eritrea, Ethiopia, Malawi and Sudan have not signed, and Zambia signed without submitting a market access offer.

See also "Interview with Peter Mandelson: EPAs: there is no Plan B" (2007) 6 *Trade Negotiations Insight*.

Agreement (IEPA) would cover trade in goods and market access, development co-operation and fisheries.⁷⁵ However, Article 37 (rendezvous clause) of the IEPA⁷⁶ provides a long list of areas⁷⁷ that would be covered in the comprehensive EPA text scheduled to be signed by 31 July 2009. It remains to be seen whether the EU's promise that countries signing the EPAs would benefit from EU financial and technical assistance would be fulfilled amid worries that signing such agreements brings with it, on the ACP governments and economies, large implementation and adjustment costs.⁷⁸

⁷⁵ Braude, W, op. cit. pg 313.

See also Bartels, L "The legal status of the initialed EPAs" (2008) 7 *Trade Negotiations Insight* pg 4.

⁷⁶ Agreement Establishing a Framework for an Economic Partnership Agreement between the East African Community Partner States and the European Community and its Member States initialled on 27 November 2007 in Kampala, Uganda < www.seatini.org/puplications/epas/index.html > accessed on 25 October 2008.

⁷⁷ These include customs and trade facilitation; outstanding trade and market access issues including rules of origin; technical barriers to trade and sanitary and phytosanitary measures; trade in services; trade related issues, such as, competition policy, investment and private sector development, trade, environment and sustainable development, intellectual property rights, transparency in public procurement; agriculture; an elaborated dispute settlement mechanism and institutional arrangements; and economic and development co-operation.

⁷⁸ See "Economic Partnership Agreements: tackling the myth", the Standard, Kenya, dated 23 August 2007 as cited in "Aid for trade and financial assistance to implement the EPAs", Analytical Note (SC/AN/TDP/EPA/6), pg 3 < http://www.sarpn-org.za/documents/d0002666/EPA_Factsheet6_SouthCentre-May_2007.pdf > accessed on 10 October 2008.

See also *Report on Economic Partnerships by the Committee on International Trade of the European Parliament* (Final A6-0084/2007) dated 27 March 2007 pg 13 where it is observed that it is clear that additional resources will be needed to cope with the effects of changes ushered in by EPAs. Scaling up of trade facilitation, technical assistance and support to help ACP producers meet EU standards must be sufficiently extensive to offset losses from tariff revenues and help ACP countries take advantage of market access. In the first instance this requires greater efforts to ensure that funds already promised are spent in a timely and effective manner. Improvements to the European Development Fund (EDF) procedures should be prioritised with requests for additional money. The EU must work to ensure that more support is given to projects which will boost ACP competitiveness and growth without reducing spending on health and education. Suspected re-labelling of existing money as "Aid for Trade" and failure of Member States to clarify how bilateral support, which is where funds additional to EDF must come from, will be co-ordinated with EPA-support has exacerbated ACP suspicion that there wont be as much money as available in practice as they appear on paper < http://www.sarpn-org.za/documents/d0002579/EPA_EU_report_March2007.pdf > accessed on 10 October 2008.

See also Van Hoestenbergh, K, et al (2006) "Economic Partnership Agreements between the EU and groups of ACP countries: will they promote development?" UNU-CRIS Occasional Papers O-2006/27, pg 1 where it is observed that EPAs will only marginally increase access of ACP countries into EU markets and empirical studies on the static effects of trade liberalisation show a small negative effect on economic development for ACP countries. However, it is further observed that EPAs can trigger changes that do contribute to development: better regional institutions, reform of agricultural subsidies in the EU, an increased role of the private sector in the economic development through foreign direct investment and outsourcing, and a new perspective in the field of migration. The process should not stop at signing regional free trade agreements, but that it should be enlarged into new approaches of economic integration and development of groups of ACP countries < www.cris.unu.edu/fileadmin/workingpapers/20061117101114.O-2006-27.pdf > accessed on 2 November 2008.

2.2 TYPES AND CONFIGURATION OF REGIONAL INTEGRATION

2.2.1 Types of regional integration

2.2.1.1 Integration by markets

There are two main types of regional integration. The first, integration by markets, focuses on the idea that economies can integrate among themselves through the use of the marketplace, i.e. allowing the private sector to be the vanguard of trade integration. This can also be described as regional integration via *de facto* agreements. More concretely, this means that the economies in a region trade intensively among themselves without explicit formal preferential trade agreements.⁷⁹ To facilitate intra-regional trade without the help of legal regional trade agreements, some of the economies may pursue policies of unilateral domestic deregulation and trade liberalisations, while others may improve their infrastructure (such as ports and highways), streamline their customs procedures, or pursue policies that may facilitate inward foreign direct investment. In other words, even integration via the markets can entail the use of some business friendly policies by individual economies, even though no legal regional trade treaties are signed by governments.⁸⁰

The increased reliance in the recent past on market led, rather than institution led, processes of regional integration is partly explained by progress in economic liberalisation and the widespread adoption of market oriented policy framework schemes.⁸¹ The market and corporations driven process in East Asia, for instance, has been encouraged by the development of both regional and global cross border production networks. Intra-industry trade in parts and components and foreign direct investment – conducted by corporations and encouraged by significant liberalisation – have been, and continue to be, the key driving forces of the established production sharing

⁷⁹ Aminian, N, et al (2008) "Integration of markets vs. integration by agreements" pg 2 < http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2008/03/04/000158349_2 > accessed on 30 October 2008.

⁸⁰ Ibid.

⁸¹ McKay, J, et al (eds) (2005) "Regional economic integration in a global framework" pg 10 < http://www.bportugal.pt/euro/emudocs/bce/regionaleconomicintegrationglobalframework2005_e.pdf > accessed on 9 October 2008.

scheme, of the evolution of these cross border networks, and of the fostering of regional co-operation and integration.⁸²

Before 1997 most Asian economists considered East Asian economic co-operation (through trade and investment) as an example of a successful *de facto* regionalism, i.e., explained by the play of pure economic forces. However, the financial crisis of 1997-98 demonstrated the weaknesses of informal regional co-operation and gave East Asians a strong impetus to search for a regional mechanism that could forestall future crises. This search is now gathering momentum and opening the door to possibly significant *de jure* integration in East Asia.⁸³

2.2.1.2 INTEGRATION BY AGREEMENTS

The second form of integration is integration by agreements, which focuses on trade integration via the use of formal or *de jure* trade treaties. This channel of integration emphasises the primacy of legal instruments to further economic integration among countries.⁸⁴

There is no doubt that the two forms of integration are very much related and, indeed, ultimately they are complementary. Integration of neighbouring markets without formal regional trade agreements can create uncertainty among businesses since the institutional foundations may not be sufficiently clear and transparent.⁸⁵ The EU model of integration corresponds more to the policy driven model of regional integration, where institutions and governments have ended up guiding the process, as the number of regional institutions and regional agreements shows.⁸⁶

However, integration by agreements can be vacuous if the underlying economic factors are not favourable for integration. For example, it can easily be seen that the East Asian economies are much more integrated among

⁸² McKay, J, et al, op. cit. pg 12.

⁸³ Aminian, N, et al, op cit. pg 10.

⁸⁴ Aminian, N, et al, op. cit. pg 3

⁸⁵ Ibid.

⁸⁶ McKay, J, et al, op .cit. pg 12.

themselves than the Latin American economies. In 2005, 50.5% of East Asian exports went to other East Asian economies.⁸⁷ The comparable figure for Latin America (including those countries in the Andean Community of Nations (CAN)⁸⁸ and Common Market of the South (MERCOSUR)⁸⁹ plus Chile and Mexico) was only 13.2%. Trade integration in East Asia was already high before the 1997-98 Asian financial crises. In 1995, 48.7% of East Asian exports were intra-regional compared with 17.2% in Latin America.⁹⁰ One could assume that taking into account Northeast Asian countries, especially China, Japan and Korea, could change results and produce very high levels of integration compared to Latin American countries. Trade integration among ASEAN countries (25.2% in 2005) was higher than the trade integration among Andean Community (8.2% in 2005) or MERCOSUR countries (12.9% in 2005). Thus, one can surmise that *de facto* trade agreements or integration via the markets were effective in helping East Asia integrate, while *de jure* trade agreements do not seem to have led to more intra-regional trade integration in Latin America.⁹¹ Similarly intra-regional grew faster in Asia than in the EC and North America in the 1980s, even though regional integration agreements are much less important in that part of the world.⁹²

2.2.2 The configuration of regional integration

The configuration of RTAs is also becoming increasingly less regional, since many countries appear to be looking for preferential partners beyond their regional borders. The trend toward cross-regional RTAs raises some interesting questions and makes one ponder to what extent the premise of RTA formation among “natural” trading partners still applies. RTAs have traditionally occurred among geographically contiguous countries with already well-established trading patterns; prime examples include the North American

⁸⁷ Aminian, N, et al, op. cit. pg 10.

⁸⁸ See Clapham, C, et al (eds), op. cit. pg 144 where it is observed that the Andean Community was established through the Cartagena Agreement, as codified in 1997, consisting of Bolivia, Colombia, Ecuador, Peru and Venezuela.

⁸⁹ See Clapham, C, et al (eds), op. cit. pg 139 where it is stated that MERCOSUR, signed under the 1991 Treaty of Asuncion, comprises of Argentina, Brazil, Paraguay and Uruguay.

⁹⁰ Aminian, N, et al, op. cit. 10.

⁹¹ Aminian, N, et al, op. cit. pg 10.

⁹² Lanjouw, G.J, op. cit. pg 74.

Free Trade Area (NAFTA) countries; the European Community (EC); Association of Southeast Asian Nations (ASEAN); groupings in sub-Saharan Africa, such as, UEMOA; Southern African Development Community (SADC); EAC; and Southern African Customs Union (SACU); and in the Western Hemisphere, notably Caribbean Community (CARICOM); Central American Common Market (CACM); and MERCOSUR. This premise is further strengthened by the ongoing efforts by most of these regional groups to intensify intra-regional integration.⁹³

The advent of cross-regional RTAs could thus be seen as a drive to look further afield once regional prospects have been exhausted. While this may be true, the sharp increase in the number of cross-regional RTAs may also indicate a shift in emphasis from regional priorities to RTAs with extra-regional partners.⁹⁴ Substantiating this argument, it is notable that the strengthening of regional integration schemes overall has been very modest, and in several cases even weakened by the go-alone policy by some of the parties to these agreements. This is especially the case with regional integration schemes among developing countries since they are often less comprehensive in terms of trade liberalisation and coverage of trade related areas than those found in cross-regional and particularly North-South FTAs; the latter include, in most cases, policy areas, such as, services, investments, government procurement, and competition, among others.⁹⁵

Perhaps with the exception of Europe where the process of integration is firmly rooted in the EU, all other regions manifest growing asymmetries between regional integration processes and the scope and depth of the cross-regional RTAs to which individual countries are parties. In this sense, and perhaps as a further facet of globalisation, RTAs are being employed as tools to overcome regional constraints and open new trade opportunities in the global market space; and in this process they are changing long

⁹³Fiorentino, R.V, et al (2006) "The changing landscape of regional trade agreements: 2006 update" pg 9 < <http://www.wto.org/english/res-e/bookp-e/discussion-paper12a-e.pdf> > accessed on 12 September 2008.

⁹⁴Ibid.

⁹⁵Ibid.

established geographical trade patterns.⁹⁶ It has to be noted that almost all WTO members are now engaged in at least one regional agreement, with the exception of Mongolia. The new wave of regionalism can involve diverse countries located in different time zones, as opposed to traditional RTAs which are usually concluded among bordering countries with comparable levels of development.⁹⁷

Among all world regions, African RTAs come closest to the traditional concept of regional integration based on the geographical proximity of the RTA partners, and political co-operation through economic integration.⁹⁸ The ambitious goals of most African RTAs (CUs, common markets and economic and monetary unions); their low level of intra-regional trade; poor implementation of several agreements; and their overlapping membership,⁹⁹ all tend to confirm the dominant role played by regional politics in the design of the region's RTAs.¹⁰⁰ Turning to extra-regional preferential trade relations: these have been based, until recently, on non-reciprocal preferences under schemes, such as, the GSP, the African Growth Opportunity Act (AGOA), and the EU-ACP programmes, as explained above. Most countries of the continent benefit from such preferential schemes,¹⁰¹ the exception being countries in North Africa and in Southern Africa that have foregone unilateral

⁹⁶ Ibid.

⁹⁷ Memis, E, et al, op.cit. pg 3.

⁹⁸ Fiorentino, R.V, et al, op.cit. pg 23.

⁹⁹ See also Musoke, M, et al, op. cit. pg 21 where it is contended that the issue of overlapping memberships in different regional organisations can no longer be left in the pending tray at the Trade Ministries. Businesses suffer the costs through punitive duties at border posts when their respective governments are not signatories to the relevant tax concessions. Moreover, in respect of CUs, under the WTO rules, a country can not sign up to more than one CU.

See also Qualmann, R, et al "Overlapping membership in COMESA, EAC, SACU, SADC: trade policy options for the region and for EPA negotiations" < <http://tanzania.fes-international.de/info-service/docs/overlapping-membership-in-comes-eac-sacu-sadc.pdf> > accessed on 10 September 2008.

¹⁰⁰ Fiorentino, R.V, et al, op.cit. pg 23.

¹⁰¹ However for a different view see Moyo, D (2009) *Dead Aid* pg 118 where the author asserts that AGOA and EBA cannot claim to have made an overwhelming impact on Africa's share of global trade as only a handful of African countries have benefited, mostly the oil-rich and larger economies. It is observed that in 2003 AGOA exports were more than USD 14 billion. Nigeria, South Africa, Gabon and Lesotho account for more than 90% of AGOA duty-free benefits, and of the total USD 14 billion export value, petroleum products account for 80%, with textiles and clothes accounting for USD 1.2 billion.

preference for reciprocal RTAs with partners in Europe, and more recently in the Western Hemisphere, Asia-Pacific and the Middle East.¹⁰²

2.3 REASONS FOR PARTICIPATING IN REGIONAL ECONOMIC INTEGRATION

2.3.1 Political reasons

It is often asserted that most of the arguments that are advanced for a country's membership of a regional economic agreement are political. The structure of any nation's international trading system should be designed to protect it from both the internal political system of lobbyists as well as from other nations.¹⁰³ In this regard governments carefully consider the political consequences of their policies and as a result most RTAs are predominantly politically motivated.¹⁰⁴ Streatfeild argues that the EAC was created largely to attain a certain political objective, based, to some degree, on the foundations of economic theory.¹⁰⁵

However, there are many reasons, in addition to political ones, that underpin the membership by a country of a regional economic integration. On the political front, the first issue is security. There may be perceived benefits from using a regional agreement as a basis for increasing security against non-members, and there are some examples where this has occurred. A regional agreement may also enhance a country's security in its relationship with other members, an important argument in the early days of European integration.¹⁰⁶ These security arguments are driven by a variety of mechanisms: interlocking economies can make conflict more expensive; regular political contact can build trust and facilitate other forms of cross

¹⁰² Ibid.

¹⁰³ Krugman, P (1999) "Regionalism versus multilateralism: analytical notes" as cited in Streatfeild, J.E.J, op. cit. pg 3.

See also Hoekman, B.M, op. cit. pg 349 where it is contended that regional integration agreements are often driven by foreign policy and national security considerations. Indeed, these often predominate, any economic costs being regarded as the price to achieve the non-economic objectives.

¹⁰⁴ Denmeret, P (1997) "The reciprocal influence of multilateral and regional trade rules: a framework of analysis" as cited in Streatfeild, J.E.J, op. cit. pg 3.

¹⁰⁵ Streatfeild, J.E.J, op. cit. pg 3.

¹⁰⁶ World Bank (WB) (2000): *Trade Blocs* < <http://oecd.org/dataoecd/39/37/1923431.pdf> > pg 6 accessed on 10 October 2008.

border co-operation. But a regional agreement can also create internal tensions, particularly if driven by economic rather than security considerations and if the economics appear to bring about an unfair distribution of benefits.¹⁰⁷ This happens especially when RTAs result in more divergence than convergence by accelerating the trend of concentration of industry in one or a few countries.¹⁰⁸ The design of regional agreements affects the way gains are distributed across members and may divert trade from non-members, thus reducing the welfare of third parties, and leading to internal and external tensions.¹⁰⁹

Becoming a member of RTA may increase intra-regional trade and investment and also link countries in a web of positive interactions and interdependency. This is likely to build trust, raise the opportunity cost of war, and hence reduce the risk of conflicts between countries.¹¹⁰ By developing a culture of co-operation and mechanisms to address issues of common interest, RTAs may actually improve intra-regional security and development.¹¹¹

A good example of such a response was the formation of Southern African Development Co-ordination Conference (SADCC) in 1980 to provide a united front¹¹² on the part of the small countries of the region against the apartheid regime in South Africa. Part of the strategy was to reduce economic dependence on South Africa both as a trading partner and as a conduit for the SADCC trade with the outside world. The objective was actually to reduce trade with the hegemon.¹¹³ Therefore, SADCC was a response to security and ideological imperatives in the region. In 1992, through the Windhoek Declaration, it was restructured into the Southern African Development

¹⁰⁷ *Trade Blocs*, op. cit. pg 6.

¹⁰⁸ Kritzinger-Van Niekerk, L. N, op. cit. pg 3.

¹⁰⁹ WTO (2003): *World Trade Report* pg 50.

¹¹⁰ Polachek, S.W (1992) "Conflict and trade: an economics approach to political integration as cited in Kritzinger-Van Niekerk, L. N, op. cit. pg 3.

¹¹¹ Kritzinger-Van Niekerk, L. N, op.cit. pg 3.

¹¹² The Frontline States consisted of Angola, Botswana, Mozambique, Tanzania, Zambia, Zimbabwe and later on, Namibia, when it attained its independence.

¹¹³ Foroutan, F (1993) "Regional integration in Sub-Saharan Africa: past experiences and future prospects as cited in *Trade Blocs*, op. cit. pg 16.

Community (SADC) to reflect the changing economic and geo-strategic reality in the region.¹¹⁴ In this regard regional integration arrangements can help prevent and resolve conflict by strengthening economic links among countries, especially African countries, and by including and enforcing rules on conflict resolution. On a continent where political instability and conflict remain major problems, the potential importance of this role cannot be overstated,¹¹⁵ as it has become obvious even to economists that absolutely nothing destroys economies as fast and as effectively as warfare or really bad governments.¹¹⁶

Therefore, forging bilateral and regional trade ties is often linked to geopolitical and security considerations. Trade policy is a key instrument of foreign policy for the EU and the United States, which use PTAs to secure regional stability by promoting the development of participating countries. South-South agreements also tend to reflect a political desire to participate in a regional initiative, such as, ASEAN and MERCOSUR in Latin America¹¹⁷ and in East Africa, one of the key objectives of EAC is the promotion of peace, security and stability within, and good neighbourliness among, the Partner States.¹¹⁸

The second sort of political factor for participation is co-ordination and bargaining power—the hope that from unity comes strength. The likelihood of this occurring depends on who the member countries are. The EU has probably been able to secure more in some international negotiations than its member states acting independently could have.¹¹⁹ Regional agreements

¹¹⁴ Dewald van Niekerk, (2001) “Globalisation and regionalism in the international system” as cited by Akokpari, J, et al (eds) *The African Union and its Institutions* pg 89.

¹¹⁵ *UNECA I*, op. cit. pg 22.

¹¹⁶ Clapham, C, et al (eds), op. cit. pg 63.

¹¹⁷ Carstens, A (2005) “Making regional integration work”, a speech delivered by Deputy Managing Director, International Monetary Fund at 20th Annual General Meeting and Conference of the Pakistan Society of Development Economists, Islamabad, Pakistan, 20th January 2005 < <http://www.imf.org/external/np/speeches/2005/011205.html> > accessed on 9 October 2008. See also Clapham, C, et al (eds), op. cit. pg 167 where it is observed that the formation of ASEAN should be seen in the context of the politico-security situation during the formation period, because it becomes clear that ASEAN was seen as a means of maintaining peace and stability by providing a forum for the discussion and resolution of regional issues relating to security.

¹¹⁸ Article 5.3(f) of the Treaty.

¹¹⁹ *Trade Blocs*, op. cit. pg 7.

between small developing countries cannot aspire to the EU's economic weight or political power, but can nevertheless enter negotiations more effectively than separate countries might be able to. They are more likely to "be noticed," and hence more likely to be able to make deals. Of course, these benefits depend on members being able to formulate a common position on relevant issues, a goal that has often proved elusive.¹²⁰ The underlying inequalities in economic power translate into bargaining strength in negotiations that poor countries are often unable to resist.¹²¹ This has led to growing differentiations in the ranks of developing countries, with the Least Developing Countries (LDCs)¹²² generally finding themselves in the weakest bargaining position.¹²³ There is some evidence that one motivation for the formation of the original European Economic Community (EEC) in 1957 was the desire to increase bargaining power relative to the United States.¹²⁴

Co-ordination within RTAs may be easier than through multilateral agreements, since negotiation rules accustom countries to a give-and-take approach, which makes trade offs between different policy areas possible. Since RTAs may enable countries to co-ordinate their positions, they will participate in multilateral negotiations e.g. World Trade Organisation (WTO) with at least more visibility, and possibly stronger bargaining power.¹²⁵ The collective bargaining power argument is especially relevant for the poor and

¹²⁰ Ibid.

¹²¹ *WCSDG*, op. cit. pg 77.

¹²² See *UNCTAD: The Least Developed Countries 2000 Report* as cited in *Converting LDC Export Opportunities into Business: A Strategic Response* pg xvi where it is stated that LDCs are officially designated as such on review by the United Nations Economic and Social Council. The criteria used as the basis for the designation include: low income (that is, a per capita gross domestic product - GDP- of under US\$ 800 for countries joining the list in 2000); low levels of human development (a combined health, nutrition and education index); and economic vulnerability (a composite index based on indicators of instability, inadequate diversification and the handicap of small size). LDCs are home to 10.4% of the world's population.

¹²³ *WCSDG*, op. cit. pg 77.

See also *Converting LDC Export Opportunities into Business: A Strategic Response* pg 2 where it is observed that declining availability of financial resources, domestic and external, including official development assistance (ODA), a heavy and unsustainable debt burden, falling and volatile commodity prices, complex trade barriers, lack of economic and export diversification and market access for key products which LDCs benefit from, as well as supply-side constraints, have seriously affected the growth and development prospects of LDCs. It is the contention of this paper that, saddled with these vulnerabilities, the bargaining power of LDCs is perpetually diminished.

¹²⁴ Whalley, J (1996) "Why do countries seek regional trade agreements" as cited in *Trade Blocs*, op. cit. pg 18.

¹²⁵ Kritziner-Van Niekerk, L.N, op. cit pg 3.

fractioned countries within a sub-region. It may help countries to develop common positions and to bargain as a group, which in turn, would contribute to increased visibility, credibility and even better negotiation outcomes.¹²⁶ Regional agreements can serve as a policy co-ordination mechanism to help prevent individual countries to opt for national strategies that fall short of optimal regional or global outcomes.¹²⁷ For instance, countries of transit trade are often tempted to use trade restricting policies, such as, seeking to set revenue maximizing fees on transit, imposing compulsory transit routes and check points, or the use of mandatory securitized convoys.¹²⁸ The small size of many African countries makes co-operation in international negotiations an attractive option achievable through regional integration arrangements. Cooperation can increase countries' bargaining power and visibility.¹²⁹

The third issue is a lock-in to domestic reforms, and relates to the effect of the regional agreement on domestic politics. Attempts at reform are often undermined by expectations of reversal. A regional agreement can provide a commitment mechanism for trade and other policy reform measures. It can be a way of raising the cost, and thereby reducing the likelihood, of policy reversal. This argument can apply to political as well as economic reform, and there are examples where regional integration agreements have reinforced democracy in member states.¹³⁰

The most spectacular examples of commitment mechanisms have probably been the North-South co-operation agreements, such as, Mexico gaining credibility through NAFTA, Eastern Europe through accession agreements with the EU.¹³¹ Under the EU rules, membership requires that the candidate country should have achieved stability of institutions guaranteeing

¹²⁶ Ibid.

¹²⁷ Maur, J.C (2008) "Regionalism and trade facilitation: a primer" pg 11 < http://www-wds.worldbank.org/external/default/WDSContent.Server/WDS/IB/2008/01/03/000158349_2 > accessed on 30 October 2008.

¹²⁸ Ibid.

¹²⁹ *UNECA I*, op. cit pg 21.

¹³⁰ *Trade Blocs*, op. cit pg 7. See also Hoekman, B.M, op. cit. pg 349 where it is observed that some governments saw regional integration agreements as a mechanism to lock in policy reforms, both economic and non-economic, for instance, democracy, and to signal such commitments to domestic and foreign investors.

¹³¹ *Trade Blocs*, op. cit. pg 24.

democracy, the rule of law, human rights and respect for and protections of minorities, the existence of a functioning market economy as well as the capacity to cope with the competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.¹³² Some South-South agreements have also acted as commitment mechanisms for reforms, notably MERCOSUR.¹³³ However, the effectiveness of regional agreements as commitment mechanisms depends on the interests and degree of involvement of all the countries concerned. Domestic political pressures and the activities of lobbies will also influence the form of many regional agreements—quite possibly preventing them from being as effective as they might otherwise have been.¹³⁴

Entering into regional trade agreements may enable a government to pursue policies that are welfare improving but time inconsistent in the absence of the RTA (e.g. adjustment of tariffs in the face of terms of trade shocks, confiscation of foreign investment, etc). There are two necessary conditions for an RTA to serve as a commitment mechanism. The first is, that the benefit of continued membership is greater than the immediate gains of exit and the value of returning to alternative policies. The other is, that the punishment threat is credible.¹³⁵ Regional integration arrangements work best as a commitment mechanism for trade policy. But RTAs can also serve to lock the country into micro and macroeconomic reforms or democracy if (i) those policies or rules are stipulated within the agreement (deeper integration arrangements) and (ii) the underlying incentives have changed following the implementation of the RTA. RTAs may be an instrument for joint commitment to a reform agenda, but their effectiveness may be limited by the low cost of

¹³² Copenhagen European Council (1993): Presidency Conclusions on Political Guidance on Enlargement as cited in Peterson, J, et al, *The Institutions of the European Union* pg 35.

See also Clapham, C, et al, op. cit. pg 189 where the authors state that a new member to the EU must satisfy the stringent formal criteria for admission, including compliance with all the EU existing rules and regulations, the so called *communautaire*, which consist of over 80,000 pages of laws, rules and standards.

¹³³ *Trade Blocs*, op. cit pg 124.

¹³⁴ *Ibid*, pg 7.

¹³⁵ Kritzinger-Van Niekerk, L.N, op. cit. pg 3.

exit and difficulties in implementing rules and administering punishment. With respect to other macroeconomic reforms, one may argue that the degree of openness of RTAs may help discipline in macro policies (especially if the zone shares, or targets, a common exchange rate).¹³⁶

For instance, it is frequently claimed that a developing country which is in the process of reforming its trade and other policies can benefit from a RTA with a large, developed country or region (e.g., the US or EU) because this binds its reforms in an international treaty, weakens the groups who stand to lose from and oppose the reforms, and raises credibility in their sustainability.¹³⁷ And even though the standard static welfare impact of such a RTA may be negative for the reforming country, the latter is likely to gain once the benefits of the enhanced credibility of the reforms are taken into account.¹³⁸ In many African countries regional integration can help make reforms deeper and less reversible. Regional integration arrangements can provide a framework for co-ordinating policies and regulations, help ensure compliance, and provide a mechanism of collective restraint.¹³⁹

The fifth issue is that RTAs are often effected with foreign policy goals in mind. Analysts often point out that both Japan and China are jockeying for positions of political and diplomatic influence when they attempt to form bilateral trade deals in Asia, including their interest in ASEAN.¹⁴⁰ Similarly, Brazil is often seen to be using its position in MERCUSOR to thwart the power of the United States in Latin America.¹⁴¹

2.3.2 Economic reasons

On the economic front, there are also a number of reasons for a country to participate in a RTA. One is trade gains. If goods from member states are

¹³⁶ Ibid.

¹³⁷ Schiff, M, et al (1997) "Regional integration as diplomacy" pg 2 <
http://www.worldbank/html/dec/Publications/workpapers/WPS_1800series/wps_1801/wsp_1801.pdf>
accessed on 24 October, 2008.

¹³⁸ Ibid.

¹³⁹ UNECA I, op. cit. pg 22.

¹⁴⁰ Aminian, N, et al, op. cit. pg 10.

¹⁴¹ Salazar-Xirinachs, et al (2005) "Regional vs. multilateral priorities for developing countries in Latin America and the Caribbean" as cited in Aminian N, et al, op. cit. pg 29.

sufficiently competitive, regional trade agreements will cause the demand for third party goods to decrease, which will drive down prices. In addition, more acute competition in the trade zone may induce outside firms to cut prices to maintain exports to the region. It will create a positive terms of trade effect for member countries.¹⁴² However, the move to free trade between partners who maintain significant tariffs vis-à-vis the rest of the world may well result in trade diversion and welfare loss. The risk of trade diversion could be mitigated if countries implement very low external tariffs (“open regionalism” arrangements).¹⁴³

Thus, DeRosa¹⁴⁴ argues that, in trade diverting RTAs, tariff revenue losses can be decisive in determining the overall welfare effect of the regional integration arrangement on individual member countries and the trading bloc as a whole.¹⁴⁵ In cases where the formation of a customs union would result in net economic benefits for the trading bloc, a facility for apportioning tariff revenues among union members might be necessary to enable the countries that gain from formation of the RTA to compensate the countries that lose.¹⁴⁶

¹⁴² Kritzinger-Van Niekerk, L.N, op. cit. pg 2.

¹⁴³ Ibid.

See also the *United Nations Commission for Latin America and the Caribbean (ECLAC) (1994): Open Regionalism in Latin America and the Caribbean: Economic Integration as a Contribution to Changing Product Patterns with Social Equity* as cited in Clapham, C, et al (eds), op. cit. pg 140 where it is stated that in contrast to the regionalism of 1960s, which sheltered behind protectionist barriers, the new regionalism is termed as ‘open regionalism’ which is defined as “a process of growing economic interdependence at the regional level, prompted both by preferential integration agreements and by other policies in a context of liberalisation and deregulation, geared towards enhancing the competitiveness of the countries in the region and, in so far possible, contributing the building blocks for a more open and transparent international economy”.

¹⁴⁴ DeRosa, D.A (2007) “Regional integration arrangements: static economic theory, quantitative findings, and policy guidelines” pg 12 < <http://www.worldbank.org/html/dec/Publications/workpapers/wps2000series/wps> > 2007/wps2007.pdf accessed on 24 October 2008.

¹⁴⁵ Ibid.

¹⁴⁶ For a tariff revenue apportioning mechanism see Bank of Namibia (2005) *The Benefits of Regional Integration for Smaller Economies* pg 21 where it is stated that 2002 Southern African Customs Union (SACU) has introduced a new system of managing and sharing the common revenue pool (CRP) which consists of all customs and excise duties collected by the five members (Botswana, Namibia, Lesotho, Swaziland- BNLS states- and South Africa-SA) into a Consolidated Revenue Fund (CRF). SA is no more receiving the residual but is now entitled to its share of customs and excise revenue just like other members. The total CRP has now three components, which are governed by a different set of distribution criteria. The customs component, consisting of all customs duties actually collected, is distributed on the basis of each country’s percentage of total intra-SACU imports, excluding re-exports. The excise component consisting of all excise duties actually collected on goods produced in the customs area (net of the development component) is allocated on the basis of the each country’s share of total SACU Gross Domestic Product (GDP). The development

DeRosa further insists that a customs union or free trade area, that results in welfare losses for one or more member countries, might still be successfully implemented if welfare gains for other member countries are sufficiently large to provide a net welfare gain for the trading bloc as a whole and if a facility for compensatory intra-bloc payments, typically involving apportionment of tariff revenues among member countries, can be successfully implemented, with the result that member countries that gain from the regional integration arrangement compensate member countries that lose.¹⁴⁷

The second economic reason relates to increased returns and increased competition. Countries participating in regional integration aim at enhancing trade in order to achieve higher levels of economic growth and material welfare. They often seek to secure access to large markets, such as the US or EU.¹⁴⁸ Sometimes countries, especially smaller ones, may see participation in regional arrangements as a defensive necessity from an economic perspective. Governments may simply fear exclusion from markets, and regard participation as an insurance policy against being placed at a competitive advantage through discriminatory policies.¹⁴⁹ Regional integration can empower people and countries to better manage global economic forces.¹⁵⁰

Within a tiny market there may be a trade off between economies of scale and competition. Market enlargement removes this trade off and makes possible the existence of: larger firms with greater productive efficiency for any industry with economies of scale;¹⁵¹ and increased competition that

component is funded initially from 15 percent of the total excise component, and distributed on the basis of each country's GDP per capita: countries with lower income per capita do receive more < www.sarpn.org/documents/d0001766/BankNamibia2005.pdf > accessed on 10 October 2008.

¹⁴⁷ DeRosa, D.A, op. cit. pg 14.

¹⁴⁸ Carstens, A, op. cit.

¹⁴⁹ *World Trade Report*, op. cit. pg 50.

See also Baldwin, R.E (1995) "A domino theory of regionalism" as cited in Hoekman, B.M, et al, op. cit. pg 349 where it is observed that as major trading partners created trade blocs, the pressure on others to follow increased as the costs of exclusion seemed to grow- the so called 'domino regionalism'.

¹⁵⁰ *WCSDG*, op. cit. pg 71.

¹⁵¹ See also Lanjouw, G.J, op. cit. pg 58 where it is observed that the dynamic effects of regional integration include effects such as economies of scale, that is, the possibility of producing on a larger

induces firms to cut prices, expand sales and reduce internal inefficiencies.¹⁵² Given the high level of fragmentation in the developing countries, especially in Sub-Saharan Africa (SSA), it is expected that market enlargement would allow firms in some sectors to more fully exploit economies of scale.¹⁵³ Clapham¹⁵⁴ observes that ASEAN countries are advocates of open regionalism simply because the region is too small for inward-looking regionalism.¹⁵⁵

Competition may lead to the rationalisation of production and the removal of inefficient duplication of plants. However, pro competitive effects will be larger if low external tariff allows for a significant degree of import competition from firms outside the zone.¹⁵⁶ Otherwise, the more developed countries within the regional integration scheme would most probably dominate the market because they may have a head start. On the other hand, current technology may be obsolete in these countries compared to current and future needs of the regional market. Firms may then decide to re-deploy new technology and re-locate in other areas depending on factor costs.¹⁵⁷ In this case, countries with the most cost effective infrastructure and human resources would be the beneficiaries.¹⁵⁸ Regional integration arrangements can help African countries overcome constraints arising from small domestic markets—allowing them to reap the benefits of economies of scale, stronger competition, and more domestic and foreign investment. Such benefits can

scale at lower average cost, permitted by the larger market in the region as well as the favourable effects of increased competition within the region.

See also “e-EAC newsletter”, Update Issue No. 24 dated 24 February 2009 “Summit Chair convenes historic meeting to usher new look EAC” pg 2 where President Kagame is reported to have mentioned some of the benefits of regional integration as larger markets, economies of scale, larger pools of human, financial, and physical capital.

¹⁵² Kritzinger-Van Niekerk, L.N, op. cit. pg 2.

¹⁵³ Ibid.

¹⁵⁴ Clapham, C, et al (eds), op. cit. pg 167.

¹⁵⁵ Ibid, where the author further states that ASEAN is the largest free trade area grouping in the world in terms of population, but the smallest in terms of gross national product (GDP). Therefore, it is leading external linkages with Asia-Pacific Economic Co-operation (APEC), Closer Economic Relations (CER) in New Zealand and Australia, the EU, NAFTA and so on.

¹⁵⁶ Kritzinger-Van Niekerk, L.N, op. cit. pg 2.

¹⁵⁷ See also Hoekman, B.M, et al, op. cit. pg 349 where it is stated that increased internationalisation of markets put pressure on firms, and, through them, governments to seek efficiency through larger markets and improved access to foreign technologies and investment. This led to private sector lobbying for reductions in regulation-related trade costs. These may be perceived to be easier to address in regional integration agreements involving like-minded governments.

¹⁵⁸ Kritzinger-Van Niekerk, L.N, op. cit. pg 2.

raise productivity and diversify production and exports.¹⁵⁹ By effectively increasing the size of domestic markets, integration increases the capacity to withstand external economic fluctuations.¹⁶⁰

The third reason is investment. Entering into a regional agreement may give a small country an advantage over other similar countries in attracting FDI. Raising the level of FDI or domestic investment requires making a country attractive vis-à-vis other countries.¹⁶¹ Regional trade agreements may attract FDI both from within and outside the regional integration arrangement as a result of: market enlargement particularly for large investment that might only be viable above a certain size; and production rationalisation (reduced distortion and lower marginal cost in production). But it would be necessary to reduce protection, especially external tariffs.¹⁶²

Regional economic integration typically encompasses reductions in regional trade barriers and investment restrictions. Hence, the impacts of RTAs on FDI flows will ultimately reflect the impact that trade and investment liberalisation has on location and firm-specific advantages. Changes in location-specific advantages are potentially associated with liberalisation induced changes in relative costs among member and non-member countries, changes in relative economic growth rates, altered investor perceptions about country-specific political risk, agglomeration economies, and so forth.¹⁶³ Some of these changes will be the direct result of liberalisation initiatives: e.g., tariff reductions alter the relative advantages of

¹⁵⁹ UNECA I, op. cit. pg 21.

¹⁶⁰ WCSDG, op. cit. pg 71. It further states that better regional co-ordination of economic policies can also help to dampen the spillover effects of external shocks between countries. Common frameworks for financial regulation, rights at work, tax co-ordination and investment incentives are practical regional goals which can help prevent any risk of a 'race to the bottom' in these areas.

¹⁶¹ Carstens, A, op. cit.

See also Akinsanya, A "International protection of foreign direct investments in the world" (1987) 36 *International and Comparative Law Quarterly* pg 58 where it is observed that the feeling of insecurity among investors is perhaps the major deterrent to the flow of direct foreign investment in LDCs. Because of the need to ensure a steady flow of investment in LDCs, measures are taken to promote and protect FDI in LDCs. These include concluding agreements for reciprocal promotion, encouragement and protection of FDI.

See also Asante, S.K.B "International law and foreign investment: a reappraisal" (1988) 37 *International and Comparative Law Quarterly* pgs 588-629 for a comprehensive discussion on FDI.

¹⁶² Kritzinger-Van Niekerk, L.N, op. cit. pg 2.

¹⁶³ Blomstrom, M, et al (1998) "Regional economic integration and foreign direct investment: the North America experience" pg 4 < <http://www.ideas.repec.org/p/hhs/hastef/0269.html> > accessed on 9 October 2008.

exporting versus establishing foreign affiliates. Other changes will indirectly reflect the consequences of economic integration; for example, economic integration will affect relative and absolute growth rates which, in turn, should affect FDI flows.¹⁶⁴

Fourthly a regional agreement can also help in dealing with region specific issues, such as, border controls, transit, migration, or movement of labour.¹⁶⁵ Countries recognise that other more opaque barriers than tariffs can hinder trade.¹⁶⁶ These include border controls, phyto-sanitary restrictions, weak transport systems, and regulatory differences. Regional economic agreements, therefore, increasingly cover some of these issues, which are more suitably addressed at the regional level.¹⁶⁷ For instance, domestic transport infrastructure constraints often have regional implications, justifying, from an economic point of view, port or regional airport hubs.¹⁶⁸ Landlocked countries depend on the quality of the infrastructure of their neighbours. Some RTAs have also included dispute resolution mechanisms, which, in the implementation phase of the arrangement, have proven to be extremely useful.¹⁶⁹

The fifth factor is signalling. Though entering RTAs is costly, in terms of investment in political capital and transaction costs, a country may want to do so in order to signal its policy orientation / approach, or some underlying conditions of the economy, such as, competitiveness of the industry and sustainability of the exchange rate, in order to attract investment. This may be especially important for countries having a credibility and consistency problem¹⁷⁰ wanting to demonstrate to potential traders and investors that

¹⁶⁴ Ibid.

¹⁶⁵ See also Hoekman, B.M, et al, op. cit. pg 349 where it is observed that some problems or issues may be shared by only a limited number of (often neighbouring) countries, and can, therefore, be better resolved on a regional basis rather than multilaterally, for instance, a desire to achieve political integration- the creation of a larger political entity.

¹⁶⁶ Carstens, A. op. cit.

¹⁶⁷ Ibid.

¹⁶⁸ Caron, et al (2001) "East Africa Sub-region: enhancing transportation management to foster US agricultural opportunities" as cited by Maur, J.C "Regionalism and trade facilitation: a primer" pg 11.

¹⁶⁹ Carstens, A, op. cit.

¹⁷⁰ Kritzinger-Van Niekerk, L.N, op. cit. pg 3

they are committed to opening their markets and that the commitment would not be easy to reverse.¹⁷¹

Turning to large industrial countries, trade in goods per se no longer appears to be the dominant factor for participating in RTAs. A growing number of RTAs includes a provision on liberalising services (including financial), investment, protecting intellectual property rights, labour, and environment standards.¹⁷² Industrial countries are keen to include such issues to counter what they regard as unfair competition due to, for example, piracy or poor labour standards. They also desire to open up markets for their services sectors, where they have a competitive advantage.¹⁷³

With regard to Africa, the similarities and differences of her countries could make regional integration and co-operation beneficial. Many African countries share common resources, such as, rivers—and problems, such as, HIV/AIDS and low agricultural productivity. But they also exhibit important differences, particularly in their endowments.¹⁷⁴ Though most have limited resources, some have well trained workers, some have rich oil deposits, some have water resources suitable for hydroelectric generation, and some have excellent academic institutions and capacity for improving research and development. By pooling their resources and exploiting their comparative advantages, integrated countries can devise common solutions and use resources more efficiently to achieve better outcomes.¹⁷⁵ Among others,

¹⁷¹ *World Trade Report* op. cit. pg 50.

¹⁷² Carstens, A, op. cit.

¹⁷³ *Ibid.*

See also Mosoti, V “Non-discrimination and its dimensions in a possible WTO Framework Agreement on Investment: reflecting on the scope and policy space for the development of poor economies” (2003) 4 *The Journal of World Investment* pg 1015 where it is observed that in investment, it would be naïve to suppose that economic or technology transfer advantages will result directly to host country because investment follows maximum return, essentially meaning that the investor is not necessarily driven by any benevolent interests in the host country but rather will try to reap maximum returns that can be secured with the barest of input and least possibility of technology and knowledge transfer. In fact, it is well known, for instance, that in knowledge intensive business sectors corporations will usually be reluctant to create subsidiaries abroad if they are not assured that their intellectual property rights will be protected and that they can operate in an environment that can ensure a minimal diffusion of their peculiar profit-making knowledge to the host country and its citizens, be they human or corporate.

¹⁷⁴ *UNECA I*, op. cit. pg 21.

¹⁷⁵ *Ibid.*

resource pooling (i.e., human resources or providing R&D expenditures jointly) and the extended diffusion of technology (i.e., higher technology spill-over, cheaper and more appropriate technology transfers) are considered to be the most significant factors in triggering economic growth.¹⁷⁶ In Africa, regional economic integration is also seen as an important route to peace and stability, and to more effective participation in the global economy. The aim is attract both foreign and local investors, and to develop a pool of regional expertise.¹⁷⁷ Regional integration can build the capabilities needed to take advantage of global opportunities.¹⁷⁸

Thus as it has been summed up by Judge Bossa, states have since come together because of shared ideals, values and norms and in some instances cultural, economic and historic ties to form economic blocs that can assist them to lower the cost of trading and business, stimulate economic growth, and transform their economies, and improve on the lives of their people.¹⁷⁹

2.4 THE IMPORTANCE OF REGIONAL INTEGRATION IN AFRICA

2.4.1 The building blocs

Regional integration is an imperative in Africa for a number of compelling reasons. Africa, and Sub-Saharan Africa in particular, is the least developed region in the world.¹⁸⁰ Of the 41 countries in the world identified by the G-8

¹⁷⁶ Memis, E, et al, op. cit. pg 7.

¹⁷⁷ WCSDG, op. cit. pg 72.

¹⁷⁸ WCSDG, op. cit. pg 71. It further states that investment in skills, infrastructure, research, technology and support for innovation often require a critical mass of efforts more readily achieved at regional level. More ambitious regional objectives are also possible, such as regional strategies for industrial transformation or a co-ordinated broader development strategy.

¹⁷⁹ Romano, C.P.R. "The proliferation of international judicial bodies: the pieces of the puzzle" as cited in Bossa, S.B (2006) "A critique of the East African Court of Justice as a human rights court" pg 10 < http://www.icj.org/IMG/Speech_BOSSA_pdf > accessed on 3 March 2009.

Judge Solomy Balungi Bossa was a Judge with the EACJ, and the High Court of Uganda.

See also Hoekman, B.M, et al, pg 348 where it is contended that the US moved from active hostility to enthusiasm towards regionalism in the 1980s, driven in part by frustration with slowness of the multilateral process. Also important was the end of cold war which reduced US willingness to accept preferential liberalisation elsewhere in the world while not pursuing this avenue for improving access to major markets itself.

¹⁸⁰ See also Portugal-Perez, A, et al (2008) "Trade costs in Africa: barriers and opportunities for reform" (Policy Research Paper No. 4619) pg 4 where it is asserted that world trade and investment flows expanded over the last years, but in contrast the trade performance of SSA countries has been disappointing. According to COMTRADE data, Africa's share of world exports has dropped by nearly two-thirds in three decades: from 2.9 percent in 1976 to 0.9 percent in 2006. This implies that if Africa's share of world exports would have been kept at the same level than at the mid-seventies, its exports revenue should be 10 times bigger than its current

(the group of eight of the most industrialised countries)¹⁸¹ in 1996 as poor and needing immediate debt relief, 33 are in Sub-Saharan Africa. African countries generally have low per capita income, with between 40% and 60% of its 900 million people earning less than \$2.00 a day, while inflation rates are high, ranging in double, sometimes the digit figures in certain countries. Overall economic growth, particularly in Sub-Saharan Africa, plummeted from a high of 5.3% in 1997 to 4.3% in 2000.¹⁸² Unemployment is highest in Africa compared to other regions. The continent faces chronic balance of payments problems, while the imbalance in economic power relations between it and the Western trading partners makes prospects for better terms of trade unlikely.¹⁸³ Grobbelaar¹⁸⁴ indicates that the continent also remains on the sidelines of financial globalisation.¹⁸⁵

It does not need to be emphasised that the issue of African economic integration is not new.¹⁸⁶ It came up at the dawn of independence as a demonstration of the willingness of African leaders to stem the adverse effects of Africa's balkanisation and underdevelopment.¹⁸⁷ It was the political and economic reactions to these adverse effects that triggered the

value < http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2008/09/16/0000158349_20089161 >

accessed on 28 October 2008.

¹⁸¹ The G-8 countries are Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and Russia.

¹⁸² See, Africa Recovery (2002) as cited by Akokpari, J, et al (eds), op. cit. pg 95.

¹⁸³ Akokpari, J, et al (eds), op. cit. pg 95

¹⁸⁴ Grobbelaar, N, et al (eds) (2008) *Unlocking Africa's Potential: The Role of Corporate South Africa in Strengthening Africa's Private Sector* pg 172.

¹⁸⁵ See *United Nations Conference on Trade and Development (UNCTAD) (1999) Foreign Direct Investment in Africa: Performance and Potentials* as cited in Grobbelaar, N, et al (eds) pg 172 where it is noted that over the period 1989-2004, Sub-Saharan Africa's share in the world's FDI flows averaged 1%, compared to 10% and 17% for Latin America and the Caribbean, and Asia and the Pacific, respectively.

See also Moyo, D, op.cit. pg 98 where the author states that in 2006 global flows of FDI soared to a record USD 1.4 trillion whereas FDI flows into developing world (globally) approached USD 400 billion. During this period, FDI flows to the whole of Sub-Saharan Africa reached a meagre USD 17 billion. The continent as a whole continues to disappoint and has failed to capitalise on the phenomenon of global FDI growth.

¹⁸⁶ See Clapham, C, et al (eds), op. cit. pg 59 where it is stated that since African states are, on the whole, both exceptionally small and weak, and since they have shared the strong sense of continental solidarity expressed notably through Pan Africanism, it is unsurprising that the continent has fostered a plethora of regional integration schemes of one sort or another.

¹⁸⁷ See also Lanjouw, G.J, op. cit. pg 69 where it is stated that in Africa the history of regional economic integration is linked to decolonisation. Attempts were made to alleviate the associated problems by economic co-operation.

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.¹⁸⁸

Given the above exposition, it can be safely stated that economic integration is widely regarded as a policy capable of lessening Africa's economic and political marginality. This is exemplified by the fact that creation of a continental African common market was a founding principle of the Organisation of African Unity (OAU) in 1963 and the African Union (AU), which replaced the OAU in 2002. The integration 'master plan' of both organisations proposes the establishment of several regional projects that, over time, integrate to form a pan-African community.¹⁸⁹

The Lagos Plan of Action (LPA) of 1980 which was presented by the UN Economic Commission for Africa (UNECA) prescribed regional collective self-reliance as the approach to development. Consistent with the prevailing African ideology, the LPA projected an introverted, state led approach to integration that envisaged the creation of a common African market.¹⁹⁰ Both the LPA and the 1991 Abuja Treaty, which established the African Economic Community (AEC), aimed to create an African economic union. Regional Economic Communities (RECs) are seen as the essential building blocs for the integration and economic development of Africa. The AEC has designated a number of RECs as pillars of the intended African economic union, including both SADC and COMESA. The AEC's ambitious goal to achieve such an economic union by 2028 will demand not only the consolidation and rationalisation of existing RECs, but also a political commitment by member states to share sovereignty and deepen integration.¹⁹¹

¹⁸⁸ Kouassi, R.N (2007) "The itinerary of the African integration process: an overview of the historical landmarks" pg 1 < <http://www.africa-union.org/root/ua/Newsletter/EA/Vol.1,No.2/Kouassi.pdf>> accessed on 28 October 2008.

¹⁸⁹ Gibb, R, (2006) "Rationalisation or redundancy? Making Eastern and Southern Africa's regional trade units relevant pg 3 (Brenthurst Discussion Paper No.3/2006) < www.givengain.com/unique/tralac/pdf/20060423-Bernthurst-Discussion.pdf > accessed on 19 September 2008.

¹⁹⁰ Akokpari, J, et al (eds), op. cit. pg 93.

¹⁹¹ Gibb, R, op. cit. pg 4.

The potentially pivotal role of regional integration, providing the essential building blocs for integration and development, is also recognised by the New Partnership for Africa's Development (NEPAD),¹⁹² which has identified RECs as having responsibility to mobilise and oversee the translation of NEPAD objectives into practical and implementable programmes.¹⁹³ Similarly to the AEC, NEPAD considers RECs to be the most appropriate political structure, and at the most appropriate geographical scale, to implement policies aimed at transforming the social, economic and political well being of the African continent.¹⁹⁴ There is, therefore, a remarkable degree of consensus that effective regional integration is necessary for the economic and political transformation of the continent.¹⁹⁵ The conclusion to the 1993 African Development Bank (ADB) study on economic integration concludes that '*so serious are the challenges facing southern Africa that governments cannot afford to ignore the limitations which national boundaries impose on their prospects for economic recovery and growth*'.¹⁹⁶

The success of the process of integration is essential for Africa - because only the virtues of integration, in economic and political terms, offer the assets necessary to take up the challenges of globalisation, and to obtain a credible capacity for negotiation in international debates.¹⁹⁷ Fostering intra-African trade integration promises to reduce dependence on the West by

¹⁹² See also Mosoti, V "The New Partnership for Africa's Development" (2004) 5 *San Diego International Law Journal* pg 153 where it is observed that NEPAD rests on a new kind of relationship between Africa and the development partners. This relationship, unlike in the past, is described as a "partnership" based on mutual obligations, commitments, interests and benefits. It recognises that the so-called development partners also benefit, in fact very profitably, by engaging with Africa. This is not a trivial recognition. According to a 1999 United Nations Industrial Development Organisation (UNIDO) Report, Africa consistently yields the highest return for foreign investment compared to all other regions of the world; four times the return compared to developed countries, double the return from Asia and two-thirds more than the from Latin America.

¹⁹³ Joint communiqué of the Chief Executive Officers of Regional Economic Communities and the NEPAD Secretariat' 29-30 October 2003, Abuja, Nigeria as cited in Gibb, R, op. cit. pg 4.

¹⁹⁴ See also Grobbelaar, N, et al (eds), op. cit. pgs 169-200 for discussion on the role of NEPAD on investment climate in Africa.

¹⁹⁵ Gibb, R, op. cit. pg 4.

See also Mosoti, V, op. cit. pg 154 where it is observed that the expected results from the full implementation of NEPAD include high and sustainable continent-wide economic growth; reduction in poverty and inequality; diversified productive capacities for enhanced international competitiveness and increased exports; and a more cohesive continent through integration.

¹⁹⁶ Gibb, R, op. cit. pg 4.

¹⁹⁷ Kouassi, R.N, op. cit. pg 2.

promoting regional self-reliance. Regionalism would enhance Africa's bargaining power with other regional blocs in the global economy.¹⁹⁸ Clapham¹⁹⁹ argues that, paradoxically, however, where African regional economic organizations did have any significant impact on regional relationships, this was much more likely to be in the field of security rather than that of economic development. The most important case has been the role of the Economic Community of Western African States Monitoring Group (ECOMOG) in the civil wars in Liberia and Sierra Leone.²⁰⁰ The SADC intervention in Lesotho, and still more controversially, its role in orchestrating military support for the Kabila regime in Democratic Republic of Congo (DRC), provide further striking examples.²⁰¹

2.4.2 Historical ties and new developments.

It is crucial to point out that, historically, most of SSA's trade links have been with the former metropolitan powers, either directly with the United Kingdom (UK) (in the case of Anglophone countries) and France (for Francophone countries), or more generally with Europe and North America.²⁰² These links have been strengthened through the development of various forms of preferential trade arrangements (Lome-Cotonou, AGOA, EPAs and FTAs). It is not surprising, therefore, that currently most of SSA's trade is with the historically industrialised countries.²⁰³

The current structure of trade slows down the prospects of regional economic integration in Africa, given the fact that regional trade agreements are usually measured by taking into account the level of intra-regional trade. For most of

¹⁹⁸ Mistry, P.S (1999) "The new regionalism: impediment or spur to future multilateralism" as cited by Akokpari, J, et al (eds), op. cit.pg 97.

¹⁹⁹ Clapham, C, et al (eds), op. cit. pg 62.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Kaplinsky, R, et al (2007) "The impact of China on Sub-Saharan Africa" IDS Working Paper 291 pg 41 < http://www.sarpn.org.za/documents/d0002953/China_Africa_IDS_Nov2007.pdf> accessed on 10 October 2008.

²⁰³ Ibid.

See also Clapham, C, et al (eds), op. cit. pg 60 where it is observed that in economic terms, a regional community comprising small and poor African states had very little to offer as the modern monetary economies of these states had been formed, certainly on a highly unequal basis, through their incorporation as sources of primary products and markets for manufactured goods and services, within a global structure of north-south trade, dominated by their colonial metropolises.

the countries, in the region the main trade partners are not the neighbouring countries but markets located further away, and that have a higher demand for the products that are being exported.²⁰⁴ The 2001 share of African imports from other African countries was approximately 9%.²⁰⁵ In 2002 intra-trade in Africa was 8.1%. This pales into insignificant in comparison to the 50.9% and 17.0% trade with Western Europe and North America respectively. In 2002 intra-regional trade in Western Europe and America was 67.3% and 40% respectively.²⁰⁶

The other reason apart from historical ties with the West for developing countries, especially in Africa, not being natural trading partners, stems from the fact that low-income countries tend to have relatively similar factors of supplies; therefore, the incentive to trade with each other is smaller than for dissimilar countries.²⁰⁷ In other words, developing countries tend to have a comparative advantage in the same sectors; therefore, they generally are not low cost producers of goods imported by other developing countries. By this reasoning, South-South trade agreements in general, and among African countries in particular, are likely to lead to trade diversion as opposed to trade creation, if any increase in imports occurs at all. From a political economy point of view, trade diversion in turn implies a stumbling block effect of South-South trade agreements for multilateral trade liberalisation.²⁰⁸ The challenge for these countries is to move into higher value exports. A strategic response is needed to promote innovation, adaptation, and the learning processes associated with it.²⁰⁹ Key to creation of national systems of innovation is the upgrading of skills and technological capabilities.²¹⁰

²⁰⁴ Fanta, E (2008) "Dynamics of regional (non-) integration in eastern Africa" W-2008/2 pg 15 < <http://www.cris.unu.edu/workingpapers/Emmanuel.pdf> > accessed on 10 October 2008.

²⁰⁵ International Monetary Fund (IMF) (2002) Direction of Trade Statistics Yearbook, IMF as quoted in Mayda, A. M, et al "Do South-South trade agreements increase trade? commodity-level evidence from COMESA" UNU-CRIS Occasional Papers 0-2006/19 pg 6 < <http://www.cris.unu.edu/UNU-CRIS-Working-Papers/Mayda.pdf> > accessed on 28 October 2008.

²⁰⁶ World Bank (2002) Statistics of World Trade as cited in Akokpari, J, et al (eds), op. cit. pg 97.

²⁰⁷ Mayda, A.M, et al, op. cit. pg 6.

²⁰⁸ Ibid.

²⁰⁹ Amsden, A (2001) *The Rise of the Rest* as cited in WCSDG, op. cit. pg 59.

²¹⁰ WCSDG, op. cit. 59.

Nevertheless, two major developments are disturbing these historical patterns. First, there appears to be a naturally growing regional market in southern Africa reflecting regional externalities in production.²¹¹ But, secondly, the rapid growth in trade between SSA and China suggests a growing ‘magnetic pull’ from the East. This poses a major policy challenge to individual and groups of SSA economies, particularly relevant in the context of stretched policy and administrative systems – given the growing importance of regional ties in the global economy. It will necessarily involve a ‘joined-up’ mix of economic and political initiatives.²¹² As SSA loosens its links with Europe and North America, it will also be necessary for countries, particularly those in southern Africa, to determine how much weight they wish to place on intra-continental regional links, and how much on forging new regional links with China and other Asian economies²¹³ in their efforts to spur economic growth. Under consideration should be the fact that China’s trade with SSA increased 50-fold between 1980 and 2005, reaching \$40 billion, though it represented only 2.5% of Chinese foreign trade.²¹⁴ China and India

²¹¹ Kaplinsky, R, et al (2006) “Deep and shallow integration in Asia towards a holistic account” as cited in Kaplinsky, R, et al, op. cit. pg 41.

²¹² Kaplinsky, et al, op. cit. pg 42.

²¹³ Ibid.

See also Gouede, N.N (2008) “Trade and investment between Japan and Africa in the context of follow up to the Fourth Tokyo International Conference on African Development (TICAD IV)” pg 4 where it is reported that Japanese investment into Africa reached USD 203 million in 2004 alone and between 2002 and 2004, Japanese FDI in SSA amounted to USD 415 million, roughly 0.4 percent of Japanese total FDI during the period. And although Japanese trade with Africa in 2007 rose to USD 26.6 billion, it still accounted for about 2 percent of the country’s global trade. Japanese investment on the continent has also been urged to take into account all African countries and not focus only on South Africa and Egypt which absorb 85 percent of Japanese investment on the continent < <http://www.afdb.org/pbs/portal/docs/PAGE/ADB-ADMIN-PG/DOCUMENTS/AEC/1.2.3.GOUDE-0.PDF> >accessed on 10 November 2008.

²¹⁴ See also Moyo, D, op. cit. pg 120 where it is observed that in 2007 Sino-African trade jumped to USD 45 billion becoming the continent’s third most important trading partner, behind the US and France, and ahead of UK.

See also Dowden, R, et al “Dialogue” in “Standpoint” dated March 2009 pg 27 where Dambisa Moyo, Zambian-born economist and author of *Dead Aid* is reported arguing that Africa should be fostering alliances with other countries, non-traditional investors that actually do have money. China has four trillion dollars in foreign reserves. They have seven percent arable land and 1.3 billion people to feed. Therefore, she further argues, Africa should not waste its time in the WTO Doha Development negotiations; instead it should foster relationships with countries that are interested in buying its produce, such as China and India.

See also Cheng, J.Y.S, et al “China’s Africa’s policy in the post-cold war era” (2009) 39 *Journal of Contemporary Asia* pg 87 where it is observed that China’s impressive economic growth involves an expansion of trade and investment activities, as well as efforts to ensure a reliable supply of resources in support of its development. Africa, therefore, is no longer an element of the abstract “Third World” concept in China’s diplomacy; it has a significant political ally in international organisations as well as an increasingly important trade partner and supplier of energy resources.

together account for about 10% of both SSA exports and imports - 25% more than the share of these two countries in world trade. SSA imports from China are mostly consumer goods, and exports to China mostly oil and other primary products.²¹⁵

However, much as regional integration is on the agenda worldwide, the rhetoric and reality do not always coincide.²¹⁶ In the EU, there are complaints of bureaucratisation, distance from the people, trade diversion and problems of unequal weight and influence between countries and social actors. In addition co-ordination of policy is proving difficult. Yet there has been enormous progress overall.²¹⁷ Elsewhere, progress has been uneven. In Latin America, the strengthening of regional institutions has been impeded by resource constraints and by a series of economic and political crises.²¹⁸ In Africa, efforts to open up and interconnect African economies require considerable investment, which has been hard to mobilise. The danger of creating another layer of bureaucracy is real.²¹⁹

2.5 CONCLUSION

This chapter has shown that regional economic integration can be either trade creating or trade diverting, depending on its design. It has transcended the traditional geographical configuration and, therefore, can be concluded between countries which are not geographically contiguous, shaped either through markets or formal legal agreements. The chapter indicates that a variety of reasons, predominantly political and economic in nature, tend to influence participation of countries in regional economic arrangements. The inevitability of regional economic integration as a policy capable of lessening Africa's economic and political marginality has been underscored. The chapter has introduced the main themes underlying regional economic

See also Tandon, Y "Ending aid dependence" in "African Business", Issue No.351 dated March 2009.

²¹⁵Broadman, H (2006) "Africa's silk road: China and India's new frontier" as cited in Sindzingre, A "Trade structure as a constraint to multilateral and regional arrangements in Sub-Saharan Africa: the WTO and the African Union" UNU-CRIS Working Papers W-2007/11 pg 8 < <http://www.cris.unu.edu/fileadmin/workingpapers/20071207142150.w-2007-11.pdf> > accessed on 10 October 2008.

²¹⁶ *WCSDG*, op. cit. pg 73.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

integration, laying a foundation to undertake an informed review of the history of the integration process in East Africa in the following chapter.



CHAPTER THREE

HISTORICAL BACKGROUND OF REGIONAL ECONOMIC INTEGRATION IN EAST AFRICA

3.1 INTRODUCTION

The three countries of East Africa, namely, Kenya, Tanzania and Uganda, have a lot of commonalities despite their separate existence. Apart from their similar colonial history, these countries harbour within their boundaries people who share almost similar cultural and social traits, and who, in some instances are in fact related, for instance, the Maasai on either side of the Tanzania-Kenya border, and the Karamoja and Teso along the Kenya-Uganda border. The political economies of these countries also have a lot in common, not to mention their geographical proximity.²²⁰

The roots of co-operation in the East African region precede the colonisation of East Africa. Before East Africa was a region in social-economic and political flux, with various people groupings, a trade route network, political dynamism and social mingling that had for centuries succeeded in establishing a common cultural identity and a non-tribal common language known as *Kiswahili*.²²¹ Co-operation in early colonial days was not based on any institutional framework but arose in accordance with the needs of the moment. However, the ad hoc mechanisms were periodically reviewed with a view to establishing a systematic framework to support what was already going on. From the early institutions of integration it can be discerned that the main thrust behind co-operation was to take advantage of the commonalities of the countries to build a strong economic bloc in the East African region. There was, however, the equally important reason during the colonial times of securing greater political control by the British Government over the territory.²²²

Two of the three countries that form East Africa, Kenya and Uganda, became British protectorates in 1894 and 1895, respectively. Kenya proceeded to

²²⁰ Ojienda, T.O, op. cit. pg 17.

²²¹ *Taasisi ya Ukuzaji wa Mitaala: Kiswahili kwa Sekondari* as cited in Mvungi, S.E.A (ed) op. cit. pg 66.

²²² Ojienda, T.O, op. cit. pg 17.

become a colony in 1920. Tanganyika had been colonised by the Germans up to 1918 when it became a British mandated territory. Thus at the beginning of the 20th century, Kenya, Uganda and Tanganyika (now Tanzania)²²³ were British territories. It, therefore, appeared to make sense to the British that, although governed separately, the East African countries should have a common market,²²⁴ taking advantage of their memorable history of cultural and socio-economic co-operation.²²⁵

3.2 PRE-INDEPENDENCE INSTITUTIONS

3.2.1 THE GOVERNORS' CONFERENCE

The institutionalisation of East Africa co-operation under British colonial rule started with the establishment of a common railway administration for Kenya and Uganda in 1902. In 1905 an East African Currency Board was established between Kenya and Uganda. In 1911 the two countries established a common Postal Union and in 1917 they established a Customs Union. Tanganyika joined the Currency Board in 1921, then the Customs Union in 1923 and finally the Postal Union in 1933.²²⁶

European settlers in Kenya were very much in favour of a federation, so they made an appeal for amalgamation in 1905, which received considerable support from Sir Percy Girouard, the man who became the Governor of the East African Protectorate in 1909.²²⁷ The Colonial Foreign Office in London was, however, hesitant about the proposal. The actual problem was that an East African Federation as demanded by the White settlers meant the establishment of a self-governing White only Colony in East Africa in which African interests played no part at all.²²⁸ Other common institutions to appear during this period include the Court of Appeal for Eastern Africa, the Kenya–Uganda Railways and Harbours, the East African Meteorological Department

²²³ Tanganyika and Zanzibar joined on 26th April, 1964 to form the United Republic of Tanzania.

²²⁴ Okoth, A (2006) *A History of Africa 1915-1995: African Nationalism and the De-colonization Process*, pg 333.

²²⁵ Shivji, I.G (ed) (2004) *Constitutional and Legal System of Tanzania: A Civics Sourcebook* pg 135.

²²⁶ Doimi de Delupis, I (1970) "The East African Community and Common Market" as cited in Mvungi, S.E.A (ed) op. cit. pg 67.

²²⁷ Rosberg, et al (1963 "An East African Federation" as cited in Mvungi S.E.A (ed), op. cit. pg 67.

²²⁸ Ibid.

and the East African Posts and Telegraphs Department.²²⁹ The East African Governors' Conference was established in 1926.

Due to the existence of the Governors' Conference of the three territories some policies adopted for one territory found acceptance with the authorities of the other East African territories. For instance, when Kenya introduced income tax in 1937 to remedy its bad financial situation, this was extended to Tanganyika and Uganda in 1940. In the same year a Joint Income Tax Board was established to handle the collection of tax. A Secretariat of the Governors' Conference finally took permanent form, and a Joint Economic Council was established to liaise between the Common Services and Civil Services of the territories.²³⁰

3.2.2 THE EAST AFRICAN HIGH COMMISSION (EAHC)

During the period after World War II East Africa saw a lavish proliferation of common services institutions. Prominent amongst these were: the East African Industrial Research Organisation, the East African Airways Corporation, the Directorate of Civil Aviation, the East African Customs and Excise Department, the East African Tobacco Company, the University of East Africa and finally, the East African Railways and Harbours.²³¹ On the recommendation of a colonial White Paper (Inter-Territorial Organisation in East Africa) of 1945, a common supreme body, the East African High Commission (EAHC), was also established in 1948²³² through an East African (High Commission) Order-in-Council which came into force on the 1 January 1948.²³³

EAHC was not an international organisation, since Tanganyika, Kenya and Uganda were not states but territorial units under colonial and/or foreign

²²⁹ Oloka-Onyango, J (ed) (2003) *Constitutional Development in East Africa for Year 2001* pg 120.

²³⁰ Ingham, K (1963) "A History of East Africa" as cited by Mvungi, S.E.A (ed), op. cit. pg 69.

²³¹ Oloka-Onyango, J (ed) (2003), op. cit. pg 120.

²³² Ibid.

²³³ Mvungi, S.E.A (ed), op. cit. pg 71.

See also Busse, M, et al "Trade effects of the East African Community" (2005) 6 *The Estey Centre Journal of International Law and Trade Policy* pg 4 where it is stated that the EAHC was established with the purpose of controlling the public service in the British colonies of Kenya and Uganda, and the British mandated territory of Tanganyika.

occupation and rule. The Order-in-Council that established the High Commission was not a treaty, but just subsidiary legislation made by the Crown in England under the Foreign Jurisdiction Act.²³⁴ Although the proposal to establish the High Commission is said to have been accepted by the legislatures of the three territories, this was important only for the consumption of the British Parliament since for the people of the territories the colonial legislative organs were not legitimate law making organs. Their members were appointees of the Governor instead of the elected representatives of the people, and had no actual legislative powers since as dependencies; Tanganyika, Uganda and Kenya were under the legislative jurisdiction of the British Parliament.²³⁵

EAHC consisted of the Governors of Kenya, Uganda and Tanganyika, a central legislature, an executive, together with various advisory boards. It was chaired by the Governor of Kenya. While this time around legislative competence was given to the Commission, no judicial body was contemplated. The functions of the High Commission related mainly to administrative duties. The Order-in-Council nevertheless introduced some rationalisation into the system of East African co-operation.²³⁶ The established Legislative Assembly, presided over by a Speaker, consisted of seven *ex-officio* members who were officers of the Commission, one official member nominated by the Governor of each territory, 13 unofficial members, one member elected by the unofficial members of the Legislative Councils (LEGCOs) in each territory, one African and one Indian member appointed by the Governor of each territory, and one Arab member elected/appointed by the High Commission.²³⁷

The Legislative Assembly had powers to make laws, that were directly applicable in the jurisdictions of the three territories, relating to all matters

²³⁴ Mvungi, S.E.A (ed), op. cit. pg 70.

²³⁵ Ibid.

²³⁶ Ojienda, T.O, op. cit. op. cit. pg 18.

²³⁷ The East African (High Commission) Order-in-Council, 1947 in the Report of the High Commission, 1949 as cited in Mvungi S.E.A (ed), op. cit. pg 71.

listed in the Order-in-Council,²³⁸ but the High Commission had powers to veto, scrutinise and allow the legislation so made. Furthermore, the High Commission could, without being invited, advise on all matters listed in the Order-in-Council provided this was deemed to be expedient and in the interest of public order, public faith and good government. The High Commission could also legislate upon advice of the legislatures of the three territories.²³⁹

EAHC was successful in its implementation of its objectives and by the time the three East African territories approached independence, the services rendered by the High Commission were enormous. Despite the success,²⁴⁰ the High Commission remained an instrument of colonial domination and exploitation, and the concentration of most of the High Commission's activities in Kenya became a bone of contention in the post-independence period, and finally led to the collapse of the regional co-operation.²⁴¹ The common market system within East Africa favoured the Kenyan industrial base which was able to export considerably more to the neighbouring countries than vice versa; this led to marketing difficulties for Ugandan and Tanzanian products, and to bitter complaints.²⁴²

²³⁸ 18 items were listed in the Order in Council as areas of legislative competence of the Legislative Assembly. These include: appropriations providing for the expenditures of the High Commission and the common services, civil aviation, customs and excise excluding tariffs, income tax excluding tax rates and allowances, Lake Victoria fisheries, Makerere College (effective from 1st August, 1948), meteorological services, pensions and emoluments of service staff, posts, telegraphs and radio communication, railways, harbours and inland water transport (effective from 1st May, 1948), loan ordinance for self-contained services, statistics and census, Royal Technical College (effective from 1949), peace, public order and good government in the territories.

²³⁹ Mvungi, S.E.A (ed), op. cit.pg 71.

²⁴⁰ See also Mukandala, R (1999) "Political co-operation" as cited in Apuuli, K.P "Fast tracking East African Federation: asking the difficult questions" pg 5 where it is stated that during the pre-independence period, from 1900 to 1960, over 40 different East African institutions in research, social services, education/training and defence, among others were established or strengthened. Several commissions were also appointed to explore the possibilities of the East African Federation, including the Ormsby-Gore Commission in 1924, the Hilton-Young Commission in 1927, and the Joint Committee of both the Houses of the UK Parliament in 1931 < <http://www.deniva.or.ug/files/articles-askingthedifficultquestions.doc> > accessed on 28 April 2009.

²⁴¹ Ibid.

²⁴² Mwase, N (1979) "The East African Community: a study of regional disintegration" as cited in Oloka-Onyango, J (ed), op. cit. pg 121.

3.3 POST-INDEPENDENCE INSTITUTIONS

3.3.1 THE EAST AFRICAN COMMON SERVICES ORGANISATION (EASCO)

The independence of the East African countries led to the assumption of power by African governments. Competition arose over the management of economic affairs, as Tanzania and Uganda felt that they stood to lose more than they gained, resulting in tensions within the Commission. While all three countries made significant progress towards self-government, the institutional framework of the High Commission failed to keep pace with these changes, resulting in some incongruence.²⁴³

In June 1961 delegations from the United Kingdom, Kenya, Uganda, Tanganyika and an observer from Zanzibar assembled in London to deliberate on the future of the High Commission. They agreed to preserve the activities of the High Commission under a restructured organisational framework taking into account the impending achievement of statehood and independence of the three territories.²⁴⁴ The High Commission was to be replaced by an East African Authority consisting of the Governors of Kenya and Uganda and the President of Tanganyika²⁴⁵. The new organisation was named the East African Common Services Organisation (EASCO).²⁴⁶ Later the Agreement was amended to include the Presidents of Kenya and Uganda when these two countries became independent.²⁴⁷

While emphasis was still laid on the economic benefits of co-operation, political leaders assumed the functions of colonial administrators and bureaucrats, hence making EASCO more political than its predecessors.²⁴⁸ However, the EASCO was a great improvement on EAHC. It created five Ministerial Committees, working directly under the Authority, in the fields of communication, finance, commercial and industrial co-operation, social and

²⁴³ Ojienda, T.O, op. cit. pg 18.

²⁴⁴ Mvungi S.E.A (ed) (2002), op. cit. pg 72

²⁴⁵ Tanganyika became independent on 9th December 1961.

²⁴⁶ Mvungi, S.E.A (ed), op. cit.pg 72.

²⁴⁷ Uganda became independent on 9th October 1962 and Kenya on 12th December 1963. Zanzibar was included in EASCO by Amendment no.2 to the EASCO Agreement, 1964.

²⁴⁸ Ojienda, T.O, op. cit.pg 18.

research services, and labour.²⁴⁹ Furthermore the EASCO Agreement established an East African Court of Appeal to hear appeals from the High Courts of the three territories. EASCO could enter into an agreement with the United Kingdom under which the East African Court of Appeal could hear cases of other territories, such as Aden, St. Helena, Seychelles and Somaliland. This transferred the powers of the Privy Council to hear appeals from the three territories to the Court of Appeal of East Africa. The powers of the East African Legislative Assembly were increased so that it could legislate on the 27 matters listed in the Annex to the EASCO Agreement.²⁵⁰

EASCO was also responsible for customs and income tax, postal services, railways, East African Airlines, the University, and other services including tsetse fly control and research. Most important was the East African Currency Board which issued the common currency, the East African schilling.²⁵¹ These services were known as common services. EASCO managed to establish itself as a very competent regional integration organisation with unprecedented supra-national powers. The free movement of goods, services, persons and capital was guaranteed, with a single currency ensuring a stable financial market without convertibility impediments.²⁵²

It is, however, significant to note that Kenya remained at all times the seat of nearly all the integration institutions.²⁵³ One relevant outcome of this was sharply contrasting levels of economic development, Kenya exhibiting a conspicuous head start in nearly all the key indicators, with Tanzania trailing behind her two 'cousins'. Whether within EAHC or EACSO, one member continued to enjoy a relatively superior level of economic development (and infrastructure), thus attracting more investments, with the ultimate result of not merely becoming a "principal beneficiary" of the integration scheme but the 'dominant' factor.²⁵⁴

²⁴⁹Mvungi, S.E.A (ed), op. cit. pg 72.

²⁵⁰Ibid.

²⁵¹Shivji, I.G (ed) (2004) *Constitutional and Legal System of Tanzania: A Civics Sourcebook* op. cit. pg 135.

²⁵²Mvungi, S.E.A (ed), op. cit. pg 73.

²⁵³Oloka-Onyango, J (ed), op. cit. pg 120.

²⁵⁴Oloka-Onyango, op.cit.pg 122.

The issue of inequitable distribution was, however, partly settled through the Raisman Commission, which recommended that each territory pay into a distributable pool a fixed percentage of the customs and excise duties, as well as corporate income taxes, which it collected. Since Kenya was economically doing better than the other two countries, it had to pay a proportionately larger percentage of the pool proceeds. The distributable pool favoured Uganda and Tanzania; therefore, this solution was not satisfactory.²⁵⁵

Although the internal institutional and investment imbalances in the East African common market as a result of colonial policies began to bear on EASCO affairs, these were immediately palliated by the radical movement towards an East African Federation which the political leadership of the three territories was offering.²⁵⁶ The idea of a political federation, with Tanzania as its strongest advocate,²⁵⁷ did not go down well with the other two. In 1963 the issue nearly broke EASCO itself. As a matter of fact, the East African Navy had already been broken up, Uganda had withdrawn from the East African Tourist Travel Association and Tanzania was threatening to withdraw from the market.²⁵⁸ Ultimately the three governments failed to agree on setting up a Federation and gradually went their own way, splitting all the common services. The Common currency was probably the most serious loss as two of the successor currencies rapidly inflated, and eventually the Kenyan currency too. The currency collapsed in value when Tanzania adopted socialism in 1967 and nationalised all its banks. Customs posts were set up

²⁵⁵ Okoth, A, op. cit. pg 334.

²⁵⁶ Mvungi S.E.A (ed), op. cit. pg 73.

²⁵⁷ See also Nyerere, J.K (1966) *Freedom and Unity* pg 90 where the author says that the balkanisation of Africa is a source of weaknesses to the continent. The forces of imperialism and neo-imperialism will find their own strength in this basic weakness of the continent. He advocated a federation of East Africa as one of the solutions to undo part of the harm that was already done by the balkanisation of the continent.

²⁵⁸ Okoth, A, op. cit. pg 334.

See also Nyirabu, M (2005) "Lessons from the East African Community of 1967-1977" as cited in Apuuli, K.P, et al, op. cit. pg 7 where it is stated that from its birth EASCO was faced with serious problems, predominantly trade imbalances and unequal distribution of benefits. Attempts were made to address the imbalance by signing the Kampala Agreement in 1964. The Agreement sought to decrease trade deficit and industrial imbalance. It was never implemented partly because Kenya refused to ratify it.

on roads which previously had experienced free trade, turning ordinary traders into smugglers.²⁵⁹

Following the dissolution of the East African Currency Board, some Partner States started introducing measures aimed at individual rectification of the existing imbalances in the economic structure of EASCO by introducing certain restrictions on trade. This led to immediate reactions in the common services, and a commission was appointed under a United Nations expert, Professor Kjeld Phillip of Denmark, to study the problems facing EASCO. Professor Phillip submitted a far reaching Report which made proposals for restructuring the EASCO into an economic community.²⁶⁰

3.3.2 The East African Community (EAC)

On the basis of the Report by Professor Phillip, on 6 June 1967 Presidents Jomo Kenyatta (Kenya), Julius Nyerere (Tanzania) and Milton Obote (Uganda) signed the Treaty for East African Co-operation²⁶¹ that established the East African Community (EAC), also referred to as 'the Community'. The Treaty came into effect six months later on 1 December 1967.²⁶² The Community was essentially a carryover into the independence era of former colonial arrangements²⁶³ as it 'took over' nearly the entire range of joint services belonging to the erstwhile EASCO. These in turn may be classified into two groups: East African Community Corporations, and General Fund Services. To the former belonged such services as railways, posts and telecommunications, airways and cargo handling services. The latter included a far broader category of services, ranging from research and training institutions to the Auditor-General's Department.²⁶⁴

Structurally the Treaty established the following organs: the East African Authority (commonly referred to as 'the Authority'), the East African Legislative Assembly, the East African Ministers, the East African Community

²⁵⁹ Shivji, I.G (ed), op. cit. pg 135.

²⁶⁰ Mvungi, S.E.A (ed), op. cit. pg 75.

²⁶¹ For purposes of clarity it may be referred to as 'the former Treaty'

²⁶² Okoth, A, op. cit. pg 334.

²⁶³ Clapham, C, et al (eds), op. cit. pg 59.

²⁶⁴ Oloka-Onyango, J (ed), op. cit. pg 124.

Council, and the Common Market Tribunal.²⁶⁵ The East African Authority was the highest decision-making, supervisory and controlling organ of the Community, consisting of the Heads of State of the three Partner States.²⁶⁶ The Authority was immediately assisted by the East African Ministers who were appointees of the Heads of the State of the three Partner States, provided that, in appointing an East African Minister, the appointing authority was required to ensure that his appointee was a person who qualified as a voter according to the electoral laws of their country and was not a member of their country's cabinet, at the time of appointment.²⁶⁷

The proviso to bar East African Ministers from being members of their home country's cabinet was included in order to ensure that an East African Minister is independent of national politics of their country. The Committee of Ministers, permanently resident in Arusha, Tanzania, the newly designated headquarters of the Community, was primarily tasked to serve as an advisory body to the Authority in respect of day to day management and decision making.²⁶⁸ Each appointed Minister enjoyed the status of a Cabinet Minister in his or her respective home government, thereby ensuring robust linkages between the Community in Arusha and the Governments of the Partner States in Dar-es-Salaam, Kampala and Nairobi. The East African Ministers further worked in further close consultation with two other organs- the East African Legislative Assembly (EALA), on the one hand, and the five Ministerial Councils, on the other. They sat along with their respective Deputies in the EALA and were entitled to also sit on the Councils.²⁶⁹

The Treaty establishing the Community did away with the committee system employed by EASCO and introduced a council system instead. The five councils established by the Treaty were: the Common Market Council, the Communications Council, the Economic Consultative and Planning Council, the Finance Council, and the Research and Social Council. Except for the

²⁶⁵ Article 3 of the former Treaty as cited in Mvungi S.E.A (ed), op. cit. pg 76.

²⁶⁶ Articles 46, 47 and 48 of the former Treaty as cited in Mvungi, S.E.A (ed), op. cit. pg 76.

²⁶⁷ Article 49 of the former Treaty as cited by Mvungi S.E.A (ed), op. cit. pg 76.

²⁶⁸ Oloka-Onyango, J (ed), op. cit. pg 125.

²⁶⁹ Ibid.

Communications Council and the Finance Council, which had only six members (namely, the three East African Ministers and one other National Minister from each Member State), the other three Councils had 12 members of whom three were the East African Ministers and three National Ministers. The functions of each Council were set out in the Treaty, and these included the carrying out of the specific duties and functions stipulated in the Treaty for their field or area.²⁷⁰ The Secretariat in Arusha co-ordinated the work of the Councils.

The legislative body, previously the Central Legislative Assembly was re-named the East African Legislative Assembly. It was to consist of nine members appointed by each partner state, a Chairman, the Secretary-General, the Counsel to the Community, and six newly created ministers, that is, three East African Ministers and three Deputy Ministers.²⁷¹ The EALA, established under the Treaty, was in the same way and with similar powers as it had been in the EASCO Agreement. Other than the changes in the composition of the Assembly, the actual method of recruitment of its members remained by appointment rather than by election. This left the Community in the same situation of isolation and alienation from the mainstream of communal or grassroots politics as was the case with its predecessor, the EASCO.²⁷²

The Partner States had equal representation in the Assembly, viz., one East African Minister, his Deputy (if any), and nine members. The tenure of the legislature was perpetual but the members of the Assembly served until the legislative period of the Government that appointed them had met after it was next dissolved. The Assembly was vested with powers of enacting the laws of the Community in the areas of Community jurisdiction. The Acts of EALA were effected by means of Bills passed and assented to by each member of the Authority. Any Act so passed and assented to became directly enforceable law in the domestic jurisdiction of the Partner States, but the

²⁷⁰ Mvungi S.E.A (ed), op. cit. pg 77.

²⁷¹ Okoth, A, op. cit. pg 335.

²⁷² Mvungi S.E.A (ed), op. cit. pg 77.

members of the Authority, jointly or severally, had powers to withhold assent. If withholding of assent persisted for more than nine months, the Act lapsed.²⁷³

The Treaty provided also for a two tier dispute settlement mechanism, namely, the Court System and the Tribunal System, under Articles 80 and 81 respectively. The Court System provided for an apex court, the Court of Appeal for East Africa, as had been established in the EASCO Agreement. The jurisdiction of the Court of Appeal for East Africa was to hear appeal cases from the High Courts of the three Partner States as provided for by the laws of each Partner State. This clearly created an apex court with roots in the domestic legal systems of the Partner States. The impact of such a system was to make the work of harmonisation of the laws in East Africa easier, since all the Partner States adhere to the common law tradition especially with regard to the doctrines of precedent and *stare decisis*.²⁷⁴

The Tribunal System included the East African Industrial Court, established by Article 84 of the Treaty, to deal with pensions and trade disputes, and the Common Market Tribunal, established by Article 32 of the Treaty, to deal with disputes arising from the Common Market established and provided for under Chapters II to XI of the Treaty.²⁷⁵ The Court of Appeal for East Africa rotated from one Partner State to another, hearing appeals from their respective High Courts.²⁷⁶

One fundamental change introduced by the Treaty was the re-location from Nairobi to Dar-es-Salaam and Kampala of the headquarters of a number of Community Corporations.²⁷⁷ The Treaty decentralised the location of the institutions of the Community so that there was a balance of interests of Community affairs. Thus, in terms of Article 84 of the Treaty, the headquarters of the Community, the Tribunal, the Secretariat and the East

²⁷³ Ibid.

²⁷⁴ Mvungi, S.E.A, (ed) op. cit. pg 78.

²⁷⁵ Ibid.

²⁷⁶ Okoth, A, op. cit. pg 335.

²⁷⁷ Oloka-Onyango, J (ed), op. cit. pg 125.

African Harbours were located in Tanzania, the East African Development Bank and the East African Posts and Telecommunications were located in Uganda, and the East African Railways and the East African Airways were located in Kenya.²⁷⁸

Another significant change brought about by the Treaty was the distribution of industries and the transfer of taxes. As a measure to achieve a more even distribution of industries in East Africa, the Treaty recommended the transfer of taxes. These were import duties which the three Partner States would impose on each other's industrial products. It was hoped that the growth of the individual national industries would be stimulated.²⁷⁹

It has been observed that the most significant aspects of the Treaty were the combining of the common services inherited from EASCO, and the transformation of the till then informal Common Market. Thus, the informal Common Market acquired legal foundation under Articles 86 and 87. However, it has also been observed that the fact that of this formalisation was not necessarily reflective of the organisational effectiveness of EAC. The real test of the latter was the readiness of the Partner States to implement measures establishing the Common Market.²⁸⁰

3.3.3 THE COLLAPSE OF THE FORMER EAC AND THE CHALLENGES OF REGIONAL INTEGRATION

Despite much progress being recorded by the former EAC, it faced numerous challenges which in the end proved insurmountable. First, there was lack of political goodwill among the Partner States to deal in a spirit of unity and with an awareness of interdependence with the inevitable difficulties of international co-operation between poor countries.²⁸¹ Personality problems was another challenge. In Uganda the government was overthrown by General Amin in January 1971, and the Heads of State ceased to meet, as

²⁷⁸ Mvungi S.E.A (ed), op. cit. pg 79.

²⁷⁹ Okoth, A, op. cit. pg 336.

²⁸⁰ Mvungi S.E.A (ed), op. cit. pg 79.

²⁸¹ Statement by Julius Nyerere, Former President of Tanzania, speaking as Chairman of the Heads of State Meeting at the signing ceremony of the Mediation Agreement, May 14, 1984 in Arusha as cited in Oloka-Onyango, J (ed), op. cit pg 126.

President Nyerere of Tanzania refused to meet with General Amin.²⁸² This completely crippled the Authority which consisted of the three Presidents. Nyerere, who at the time was the Chairman of the Authority, was unwilling to convene any meeting to discuss the Community's problems.²⁸³

The joint Corporations began to break up as some interests in Kenya, among other things, undermined common services. The result was three weak economies where there had previously been a relatively strong regional economy. The airline and railways suffered by losing their common maintenance and planning.²⁸⁴ The last blows that brought the Community to its final demise were delivered by the decision of the East African Airways to suspend the less profitable routes, namely, routes serving the weaker Partner States, Tanzania and Uganda, and the order by the Kenyan Government grounding the East African Airways and establishing in its place a national airline. The decision to suspend certain less profitable routes interfered with the interests of the weaker Partner States, whereas the grounding of the East African Airways and the establishment of Kenya Airways amounted to a total breach of the Treaty.²⁸⁵

The ideological differences of the economic systems among the three countries was another key factor that contributed to the collapse of EAC. While Kenya had continued with the inherited liberal and private economy, Uganda and Tanzania had adopted state run economic system.²⁸⁶ The difference between Kenya and Tanzania was that Kenya wanted a more open market than Tanzania. However, the Tanzanians feared that a completely common and open market would favour Kenya whose manufacturing and agricultural sectors were more advanced. Tanzanian industries were in their infancy and Tanzania wanted conditions that would protect them. As a result of this economic imbalance and ideological differences,²⁸⁷ Tanzania closed

²⁸² Shivji I.G (ed), op. cit. pg 135.

²⁸³ Okoth, A, op. cit pg 336.

²⁸⁴ Shivji I.G (ed), op. cit pg 135.

²⁸⁵ Mvungi S.E.A, (ed), op. cit. pg 80.

²⁸⁶ Shivji I.G (ed), op. cit pg 136.

²⁸⁷ See also Mair, S (2000) "Regionale integration und cooperation in Afrika sudlich der Sahara: fallstudie East African Co-operation" as cited in Busse, M, et al, op. cit. pg 4 where it is observed that from the beginning

her common border with Kenya in 1977.²⁸⁸ The opposing political economies conducted by socialist Tanzania and free market Kenya, coupled with political tensions between Tanzania and Uganda, led to the demise of the regional group and the eventual abandonment of the EAC.²⁸⁹

Forces of economic nationalism took over. Each of the Partner States effectively withdrew from the common currency arrangement. This played havoc with inter-state remittances, leading to a further decline in intra-East African trade through restrictions on trade and financial services, thus undermining the bedrock of the Common Market system.²⁹⁰ There were other economic problems since various compensatory and corrective measures in the Treaty did not prove satisfactory to all concerned. Kenya became particularly unhappy with Uganda and Tanzania for imposing transfer taxes to their advantage. The provision that partners would levy import duties on goods from each other's industries worked against Kenya's interests as she was selling more goods to the partners. Uganda and Tanzania had no problem with this arrangement as they were selling less to Kenya.²⁹¹ Furthermore, lack of co-ordination of the policies of industrialisation in the Partner States made the situation worse, for when these countries began to produce the same goods, the spirit of the Common Market was endangered.²⁹²

probably the most important problem threatening the existence of the former EAC was the industrial dominance of Kenya in the region, leading to growing deficits for Tanzania and Uganda in their trade. The persistence of trade imbalances among the Partner States was, therefore, one of the main reasons for the collapse of former EAC.

²⁸⁸ Okoth, A, op. cit pg 337.

²⁸⁹ Fanta, E, op. cit. pg 11.

²⁹⁰ Oloka-Onyango J (ed), op. cit pg 127.

See also Lanjouw, G.J, op. cit. pg 73 where it is stated that difficulties were also caused by the debt problems of the developing countries, which on several occasions led to trade restrictions in order to combat the shortage of foreign exchange. The restrictions were often also applied to integration partners.

²⁹¹ Okoth, A, op. cit. pg 337.

²⁹² Ibid.

See also Lanjouw, G.J, op.cit. pg 73 where the author observes that the most fundamental problem concerning regional integration between developing countries is the tension which has often existed between an import substitution policy and the establishment of regional trade policy. Import substitution creates vested interests in the import-competing sector which are difficult to overcome, even if it is 'only' a question of regional free trade.

Other factors that precipitated the collapse of EAC were: lack of strong participation of the private sector and civil society in co-operation activities; the continued disproportionate sharing of benefits of the Community among Partner States due to the differences in their levels of development; and lack of adequate policies to address this situation.²⁹³ Lastly, there were other institutional shortcomings, too, which were not unrelated to the inability of the Authority, the supreme policy making body, to meet. At the centre of these institutional problems were the influential East African Ministerial Committees and Councils. If any meetings were ever held, decisions took inordinately long to be reached or matters were simply left in abeyance. As a consequence individual Partner States found themselves intervening directly in the day to day operations of what was designed to be an autonomous institution with distinct legal personality. The *coup de grace*, however, came in June 1977 when Partner States withheld approval of the General Fund Services budget for the year beginning 1 July 1977.²⁹⁴

The Community was thus afflicted by numerous economic, ideological and administrative difficulties.²⁹⁵ It finally collapsed in 1977. Kenya disbanded all the Community operations and replaced them with national services. Tanzania and Uganda did the same within their borders.²⁹⁶

3.4 REVIVAL OF THE COMMUNITY

3.4.1 THE MEDIATION AGREEMENT

In accounting for the revival of institutionalised regional co-operation in East Africa, which efforts culminated in the signing of the 1999 Treaty for the Establishment of the East African Community, one cannot ignore the Mediation Agreement of 1984. Amidst intense mutual acrimony following the collapse of the former Community in 1977, Tanzania, Kenya and Uganda

²⁹³ Shivji I.G (ed), op. cit pg 136.

²⁹⁴ Umbritch, V.H (1988) "Multilateral Mediation: Practical Experience and Lessons" as cited by Mvungi S.E.A (ed), op. cit. pg 127.

²⁹⁵ See Clapham, C, et al (eds), op. cit. pg 61 where it is observed that the collapse of EAC, as a result partly of structural economic problems (notably the centrality of Kenya), partly of ideological disputes (notably as between capitalist Kenya and socialist Tanzania), and partly of differences between the leadership of the three member states that were exacerbated by the overthrow of President Obote by General Amin in Uganda, illustrates the difficulties of regional integration.

²⁹⁶ Okoth, A, op. cit pg. 339.

were still able to 'agree to disagree'. They did so in the form of a Treaty, the Agreement for the Division of Assets and Liabilities of the Former East African Community (popularly referred to as the Mediation Agreement of 1984) effected by a Swiss diplomat, Ambassador Victor Umbricht, after seven years of relentless work.²⁹⁷ Through this Mediation Agreement, the Partner States divided among themselves the assets and liabilities of the fallen Community, and so marked the end of co-operation among them. One positive element of that Mediation Agreement was a provision for possibility of pursuit of co-operation among these countries in future.²⁹⁸ The pertinent and innocuous provision, Article 14.02, of the Mediation Agreement stated that States agreed to explore and identify further areas for future co-operation and to work out concrete arrangements for such co-operation.²⁹⁹

3.4.2 THE PERMANENT TRIPARTITE COMMISSION (PTC)

This provision, popularly known as the 'Umbricht Clause', although without a timeframe, facilitated a meeting of East African Heads of State in Harare, Zimbabwe, at a satellite meeting within the Commonwealth Heads of Government and States Meeting in October 1991.³⁰⁰ This set the pace for a series of actions that culminated in the signing of the Agreement for East African Co-operation on 30 November 1993.³⁰¹ The PTC, created as a co-ordinating body with decision making powers, consisted of Ministers responsible for agreed areas of co-operation and was headed by the Ministers responsible for regional co-operation.³⁰²

²⁹⁷ Oloka-Onyango, J (ed), op. cit. pg 131.

²⁹⁸ Report of the 6th Summit of the East African Community Heads of State, AICC, Arusha, Tanzania, November 26th, 2004 (Ref: EAC/SHS/06/2004) pg 11.

²⁹⁹ Oloka-Onyango, J (ed), op. cit. pg 131.

³⁰⁰ See Report of the 6th Summit of EAC Heads of State, op. cit. pg 11 where it is stated that, at that meeting, the Heads of State agreed on the revival of East African co-operation. This meeting was soon followed by a meeting of the same Heads of State in Nairobi, Kenya, in November 1991, at which they issued a formal communiqué to revive the co-operation and set up a Committee of Ministers of Foreign Affairs to work out the details.

³⁰¹ See Report of the 6th Summit of EAC Heads of State, op. cit. 11 where it is reported that the Agreement established the Permanent Tripartite Commission (PTC) to steer the process of the new co-operation. This process moved on to the establishment of a Secretariat in Arusha, Tanzania, on 14 March 1996. Unique to this Secretariat was the emphasis on its "small and lean nature", leaving most of the activities to take place at the Partner State level.

³⁰² Oloka-Onyango, J (ed), op. cit. pg 133.

3.4.3 THE NEW EAC

Recognising the need to consolidate regional co-operation, the East African Heads of State, from Kenya, Tanzania and Uganda, at their second Summit in Arusha on 29 April 1997, directed the PTC to start the process of upgrading the Agreement³⁰³ into a Treaty.³⁰⁴ The Treaty for the Establishment of the East African Community was signed in Arusha on 30 November 1999.³⁰⁵ The Treaty entered into force on 7 July 2000 following the conclusion of the process of its ratification and deposit of the Instruments of Ratification with the Secretary-General by all the three Partner States. Upon the entry into force of the Treaty, the East African Community came into being.³⁰⁶ The official launching marked the culmination of a process that started way back in 1993 and which was boosted by the business community which no doubt takes a more strategic view of the East African market as a whole.³⁰⁷ The Republics of Burundi and Rwanda acceded to the Treaty on 18 June 2007³⁰⁸ and became full members of the EAC with effect from 1 July, 2007.³⁰⁹ The accession of the two countries had been delayed by some years until the customs union was in place.³¹⁰ Arusha, Tanzania, as per the Treaty,³¹¹ serves as the headquarters of the Community. The Secretary-General (SG) is mandated to conclude agreements relating to privileges and immunities to be accorded by Governments of Partner States in whose territory the headquarters or offices of the Community will be situated.³¹²

³⁰³ The Agreement Establishing the Permanent Tripartite Commission for East African Co-operation.

³⁰⁴ See "About EAC: History from Co-operation to Community" < <http://www.eac.int/index.php/about-eac/eac-history.html> > accessed on 6 October 2008.

³⁰⁵ After a treaty making process, which involved negotiations among the Partner States, as well as wide participation of the public, was successfully concluded within three years.

³⁰⁶ Ibid.

³⁰⁷ Shivji I.G (ed), op. op. pg 136.

³⁰⁸ Deya, D, "Rule of Law and Independence of the Judiciary in the East African Region" (2007)1 *The Tanzania Lawyer* pg 53.

³⁰⁹ See "Welcome to EAC" < <http://www.eac.int/index.php/about-eac.html> > accessed on 10 September 2008.

³¹⁰ Braude, W, op. cit. pg 4. The author states that this was done because existing members felt that the Customs Union Protocol should not be open to major re-negotiation by new comers. The Treaty has a formal procedure for accession and rules of procedure for entry have been drawn up which are verified by country visits and scrutiny of indicators and statistics.

³¹¹ Article 136 of the Treaty. The provision also allows establishment of such offices of the Community in the Partner States and elsewhere as the Council may determine.

³¹² See also Van Krieken, P.J, et al (eds) (2005) *The Hague: The Legal Capital of the World* pg 65 where it is stated that as far as substance of the existing headquarters' agreements is concerned, *prima facie* they generally cover the more or less classic privileges and immunities for international organizations and their staff, such as, the inviolability of the premises and of archives of the

3.5 CONCLUSION

The chapter has traced the background to the integration process in East Africa which is rooted in the historical commonalities of the countries constituting the region. It has been shown that the integration process took a more advanced, mainly economic, form during the period of colonial domination, to serve the interests of colonial rulers. The chapter has indicated that a series of organisations emerged during this period to manage the process which was later taken over by African governments upon attaining independence in the early 1960s, culminating in the formation of the former East African Community in 1967. However the Community collapsed in 1977 due to a number of reasons including ideological differences, personality problems and institutional weaknesses. And it has been shown that it took the region twenty years to revive the Community.



organization; immunity from jurisdiction and from execution; freedom of communication; the organization is exempt from direct taxation; salaries and emoluments of staff members are exempt from income tax; settlement of disputes through arbitration; and, no parliamentary approval of the agreement is required.

See also the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.

CHAPTER FOUR

INSTITUTIONAL FRAMEWORK OF THE EAST AFRICAN COMMUNITY

4.1 OBJECTIVES OF THE COMMUNITY (EAC)

The EAC (also referred to as 'the Community') was established with lofty objectives³¹³ of developing policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security, and legal and judicial affairs, for their mutual benefit.³¹⁴

The achievement of the above stated objectives were to be governed by the Fundamental Principles³¹⁵ of mutual trust, political will, and sovereign equality; peaceful co-existence and good neighbourliness; peaceful settlement of disputes; good governance; equitable distribution of benefits; and co-operation for mutual benefit.³¹⁶

4.2 THE INSTITUTIONAL FRAMEWORK

4.2.1 BACKGROUND

The Treaty establishes various organs of the Community.³¹⁷ These are the Summit; the Council; the Co-ordination Committee; the Sectoral Committees; the East African Court of Justice (EACJ); the East African Legislative Assembly (EALA); and the Secretariat. The institutions of the Community³¹⁸ shall be such bodies, departments and services as may be established by the Summit.³¹⁹ Thus, the focus of this chapter shall be on the organs, established

³¹³ Article 5.1 of the treaty.

³¹⁴ Article 5.2 of the Treaty requires that, in fulfilment of these objectives, the Partner States undertake to establish among themselves a Customs Union, a Common Market, subsequently a Monetary Union, and ultimately a Political Federation, in order to achieve accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefits of which would be equitably shared.

³¹⁵ Article 6 of the Treaty.

³¹⁶ The Fundamental Principles are complimented by the Operational Principles as provided under Article 7 of the Treaty. The enshrined Operational Principles guide the practical achievement of the objectives. These are: people-centred and market-driven co-operation; provision of an adequate and appropriate enabling environment; establishment of an export oriented economy; subsidiarity; variable geometry; equitable distribution of benefits; complementarity; and asymmetry

³¹⁷ Article 9.1 of the Treaty.

³¹⁸ Article 9.2 of the Treaty.

³¹⁹ However, under Article 9.2 of the Treaty, the East African Development Bank (EADB), the Lake Victoria Fisheries Organisation (LVFO), and surviving institutions of the former EAC are deemed to be institutions of the Community, and shall be designated and function as such.

under Article 9(1) of the Treaty, which are responsible for the overall management and co-ordination of the integration process.³²⁰

4.2.2 THE SUMMIT

4.2.2.1 STRUCTURE

The Summit consists of the Heads of State or Government of the Partner States.³²¹ If a member of the Summit is unable to attend, he may, after consultation with other Summit members, appoint a Minister of Government to attend the meeting.³²² This kind of composition gives the Summit an intergovernmental character.³²³

4.2.2.2 FUNCTIONS

The role of the Summit is set out in Article 11 of the Treaty. The Summit is mandated to give general direction and impetus to the development, and achievement of the objectives, of the Community. Other functions include: to consider the annual progress reports and such other reports submitted by the Council; to review the state of peace, security and good governance within the Community and the progress achieved towards the establishment of a Political Federation; and other functions as conferred upon it by the Treaty.

4.2.2.3 WORKING METHODS

Under Article 11.4 the Summit may delegate the exercise of any of its functions, subject to any condition it may think fit to impose, to a member of the Summit, to the Council or to the Secretary-General.³²⁴ However, Article 11.9 of the Treaty excludes delegation of certain functions and powers.³²⁵

The Summit meets at least once every year and may hold extraordinary

³²⁰ See Braude, W, op. cit. pg 143 where it is stated that integration requires constant institutional and policy co-ordination. Such co-ordination is the central nervous system of any regional economic community initiative in that it provides pathways along which decisions flow.

³²¹ Article 10.1 of the Treaty.

³²² Article 10.2 of the Treaty.

³²³ Peterson, J, et al, op. cit. pg 21

³²⁴ Under Article 11.6 of the Treaty, an Act of the Community may provide for the delegation of any powers, including legislative powers, conferred on the Summit by the Treaty or any Act of the Community, to the Council or to the Secretary-General.

³²⁵ These are: the giving of general direction and impetus; the appointment of judges to the EACJ; the admission of new Members and granting of observer status to foreign countries; and assent to Bills.

meetings at the request of any of its members.³²⁶ The office of the Chairperson of the Summit is held on a rotational basis for one year. In terms of Article 12.3 of the Treaty, the decisions of the Summit are made by consensus.³²⁷

4.2.2.4 ANALYSIS

(i) The frequency of Summit meetings

The number of meetings of the Summit provided for by the Treaty, that is, one ordinary meeting every year, and any other extraordinary meetings, is shockingly insufficient. For a regional organisation that has set lofty ambitions of ultimately forming a political federation, given the fact that it is only at the stage of a Customs Union which is beset by a series of problems, the fact that it will be engaged in (a lot of) meetings to negotiate the remaining stages of integration, and bearing in mind that it is now locked in protracted negotiations for the establishment of a Common Market, one would tend to think that the Treaty should have provided a sufficient number of ordinary meetings, say four per year, which would have compelled the Summit to meet fairly regularly to iron out problems of the Community and hence help to enhance and deepen the integration process. Sticky issues which cannot be resolved by the Council have to be sent to the Summit, which is the ultimate source of authority, for reconsideration and resolution.

It is reasonable to assume that, in view of their other obligations, it would be impossible for heads of government to meet more frequently, on a regular basis. But, on the other hand, it is far from clear that such a limited number of meetings a year, however intense, are sufficient to deal effectively with a growing workload. Governing an increasingly complex multinational entity needs more regular and more frequent efforts.³²⁸

³²⁶ Article 12.1 of the Article.

³²⁷ Under Article 12.5 of the Treaty, the Summit is empowered to discuss business submitted to it by the Council and any other matter which may have a bearing on the Community. It determines its own procedure, including that for convening its meetings, for the conduct of the business thereat and other times, and for the rotation of the office of the Chairperson among the members of the Summit.

³²⁸ Peterson, J, et al, op. cit. pg 43.

(ii) Mode of decision making at the Summit

The decision making process of the Summit, which is wholly based on consensus, is also hardly helpful. Consensus as a decision making procedure is relatively inefficient as the Summit may frequently fail to reach decisions, creating 'leftovers', or postponing decisions to a future date.³²⁹ Given their respective stages of development,³³⁰ the Partner States may not be ready to support certain policies of the Community or even steps towards full integration at a given time.³³¹ Therefore, the exclusive use of the consensus procedure in decision making may hamper the progress of the Community.³³²

Takiramudde³³³ argues that the Achilles heels of the founding texts of the regional economic communities in Africa are the unanimity rule and the requirement for domestic ratification and incorporation of the regional instruments into the domestic laws of the Partner States. The implication is that each Partner State reserves the right to pursue an independent line of

³²⁹ Peterson, J, et al, op. cit. pg 44.

³³⁰ See *Converting LDC Export Opportunities into Business: A Strategic Response*, pg iv where four out of five EAC Partner States are categorized as LDCs. These are Burundi, Rwanda, Tanzania and Uganda. Kenya is not an LDC.

³³¹ See "e-EAC newsletter", Issue No. 2008/12, op. cit. pg 6 where it is reported that some Partner States are objecting to certain provisions of the Draft EAC Common Market Protocol being negotiated by the High Level Task Force, especially the Right of Establishment, Residence and Free Movement of Persons within the EAC Common Market as well as Transport Policy and Free Movement of Services < <http://www.eac.int/downloads/e-newsletter.html> > accessed on 15 March 2009.

³³² See "e-EAC newsletter", Issue No. 2008/12, op. cit. pg 3 where it is reported that the EAC delegation during a three day (25-27 August 2008) strategic consultative mission to Rwanda on the EAC integration process in Kigali, addressed a series of meetings attended by Cabinet Ministers, Permanent Secretaries and Senior Officers of the Rwanda government. During the launching session, the Counsel to the Community, Hon Wilbert Kaahwa, reviewed the judicial and legal challenges facing the Community. The Hon Kaahwa said the enforcement processes as well as the sanctions provided under the Treaty were weak. He quipped that the provisions were negotiated "more by diplomats than lawyers", noting that the provisions of decision making by consensus posed a great challenge to the Community's performance adding that, "How do you enforce sanctions against a Partner State where you have decision by consensus and the Partner States are expected to take sanctions against one of them by consensus?"

See also *Advisory Opinion of the Court in the Matter of a Request by the Council of the Ministers of the EAC for an Advisory Opinion (Application No.1 of 2008)*, delivered by the First Instance Division of the EACJ on 24 April 2009 pg 8 where Counsel for the Community, Hon. W. Kaahwa, quoting from *International Institutional Law* by Henry, S.G, et al, enumerated, among others, the following as shortcomings of the consensus decision making, namely, intransigence associated with determining consensus; the possibility of indiscriminate vetoing of proposals that may be favoured by the majority of Partner States leading to preservation of *status quo*; the fact that consensus may not stand the test of usefulness when the membership of the Community increases to more than five countries; and susceptibility to disruption where the group may be held hostage to an inflexible minority or individual.< <http://www.ealawsociety.org/Joomla/index.php?>.html> accessed on 28 April 2009.

³³³ Takiramudde, P (1999) "The rival strategies of SADC & PTA/COMESA in Southern Africa" as cited in Fanta, E, op. cit. pg 19.

action if it does not agree with a particular measure.³³⁴ Braude further adds that in many regional economic communities elsewhere in the world, consensus decision making often leads to slow and cumbersome processes arising from wide divergencies between member states' positions on particular matters under negotiation.³³⁵ The decision making process, in the EAC Summit as well as in the Council, should provide for three modes, namely, consensus, simple majority votes, and absolute majority votes, depending on the subject matter. Matters within the competence of the Community should be categorised accordingly. For instance, issues, such as, giving general direction, as well as admission of new Members, could be decided by consensus whereas all other issues may be divided between the other two modes.³³⁶

(iii) Chairpersonship of the Summit

The incoming Chairperson of the Summit should be required to present his programme of action during his chairpersonship, so that at the end of his tenure it can be determined whether he fulfilled the mandate as expected. For instance, by having regard to the number of decisions agreed upon, or the number of decisions implemented, during his tenure. Otherwise the rotational chairpersonship will remain just that, rotational, without tangible results at the end of the tenure. Every country should have priority areas to focus on during

³³⁴ Ibid.

³³⁵ Braude, W, op. cit. pg 23.

³³⁶ See also Application No.1 of 2008, op. cit. where the EAC Council had formally sought the Court's opinion on whether the operational principle of variable geometry, which is provided for in the Treaty, is in contradiction with the Treaty requirement that decisions of the EAC organs should be by consensus. In an opinion delivered by the Principal Judge of the First Instance Division, the Court opined that the operational principle of variable geometry is in harmony with the requirement of consensus decision making at the EAC, if applied appropriately; that the principle of variable geometry can and should be applied to guide the integration process, the requirement of consensus decision making notwithstanding; and that consensus does not necessitate unanimity of the Partner States. In other words, no Partner State has a veto power when it comes to decision making at the EAC. However, the Court stated that, consensus, as it stands in the Treaty, the Protocol on Decision Making and the Rules of Procedure of various organs of the EAC, is undefined and its application unclear. The provisions simply state 'consensus' plain and naked. It is not defined in relation to differing weight of particular decisions. It is not defined in relation to the various executive organs of the Community according to their hierarchy. Little wonder, the Court observed, the vacuum was filled by unanimity. Consequently the Court was of the opinion that the cure of this defect does not lie in equating it, from the blue, with unanimity. Rather it lies in amending the relevant instruments.

their chairpersonship.³³⁷ Leaders should be held accountable once they are at the helm of public institutions. This requirement may be inserted in a Protocol in order to be formalised. Of course, the programme of the Chairperson should be within the general development programme framework of the Community.

4.2.3 THE COUNCIL

4.2.3.1 STRUCTURE

The Council consists of the Minister responsible for the EAC affairs of each Partner State; such other Minister of the Partner State as each Partner State may determine; and the Attorney-General of each Partner State.³³⁸

4.2.3.2 FUNCTIONS

The Council is the policy organ of the Community.³³⁹ It is mandated³⁴⁰ to promote, monitor and keep under constant review the implementation of the programmes of the Community. It is entrusted with various functions, chief among them being: making policy decisions; initiating and submitting Bills to the Assembly; giving directions to Partner States and to all other organs and institutions of the Community other than the Summit, Court and Assembly; and making regulations, issuing directives as well as taking decisions.³⁴¹

³³⁷ See "e-EAC newsletter", Issue No. 2008/12, op. cit. pg 2 where it is reported that the current Chairperson of the EAC Summit, President Paul Kagame of Rwanda, during a meeting with senior officials of EAC in Kigali on 27 February 2008 unveiled his vision that would characterise his Chairpersonship. He said that, among the regional projects that would receive priority attention, and moved to advanced stages of implementation during his tenure, were the ongoing regional infrastructure development master plans in roads, railways, inland waterways, ports and harbours, as well as the Lake Victoria investment and development master plan. He said that other priority projects and programmes would: be the promotion of East Africa as a single tourist destination; the introduction of a common East African visa for tourists and business persons; intensification of the programme of elimination of non-tariff barriers (NTBs) under the ongoing programme of the EAC Customs Union; and the negotiation of the EAC Common Market. He said the immediate measures would be aimed at reducing the costs of doing business in East Africa and, on the whole, promote East Africa as a competitive single market and investment area with a thrust on tourism, trade and investments promotion.

³³⁸ Article 13 of the Treaty

³³⁹ Article 14.1 of the Treaty.

³⁴⁰ Article 14.2 of the Treaty.

³⁴¹ Other functions include: making recommendations and giving opinions in accordance with the provisions of the Treaty; and considering the budget of the Community considering measures that should be taken to promote the attainment of the objectives of the Community; making staff rules and regulations and financial rules and regulations; submitting annual progress reports to the Summit and preparing agendas for the meetings of the Summit; establishing Sectoral Councils from among its members; establishing Sectoral Committees; implementing the decision and directives of the

4.2.3.3 WORKING METHODS

By virtue of Article 15.1 of the Treaty, the Council meets twice a year, one meeting being held immediately preceding a meeting of the Summit. Extraordinary meetings of the Council may be held at the request of a Partner State or the Chairperson of the Council.³⁴² Subject to a protocol on decision making, the decisions of the Council shall be by consensus and are binding on Partner States.³⁴³

4.2.3.4 Analysis

(i) Mode of decision making at the Council

The issue of decision making by consensus by the Council is critical and should be treated as suggested for the Summit hereinabove {4.2.2.4(ii)}. The above model makes Article 15(3) of the Treaty redundant. This article is not progressive in nature as it presupposes that the Council is precluded from discussing and deciding on matters, in this case any matter, once an objection from a Partner State has been recorded on such matter. A look at the functions of the Council clearly shows that this organ is the engine of the Community, so all matters under its jurisdictions should be allowed to be discussed at this level regardless of any objections from any Partner State or its perceived outcome.

The decision making process at the level of the Council is ineffective and time-wasting, leading to diminished efficiency in the functioning of the Community. This reality is recognised even within the Community itself. In the

Summit; endeavouring to resolve matters that may be referred to it; and exercising such other powers as are conferred by the Treaty. The Council may also request advisory opinions from the EACJ, in accordance with the Treaty.

³⁴² Under Article 15.2 of the Treaty, the Council determines its own procedure for the conduct of its business and for the rotation of the office of the Chairperson of the Council. A member of the Council who is leader of his or her Partner State's delegation to the Council meeting may, in terms of Article 15(3) of the Treaty, record his or her objections to a proposal submitted for the decision of the Council and, if any such objection is recorded, the Council shall not proceed with the proposal and shall, unless the objection is withdrawn, refer the matter to the Summit for decision.

³⁴³ Under Article 16 of the Treaty, the regulations, directives and decisions of the Council are binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court, and the Assembly within their jurisdictions, and on those to whom they may be addressed under the Treaty.

EAC Development Strategy 2006-2010,³⁴⁴ it is stated that “*the Council of Ministers meets twice per annum and works on the basis of recommendations and other inputs from each of the Sectoral Committees, through the Coordination Committee. Decisions are made based on the recommendations and inputs and these decisions become the basis for implementation by the Sectoral Committees. Given that the Sectoral Committees also meet on average twice per annum, in practice it is not uncommon for the implementation of decisions to take up to eighteen months from the time recommendations are made.*”³⁴⁵

It is obvious that this kind of decision making process which moves at a snail’s pace is counter-productive and at odds with the spirit of the Preamble to the Treaty. The Preamble advocates realisation of a fast and balanced regional development through creation of an enabling environment in all the Partner States in order to attract investments and allow the private sector and civil society to play a leading role in the socio-economic development activities through the development of sound macro-economic and sectoral policies and their efficient management while taking cognisance of the developments in the world economy. This is a very unhealthy situation which clearly justifies a change in the mode of decision making within the Council and other organs and institutions of the Community.

(ii) Proposed formation of a permanent Secretariat of the Council of Ministers
Given the above exposition, it is imperative that the decision making process of the Council needs to be radically transformed. The Council should be assisted by a permanent Secretariat which is “a relatively small and ostensibly politically neutral body, providing it with vital logistical, technical

³⁴⁴ *The EAC Development Strategy 2006-2010* was adopted by the EAC Ministers Sectoral Council on Finance and Administration on 26th November 2006. It is Decision Reference No. EAC/CM13/DC 97 < http://www.eac.int/council_decision/SectorDecision.php?SectorID=FINADMIN > accessed on 3 March 2009.

See also Busse, M, et al, op. cit. pg 2 where it is contended that the *EAC Development Strategy* translates the vision of co-operation among Partner States into a comprehensive action programme including areas, such as, trade and industry, transport and communications, agriculture, environment, tourism, social and cultural activities, and fiscal and monetary policies.

³⁴⁵ *The EAC Development Strategy 2006-2010* pg 23 < <http://www.eac.int/EACDevelopmentStrategy2006-2010.pdf> > accessed on 12 February 2009.

and administrative support”.³⁴⁶ This organ, constituted with various units or sectors reflecting the portfolios under the Community, will work on a daily basis carrying out the mandate entrusted to it, and thereby ensure that the flow of the work of the Council is not inhibited by institutional requirements of an ad hoc organ in the form of the Sectoral Committees. These meet on average twice a year although the Treaty provides that they may meet as often as necessary.³⁴⁷ It then follows that, with the establishment of a permanent Secretariat, the Sectoral Committees which are established under Article 9.1(d) of the Treaty will cease to exist.

The permanent nature of the Secretariat will cure another perennial problem associated with the composition of the Sectoral Committees which undermines their quality of work, that is, the ever changing membership of those Committees. The EAC Development Strategy, on this matter, notes that “*membership to the Sectoral Committees keeps on changing as these are nominated from Partner States government departments from time to time often depending on who is available to travel or is not too busy presumably with other important commitments at the national level. This situation decreases the effectiveness of the committees especially when the members sent are not sufficiently senior to make decisions during the meetings or to express opinions based on insights from progress made in previous meetings*”.³⁴⁸

This permanent Secretariat may be headed by a Secretary-General who will be appointed by the Summit. The Secretariat should be staffed by independent, international civil servants, recruited by open competition from among the nationals of the member states.³⁴⁹ A number of units/sectors in the Secretariat may consist of a mixture of members of the Secretariat and seconded national officials reflecting the sensitivity and the intergovernmental nature of their work, such as, security and military matters.³⁵⁰ This kind of

³⁴⁶ Peterson, J, et al, op. cit. pg 52.

³⁴⁷ Article 22 of the Treaty.

³⁴⁸ *The EAC Development Strategy*, op. cit. pg 24

³⁴⁹ Peterson, J, et al, op. cit. pg 53.

³⁵⁰ Ibid.

organ takes a leaf from the Secretariat-General of the Council of Ministers of the EU.³⁵¹ Hartley³⁵² contends that the General Secretariat of the Council is similar to, but much smaller than, the European Commission staff.

However, unlike the Secretariat-General of the Council of Ministers of the EU, the permanent Secretariat of the EAC Council, since it is replacing the Sectoral Committees, will assume more major roles, in addition to organising and servicing the Council's and Co-ordination Committees' meetings. These roles include: responsibility for the preparation of a comprehensive implementation programme and the setting out of priorities of different sectors; monitoring and keeping under constant review the implementation of the programmes of the Community with respect to different sectors; submitting from time to time, reports and recommendations to the Co-ordination Committee either on its own initiative or upon the request of the Co-ordination Committee concerning the implementation of the provisions of the Treaty; and any other functions conferred on it by the Treaty.³⁵³ Preparatory legislative work will be an important assignment of the Secretariat since, under the Treaty,³⁵⁴ the Council is the organ mandated to initiate and submit Bills to the Assembly.

The conference organisation involves, among other things, convening meetings, preparing meeting rooms, and producing documents, which in turn requires the translation,³⁵⁵ photocopying, distribution and archiving of documents. Servicing involves drawing up agendas, preparing briefing notes, advising on questions of procedure and legality, helping to draft amendments, note taking, and producing minutes held within the Council hierarchy.³⁵⁶ The Secretariat officials, therefore, fulfil technical, advisory and logistical duties. They act as the memory of the Council, ensure consistency between

³⁵¹ See Peterson, J, et al, op. cit. 52.

³⁵² Hartley, T. C (1998) *The Foundations of the European Community Law: An Introduction to the Constitutional and Administration Law of the European Community*, pg 19.

³⁵³ Article 21 of the Treaty.

³⁵⁴ Article 13(3) (b) of the Treaty.

³⁵⁵ Partner States of EAC have different official languages: Burundi (French, Kirundi), Kenya (English), Uganda (English, Swahili), Rwanda (English, French, Kinyarwanda) and Tanzania (English, Swahili).

³⁵⁶ Peterson, J, et al, op. cit. pg 60.

successive presidencies (chairpersonships), co-ordinate the activities of the various Councils, and ensure that the work of various preparatory bodies is coherent.³⁵⁷ There is no voting at this stage, the Secretariat is encouraged to reach decisions consensually.

The co-ordination role of the EAC Council of Ministers' Secretariat, under the guidance of the Co-ordination Committee, is crucial, given the number of sectors, under the Council, which are very diverse, ranging from being responsible for Nile perch protection³⁵⁸ to dealing with trade barriers.³⁵⁹ The Council has more than 25 sector formations. These include: Agriculture; Capital Markets; Customs; Defence; Education; Energy; Environment; Finance and Administration; Fiscal Affairs; Gender; and Health. Others are Immigration; Inter-University Matters; Interstate Security; Labour and Employment; Lake Victoria Development; Legal and Judicial; Monetary Affairs; Political Affairs; Research and Planning; Standards; Statistics; Tourism and Wildlife; Trade; and Transport.³⁶⁰ These sectors are grouped in clusters to form Sectoral Councils, such as, the Sectoral Council on Transport, Communication and Meteorology,³⁶¹ the Sectoral Council on Trade, Finance, Investment and Industry,³⁶² the Sectoral Council on Foreign Policy Co-ordination,³⁶³ the Sectoral Council on Interstate Security (comprising of internal affairs, security, intelligence, public safety and disaster management),³⁶⁴ and the Sectoral Council on Legal and Judicial Affairs.³⁶⁵

³⁵⁷ Ibid.

³⁵⁸ See "Daily News Online" dated 2 March, 2009 which reported that the EAC Council of Ministers responsible for the Lake Victoria Fisheries Organisation (LVFO) has, on 27 February 2009, at a meeting held in Dar-es-Salaam, Tanzania, approved zero tolerance measures against illegal fishing in effort to save declining Nile perch stocks < <http://www.dailynews.co.tz/home/?cat=home> > accessed on 3 March 2009.

³⁵⁹ See "the Standard" dated 28 February 2009, which reported that the EAC Council of Ministers has set up a monitoring mechanism to deal with non-tariff barriers that have ruined investor confidence causing a drop in the region's business climate index which fell to 44 points last year (2008) compared with 51 points in 2007 < <http://www.eaststandard.net/insidepage.php> > accessed on 3 March 2009.

³⁶⁰ See "EAC Council Decisions Sector" < <http://www.eac.int/councildecisions/sector.php> > accessed on 2 March 2009.

³⁶¹ See *The 17th EAC Council of Ministers Meeting* held at AICC in Arusha, Tanzania from 8th -13th September 2008 (Ref. EAC/CM17/BP/2008) pg 1 < <http://www.eabc.info/files/17th%20Council%20of%20Ministers%20Meeting.doc> > accessed on 3 March 2009.

³⁶² *The 17th EAC Council of Ministers Meeting*, op. cit. pg 2.

³⁶³ *The 17th EAC Council of Ministers Meeting*, op. cit. pg 16.

³⁶⁴ *The 17th EAC Council of Ministers Meeting*, op. cit. pg 18.

However, the formation and composition of the Sectoral Councils have been put under spotlight by the EACJ.³⁶⁶

The fact that Partner States have established functional ministries to handle EAC matters, especially co-ordination of the implementation of Council decisions, as per the May 2005 Summit decision,³⁶⁷ does not diminish the vitality of the proposed permanent Secretariat of the Council, as the designated ministries would still work at the national level. A great deal of groundwork has to be undertaken at this level before further decisions are taken by the Co-ordination Committee and the Council. It is indeed pointed out that most of the detailed negotiation, and much of the actual agreement, tend to occur at various levels below that which can take the final decision in the name of the Council.³⁶⁸

(iii) Frequency of Council meetings

Given the amount of workload at the Community, the Council of Ministers needs to meet on a monthly basis whereas the Sectoral Councils should meet as often as necessary. A careful look at the proceedings of the meetings of the EAC Council of Ministers reveals that the Council acts as a “co-ordinator” of the Sectoral Councils. This is not surprising, as the Council is mandated, as seen above, to establish, among its members, Sectoral Councils to deal with such matters that arise under the Treaty.³⁶⁹ The decisions³⁷⁰ of such Sectoral Councils are deemed to be decisions of the

³⁶⁵ See the 14th Meeting of the EAC Councils of Ministers held at AICC in Arusha, Tanzania from 24th -27th September 2007 (Ref.EAC/CM14/A1/2007) pg 1.

³⁶⁶ See Deya, D “Rule of Law and Independence of Judiciary in the East African Region” (2007) 1 *The Tanzania Lawyer* pg 57 where it is reported that, in the case of *Calist Andrew Mwatela and others v The EAC EACJ Reference Number 1 of 2005*, the Court, among other things, ruled that the Sectoral Councils (composed of Ministers of the Partner States’ cabinets) must only consist of legally competent ‘ministers’ in the various cabinets of the Partner States. It went on to declare that the Sectoral Council on Legal and Judicial Affairs of the EAC was improperly constituted as it consisted of the three Partner States Attorneys-General yet only the Ugandan Attorney-General was a ‘minister’ under the Ugandan Constitution. It declared that the Tanzanian Attorney-General was definitely not a minister. The Court adopted the contention of the Counsel for the Kenyan Attorney-General that, while the Kenyan Constitution does not explicitly make the latter a cabinet minister, its interpretation and general provisions statute states that she or he can act as a minister.

³⁶⁷ *EAC Development Strategy*, op. cit pg 24.

³⁶⁸ Peterson, J, et al, op. cit. pg 54.

³⁶⁹ Article 14.3(i) of the Treaty.

³⁷⁰ Deya, D, op. cit. pg 57 where, in the above cited case of *Calist Andrew Mwatela and others v The EAC*, the Court, in passing, expressed doubts on the legality of decisions, directives or regulations

Council.³⁷¹ Reports of the meetings of the Sectoral Councils are submitted by the Co-ordination Committee to the Council. The Council takes note of the decisions of the Sectoral Councils or refers matters from one Sectoral Council to another because of certain implications; for instance, decisions with financial implications are referred to the Sectoral Council on Finance and Administration for appropriate action, and matters of a legal nature are referred to the Sectoral Council on Legal and Judicial Affairs for legal input.³⁷² This role of the Council is almost akin to the one played by the General Affairs Council of the EU which is composed of the foreign affairs ministers of the member governments.³⁷³

4.2.4 THE CO-ORDINATION COMMITTEE

4.2.4.1 STRUCTURE

Under Article 17 of the Treaty, the Co-ordination Committee consists of the Permanent Secretaries responsible for East African Community affairs in each Partner State and such other Permanent Secretaries of the Partner State as each Partner State may determine.

4.2.4.2 FUNCTIONS

The Co-ordination Committee is entrusted to submit, from time to time, reports and recommendations to the Council, either on its own initiative or upon the request of the Council, on the implementation of the Treaty. The Co-ordination Committee implements decisions of the Council.³⁷⁴

that can only be found in 'Minutes' or other narrative records of deliberations not yet officially 'gazetted'. It exercised its advisory mandate under the Treaty to advise that the previously lax attitude of the EAC in failing to 'gazette' the foregoing ought to cease forthwith.

³⁷¹ Ibid.

³⁷² See *The 17th EAC Council of Ministers Meeting* held at AICC in Arusha, Tanzania from 8 -13 September 2008 (Ref. EAC/CM17/BP/2008) pg 2 where it is reported that the 17th Extraordinary Meeting of the Council of Ministers had decided to refer the Memorandum of Understanding on Co-operation in Meteorological Services to the Sectoral Council on Legal and Judicial Affairs for legal input.

³⁷³ Peterson, J, et al, op. cit. pg 50.

³⁷⁴ Under Article 18 of the Treaty, the Co-ordination Committee receives and considers reports of the Sectoral Committees, and coordinates their activities. The Co-ordination Committee may request a Sectoral Committee to investigate any matter; and shall undertake other functions as conferred on it by the Treaty.

4.2.4.3 WORKING METHODS

The Co-ordination Committee meets at least twice in each year preceding the meetings of the Council and may hold extraordinary meetings at the request of its Chairperson.³⁷⁵ Members of the Co-ordination Committee are the Permanent Secretaries responsible for East African Community affairs in each Partner State.³⁷⁶

4.2.4.4 ANALYSIS

(i) Structure

If the proposal, set out above, to establish a permanent Secretariat of the Council is adopted, and, therefore, replaces the Sectoral Committee, it is imperative that the Co-ordination Committee, as an overseer of the activities of the Secretariat of the Council, should be reconstituted in a permanent form in order to be able to give guidance on the daily work of the Secretariat. In this case the members of the Co-ordination Committee should be permanently stationed at Arusha, Tanzania, the Headquarters of the Community.

The members of the Co-ordination Committee would be permanent representatives of the Partner States in the EAC. This role is modeled on the Committee of Permanent Representatives (Coreper) in the EU, but without the two tier formation that characterises Coreper.³⁷⁷ This is a critical organ, as its work, mainly in the form of reports and recommendations, determines the functioning of the Council. Issues to be decided by the Council have to pass through the Co-ordination Committee first. Detailed and substantive negotiations are done at this stage to try to reach an agreement before

³⁷⁵ Article 19.1 of the Treaty.

³⁷⁶ Article 19.2 of the Treaty, the Co-ordination Committee determines its own procedure, including, that for convening its meetings, for the conduct of the business thereat and at other times and for the rotation of the office of Chairperson among its members.

³⁷⁷ See Hartley, T.C, op. cit. pg 18 where it is stated that Coreper was set up to prepare the work of the Council. The Permanent Representatives are the ambassadors of the Member States to the Community and the Committee represents the Member States at a lower level than the Ministers. Coreper itself meets on two levels: Deputy Permanent Representatives (Coreper I) for more technical questions; and the Permanent Representatives themselves (Coreper II) for the more important political questions. At a lower level there are still many Coreper committees and working groups, staffed by national officials based in Brussels, Belgium or in their home countries.

matters are forwarded to the Council for decision. It meets with the Secretariat officials in order to carry out preparatory work for decision making in the Council.³⁷⁸ These meetings give rise to a relationship which facilitates the subsequent implementation of decisions of the Council.³⁷⁹ Peterson argues that the ability to serve as gatekeeper for the Council's work is not simply about paving the way for Ministers to find agreement, but, increasingly, the ability to dispose of large quantities of business by forging consensus out of seemingly irreconcilable national positions.³⁸⁰

As negotiations are full of drama and maneuvering, the Co-ordination Committee actually acts as a buffer zone shielding the Ministers, and by extension their countries, from diplomatic fights that may damage the relations of the Partner States. It is observed³⁸¹ that when there is a political need to avoid confrontation or politicisation at the level of the Ministers, permanent representatives will have a freer hand in making deals, and selling success at home.

It logically follows that the composition of the Co-ordination Committee also needs to change. Given the fact that the Permanent Secretaries are also the principal co-ordinators of the Ministries at national level dealing with all matters under their dockets, such as, finance, administration, policy, etc, it is difficult for them to be permanently stationed at the seat of the EAC, as well as attend to their duties effectively. Experienced senior civil servants may be posted to serve in the Co-ordination Committee. Peterson contends that the permanent representatives are selected from the highest tier of career diplomats and civil servants, usually with a considerable background in integration affairs.³⁸² Appointments are typically made after a recommendation by, or at least tacit approval of the head of state or government. Such high level political selection contributes enormously to the

³⁷⁸ See Bray, R (ed) (1999) *Constitutional Law of the European Union*, pg 386.

³⁷⁹ Ibid.

³⁸⁰ Peterson, J, et al, op. cit. pg 282.

³⁸¹ Peterson, J, et al, op. cit. pg 290.

³⁸² Peterson, J, op. cit. pg 285.

credibility and confidence of the permanent representatives to negotiate.³⁸³ Appointments are noteworthy for length of tenure and absence of partisan politics. The average appointment is five years, slightly longer than the typical three- or four-year diplomatic rotation. Longer appointments provide continuity in the representation of interests.³⁸⁴

(ii) Frequency of meetings

The Co-ordination Committee will be meeting as often as necessary, weekly or possibly daily, to keep up with the work of the experts, that is, the Council's Secretariat, if one puts into consideration the range of sectoral formations at EAC. One of the really distinctive features of diplomacy at this level is the degree of insulation from the normal currents of domestic pressures.³⁸⁵ The meetings are to be treated as confidential, and many sensitive national positions are ironed out in restricted sessions where the permanent representatives can speak frankly and in confidence that what is said will not be reported to the capitals or the media. This can even include group discussion on how an agreement will be packaged back home.³⁸⁶

Apart from negotiating deals and preparing reports and recommendations for the consumption of the Ministers, the permanent representatives sit beside their Ministers during Council sessions, briefing them beforehand and offering tactical suggestions. They attend Summits and can serve as behind-the-scenes consultants. They monitor the proceedings of the working groups and offer specific points of strategy or emphasis. They are closely involved in monitoring co-operation and association agreements and accession negotiations.³⁸⁷

As per the Treaty, the Co-ordination Committee determines its own procedure for the conduct of its business.³⁸⁸ It is hoped that there is no voting

³⁸³ Ibid.

³⁸⁴ De Zwan, J (1995) *The Permanent Representatives Committee: Its Role in European Union Decision-Making* as cited in Peterson, J, op. cit. pg 285.

³⁸⁵ Peterson, J, et al, op. cit. pg 290.

³⁸⁶ Ibid.

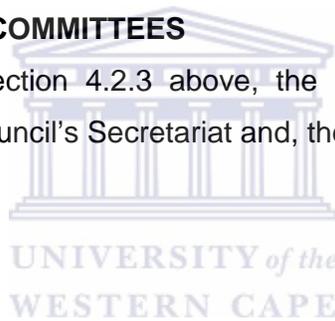
³⁸⁷ Peterson, J, et al, op. cit. pg 288.

³⁸⁸ Article 19.2 of the Treaty.

at this stage, and that decisions are made consensually. The reasoning behind no voting at the permanent representatives as well as the Council's Secretariat stages, is that these are supposed to be continuous negotiation chambers³⁸⁹ where negotiators try to accommodate as many various interests as possible. The other reason is, that juridical decision making authority is a power exclusively reserved for Ministers.³⁹⁰ The mode, known as A-point procedure, used by Coreper to forward matters to the Council for decision-making is worth emulating in EAC. A-points are 'agreed points' which are passed *en bloc* and without discussion by the Ministers at the beginning of each Council session. B-points are those issues sent to Ministers that do require further discussion. This corresponds to the agenda of each Council meeting that is divided into parts A and B.³⁹¹

4.2.5 THE SECTORAL COMMITTEES

As indicated in section 4.2.3 above, the Sectoral Committees are to be replaced by the Council's Secretariat and, therefore, they cease to exist.



4.2.6 THE EAST AFRICAN COURT OF JUSTICE (EACJ)

4.2.6.1 STRUCTURE

The EACJ (also referred to as 'the Court') is a judicial body which ensures adherence to law in the interpretation and application of, and compliance with, the Treaty.³⁹² It consists of two divisions, namely, the First Instance Division and the Appellate Division.³⁹³ The Court is composed of a maximum of 15 Judges of whom not more than ten shall be appointed to the First Instance Division and not more than five to the Appellate Division.³⁹⁴ The

³⁸⁹Peterson, J, et al, op. cit. pg 287.

³⁹⁰ Ibid.

³⁹¹ Ibid.

³⁹² Article 23.1 of the Treaty.

See also Keiuwa, O.M "Focus on the East African Court of Justice" (2003) 4 *The East African Lawyer* pg 14.

³⁹³The First Instance Division shall have jurisdiction to hear and determine matters at first instance subject to a right of appeal to the Appellate Division.

³⁹⁴ Article 24.2 of the Treaty.

Judges shall be appointed by the Summit from among persons recommended by the Partner State³⁹⁵.

Under Article 25.1 of the Treaty, the tenure of a Judge is seven years. However, under the proviso to Article 23.2 of the Treaty, of the Judges first appointed to the Court only one third of them will serve their full seven year terms, while another one third will serve six year terms, and the remaining one third will serve five year terms. The Appellate Division shall be headed by a President assisted by a Vice President, both of whom are appointed by the Summit from among Appellate Division Judges.³⁹⁶

A Judge may be removed from office by the Summit: for misconduct or inability to perform the functions of his or her office due to infirmity of mind or body; for being adjudged bankrupt; for being convicted of an offence involving dishonesty or fraud or moral turpitude; and in the case of a Judge who holds judicial office or other public office in a Partner State, if removed from that office for misconduct due to inability to perform, or resigns from that office due to allegations of misconduct or inability to perform.³⁹⁷ The Registrar of the Court is appointed by the Council from among citizens of the Partner States qualified to hold such high judicial office in their respective Partner States.³⁹⁸

4.2.6.2 JURISDICTION

The Court shall initially have jurisdiction over the interpretation and application of the Treaty. However, this Court's jurisdiction to interpret does not include the application of any such interpretation to jurisdiction conferred

³⁹⁵ These must be persons with proven integrity, impartiality and independence and who fulfil the conditions required for the holding of such high judicial office, or jurists of recognised competence in their own countries. However, no more than two Judges of the First Instance Division and one for Appellate Division can be appointed on the recommendations of the same Partner State.

³⁹⁶ The President is responsible for the administration and supervision of the Appellate Division, including presiding over its sessions. The office of the President of the Court is rotated after completion of any one term. The Summit also designates two of the Judges of the First Instance Division as the Principal Judge and Deputy Principal Judge, respectively. However the President, Vice President, Principal Judge and Deputy Principal Judge shall not be nationals of the same Partner State

³⁹⁷ Article 26.1 of the Treaty.

³⁹⁸ Article 45.1 of the Treaty.

by the Treaty on organs of the Partner States.³⁹⁹ The Court's jurisdiction also extends to labour and arbitration matters.⁴⁰⁰

The Court has jurisdiction, under Article 28 of the Treaty, to adjudicate on references by Partner States where a Partner State considers that another Partner State or an organ or institution of the Community has failed to fulfil an obligation under the Treaty or has infringed its provisions. A Partner State may also refer for determination by the Court, the legality of any Act, regulation, directive, decision or action on the grounds that it is *ultra vires* or unlawful or an infringement of the Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.⁴⁰¹ Legal and natural persons, residing 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 ground that such an Act, regulation, directive, decision or action is unlawful or is an infringement of the Treaty.⁴⁰²

4.2.6.3 WORKING METHODS

The Court considers and determines every reference made to it and delivers in public session, a reasoned judgment. In special circumstances the Court may deliver the judgment in private. The Court delivers one judgment only in respect of every reference to it, which shall be the judgment of the Court

³⁹⁹ Article 27.1 of the Treaty.

⁴⁰⁰ The other jurisdiction of the Court is to hear and determine disputes between the Community and its employees that arise out of the terms and conditions of employment. Disputes to which the Community is a party shall not on that ground alone be excluded from the jurisdiction of the national courts of the Partner States, except where jurisdiction is conferred on the Court by the Treaty. Decisions of the Court on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter. The Court also has jurisdiction, as per Article 32 of the Treaty, to hear and determine any matter arising from an arbitration clause in a contract or agreement which confers such jurisdiction and to which the Community or any of its institutions is a party; or arising from a dispute between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement between the Partner States concerned; or arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

⁴⁰¹ Under Article 29 of the Treaty, references may also be made by the Secretary-General where he considers that a Partner State has failed to fulfil its obligation under the Treaty or has infringed a provision of the Treaty.

⁴⁰² Article 30 of the Treaty.

reached in private by majority verdict. However, a Judge may deliver a dissenting judgment.⁴⁰³

An application for review may be made to the Court only if it is based upon the discovery of some fact which by its nature might have a decisive influence on the judgment if it had been known to the Court at the time the judgment was given.⁴⁰⁴ The Court may give advisory opinions upon request by the Summit, the Council or a Partner State, regarding a question of law arising from the Treaty which affects the Community.⁴⁰⁵

Judge Bossa espouses that the framework of EACJ clearly gives it an international character as it meets the features of an international court.⁴⁰⁶ International courts are permanent in that states do not establish them to deal with a specific case or cases.⁴⁰⁷ An international legal instrument establishes them. They apply international law in disposing of cases before them, as opposed to national law. Their rules of procedure should exist before they handle any cases. They make binding decisions, even if they may have additional jurisdiction to render advisory opinions as well. States select their judges before any case in an impartial and transparent procedure. One of the parties to the disputes they handle must be a state or an international organisation.⁴⁰⁸

⁴⁰³ Article 35.1 of the Treaty.

⁴⁰⁴ Article 35A of the Treaty, an appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division only on points of law, lack of jurisdiction or procedural irregularity. The Court may, in a case referred to it, in terms of Article 39 of the Treaty, make any interim orders or issue any directions which it considers necessary or desirable. Such interim orders or directions shall have the same effect *ad interim* as decisions of the Court.

⁴⁰⁵ Article 36.1 of the Treaty.

⁴⁰⁶ Bossa, S.B, op. cit. pg 11.

⁴⁰⁷ Romano, C.P.R “The proliferation of international judicial bodies: the pieces of the puzzle” as cited in Bossa, S.B, op. cit. pg 11.

⁴⁰⁸ Ibid.

4.2.6.4 ANALYSIS

(i) Structure

(a) Composition, independence and impartiality of the Court

As Ruhangisa⁴⁰⁹ contends, adjudication and determination of disputes arising under the Treaty is the major function of the EACJ. The Court, therefore, plays a crucial role in the process towards integration of the EAC. This role can be effectively realised through the Court's effective and efficient execution of its mandate as an arbiter in dispute resolution, thereby contributing to confidence building in the region. Invariably the Court, by playing its role effectively, is expected to enhance the observance and upholding of human rights through good governance and democratic institutions in the region. All these aspirations and objectives must be reflected in the way the Court conducts its activities, including the rules governing litigation.⁴¹⁰ But this realisation is undermined by the fact that the institutional framework underlying the existence of EACJ takes away its independence, hence thwarting the envisaged effectiveness and efficiency.

It has long been recognised that independence and impartiality are the fundamentals of any judicial institution.⁴¹¹ With primary responsibility to uphold the rule of law and to defend the constitution (in this case, the Treaty), the judiciary is a uniquely different organ whose effective functioning depends critically on its independence.⁴¹² The essential requirements of an independent judiciary include, invariably: a system of recruitment of judges and other judicial officers, that is, free from political domination; a secure tenure of office for judicial officers; and a system that guarantees the administration of justice to be free from political and executive pressure and

⁴⁰⁹ Dr. John Eudes Ruhangisa is the Registrar of the EACJ.

⁴¹⁰ Ruhangisa, J.E (2006) "Litigation in the East African Court of Justice" < <http://www.africanexecutive.com/modules/magazine/articles.php?article=794> > accessed on 3 March 2009.

⁴¹¹ Ojienda, T.O, op. cit. pg 22.

See also International Commission of Jurists (ICJ) (2004) *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners' Guide* pg 22 where it is observed that the independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.

⁴¹² Addo, M.K (ed) (2000) *Freedom of Expression and the Criticism of Judges: A Comparative Study of European Legal Standards* pg 3.

interference.⁴¹³ That these conditions apply to national courts does not make it any different for courts whose jurisdiction is of a supranational character. In the case of the East African countries, national courts seem not to be entirely independent of executive control, with the appointment and dismissal of judges and other judicial personnel being in the control of the executive. This tradition, where the executive arm exercises control over the judicial arm, has been carried over to the EACJ where the judges⁴¹⁴ are appointed by the Summit which is the highest organ of the Community.⁴¹⁵

It is not only appointment and dismissal of these judges that are at the whim of the executive. Their salaries and other terms and conditions of service are determined by the Summit on recommendation by the Council.⁴¹⁶ Independence of the judiciary requires that determination of terms and conditions of service be vested in a body other than the executive. It is a great risk to allow heads of states the power to determine terms and conditions of service.⁴¹⁷ The political fortunes or misfortunes of a head of state in his country may well determine his view of the Court, and how it will operate.⁴¹⁸ Consequently, the Court can be rendered irrelevant by the type of terms and conditions of service set. It should be kept in mind that the decisions of the Summit are by consensus. There is no voting. Therefore, there will eventually be a need to establish a Regional Judicial Service Commission to deal with all matters of the Court.⁴¹⁹

There are numerous workable and better time tested ways of appointing judges of superior courts. In Namibia, the President (executive) has to act, on

⁴¹³ Mwaikusa, J.T "Rule of law and independence of the Judiciary in the SADC region: some pertinent challenges" (2007)1 *The Tanzania Lawyer* pg 64.

⁴¹⁴ The Summit appointed the following persons as the first Judges of EACJ: Mr. Moijo M. Ole Keiwua (President) (Kenya), Mr. Joseph Mulenga (Vice President) (Uganda), Mr. Augustino Ramadhani (Tanzania), Mr. Kasanga Mulwa (Kenya), Mr. Joseph Warioba (Tanzania) and Ms Solomy Bossa (Uganda).

⁴¹⁵ Ojienda, T.O, op. cit 22.

⁴¹⁶ Article 25.5 of the Treaty.

⁴¹⁷ See also Addo, M. K (ed), op. cit. pg 12 where it is observed that in most liberal democratic societies judges have security of tenure and their salaries are similarly safeguarded.

⁴¹⁸ Ogalo, D.W (2006) "East African Court of Justice: wanting in goodwill" < <http://www.africanexecutive.com/modules/magazine/articles.php?article=760> > accessed on 3 March 2009.

⁴¹⁹ Ibid.

making appointments of judges of superior courts, in accordance with the advice of the Judicial Service Commission consulted. There is a similar requirement for the appointment of judges in Botswana, Lesotho and South Africa, but not for the appointment of the Chief Justice. In appointing the Chief Justice the requirement on the President is limited to consultation only and there is no obligation to act according to advice.⁴²⁰ The appointing practice, excluding that of the Chief Justice, obtaining in these countries, is worth emulating.

An independent judicial service commission⁴²¹ of member states would exercise the power of nomination, with appointment by the Summit being merely a formality. Alternatively, appointment could be a direct process carried out by an independent judicial commission constituted in each of the partner states. Of course, this will call for a radical reorganisation of the constitutional dispensation of the member countries with regard to constituting judicial service commissions.⁴²² Appointment of the Judges of EACJ may also be done by the parliaments of the respective partner states, or such parliaments may vet and subsequently confirm appointments of such Judges.⁴²³

In the EU national practices with regard to the appointment of judges to the highest courts vary considerably.⁴²⁴ The members of the judiciary may all be elected by the legislature, or some members elected by the judiciary, the government, and the legislature, or by the head of state and by each legislative chamber. Some member states have established judicial appointment boards or other vetting procedures, which allow some degree of

⁴²⁰ Mwaikusa, J.T, op. cit. pg 65.

⁴²¹ See also "the EAC Press Release" dated 14th February 2009 after a High Level Strategy Retreat for Key Organs and Institutions of the EAC, convened by EAC Summit Chairperson, President Paul Kagame of Rwanda, held from 9-10 February 2009 in Kigali, comprising of the EAC Council Ministers, the Speaker and Members of the EALA, the Judge President, the Principal Judge, the Registrar and Senior Officers of EACJ, the Secretary-General and the Deputy Secretaries-General of the EAC, Heads of EAC Institutions, Senior Government and EAC Officials, and Representatives of the business community and civil society, where one of the recommendations of the meeting was a call for establishment of the EAC Judicial Service Commission < <http://www.eac.int> > accessed on 3 March 2009.

⁴²² Ojienda, T.O, op. cit. pg 25.

⁴²³ Ibid.

⁴²⁴ Stone Sweet, A (2000) "Governing with Judges" as cited in Peterson, J, et al, op. cit. pg 121.

scrutiny of candidates' suitability for appointment.⁴²⁵ The Judges of the European Court of Justice (ECJ) are appointed by 'common accord of the Member States', in practice the Council of Ministers.⁴²⁶

The ECJ comprises one Judge per member state. Judges are selected on the basis of their independence and legal stature, and must either have the qualifications to be appointed to the highest court in their home member state, or otherwise have an outstanding academic or professional record;⁴²⁷ some, but not all, have held high judicial office before joining the ECJ. The Court, in this case the ECJ, therefore, has direct access to authoritative guidance on the law of the individual member states.⁴²⁸ This presence on the Court of members from all the national legal systems is undoubtedly conducive to harmonious development of Community case law, taking into account concepts regarded as fundamental in the various Member States, and thus enhancing acceptability of the solutions arrived at. It may also be considered that the presence of a Judge from each Member State enhances the legitimacy of the Court.⁴²⁹

The absence of any Community vetting procedure, in the EU, for the ECJ is widely considered to be unsatisfactory. One of the principal tasks of the ECJ is to review the application of Community law by the Member States; Judges are thus called upon to review the acts of the governments that appointed them. They also decide disputes between the Council, the Community institution comprising national government representatives, and other institutions.⁴³⁰ Therefore, the personal stature, and the quality of the work, of the members should be beyond doubt. If the judges are not seen to be appointed through a procedure that sufficiently guarantees their neutrality vis-

⁴²⁵ Peterson, J, et al, op. cit. pg 121.

⁴²⁶ Simamba, B.H "Suspension and removal of Judges and Magistrates from the East African Court of Justice" (2005) 16 Journal of the Commonwealth Magistrates' and Judges' Association pg 5 < <http://www.cmja.org/downloads/CJJ/42087%20com%20Journal%2016-1.pdf> > accessed on 12 March 2009.

⁴²⁷ Article 167 of the Treaty of the European Union.

⁴²⁸ Peterson, J, et al, op. cit. pg 120.

⁴²⁹ Proceedings of the Court of Justice and Court of First Instance of the European Communities, 22-26 May, 1995, No.15/95 as cited in Arnall, A (2006) *The European Union and its Court of Justice* pg 7.

⁴³⁰ Peterson, J, et al, op. cit. pg 121.

a vis governments, the authority of the institution, and the legitimacy of the Community's legal order, could ultimately suffer.⁴³¹

All in all, the procedure adopted for appointment of Judges, in all jurisdictions including the EAC, must be open, all-inclusive and not subject to the discretion of individual persons. In this way it will be possible to adhere to the requirements set out in the Treaty that the appointees must be persons of proven integrity, impartiality and independence. Eventually it will be possible that individuals who are competent enough to carry out their duties will fill the positions.⁴³²

When the Judges are appointed, they must be the ones that are in control of the Court. The Summit or other executive members of the Partner States must protect them from interference. As such, the Judges should be the ones to elect the President and Vice-President of the Court as well as the Principal Judge and Deputy Principal Judge of the First Instance Division. Alternatively, a workable system of rotation may be devised without involving the executive.⁴³³ The executive should refrain from designating the Court's top leadership regardless of what criteria inform their decision.⁴³⁴ In the EU, the Judges, from among their number, by absolute majority and in secret ballot, elect a President. He or she serves in that capacity for a renewable term of three years. At the end of his term as President, he or she is allowed to sit as an ordinary Judge for remainder of the six year term.⁴³⁵

The reluctance among member states of the EAC to create a body that would be independent of their control is posing problems. The significance of this state of affairs comes out when a judge is required to make a decision that

⁴³¹ Ibid.

⁴³² Ojienda, T.O, op. cit. pg 25.

⁴³³ Ojienda, T.O, op. cit. pg 26.

⁴³⁴ See *the Report of the 7th Extraordinary Summit of Heads of State* (Ref. No .EAC/SHS EX.7/R/2008 held in Kampala, Uganda, on 22 October, 2008 pg 7 where it is reported that in designating the Hon. Mr. Justice Harold J.Nsekela and the Hon. Mr. Justice Johnston Busingye as Judge President of the Court and Principal Judge of the First Instance Division respectively, the Summit took into consideration seniority in service in the Appellate Division and First Instance Division as well as the need to ensure effective continuity.

⁴³⁵ Simamba, B.H, op. cit. pg 5.

may run counter to the wishes of the appointing person, and such independence and impartiality are compromised.⁴³⁶ This apprehension was vindicated by none other than the Summit itself in November 2006, in the second case to be filed at the EACJ, in *Honourable Prof. Peter Anyang' Nyong'o and others v The Attorney General of Kenya and others*.⁴³⁷

In that case the applicants sued the Government of Kenya, challenging the manner in which the government handled nominations for the Kenyan representatives to the second EALA, which was due to be sworn in on 30 November 2006. Among other things, they sought an interim injunction stopping the swearing in of the Kenyan nominees to the EALA.⁴³⁸ On 27 November 2006, after listening to all the parties in the reference, the Court granted an interim injunction, barring the swearing in of the Kenyan nominees to the EALA pending full hearing of the application. The Court urged all the parties to expedite the hearing of the application.⁴³⁹

These developments triggered an unprecedented reaction from the top executive organ of the EAC. The Summit immediately launched a series of disparaging attacks⁴⁴⁰ on the Court. Among other things, it was alleged that the Court was biased against the Government of Kenya because the two judges of the EACJ from Kenya, Moijo Mataiwa ole Keiwua (its President) and Judge Kassanga Mulwa, had a grudge against it. The two were among the judges 'purged' by the Kibaki Government in October 2003, in an exercise the ostensible objective of which was to rid the Kenyan judiciary of corruption.⁴⁴¹

As a consequence the EAC Summit decreed an urgent process of amendment of the EAC Treaty to clip the EACJ's wings by, among other things, establishing an Appellate Division, which would reverse decisions of the then existing Court. This was contained in the official communiqué issued

⁴³⁶ Simamba, B.H, op.cit. pg 23.

⁴³⁷ EACJ Reference Number 1 of 2006.

⁴³⁸ Deya, D, op. cit. pg 58.

⁴³⁹ Ibid.

⁴⁴⁰ These were led by Kenyan President Mwai Kibaki and the Kenyan EAC Minister Honourable John Koeh.

⁴⁴¹ Deya, D, op. cit. pg 58.

by the Summit after its meeting of 30 November 2006.⁴⁴² Within one week, the staff of the three Attorneys-General and the EAC Secretariat had agreed upon draft Treaty amendments solely targeting the Court. These were approved by the Attorneys-General, and sent to the EAC Council of Ministers, who cleared and forwarded them to the Summit for signature.⁴⁴³ Thus, in less than a fortnight after the interim Court decision, the Kenyan cabinet purported to 'ratify' the amendments, without taking them to the Kenyan Parliament, as the law requires.⁴⁴⁴ Ultimately the Court ruled against the Government of Kenya, declaring that no "election" as provided for under the Treaty had taken place in Kenya.⁴⁴⁵ Upon ratification of the amendments by the Partner States through the instruments of ratification, the last of which was deposited with the Secretary-General of the Community on 16th March 2007, the Summit approved the operationalisation of the re-constituted Court with effect from 1 July 2007.⁴⁴⁶

By ushering in the new amendments to the Treaty, the Summit was "*using the legislative process to effectively overrule the Court decisions which the executive does not like*".⁴⁴⁷ Of all the amendments passed, the provisions with regard to the removal of judges from office were the harshest, devastating, and calculated, by the executive, to intimidate them in the course of their duties.⁴⁴⁸ The amendments effectively established two sets of

⁴⁴² Ibid.

⁴⁴³ See also *the Communiqué of the 5th Extraordinary Summit of the EAC Heads of State* held in Kampala, Uganda on 18 June, 2007 which records that the Summit at its 4th Extra-ordinary meeting in Nairobi, Kenya on 14th December, 2006 adopted proposals by the Council of Ministers to amend some provisions of Chapter Eight of the Treaty.

⁴⁴⁴ Deya, D, op. cit. pg 58.

⁴⁴⁵ Deya, D, op. cit. pg 60.

⁴⁴⁶ See *Communiqué of the 5th Extra-ordinary Summit of EAC Heads of State*, op. cit.

⁴⁴⁷ Mwaikusa, J.T, op. cit. pg 69.

⁴⁴⁸ See also the proviso to Article 27.1 of the Treaty which bars the Court's interpretation of jurisdiction conferred by the Treaty on organs of Partner State. It is feared that this may lead to impunity, as Partner States know that they will not be challenged by the EACJ for certain violations in breach of the Treaty.

See also Sarooshi, D (2005) *International Organisations and Their Exercise of Sovereign Powers* pg 31 where the author contends that there is an inherent conflict between law and politics at the heart of the practice of States conferring governmental powers on international organisations. The greater the degree or extent of conferrals by States of powers on an international organisation, the less is the degree of direct control that States are allowed to exert over the organisation's exercise of the powers outside the confines of the organisation's decision making processes; and, yet as a State confers powers to a greater degree on an organisation there will often be more pressures exerted by the State-often as a result of increased domestic political pressures-to try and control the

standards to determine removal of a judge from the service of the Court. These are determined either by misconduct or inability to perform the functions of office (EACJ) due to infirmity of mind or body,⁴⁴⁹ on one hand, or misconduct or inability to perform functions of office (judicial or other public office in a Partner State) for *any reason*, on the other.⁴⁵⁰ (emphasis supplied)

In this case the amendments introduced in two separate disciplinary regimes: charges under Article 26.1(a) are dealt with by an ad hoc independent tribunal, consisting of three eminent Judges drawn from within the Commonwealth of Nations, appointed by the Summit,⁴⁵¹ whereas the charges under Article 26.1(b) are managed by a tribunal or other relevant authority of the Partner State. This invocation of double standards in dealing with disciplinary matters of the Judges of the same Court was driven by bad faith as it is controversial and counter-productive in achieving the deserved security of tenure of judges; hence, eroding the independence of the Court. It is clear that, now that the amendments have been entrenched in the Treaty, Judges of EACJ should not hold other judicial or public offices in their home countries to avoid situations that put them on a confrontational course with the executive which might negatively impact on their duties at the Court. It is further argued that if appellate jurisdiction is conferred on the Court as envisaged by Article 27.2, Judges would find their decisions in national courts, where they also serve, being appealed in the regional Court, their other work station; a situation which does not create a favourable impression on the litigants, and actually complicates the Judges' working environment.⁴⁵²

organisation's decisions. This attempt to try and exercise greater control over the organisation's decisions is not only actively pursued by the State's executive branch, but also by the legislative and judicial branches of a State who may seek either to direct the executive in its representation of the State in the organisation or more simply threaten to exercise their own powers on the domestic plane to block the organisation's decisions from having an effect within the State's legal system.

⁴⁴⁹ Article 26.1(a) of the Treaty.

⁴⁵⁰ Article 26.1(b) of the Treaty.

⁴⁵¹ In the EU a judge is not removed by politicians. Article 6 of the Statute of the Court of Justice of the European Union clearly states that he may be removed from office "only if, in the unanimous opinion of the Judges and Advocates General of the Court, he no longer fulfils the requisite conditions or meets the obligations arising from his office."

⁴⁵² In actual fact Article 43.2 of the Treaty bars a Judge of the Court from holding any political office, or any other office in the service of the Partner State or the Community, or engaging in anything that interferes or creates a conflict of interest for his or her position. The law should be followed strictly to avoid interferences.

However, it has to be understood that misconduct of whatever nature is not to be condoned, and has to be absolutely abhorred, especially in respect of persons holding judicial office, regardless of when the conduct occurred. What is disputed here is the timing, when and manner in which, the said amendments to the Treaty were effected. It has to be remembered that Justices Keiwua and Mulwa were mentioned in the 'Corruption Report' way back in October 2003 and were immediately suspended from the judicial positions they held in Kenya upon appointment of the tribunals⁴⁵³ to investigate them. It took the Summit more than three good years to realise that the Treaty needed to be amended immediately to cure the lacuna with regard to removal of Judges from office due to misconduct arising from their previous judicial positions in their home states.⁴⁵⁴ The fact that the amendments were effected within three weeks⁴⁵⁵ after the issuance of the preliminary ruling by the Court against one of the Partner States and amid disturbing and disparaging remarks against the Court from the executive⁴⁵⁶ leaves a lot to be desired, and, indeed imports inferences of outright interferences by the executive.⁴⁵⁷ By nature of their tasks judges cannot easily respond to criticism, and for that

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⁴⁵³ Simamba, B.H, op. cit. pg 4.

⁴⁵⁴ See Simamba, B.H. op. cit. pg 6 where the following possible situations of misconduct are noted : first, an EACJ Judge, who is also serving at home, may have misconducted himself there in a judicial capacity with respect to a matter in which he was involved before appointment to EACJ; secondly, it is also possible that the alleged misconduct might occur at home, again in a judicial capacity, during a period when the Judge is serving in a similar capacity in the sub-regional Court; thirdly, there may be cases where a Judge no longer holds a judicial capacity at home but there is evidence of misconduct with respect to his conduct when he was on the bench there after he is appointed to the sub-regional Court; and fourthly, whether or not the person is or was a Judge in a national court, the misconduct in issue may relate to his conduct when he was a lawyer in practice or otherwise involved in the legal field.

⁴⁵⁵ The Executive disregarded the dictates of Article 150 of the Treaty which sets out a mandatory process and a minimum timeframe of 120 days for amendments.

⁴⁵⁶ See Braude, W, op. cit. pg 277 where it is reported that when the Court overruled the appointment of the Kenyan legislators, it was heavily criticised by the governments and the EAC Council, and the November 2006 Summit then coincidentally directed that the procedure for the removal of Judges from office provided in the Treaty be reviewed, with a view to including all possible reasons for removal, other than those provided in the Treaty. This was criticised by civil society as an attempt to weaken the Court.

See also Addo, M.K (ed), op. cit. pg 11 where it is observed that, in relation to the criticism of judges, it is important to ensure that the call to account does not overwhelm judicial independence or the process of accountability itself will be unworkable and, therefore, unacceptable.

⁴⁵⁷ For contrary views see Beatson, J, et al (eds) (1998) *European Public Law* pg 128 where it is opined that the counter-majoritarian difficulty arises because at first sight it appears anti-democratic that a small, unrepresentative and unaccountable minority of the population which happens to hold judicial office should be able to overrule the expression of legislative will which represents (however imperfectly) a much larger group of the population.

reason, need to be protected,⁴⁵⁸ although they must consciously accept the risk that their judgments in crucial areas may be subject to criticism.⁴⁵⁹

The Summit has been too much involved in matters that are traditionally in the domain of the administration of justice. Under the Treaty, if a Judge is directly or indirectly interested in a case before the Court and if he or she considers that the nature of the interest makes it prejudicial for him or her to participate in a case, he or she informs the President or Principal Judge, as the case may be, who in turn makes a report to the Chairperson of the Summit, and the Summit appoints a temporary Judge to act for that case only in place of the substantive Judge.⁴⁶⁰ Ordinarily, if a judge has an interest in a case before him, he will state his interest, disqualify himself, and ask the head of the court to allocate the case to another judge.⁴⁶¹

This is a clear case of interference by the Summit in judicial functions. Mwaikusa contends that any interference, by the executive or any other institutions, with the functions of the judiciary is a violation of the rule of law simply because such interference goes contrary to the principle of separation of powers.⁴⁶² The executive has been employing interference by legislative action, which is a complex affair, in a deliberate scheme whose ultimate goal is to render the courts helpless and redundant.⁴⁶³ The end result is that parties will have to wait until the Summit is convened. Presently the Summit

⁴⁵⁸ Addo, M.K (ed), op. cit. pg 12.

⁴⁵⁹ See "The Thinker", dated March 2009, "Interview" pg 21 ascribing the statement to the late former South African Chief Justice (CJ) Ismail Mahomed. The late CJ Mahomed is further quoted to have said that criticism should not cause judges no distress as a viable and credible constitutional culture evolves most effectively within the crucible of vigorous intellectual combat and even moral examination. What they are entitled to and demand is that the criticism should be fair and informed; that it must be in good faith, that it does not impugn upon the dignity or bona fides, and above all it should not impair their independence because judges themselves would not be the only victims of such impairment.

See also "Newsweek", dated 9 March, 2009, "When Judges Behave Badly" where Lithwick, D says "If we create too many systems that monitor the judiciary, we are really saying that we their judgment only when they agree with us. To paraphrase Justice Antonin Scalia of the US Supreme Court, judges are not gods. But we must trust them to do their jobs, or do away the institution itself."

⁴⁶⁰ Article 26.6 of the Treaty.

⁴⁶¹ Ogalo, D.W, op. cit.

See also International Commission of Jurists, op. cit. pg 28 where it is contended that independence of the judiciary requires it to have exclusive jurisdiction over all issues of judicial nature and decide whether an issue before it is of judicial nature.

⁴⁶² Mwaikusa, J.T, op. cit. pg 67.

⁴⁶³ Mwaikusa, J.T, op .cit.pg 70.

meets once a year. This is a clear case of justice delayed, and, therefore, denied.⁴⁶⁴ That judges should be free from all forms of unnecessary interference in the performance of their judicial duties not only makes common sense but is also central to the survival of the rule of law.⁴⁶⁵ It is the independence of the judiciary that enables the judicial arm to act as a check on the other two arms in fulfillment of the judges' duty to uphold the law.⁴⁶⁶

(b) Competence and industry of Judges

The competence, industry and impartiality of some of the Judges of the Partner States have been questioned time and again.⁴⁶⁷ By having powers to decide on whom to nominate and then appoint, the Summit members mainly exercise an extension of their powers under their national constitutions. The factors that influence their choices at national level will extend to influence their choices at Community level, hence producing little qualitative change in the composition of the Court.⁴⁶⁸ Respect for a judicial institution depends on: the perceived fairness of the substantive law to be applied; the degree of confidence in the independence, impartiality, and competence of the Judges, and the quality of the judgments rendered.⁴⁶⁹ In this regard the Community should continue to ensure the quality of individual judges as this has a direct bearing on their independence and affects the esteem of the Court.⁴⁷⁰ This includes the need to ensure that the judges appointed are persons who have exhibited a high degree of competence in judicial work or as jurists. High academic credentials would certainly be in order though not a *sine qua non*.⁴⁷¹ A judge should be assisted by at least one legal secretary whose

⁴⁶⁴ Ogalo, D.W, op. cit.

⁴⁶⁵ Addo, M.K (ed), op. cit. pg 12.

⁴⁶⁶ Ibid.

See also *Inter-American Commission of Human Rights (2002) Report on Terrorism and Human Rights* (2002) as cite in International Commission of Jurists, op. cit. pg 27 where it is stated: "*The requirement of independence (...) necessitates that courts be autonomous from the other branches..., free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring the correct and independent performance of judicial functions, including tenure and appropriate professional training*".

⁴⁶⁷ Ojienda, T.O, op. cit. pg 22.

⁴⁶⁸ Ojienda, T.O, op. cit. pg 23.

⁴⁶⁹ Cron, D.D (2000) "War and international adjudication: reflections on the 1899 Peace Conference" as cited in Bossa, S.B, op. cit. pg 23.

⁴⁷⁰ Bossa, S.B, op. cit. pg 23.

⁴⁷¹ Ojienda, T.O, op. cit. pg 26.

main task is to carry out legal research and to help in the preparation of opinions or other legal writing.⁴⁷² This enables the judge to write well researched judgements.

Closely related to the competence and industry of the Judges is the issue of tenure of office. The Treaty unnecessarily restricts the tenure of office of judges to a maximum period of seven years.⁴⁷³ This period is too short. Ogalo argues that all the experience and knowledge acquired by a judge in determining disputes between states is lost after five to seven years. As soon as new judges have mastered this new legal field, they are removed. This weakens the Court, instead of strengthening it.⁴⁷⁴

Judges at the EACJ should enjoy a renewable tenure in order to enrich the Court, and avoid a situation where the Court would perpetually have a new composition which is undoubtedly not a positive development since relevant experience at that level matters for justice to be properly administered.⁴⁷⁵ This also in turn will render redundant the requirement of drawing of lots by the Summit to determine the Judges whose terms are to expire at the end of each of the initial periods.⁴⁷⁶ It will spare the Judges and the members of the Summit some embarrassment as one observer commented that the picture of Presidents picking pieces of paper from a basket to determine which judge to cease service is both hilarious and ridiculous.⁴⁷⁷ The renewal of judges' tenure of office at regional or international courts is not a new phenomenon. Members of both the European Court of Justice (ECJ) and its Court of First

See also The Hon. Doyle, J "The National Judicial College of Australia" (2005) 16 *Journal of the Commonwealth Magistrates' and Judges' Association* pg 19 where the Hon. Doyle observes: "*Judges and Magistrates are expected to have professional legal skills of a high order. They should also have a wide range of practical skills to enable them to carry out judicial work properly. Some of these practical skills are peculiar to the judicial role; some are skills that are also required in other professions*".

⁴⁷² See Hartley, T.C, op. cit. pg 57.

⁴⁷³ Article 25.1 of the Treaty.

⁴⁷⁴ Ogalo, D.W, op. cit.

⁴⁷⁵ See also The Hon. Doyle, op. cit. pg 19 where it is argued that "*judicial officers tend to occupy judicial office for fairly lengthy periods. This is in public interest. It takes time to develop fully the skills required of a judicial officer, and it is in the public interest that those who have fully developed those skills put them to the public benefit for as long as possible*".

⁴⁷⁶ Article 24.3 of the Treaty.

⁴⁷⁷ Ogalo, D.W, op. cit.

Instance (CFI) are appointed by a common accord of the member state governments for a renewable six year term.⁴⁷⁸

(ii) Jurisdiction

(a) Extended jurisdiction

As stated above, the Court has initial jurisdiction over the interpretation and application of the Treaty.⁴⁷⁹ Under Article 27.2 of the Treaty, the Court shall have such other original, appellate, human rights and other jurisdiction as shall be determined by the Council at a suitable subsequent date through a protocol. It is submitted that it is high time the extended jurisdiction stated in the Treaty became a reality.⁴⁸⁰ The fact that, on the one hand, the Community has recognised the extended jurisdiction of the Court, but, on the other hand, is apprehensive about putting in place the operational mechanism in form of a protocol, raises disturbing questions.⁴⁸¹ This stance has indeed seriously and unnecessarily restricted the Court's areas of competence.

Ojienda states that there does not seem to be a good reason why the Court's jurisdiction should now be limited to the interpretation of the treaty provisions and not embrace other legal and human rights issues.⁴⁸² The only conclusion that can be drawn is that there is a fear that such extended jurisdiction would create an institution with power to raise questions about the human, social, political and other rights records of the Partner States. At a time when there has been restricted tolerance of alternative, seemingly resistant, opinions,

⁴⁷⁸ Peterson, J, et al, op. cit. pg 121.

⁴⁷⁹ Article 27.1 of the Treaty.

⁴⁸⁰ See also Mulenga, J.N "Linkages between the EACJ and national courts" (2003) 5 *The East African Lawyer* pg 28 where the author, former Honourable Justice of the EACJ, commenting on appellate jurisdiction, says: "*During its existence, the EACA had the final appellate jurisdiction over all matters in each of the Partner States, except jurisdiction over national constitutional issues, which the respective national High Courts retained....It may well be expedient to harmonise the judicial structures, adopting a uniform one or two tier appellate ladder in the Partner States. In theory, however, each Partner State could retain its system while ceding final appellate jurisdiction to the EACJ. This is particularly plausible if the appellate jurisdiction to the EACJ is limited to selected categories of disputes. For example, it has been suggested that it might enhance investor confidence if appeals in commercial cases were to lie to the EACJ*"

⁴⁸¹ See also Mchumo, A, S "The East African Community" (2003) 4 *The East Africa Lawyer* pg 9 where the author observes that a temporary difficulty is that the jurisdiction of the EACJ, which would be at the fore front of creating an East African jurisprudence, is initially rationed.

⁴⁸² Ojienda, T.O, op. cit. pg 25.

Partner States might have been wary of providing a forum at the regional level for propounding such views.⁴⁸³

Being a judicial body, the Court's responsibility is to administer justice and ensure the adherence to law in the interpretation and application of, and compliance with, the Treaty. It can administer justice by hearing and deciding cases and other matters brought before it. In other words, the Court is responsible for, among other things, determination of disputes that may arise out of the Treaty. The Court, therefore, has a crucial role to play in conflict resolution and confidence building in the region.⁴⁸⁴ However, this exposition is complicated by the situation on the ground. The absence of the Protocol on Extended Jurisdiction unnecessarily complicates a recourse to the Court for a person aggrieved by an infringement perpetuated by the Partner State, the Community, its organs or institutions, on such person's rights as embedded in the fundamental principles of the Community, especially those under Article 6(d) of the Treaty.⁴⁸⁵

It has to be borne in mind that the Sectoral Council on Legal and Judicial Affairs initiated the process of putting in place the Protocol on Extended Jurisdiction during its meeting on 24 November 2004 by directing the Secretariat to prepare the Draft Protocol.⁴⁸⁶ The Draft Protocol accordingly provides for original, appellate, human rights, and other jurisdiction, including alternative dispute resolution.⁴⁸⁷ More than four years have passed since the

⁴⁸³ Ibid.

See also Mulenga, J.N, op. cit.pg 28 the author opines that: "*human rights are entrenched in the respective national constitutions of the Partner States which provide for their observance and protection. The national courts have jurisdiction to enforce those entrenched human rights....Vesting human rights jurisdiction in the EACJ will not necessarily affect the jurisdiction of the national courts over the same. Nor will that jurisdiction be in appellate form in the strict sense. However, because primarily it is the responsibility of the state to protect the human rights and to observe its international obligations, a person seeking to invoke that jurisdiction would have to go to the national courts first, to exhaust local remedies.*"

⁴⁸⁴ Ruhangisa, J.E, op. cit.

⁴⁸⁵ The fundamental principles of good governance include: adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

⁴⁸⁶ See *the report of the Meeting of the Sectoral Council on Legal and Judicial Affairs of 24th November 2004*-Ref.EAC/SC/01/2004 as cited in Bossa, S.B, op. cit. pg 5.

⁴⁸⁷ Bossa, S.B, op. cit. pg 6.

process started but still the so called “consultations” on the Draft Protocol are going on and no one knows when the process will be concluded. It is, therefore, justified for the people of East Africa to demand that the process of preparing the Protocol be expedited. Ruhangisa, the Court Registrar, says that it is the wish of the Court itself, and probably many other stakeholders, including members of the bar, that the presently deferred appellate and human rights jurisdiction of the Court be operationalised as soon as possible.⁴⁸⁸

(b) Combined jurisdiction

The combined jurisdiction of the EACJ as a court of justice and a human rights and appellate court is too heavy, and in future this is bound to impact on its functioning. It is contended here that the human rights jurisdiction needs to be removed from the Court. A separate regional court should be established to take charge of the equally important human rights issues within the integration framework. The Community may need to borrow a leaf from the European Community.⁴⁸⁹ The European Community has two separate courts, namely the ECJ⁴⁹⁰ and the European Court of Human Rights (ECHR). The ECJ⁴⁹¹ deals with disputes arising from the functioning of the Treaty of the European Union. On the other hand the ECHR,⁴⁹² established under the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECPHR) of 1950 as amended by various Protocols, deals specifically with human rights violations under ECPHR. This is a separate and distinct legal regime.⁴⁹³ The combined docket of EACJ is a cause for worry. Compared to ECJ and ECHR, the EACJ has a very wide jurisdiction

⁴⁸⁸ Ruhangisa, J.E, op.cit.

⁴⁸⁹ The Treaty establishing the European Community comprises of the following European Communities: European Atomic Energy Community Treaty (Eurotom) (1958); the European Coal and Steel Community (ECSC) (1951); and the European Economic Community (EEC) under the Treaty of Rome (1958).

⁴⁹⁰ The ECJ has three levels, namely, the Court of Justice (established under the European Coal and Steel Community, 1952), the Court of First Instance (established under the Single European Act, 1986 but the Court came into effect in 1989), and Judicial Panels. The Council of Ministers is empowered to establish the Judicial Panels under Article 225a of the Treaty of the European Community as and when the Treaty of Nice, 2001 enters into force.

⁴⁹¹ ECJ may hear cases by individuals (companies and natural persons) and Community institutions, as well as by member states.

⁴⁹² ECHR is exclusively responsible to hear complaints by individuals or contracting parties.

⁴⁹³ Bossa, S.B, op. cit. pg 16.

and the paltry number of fifteen Judges, i.e. three per Partner State, might not be sufficient to handle the work that the enactment of the Protocol is likely to generate.⁴⁹⁴

(c) Preliminary rulings of national courts

Article 34 of the Treaty provides that where a question is raised before any court on the interpretation and application of the Treaty, or the validity of regulations, directives, decisions or actions of the Community, that court shall, if it considers a ruling on the question necessary to enable it to give judgment, request the EACJ to give a preliminary ruling on the question. Scrutiny of this provision reveals that its drafting is not tight enough to impose a mandatory obligation on national courts to seek preliminary rulings from the Court on matters within the ambit of the Treaty. The national court may elect not to request such a ruling from the Court.⁴⁹⁵ For purposes of giving uniform application and clarity to the Treaty provisions across East Africa on the same matters, Article 34 should have made it mandatory for the national courts, especially the superior courts, to refer any matter on the interpretation and application of the Treaty to the Court.

Giving the practice in the EC, Peterson⁴⁹⁶ states that as Community law is administered primarily by the national authorities, national courts are in a very real sense Community courts. To prevent divergent interpretations of Community rules, the treaty authors devised a procedure⁴⁹⁷ to allow the Court of Justice to provide an authoritative ruling on any aspect of Community submitted to it, and hence guarantee its uniform application.⁴⁹⁸ Where necessary to reach judgment, the national court can obtain a ruling on the

⁴⁹⁴ Bossa, S.B. op. cit. 17.

⁴⁹⁵ See also Mulenga, J.N, op.cit. pg 26 where the author observes that the national court or tribunal is left with the discretion to determine if the ruling of the EACJ is necessary to enable such court or tribunal to give its own judgment.

⁴⁹⁶ Peterson, J, et al, op. cit. pg 124.

⁴⁹⁷ Underlying the preliminary ruling procedure of Article 234 of the Treaty of the European Community (TEC)(formerly Article 177) is a dispute before a national court that raises one or several issues of Community law, on the interpretation of the Treaty, or on the interpretation or validity of an of a Community institution or body. The ECJ only answers the Community law question, and does not decide the case. In practice, however, the national court will often have little remaining discretion as to the outcome of the proceedings before it.

⁴⁹⁸ Peterson, J, et al, op. cit. pg 124.

Community law question from the ECJ. Lower courts may choose not to ask for a ruling, whereas national supreme courts are obliged to seek such a ruling where a Community law point arises, except where the answer is obvious or would not influence the outcome of the case.⁴⁹⁹ The significance of the preliminary reference procedure is that the ECJ's ruling is binding, not only on the referring court, but on all the courts of all the member states faced with the same issue, the so called 'multiplier effect'.⁵⁰⁰

(iii) Applicable Law

The Treaty has not dealt sufficiently with the issue of the applicable law for the Community. As explained earlier, the Treaty provides that the Court shall ensure adherence to the law in the interpretation and application of, and compliance with, the Treaty.⁵⁰¹ It is obvious, Judge Bossa⁵⁰² argues, that the Treaty does not state the law the Court should adhere to specifically. However, the Treaty gives further guidance in this regard, in the Fundamental Principles⁵⁰³ and in the Operational Principles⁵⁰⁴ of the Community. This may appear an oblique reference but it is a pointer to the standards, any organ of the Community, the EACJ inclusive, should set and apply in any matter. It incorporates universal principles, as well as principles of the African Charter on Human and Peoples' Rights (ACHPR).⁵⁰⁵ These are among the highest

⁴⁹⁹ Ibid.

⁵⁰⁰ Peterson, J, et al, op cit. pg 125.

⁵⁰¹ See note 284.

⁵⁰² Bossa, S.B, op. cit. pg 12.

⁵⁰³ Article 6 of the Treaty.

See also the justiciability of the principle of rule of law by citizens of one of the Partner States as embedded in Article 6 of the Treaty in the case of *Katabazi and 21 Others v Secretary of the EAC and Another (Ref. No.1 of 2207) {2007}EACJ 3 (1 November 2007)*. In this case the claim arose from the disputed conduct of the Government of Uganda which rearrested and took back to jail the claimants immediately upon their release, on bail, by the High Court on charges of treason and misprision of treason. This conduct by the security personnel interfered with the process of preparation of bail documents. The claimants were later arraigned before a military General Court Martial for possession of firearms and treason. Despite the decision of the Constitutional Court of Uganda that the interference of the court process was unconstitutional, the claimants were not released hence petitioned the EACJ. The EACJ ruled that "We, therefore, hold that the intervention by the armed security agents of Uganda to prevent the execution of a lawful court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the cornerstone of the independence of the judiciary which is one of the principles of the observation of the rule of law." < <http://www.saflii.org/ea/cases/EACJ/2007/3.html> > accessed on 24 April 2009.

⁵⁰⁴ Article 7 of the Treaty.

⁵⁰⁵ Bossa, S.B, op. cit. pg 13.

standards in human rights,⁵⁰⁶ and as such they put EACJ on a very high pedestal in terms of stature.⁵⁰⁷ The uniqueness of ACHPR, among the instruments that exist on human rights, is illustrated by, for example, the inclusion of civil and political rights, economic, social and cultural rights, and peoples rights, in one document treating them as indivisible.⁵⁰⁸ Additionally, the drafting of the provisions relating to the latter, and to the duties of the individual, are in considerable detail.⁵⁰⁹ The African Charter specifically refers to 'Human and Peoples Rights', highlighting the idea of preserving the traditional African collective rather than individual nature of the Western-formulated human rights.⁵¹⁰

However, the framers of the Treaty could have been more categorical. The Community should enact a clear and distinct provision on the law applicable. No doubt, the Fundamental Principles and Operational Principles serve a purpose but may not be the best place for guidance to the EACJ on the law to apply.⁵¹¹ With regard to this matter, it is, therefore, apparent that, apart from deficiencies in other discourses, the EACJ does not have a specific Treaty based regime on human rights to enforce, unlike its oldest sister, the ECHR.⁵¹² Judge Bossa⁵¹³ further argues that this weakness may stem from the fact that EAC is yet to harmonise its human rights laws. While Partner States have signed and ratified a number of International Human Rights Instruments, they are yet to domesticate many of them.⁵¹⁴ On their part, the national courts remain reluctant to invoke them. In addition, the Partner States have not harmonised their Bills of Rights.⁵¹⁵

⁵⁰⁶ Romano, C.P.R "The proliferation of international judicial bodies: the pieces of the puzzle" as cited in Bossa, S.B, op. cit. pg 13.

⁵⁰⁷ Bossa, S.B, op.cit. pg 12.

⁵⁰⁸ Scoble, H (1984) "Human rights and non-governmental organizations in black Africa: their problems and prospects in the wake of the Banjul Charter" as cited in Murray, R , *The African Commission on Human and Peoples Rights & International Law*, pg 10.

⁵⁰⁹ Nowak, M (1986) "The African Charter on Human and Peoples Rights" as cited in Murray, R, *ibid.*

⁵¹⁰ Bunn-Livingstone, S. L (2002) *Juricultural Pluralism vis-à-vis Treaty Law: State Practice and Attitudes* pg 19.

⁵¹¹ Bossa, S.B, op.cit.pg 13.

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ See the United Nations Charter, the International Covenant on Civil and Political Rights, the Convention for the Eliminations of all Forms of Discrimination against Women, The African Charter on Human and Peoples' Rights, among others.

⁵¹⁵ Bossa, S.B, op. cit. pg 13.

The reluctance of the framers to specifically provide for applicable law provisions seems not to be peculiar to the EACJ only. Peterson⁵¹⁶ points out that the European Community (EC) Treaty⁵¹⁷ defines the role of the ECJ as being to 'ensure that, in the interpretation and application of the Treaty, the law is observed'. The EC Treaty does not provide further guidance as to what 'the law' is, apart from the policy objectives, principles, instruments, and procedures it establishes for the Community institutions and the member states.⁵¹⁸ It is clear, however, that 'the law' is something more than the mere provisions of the EC Treaty and Community legislation, and that the intention of the authors was that the ECJ itself would define 'the law'. ECJ judgments, therefore, frequently provide direction for the political institutions in the establishment and the operation of the Community.⁵¹⁹

Furthermore the ECJ⁵²⁰ applies general principles of law that are recognised in the legal systems of the member states.⁵²¹ Tridimas⁵²² observes that they occupy a distinct position among the sources of Community law as they⁵²³ are "children of national law but, as brought up by the ECJ, they become *enfants terribles*: they are extended, narrowed, restated, and transformed by a creative and eclectic judicial process".⁵²⁴ One cannot agree more with this notion of the Court itself defining 'the law', and it is fully adopted here to the circumstances obtaining in the EACJ.⁵²⁵

⁵¹⁶Peterson, J, et al, op. cit. pg 128.

⁵¹⁷ Article 220 of the Treaty of European Community.

⁵¹⁸Peterson, J, et al, op. cit. pg 129.

⁵¹⁹ Ibid.

⁵²⁰ Peterson, J, et al, op. cit. pg 119.

⁵²¹ ECJ calls this system 'a new legal order' for the Community which is quite distinct from either national or international law, comparable in some respects to the constitutional law of a federal polity.

⁵²²Tridimas, T, (2006) *The General Principles of EU Law* pg 5.

⁵²³ See Tridimas, T, op. cit. pg. 6 where the following general principles, among others, have been recognised by the ECJ: the right to judicial protection, the principle of equal treatment or non-discrimination, the principle of proportionality, the principle of legal certainty, the principle of the protection of legitimate expectations, the protection of fundamental rights, and the rights of defence.

⁵²⁴ Tridimas, T, op. cit. pg 6.

⁵²⁵See Deya, D, op. cit. pg 57 where, in the above cited case of *Calist Andrew Mwatela and others v The EAC*, the Court applied the general principle of 'prospective annulment' to preserve the previous decisions of the EAC Council of Ministers and Sectoral Council for Legal and Judicial Affairs, to avoid anarchy with regard to past actions of EAC. It observed that prospective annulment which has been used in other jurisdiction is good law and practice, and proceeded to cite the case of *Defrene v Sabena (1981) All E.L.R. 122*, decided by ECJ, as one of the authorities.

(iv) The official language of the Court

The Treaty⁵²⁶ decrees English to be the official language of the Court. This requirement impedes ordinary citizens' access to the Court. Partner States, as observed above, have different official languages. English is not even an official language in Burundi, and it is not widely spoken by the general populace in some other Partner States. For instance, in Rwanda, "*ninety three per cent of the country speaks only Kinyarwanda. Just over one half of a per cent (.59) speak English, about 51,000 out of the nearly 9 million population*".⁵²⁷ With this limited use of English as a medium of communication, it is absurd to note that only English is allowed as an official language of the Court. It is submitted that the principle of linguistic equality, particularly of the official languages as recognised by the Partner States, should be applied, not only by the Court, but also by the entire Community. One wonders that even *Kiswahili*, which is the *lingua franca* in the region,⁵²⁸ has not been accorded the status of an official language of the Court, whereas it is an official language of the African Union, a continental body. Hartley⁵²⁹ observes that one of the characteristic of ECJ is that it is multilingual.⁵³⁰ Hartley further observes that when the Community turns multilingual, it must be able to operate in any official language.⁵³¹ Community institutions are, therefore, required to accommodate themselves to the needs of the citizens and the other party.⁵³²

⁵²⁶ Article 46 of the Treaty.

⁵²⁷ "New African", Issue No. 482, dated March 2009 "Rwanda & the charity industrial complex (part 2)" pg 35.

⁵²⁸ Article 137 of the treaty states that the official language of the Community shall be English and Swahili is to be developed as the *lingua franca* of the Community.

⁵²⁹ Hartley, T.C (2007) *The Foundations of the European Community Law*, pg 66.

⁵³⁰ See Hartley, T. C (2007) *op. cit.* pg 66 where it is stated that the partner states in EU have 23 official languages which are used by ECJ namely, Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish, and Swedish. All the official languages, except Irish, are working languages of the European Constitution. Community legislation is published in all the working languages, and it is generally accepted that all versions are equally authentic.

⁵³¹ Hartley, T. C (2007), *op. cit.* pg 68.

⁵³² *Ibid.*

4.2.7 THE EAST AFRICAN LEGISLATIVE ASSEMBLY (EALA)

4.2.7.1 STRUCTURE

The membership of EALA (also referred to as 'the Assembly') comprises of nine members elected by each Partner State⁵³³ and ex-officio members.⁵³⁴

The Assembly shall have committees constituted in the manner provided in the rules of procedure.⁵³⁵ A Clerk and other officers of the Assembly are appointed by the Council.⁵³⁶

The National Assembly of each Partner State elects, not from among its members, nine members of the Assembly, who shall represent as much as feasible, the various political parties represented in the National Assembly, shades of opinion, gender, and other special groups, in accordance with such procedure as the National Assembly of each Partner State may determine.⁵³⁷ A person has to meet certain membership qualifications.⁵³⁸

An elected member of the Assembly shall hold office for five years and be eligible for re-election for a further term of five years.⁵³⁹ Terms and conditions of service of the members are determined by the Summit⁵⁴⁰. A member may vacate his or her office in a number of ways.⁵⁴¹ The Speaker of the Assembly

⁵³³ Article 48.1 (a) of the Treaty.

⁵³⁴ These consist of Ministers responsible for East African Community Affairs from each Partner State; the Secretary-General and the Counsel to the Community. The Assistant/Deputy/State Ministers may only participate in the meetings of the Assembly when substantive Ministers are unable to attend.

⁵³⁵ Article 48.3 of the Treaty.

⁵³⁶ Article 48.4 of the Treaty.

⁵³⁷ Article 50.1 of the Treaty.

⁵³⁸ Article 50.2 provides that such a person must: be a citizen of that Partner State; be qualified to be elected a member of the National Assembly of that Partner State; not be holding office as a Minister in that Partner State; not be an officer in the service of the Community; and has proven experience or interest in consolidating and furthering the aims and objectives of the Community.

⁵³⁹ Article 51.1 of the Treaty.

⁵⁴⁰ Article 51.2 of the Treaty.

⁵⁴¹ They are provided under Article 53.3 of the Treaty, namely: upon the delivery of his or her resignation in writing to the Speaker; upon his or her ceasing to be qualified for election as an elected member; upon his or her election or nomination as a member of the National Assembly of the Partner State; upon his or her appointment as a Minister in the Government of a Partner State; upon his or her having been absent from the Assembly for such period and in such circumstances as prescribed by the rules of the Assembly; or upon his or her conviction by a court of competent jurisdiction of an offence and sentenced to imprisonment for a term exceeding six months and if no appeal has been preferred against such a decision.

shall be elected on a rotational basis by the elected members from among themselves to serve for a period of five years.⁵⁴²

4.2.7.2 FUNCTIONS

The Assembly is the legislative organ of the Community.⁵⁴³ It liaises with the National Assemblies of Partner States on matters relating to the Community; debates and approves the budget; considers annual reports, audit reports and any other reports submitted by the Council; discusses matters of the Community and makes recommendations to the Council; may establish any committee; recommends to the Council the appointment of the Clerk and other officers of the Assembly⁵⁴⁴; establishes its own procedures; and perform any other function as conferred by the Treaty.⁵⁴⁵

4.2.7.3 WORKING METHODS

The meetings of the Assembly shall be held at such times and places as the Assembly may appoint.⁵⁴⁶ However, the Assembly shall meet at least once in every year at Arusha.⁵⁴⁷ The Speaker shall preside over the meetings of the Assembly.⁵⁴⁸ All questions proposed for decision in the Assembly shall be determined by a majority of the votes of members present and voting.⁵⁴⁹ Ex-officio members are not entitled to vote. If the votes of the members are equally divided upon any motion before the Assembly, the motion is lost.⁵⁵⁰ Under Article 59.1 of the Treaty, any member may propose any motion or introduce any Bill in the Assembly subject to the rules of procedure.⁵⁵¹ The Assembly is precluded from proceeding with Bills in certain specified circumstances.⁵⁵²

⁵⁴² Article 53.1 of the Treaty.

⁵⁴³ Article 49.1 of the Treaty.

⁵⁴⁴ Article 49.2 of the Treaty.

⁵⁴⁵ Article 49.3 of the Treaty.

⁵⁴⁶ Article 55.1 of the Treaty.

⁵⁴⁷ Article 55.2 of the Treaty.

⁵⁴⁸ Under Article 56 of the Treaty, in the absence of the Speaker, an elected member of the Assembly may be elected to preside over the sitting of the Assembly.

⁵⁴⁹ Article 58.1 of the Treaty.

⁵⁵⁰ Article 58.4 of the Treaty.

⁵⁵¹ The proviso to Article 59.1 provides that a motion which does not relate to the functions of the Community or a Bill which does not relate to a matter with respect to which Acts of the Community may be enacted, shall not be proposed or introduced, as the case may be, in the Assembly.

⁵⁵² These, provided under Article 59.2, include a Bill that makes provision for the imposition of any charge upon any fund of the Community, or for the payment, issue or withdrawal from any fund of the

The enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, and every Bill that has been duly passed and assented to is styled an Act of the Community.⁵⁵³ Under Article 63.1 of the Treaty, the Heads of State may assent to or withhold assent to a Bill of the Assembly.⁵⁵⁴ If a Head of State withholds assent to, a re-submitted Bill, the Bill shall lapse.⁵⁵⁵ Mechanisms for co-operation between the Assembly and National Assemblies of Partner States are provided by Article 65 of the Treaty.⁵⁵⁶

4.2.7.4 ANALYSIS

(i) Structure

(a) Composition

Upon the accession of Burundi and Rwanda, the number of elected members of the Assembly increased to forty five. However, this size of the Assembly still raises concerns. Oloka-Onyango⁵⁵⁷ states that it is a standard practice that legislative bodies the world over transact a considerable amount of their business while constituted as Committees, and the Treaty 'concedes' as much.⁵⁵⁸ Whether with forty five elected members the Assembly has the human power necessary to efficiently carry out its voluminous legislative functions, is to be seriously doubted.⁵⁵⁹ This worry stems from the fact that,

Community of any moneys not charged thereon, or the increase in the amount of any such payment, issue or withdrawal, or for the remission of any debt due to the Community.

⁵⁵³ Article 62.1 of the Treaty.

⁵⁵⁴ A Bill that has not received assent within three months from the date on which it was passed by the Assembly shall be referred back to the Assembly, giving reasons, and with a request that the Bill or a particular provision thereof be reconsidered by the Assembly in terms of Article 63.2. If the Assembly again approves the Bill, the Bill shall be re-submitted to the Heads of State for assent.

⁵⁵⁵ Article 63.4 of the Treaty.

⁵⁵⁶ These include: transmission of copies of records of all relevant debates of the meetings, and copies of relevant Bills and Acts, by the Clerk of the Assembly to the Clerks of National Assemblies, and vice versa.

⁵⁵⁷ Oloka-Onyango, J (ed), op. cit. pg 37.

⁵⁵⁸ See also Hughes, T, (ed) (2006) *SADC: Parliamentary-Civil Society Engagement Handbook* pg 31 where it is contended that parliamentary committees constitute the most important work centres of any elected assembly, thus they are often termed the 'engine room' of parliament. Committees serve at least three crucial roles. The first role is that of constituting a body of members of Parliament (MPs) who are policy and legislative specialists to represent the parliament in a particular policy area. The second important role is consultative and to involve the public in the deliberative process. The third vital role played by committees is that of conducting oversight over the executive.

⁵⁵⁹ Oloka-Onyango, J (ed), op. cit. pg 37.

under the provisions of Article 49 of the Treaty, the Assembly is “*mandated to exercise both legislative and oversight functions on all matters within the purview of the EAC. The mission of the Assembly is, therefore, to support, through legislation and oversight roles, the overall mission of EAC which aims at widening and deepening co-operation, among Partner States in political, economic, social, cultural, defense, etcetera for their mutual benefits.*”⁵⁶⁰

The oversight roles include carrying out spot assessment visits to EAC projects and/or demand for periodic reports in lieu of visits.⁵⁶¹ This is a continuous process whose aim is to provide legislative oversight in an attempt to ensure that the targets set out in the EAC Development Strategy are achieved by the stipulated dates.⁵⁶² This work of the Committees⁵⁶³ involves extensive travelling throughout the region where the programmes are executed.⁵⁶⁴ With as few as six Committees⁵⁶⁵ and a skeleton staff of 23 only 13 of whom are employed at a professional level, whereas the remaining 10 are in the general staff category,⁵⁶⁶ it will be an arduous task for the Assembly to fully and efficiently help to realise the stated mission of EAC. A 45 member Assembly with such a skeleton supporting staff does not appear to be too reassuring.⁵⁶⁷ Hence the parliament and its committees need to be fully resourced if they are to properly carry out their multiple roles.⁵⁶⁸ For instance, they must have access to library and research services⁵⁶⁹ as

⁵⁶⁰ See *the 14th Meeting of the Council of Ministers*, AICC, Arusha, Tanzania, 24th-27th September 2007 (Ref: EAC/CM 14/A1/2007) pg 84.

⁵⁶¹ See also Hughes, T (ed), op. cit. pg 5 where it is observed that parliaments have a democratic obligation to exercise oversight of the executive branch. This is a legitimate role of parliaments and one that should be central to any representative democracy.

⁵⁶² *The 14th Meeting of the Council of Ministers*, op. cit. pg 86.

⁵⁶³ The following are the six Committees of the Assembly, as discerned from various reports to the Council of Ministers Meetings (especially reports with Ref. Nos. EAC/CM 14/A1/2007 and EAC/CM 17/BP/2008), namely, the General Purpose Committee, House Business Committee, Committee on Accounts, Committee on Regional Affairs and Conflict Resolution, Committee on Communication, Trade and Investments, as well as Committee on Agriculture, Tourism and Natural Resources.

⁵⁶⁴ See also Hughes, T (ed), op. cit. pg 36 where the author opines that committees need to conduct regular departmental oversight and study tours to better understand the day-to-day activities, challenges and achievements of a particular department, and these need to be lobbied for and budgeted for by parliament.

⁵⁶⁵ See *14th Meeting of the Council of Ministers*, op. cit. pg 86.

⁵⁶⁶ *The 17th Meeting of the Council of Ministers*, op. cit. pg 59.

⁵⁶⁷ Oloka-Onyango, J (ed), op. cit. pg 138.

⁵⁶⁸ Hughes, T, (ed), op. cit. pg 33.

⁵⁶⁹ Ang'ila, F (ed) (2003) “Working structures of parliaments in East Africa” pg 9 < <http://kenya-fes-international.de/publications/workingstructures.pdf> > accessed on 10 April 2009.

research capacity is essential for effective performance of any parliamentary committee.⁵⁷⁰ This is important as parliament, and committees in particular, cannot and will not be taken seriously by the executive branch unless they prove themselves to be well informed, well researched, proactive and constructive in their engagement with the executive.⁵⁷¹

The issue of the number of members of EALA raises another pertinent question of the current mode of representation where each Partner State is equally represented (nine elected members each) regardless of its size in terms of geographical configuration and populations.⁵⁷² Proportional representation, in these circumstances, seems to be an ideal situation as opposed to allocation of equal number of seats per Partner State. Morara⁵⁷³ aptly argues that the fixation on equal national representation leads to the neglect of important factors, such as, population density and size. The latter should ordinarily determine the level of representation, particularly when one takes into account that all the founding protocols proclaim that the parliamentary bodies are supposed to represent the people of the respective regions, and not an accumulation of individual national interests.⁵⁷⁴

(b) Election procedures

As mentioned above, the Treaty mandates the National Assembly of each Partner State to determine the procedure for electing members of the Assembly to represent their countries. However, Partner States have come up with different election rules, for example, *“while in Tanzania and Uganda, the representation of gender interests was a critical criteria and its impact was well vindicated in the membership, in Kenya this was not the case, leading to demonstrations by civil society during the inauguration of EALA on*

⁵⁷⁰ Ang'ila, F (ed) (2003), op. cit. pg 25.

⁵⁷¹ Hughes, T (ed), op. cit. pg 36. The author further argues, at pg 33, that committee members must develop a high level of appropriate skills both in un-packing and interpreting legislation and within the specific policy area covered.

⁵⁷² Rwanda (8 million), Burundi (8.6 million), Uganda (24.6 million), Kenya (34 million) and Tanzania (38 million) < <http://www.eac.int/web-links/2-partner-states.html> > accessed on 16 March 2009.

⁵⁷³ Morara, H.O (2001) “The inauguration of East African Legislative Assembly-time to rejoice?” as cited in Terlinden, U “African regional parliaments-engines of integration and democratization? pg 5 < <http://library.fes.de/pdf-files/iez/02581.pdf> > accessed on 15 March 2009.

⁵⁷⁴ Ibid.

21 November, 2001.”⁵⁷⁵ In Kenya and Tanzania, the lists of candidates were drawn up by the party caucuses, while aspirant members who wished to be nominated in Uganda had to gain support of at least 50 Members of Parliament (MPs) of the “no party” Parliament.⁵⁷⁶

The representation in the Assembly has been exclusively confined within the context of political parties.⁵⁷⁷ Oloka-Oyango⁵⁷⁸ further argues that this approach barely strikes one as a faithful implementation of the letter and spirit of Article 50, and the Treaty in general. The “representativeness” that the Treaty seeks to achieve transcends political parties, extending to, and including, shades of opinion, gender and other special interest groups in the Partner States. If this were not the case, it would be exceptionally difficult to explain the Treaty’s special recognition of such sections of society as business organisations and professional bodies,⁵⁷⁹ women, civil society⁵⁸⁰ in general, and the declared operational principle of a people centred EAC.⁵⁸¹

The flagrant disregard of the rules was prominent, especially in Kenya. This was not entirely unexpected as Africa’s experience with constitutionalism has not been a happy one.⁵⁸² The President ordered the Cabinet to ensure that the National Assembly approves a motion seeking to reverse a commitment to nominate three women⁵⁸³ to represent Kenya in EALA.⁵⁸⁴ On voting day,

⁵⁷⁵ Ang’ila, F (ed) (2004) “Processes for elections to the East African Legislative Assembly” pg 3<
<http://www.kenya.fes-international.de/publications/eala.pdf> > accessed on 10 October 2008.

⁵⁷⁶ Terlinden, U, op. cit. pg 4.

⁵⁷⁷ Oloka-Onyango, J (ed), op. cit. pg 140.

⁵⁷⁸ Ibid.

⁵⁷⁹ Article 129 of the Treaty.

⁵⁸⁰ Article 127.3 of the Treaty.

⁵⁸¹ Oloka-Onyango, J (ed), op. cit. pg 140.

⁵⁸² See Akiba, O (ed) (2004) *Contemporary Perspectives on Developing Societies: Constitutionalism and Society in Africa* pg 7.

See also De Smith, S.A (1962) “Constitutionalism in the Commonwealth today” as cited in Akiba, O, op. cit. pg 3 where he states: “Constitutionalism in its formal sense means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedures according to which it must be performed or by delimiting its permissible content. Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty”

⁵⁸³ See Ang’ila, F (ed), op. cit. pg 10 where he states that under the Treaty for Establishment of the East African Community (Election of the Members of Assembly) Rules, 2001 (LN 154/2001) enacted by the Kenyan Parliament, though the seats were to be shared according to the parties’ strength in

KANU, the ruling party, won the motion to alter the election rules by 89-79 votes in favour of changing the number of women.⁵⁸⁵ The rules gave political parties the right to nominate EALA members, thereby violating Article 50 of the Treaty.⁵⁸⁶ Given the open secret that quite a significant section of the citizenry has no conscious affiliation whatsoever with any of the registered political parties,⁵⁸⁷ their monopoly over representation can not be justified as being microcosmic of all existing shades of opinion.⁵⁸⁸ The EALA should reflect as much as it is feasible the rich political, economic and social spectrum of society.⁵⁸⁹

The process of electioneering for membership of EALA should be brought under order through uniform rules cutting across the five National Assemblies to limit unnecessary disruptions to the work of the Community. As seen above, in the case of *Honourable Prof. Peter Anyang' Nyong'o and others v the Attorney-General of Kenya and others*,⁵⁹⁰ the injunction issued by the EACJ preventing the nine members from Kenya from being sworn in until the petition has been disposed off paralysed the entire process because, for other underlying practical realities, the members from other Partner States could not be sworn in either.⁵⁹¹ When the EACJ held that the election method employed was inconsistent with Article 50 of the Treaty, hence necessitating fresh elections in Kenya, which were held in May 2007, the entire Assembly was kept in limbo for five months. As a result of this delay, no legislative work⁵⁹² was carried out in the most part of the second half of the financial

Parliament, political parties were required to ensure that at least a third of their nominations to the EALA were women. Unfortunately this aspect of the rules proved inconvenient to the ruling Kenya African National Union's (KANU) ethnic/regional based nominations, and the party, with its partner, the National Development Party (NDP) was able to force through an amendment to the rule, with the result that it nominated one instead of three women.

⁵⁸⁴ Ang'ila, F (ed), op. cit. pg 10.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ang'ila, F (ed), op. cit. pg 11.

⁵⁸⁷ Oloka-Onyango, J (ed), op. cit. pg 140.

⁵⁸⁸ Oloka-Onyango, J (ed), op. cit. pg 141.

⁵⁸⁹ Ibid.

⁵⁹⁰ EACJ Reference Number 1 of 2006.

⁵⁹¹ *The 14th Meeting of the Council of Ministers*, op. cit. pg 84.

⁵⁹² The second Assembly was sworn in on June 5, 2007.

year. EALA had to re-adjust its work plans inevitably pushing most of the planned activities for that period to the 2007/2008 financial year.⁵⁹³

Ang'ila⁵⁹⁴ contends that EALA itself should provide leadership in this process by drafting new regulations for uniform application in all the Partner States. This is feasible even if Uganda retains its current no-political party system, and is the only way that uniformity and faster integration can be achieved.⁵⁹⁵ Indeed EALA has taken up the challenge, as during its 6th meeting,⁵⁹⁶ pursuant to Article 59 of the Treaty and Rule 64 of the EALA Rules of Procedure, the Assembly approved the introduction of a Private Members Bill entitled: "*The East African Community Elections Bill, 2008*".⁵⁹⁷ The objective of the Bill is to establish principles or guidelines for the conduct of elections to be adhered to by all Partner States within the Community.⁵⁹⁸ This is a welcome development as the EACJ, among other decisions it gave in the case of *Hon. Prof. Anyang' Nyong'o* cited above, was that the Kenya's Election of East Africa Legislative Assembly Rules do not comply with Article 50 of the Treaty.⁵⁹⁹

Terlinden⁶⁰⁰ argues that the challenge lies in setting clear criteria and making them as obligatory as possible. The definition and homogenous application of electoral procedures within the partner states of a regional parliament are required to guarantee that due democratic process will be followed and equitable representation can actually be achieved.⁶⁰¹ Any electoral procedure proposed should be able to put an end to the wrangling, bickering and chaos that has characterised the past two elections of members of the Assembly. The negativity accompanied with chaotic elections dents the image of the members in particular, and the Assembly generally, hence diminishing their

⁵⁹³ *The 14th Meeting of the Council of Ministers*, op. cit. pg 85.

⁵⁹⁴ Ang'ila, F (ed), op. cit. pg 12.

⁵⁹⁵ Ibid.

⁵⁹⁶ The meeting was held from 11th -24th May 2008.

⁵⁹⁷ *The 17th Meeting of the Council of Ministers*, op. cit. pg 60.

⁵⁹⁸ Ibid.

⁵⁹⁹ *The 14th Meeting of the Council of Ministers*, op. cit. pg 15.

⁶⁰⁰ Terlinden, U, op. cit. pg 5.

⁶⁰¹ Ibid.

moral authority, which is crucial in a legislative capacity because of the supervisory role it plays.

It is, however, submitted that the best solution to the problem lies in the periodic direct elections of the EALA by the people of East Africa. Direct universal suffrage for the Assembly would give it 'democratic legitimacy' as it will have the support of the people on the ground.⁶⁰² As it stands now, none of the organs or institutions of the Community is directly elected by the people.⁶⁰³ This, in the long run, may work to the detriment of the Community as people may feel alienated from the integration process, since they are not involved in deciding who should run the institutions governing the process.⁶⁰⁴ Clapham⁶⁰⁵ argues that while the more formal process of regional integration remains a governmental endeavour directed by the political actors of member states, citizens' participation in the process cannot be ignored in the long term. Braude⁶⁰⁶ insists that sustainable integration rests on broad public support, which helps to safeguard political shocks and ensures that integration addresses matters such as development and political governance.⁶⁰⁷

⁶⁰² See also Hughes, T (ed), op. cit. pg 6 where it is observed that legitimacy and credibility are also a function of public familiarity with and knowledge of parliament. Ignorance of or lack of information about parliament can lead to widespread disinterest, scepticism and apathy.

⁶⁰³ See "e-EAC newsletter", EAC Update Special Issue No. 2008/15 dated 6 October 2008 "EAC Common Mandate Drive Gets Major Boost as Region's Parliamentarians Join Forces" pg 4 where Hon Sarah Bonaya, EALA Member, is reported to have said that although the present situation whereby the EALA is indirectly elected through the National Assembly is not satisfactory, this should not be used to marginalise the Assembly's representative, legislative and oversight roles as enshrined in the Treaty. A road map should be provided for the transition from the present indirectly elected EALA to an EALA that would be elected by universal suffrage < <http://www.eac.int/downloads/e-newsletter.html> > accessed on 3 March 2009.

⁶⁰⁴ See Braude, W, op. cit. pg 205 where it is recounted that one of the most common complaints regarding the driving forces behind EAC integration is that the process has not been sufficiently inclusive or people centred. Most agree that it is largely governments that have been driving integration, followed by business. This means that only politics and trade have been pushing the integration process thus far, rather than a wider agenda including, for example, socio-economic development, human rights, governance, culture, and identity.

⁶⁰⁵ Clapham, C, et al (eds), op. cit. pg 160. It is further argued that to effectively mediate the negative effects of integration, political participatory mechanisms become important. The lessons learnt at a national level in terms of democratization and economic management are no less important at the regional level.

⁶⁰⁶ Braude, W, op. cit. pg 19.

⁶⁰⁷ Ibid. Braude further argues that if the citizens are to accommodate the adjustments, sacrifice and disruption entailed in the process, the public and the nation must be satisfied that integration is in their best interests. To bring about this acceptance demands an inclusive process, not only stronger and more sustainable at the political level due to the popular support it would bring about, but also greatly strengthened by the contributions from a range of stakeholders in business and civil society.

A perfect example, given by Karns,⁶⁰⁸ of the 'democratic deficit', whereby most decisions are made by governmental leaders and bureaucrats without direct input from voters, is derived from the EU, where the Maastricht Treaty on European Union⁶⁰⁹ was briefly set back when Danish voters rejected the treaty in a referendum.⁶¹⁰ Following agreement that Denmark could opt out of certain provisions of the Maastricht Treaty, Danish voters passed it in a second referendum.⁶¹¹

The EAC will not be the first to adopt a system of direct election of the members of a regional Assembly, albeit in a gradual way. In the EU, the organisation that the EAC has been greatly modelled on, a specific provision, under the Treaties of Rome, was made for direct election of the European Parliament (EP) and it was no longer to be a matter for each member state to decide.⁶¹² No fixed timetable was agreed for the change, but the commitment to abolish the system of nominated members was made legally binding. It took over twenty years for direct elections to be organised. Nevertheless, the change was to prove of long term significance in shaping the institution,⁶¹³ as through representative democracy the EP provides the EU with a degree of democratic legitimacy⁶¹⁴ when it participates in the legislative process whose purpose is accountability of decision makers.⁶¹⁵ This route, though, seems to

⁶⁰⁸Karns, M.P, et al (2004) *International Organisation: The Politics and Processes of Global Governance* pg 163.

⁶⁰⁹See Karns, M.P, et al, op. cit. pg 163 where it is stated that the Maastricht Treaty transformed the European Community (EC) into the EU. The original EC became one of the three pillars of the new EU. A second pillar was a Common Foreign and Security Policy (CFSP), while the third pillar included home affairs and justice. In reality, though, both the second and the third pillars remain largely matters for individual governments or at best intergovernmental agreement. The Maastricht Treaty also gave impetus to a European monetary union with agreement to institute a single European currency by 1999, and created European citizenship with a common passport and rights to live and vote wherever they liked.

See also Meadle, E, op. cit. pg 47 where the authors indicate that, now, the EU monetary union comprises 16 countries (Slovenia, the newest member was welcomed in 2009). Its central bank, the European Central Bank (ECB), is one of the world's most influential institutions, and its currency, the euro, is one of the world's most prominent currencies.

⁶¹⁰Karns, M.P, et al, op. cit. pg 163.

⁶¹¹Ibid.

⁶¹²Peterson, J, et al, op. cit. pg 97.

⁶¹³Ibid.

⁶¹⁴Szyszcak, E, et al (2005) *Understanding EU law* pg 35.

⁶¹⁵Szyszcak, E, et al, op. cit. pg 36.

be not enough for the EU citizens.⁶¹⁶ Indeed the people should take part in the exercise of power through the intermediary of a representative assembly.⁶¹⁷

(c) Lifespan of the Assembly

There are glaring *lacunae* in the Treaty with regard to the life of the Assembly, an important body of the Community. The Treaty does not provide for the lifespan of the Legislative Assembly itself.⁶¹⁸ Its lifespan is determined through a proclamation by the EAC Heads of State.⁶¹⁹ The Treaty, however, provides for the tenure of the individual members of the Legislative Assembly.⁶²⁰ This matter, which was brought to light through *Mtikila's case*⁶²¹ needs to be dealt with accordingly through amendments to the Treaty.⁶²² Although the Court did not address this matter as it was not an issue under dispute, the revelation that the lifespan of the Assembly itself is determined by the Summit does not sit well with the principle of separation of powers. It has been taken for granted that when the tenure of the individual members end, then the life of the Assembly also comes to an end. In *Mtikila's case* the matter was complicated by the fact that two new members of the Assembly

⁶¹⁶ Piris, J.C (2006) *The Constitution for Europe: A Legal Analysis* pg 115 where the author contends that the Constitution for Europe, signed on 29 October, 2004 by 25 European Heads of State and Government, when it comes into force, will confer increased rights on some actors other the EU institutions: the National Parliaments, the Committee of the Regions and the EU citizens. These increased rights are an additional attempt to bring in the people, to try to give them other channels than the EP (directly elected) and the Council (composed of members of governments responsible to their people) through which to express their wishes and concerns.

⁶¹⁷ Peterson, J, et al, op. cit. pg 98.

⁶¹⁸ See *Mtikila v Attorney-General of the United Republic of Tanzania and others Ref. No. 2 of 2007 (Ruling)* {2007} EACJ 4 (25 April 2007) pg 7 < <http://www.saflii.org/ea/cases/EACJ/2007/4.pdf> > accessed on 9 October 2008.

⁶¹⁹ See Vedasto, A.K "The East African Court of Justice: what it can determine and what it cannot", Part II (2007) 1 *The Tanzania Lawyer* pg 81 where it is stated that through Proclamation by the Heads of State dated 16 November 2006 the first EALA was, pursuant to Rule 86 of the East African Legislative Rules of Procedure, dissolved with effect from 29 November 2006...The effect of the dissolution was to dissolve the hitherto membership of the EALA and create the 27 vacancies pending election of new members. By the fact dissolution of the business and membership in the EALA including that of Dr. Norman Sigalla and Mrs. Hulda Stanley Kibacha (from Tanzania), effectively ended on 29 November 2006.

⁶²⁰ Article 51.1 of the Treaty an elected member of the Assembly shall hold office for five years and be eligible for re-election for a further term of five years.

⁶²¹ *EACJ Ref. No.2 of 2007.*

⁶²² Compare with the Parliament of Tanzania, one of the Partner States. The Constitution of the United Republic of Tanzania, 1977, as amended, under Article 65 provides that the life of the Parliament shall be five years < <http://www.nec.go.tz/publications/constitution.pdf> > accessed on 22 April 2009.

who assumed their position in the last year of the tenure of the serving members, upon resignation of two Tanzanian members, found that their tenure was deemed to end with the end of the sitting members' tenure contrary to Article 51.1 of the Treaty.

Vedasto⁶²³ argues that Article 51.3 of the Treaty which lists and limits the circumstances that can terminate membership before expiry of the five years excludes in that list termination by proclamation by Heads of State. He further argues that if Article 51 is a provision deserving respect, the proclamation and all such regulations, rules, circulars and whatever fathering or surrounding it would not work. For Article 51.1 guarantees five years regardless of anything except of the circumstances stated under Article 51.3.⁶²⁴

It also came to light that the Treaty does not provide for the process of filling any of the vacancies enumerated in Article 51.3.⁶²⁵ The assumption has been that this also falls under the jurisdiction of the National Assemblies.⁶²⁶ It is submitted that the Treaty should provide guidance on these important issues so as to create certainty. The call made earlier, hereinabove, that the Partner States need harmonised election procedures with regard to the membership of the EALA is reiterated to encompass the vacant position created by the operation of Article 51.3 of the Treaty.

⁶²³ Vedasto, A.K, op. cit. pg 82.

⁶²⁴ Ibid. It is indeed incredible that the Proclamation made under Rules 5 and 86 of the East African Legislative Assembly Rules, 2001, which are themselves made under Articles 49.2 (g) and 60 of the Treaty, appear to overrule the dictates of a Treaty provision, that is, Article 51.1.

⁶²⁵ It lists events upon whose occurrence a member is obliged to vacate his or her seat. These include resignation, ceasing to be qualified for election, upon nomination to the National Assembly of the Partner State, upon appointment as a Minister in the Government of a Partner State, absence from the Assembly for such period and such circumstances as prescribed by the rules of procedure and upon conviction by a competent court and sentenced to imprisonment for a term exceeding six months.

⁶²⁶ See *Mtikila's case*, op. cit. pg 11 where it is observed that Rule 16 of the East African Legislative Assembly Election Rules (the Tanzania Election Rules) states that the procedures, jurisdiction and the grounds of a Member of the EALA shall be the same as the provided by the law for election petitions in respect of the National Assembly. See also Article 52 of the Treaty.

(ii) Legislative and oversight powers

(a) Oversight powers

Generally most of the regional parliamentary assemblies, EALA included, pursue a number of activities outside the 'classical' responsibilities which are important for the practical democratic value of these bodies,⁶²⁷ namely, representing constituent interests, making or shaping public policy including law making, and overseeing policy implementation by executive branch agencies.⁶²⁸ African legislators face many constraints in fulfilling their roles and responsibilities, including, weak individual and institutional capacity, little independence from more powerful executives and ruling political parties, and limited political will.⁶²⁹

The powers of the Assembly have been greatly and craftily muted. The muted nature of the Assembly's power has been disguisingly acknowledged by the Community. One of the strategic interventions earmarked under the Development Strategy 2006-2010 is enhancement of the mandate of the EALA,⁶³⁰ though the success indicator over the matter indicates that the intended mandate is that of EALA taking precedence over National Parliaments.⁶³¹ A careful reading of Article 49.2 of the Treaty on Functions of the Assembly shows that the Assembly is entrusted with general functions/responsibilities with not much real power. The Assembly mainly exercises advisory functions, that is, it can discuss, debate, consider and make recommendations, but it cannot censure, direct or demand general or specific actions to be taken by the Summit, Council, Secretariat or any of the institutions of the Community. Eze contends that none of the executive bodies is obliged to pay attention to these different types of advice.⁶³²

⁶²⁷ Terlinden, U, op. cit. pg 6.

⁶²⁸ Bryan, S, et al (eds) (2007) "Transparency and accountability in Africa's extractive industries: the role of legislature" pg 10 < <http://www.ndi.org/files/2191-extractive-080807.pdf> > accessed on 16 March 2009.

⁶²⁹ Ibid.

⁶³⁰ *EAC Development Strategy*, op. cit. pg 49.

⁶³¹ *EAC Development Strategy*, op. cit. pg 89.

⁶³² Eze, O.C (2004) "The electoral processes of regional parliaments-similarities, differences and cost implications" as cited in Terlinden, U, op. cit. pg 6.

The EALA can invite anybody to address them and the Heads of State of EAC have followed such an invitation several times.⁶³³ Terlinden,⁶³⁴ however, submits that this right has no practical value if invited officials refuse co-operation.⁶³⁵ In the EU not only are invitations honoured but it is standard procedure that after the conclusion of the European Council session, its President, accompanied by the President of the Commission, reports to the European Parliament (EP) on the meeting.⁶³⁶ It is submitted that such a practice needs to be introduced in the EAC as it helps to forge links between the principal organs of the Community for a deeper integration. The EAC is urged to take practical steps to remove procedural bottlenecks that curtail the Assembly's power. For instance, in a case of conflict EALA powers to investigate thoroughly and hold the executive accountable remain very limited. Questions put to the Council lapse automatically if not answered within a period of six weeks.⁶³⁷

Ordinary parliaments exert a lot of their influence by providing checks and balances on the executive's spending, and guiding the allocation of funds.⁶³⁸ Under Article 49.2(a) of the Treaty, the Assembly has the power to debate and approve the budget. The Assembly has, indeed, on several occasions, exercised its power to disapprove the budget.⁶³⁹ Despite the ability to defer budgets, Ogalo argues that this provision which appears to empower the

⁶³³ Terlinden, U, op. cit. pg 7.

⁶³⁴ Ibid.

⁶³⁵ EALA reportedly wished to hold a session on the conflict in Northern Uganda in 2003, in which President Yoweri Museveni of Uganda had agreed to participate. Yet when the Assembly supported the Ugandan Parliament's call to declare the North a disaster area and asked for international engagement, Museveni cancelled his attendance at the meeting. (Adopted from Terlinden, U, op. cit .pg 7).

⁶³⁶ Peterson, J, et al, op. cit. pg 28.

⁶³⁷ Terlinden, U, op. cit. pg 7.

⁶³⁸ Ibid.

⁶³⁹ See *the 17th Meeting of the Council of Ministers*, op. cit. pg 59 where it is reported that the EALA, during its sixth meeting held from 11-24, May, 2008 in Nairobi, Kenya, deferred approval of the Community budget for the financial year 2008/2009 due to failure to adhere to the agreed Medium Term Expenditure Framework (MTEF) principles in budgeting. The EALA, however, finally approved the re-worked budget during its seventh meeting held from 13-17 June 2008 in Arusha, Tanzania. See also Hughes, T (ed), op. cit. pg 42 where it is observed that one of the roles of the parliamentary budget committee is to assess the degree of adherence and variance between MTEF and each annual budget. Where there is substantial variance between the two, the reasons for such variance must be interrogated. Where there is no MTEF in place, it is strongly recommended that some medium term budgetary framework be established to assist with policy formulation and planning.

Assembly is misleading.⁶⁴⁰ The Assembly's power does not include the entitlement to draw up or revise budgets, in terms of Article 59.2 of the Treaty, which effectively reduces the Assembly to a "rubber stamping institution".⁶⁴¹ It is really disturbing to rationalise the fact that the kind of oversight exercised by National Assemblies that is normally seen in the Partner States has not been replicated at the regional level in the respective areas of competence, which are much fewer than those under national jurisdiction.

(b) Law making powers

As indicated above, the Assembly plays a role in law making, under Article 59.1 of the Treaty. However, these powers are seriously constrained as EALA can only put forward and vote on motions and Bills if these have no cost implications for any fund of the Community.⁶⁴² This gravely impairs the scope and relevance of potential laws.⁶⁴³ The EACJ, in the case of *Calist Andrew Mwatela and others v The East African Community*,⁶⁴⁴ observed that the prohibition on the general powers of legislation by the Assembly, under Article 59, applies to any member of the Assembly, both the members and also the Council, when introducing Bills in the Assembly.⁶⁴⁵

As it has already been mentioned, Bills can be initiated by the Council⁶⁴⁶ or on the Assembly's own initiative,⁶⁴⁷ however, they will only be enacted into community law if the Heads of State assent to them.⁶⁴⁸ Bills which are not

⁶⁴⁰ Ogalo, D. W, op. cit.

⁶⁴¹ Morara, H.O (2001) "The inauguration of East African Legislative Assembly-time to rejoice?" as cited in Terlinden, U, op. cit. pg 7.

⁶⁴² Article 59.2 of the Treaty.

⁶⁴³ Terlinden, U, op. cit. pg 8.

⁶⁴⁴ *EACJ Reference Number 1 of 2005*

⁶⁴⁵ *EACJ Reference Number 1 of 2005*, pg 22.

⁶⁴⁶ Braude, W, op. cit. pg 145 where the author observes that the standard process for regional law making is that the Secretariat drafts laws that are forwarded to the Council of Ministers, which then forwards them to EALA.

⁶⁴⁷ Article 59.1 of the Treaty.

⁶⁴⁸ Article 63.1 of the Treaty.

See also Ogalo, D.W "The East African Legislative Assembly Perspective" (2003) 4 *The East African Lawyer* pg 13 where the author contends that the initiative taken by members of the Assembly, via Article 59.1 of the Treaty, to draft and enact laws is hampered by the fact that the Assembly does not have a draftsman of its own. Members have to do the drafting themselves, yet they are not experts in that field. They also lack sufficient funding to do their work.

assented to, and referred back to the Assembly, lapse if they do not get assented to on re-submission.⁶⁴⁹ In other words, argues Terlinden, the Summit of Heads of State and Government has an effective veto right over the Assembly's legislation.⁶⁵⁰ Worse still, the Community legislative instruments are not directly applicable in the Partner States unless they are ratified by the National Assemblies.⁶⁵¹ Delays in ratification of these instruments, which sometimes run for several years,⁶⁵² have greatly hampered the overall progress of the Community, as implementation cannot commence without lawful authority.⁶⁵³

Oloka-Onyango⁶⁵⁴ argues that the prevailing legal system in the Partner States, which was and remains 'dualist' in nature, draws a 'china wall' between rules of international law, on one hand, and national law, on the other hand, with the consequence, in the event of conflict, the national law prevails.⁶⁵⁵ It is advisable to accord the Community's legislative instruments,

⁶⁴⁹ Article 63.4 of the Treaty.

⁶⁵⁰ Terlinden, U, op. cit. pg 8.

⁶⁵¹ See Article 8.5 of the Treaty which provides that the Partner States undertake to make necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones.

⁶⁵² See the 17th Meeting of the Council of Ministers, op. cit. pg 20 where it was reported that, except for the Republic of Uganda which has ratified the Protocol on the Establishment of the East African Civil Aviation Safety and Security Oversight Agency, the Partner States had not ratified the following protocols (by 30th June 2008) as urged by the Council:-

- (a) Protocol on Environment and Natural Resources - concluded on 03/04/2006;
- (b) Protocol on the Establishment of the East African Science and Technology Commission – concluded on 18/04/2007;
- (c) Protocol on the Establishment of East African Civil Aviation Safety and Security Oversight Agency – concluded on 18/04/2007;
- (d) Protocol on the Establishment of East African Kiswahili Commission – concluded on 18/04/2007; and
- (e) Protocol on the Establishment of the East African health Research Commission – concluded on 18/04/2007.

⁶⁵³ See *UNECA II*, op. cit. pg 21, UNECA contends that protocols are needed to put treaties in effect, so it slows implementation of agreed programmes when members of the regional economic community fail to sign or ratify a treaty/protocol or to submit a ratified treaty/protocol in a timely fashion. Although strong actions would be expected at the national level, only 16% of ratifications take less than three months. In most countries the process takes a year. Delaying in signing and ratifying regional agreements contribute to a loss of momentum in integration.

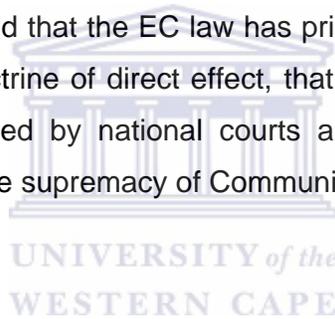
⁶⁵⁴ Oloka-Onyango, J (ed), op. cit. pg 128.

⁶⁵⁵ Ibid.

See also Bhuiyan, S (2002) *National Law in WTO: Effectiveness and Good Governance in the World Trading System* pg 31 where the author observes that the gradual emergence of individuals as subjects of international law in such areas as human rights, investment, international administrative law, or international criminal law has thwarted one of the basic premises of the dualist doctrine. International law has also made considerable inroads into national legal systems in various ways, for instance by stipulations in treaties for states to take effective legislative, administrative or other

such as, Treaties, Protocols and Acts, automatic direct applicability in the Partner States to create an “interface between Community law and municipal law of the Partner States”.⁶⁵⁶ This will ensure the smooth operation of the Community, in the process cutting down the delays and bureaucratic inertia at country level.

With the direct applicability of Community legislation in Partner States, the legislative sovereignty of the National Assemblies in Community matters ceases to apply. Herling⁶⁵⁷ states that the transfer by states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.⁶⁵⁸ In the case of *Costa v ENEL*,⁶⁵⁹ it was held that the EC law has priority over national law. Hartley⁶⁶⁰ insists that the doctrine of direct effect, that is, the principle that Community law must be applied by national courts as the law of the land, and the establishment of the supremacy of Community law are very essential.⁶⁶¹



measures to implement treaty provisions. Examples of such treaties are: International Convention on the Elimination of All Forms of Racial Discrimination 1966, Articles 2(1)(c) and (d); International Covenant on Civil and Political Rights 1966, Article 2(2); American Covenant on Human Rights 1969, Article 2; African Charter on Human and Peoples Rights 1981, Article 1; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, Article 2(1); and the UN Convention on the Rights of the Child 1989, Articles 3(2), 4, 19(1), 32(2) and 33.

⁶⁵⁶Oloka-Onyango, J (ed), op. cit. pg 128.

⁶⁵⁷ Herling, D, et al (2004) *Briefcase on Constitutional and Administrative Law*, pg 49.

⁶⁵⁸ Ibid.

⁶⁵⁹ *Case No. 6/64 (1964) ECJ*, as cited in Herling, D, et al, pg 49, where it is stated that ECJ further held that, the provision (of the Treaty) which is subject to reservation would be meaningless if a state could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

⁶⁶⁰ Hartley, T. C. (2007), op. cit. pg 48.

⁶⁶¹ Ibid.

See also Craig, P (2001) “Constitutions, Constitutionalism and the EU” as cited in Bhuiyan, S, op. cit. pg 31 where it is stated that the EU legal order, which in many respects partakes the characteristics of a domestic federal constitutional structure but yet remains an international treaty based system, provides another instance where the traditional lines between national and international law seem entirely inapt.

See also Clapham, C, et al (eds), op. cit. pg 158 where it is stated that the Andean countries took decisive steps toward supranationality in the legal sphere with the establishment of the Andean Court of Justice in 1979. This court’s decisions are directly applicable and of a binding nature on all member states. The jurisprudence established by this court has given the Andean process another distinctive integrative layer, which is absent from most other integrative schemes.

Interestingly, though, the Treaty does not provide procedures for treaty making between the Community and the outside world, which is essentially a portion of “sovereign power to create international obligations and new law in as far as the external treaty agreement with a state or international organisation”⁶⁶² is concerned. It is not known whether the existing Treaty was meant to be the one and only treaty in the Community. It provides for procedures for its amendment,⁶⁶³ and for Protocols⁶⁶⁴ which may be concluded in each area of co-operation. This is a serious *lacuna* in the area of Community external relations. Being an economic oriented organisation, and aspiring to an eventual political federation, the Community might need to conclude treaties and agreements with states and international organisations. It is doubtful whether the legal capacity of the Community, as provided under Article 4 of the Treaty,⁶⁶⁵ gives it sovereign powers to conclude treaties.⁶⁶⁶ The powers under this Article, on legal capacity of the Community, are normal powers with regard to its ordinary commercial transaction, privilege and immunities, undertaking legal proceedings, etc, as a body corporate in the Partner States. The Treaty only states that “the Community shall enjoy international legal personality”.⁶⁶⁷

Bowett⁶⁶⁸ argues that whilst treaty making power is clearly evidence of international personality, the reverse may not be true, for ‘personality’ is an infinitely variable concept and it does not in the least follow that every international person has capacity to make treaties. As the International Law Commission (ILC) has put it: “...all entities having treaty making capacity necessarily have international personality. On the other hand it does not

⁶⁶² Lasok, D, et al (1987) *Law and Institutions of the European Communities (4ed)*, pg 111.

⁶⁶³ Article 150 of the Treaty.

⁶⁶⁴ Article 151.1 of the Treaty.

⁶⁶⁵ Article 4(1) of the Treaty states that the Community shall have the capacity, within each of the Partner States, of a body corporate with perpetual succession, and shall the power to acquire, hold, manage and dispose of land and other property, and to sue and be sued in its own name. Article 4(2) provides that the Community shall have power to perform any of the functions conferred upon it by the Treaty and do all things, including borrowing, that are necessary or desirable for the performance of those duties.

⁶⁶⁶ See also Jackson, J.H (2006) *Sovereignty, the WTO, and Changing Fundamentals of International Law* pgs 57- 78 for an insightful discussion on modern approaches to the concept of sovereignty.

⁶⁶⁷ Article 138.1 of the Treaty.

⁶⁶⁸ Bowett, D.W (1982) *The Law of International Institutions* pg 341.

follow that all international persons have treaty making capacity.”⁶⁶⁹ Sarooshi⁶⁷⁰ adds that the main way states confer powers on international organizations is by concluding treaties that provide for such conferrals.⁶⁷¹ The International Court of Justice (ICJ) in the *WHO Advisory Opinion case* observed that “the powers conferred on international organizations are normally the subject of express statement in their constituent instruments.”⁶⁷² Scrutiny of the whole Treaty shows that there is no such express statement of conferral, by Partner States, of treaty making power with the outside world to the EAC.

Giving the example of the EU, Lasok⁶⁷³ observes that the treaty making powers of the Community, unlike that of a state, are not unlimited. The Community can enter into agreements with states and international organisations where this is provided for by the treaty. Such agreements shall be binding among Member States if concluded in accordance with the procedure laid down.⁶⁷⁴ Lasok⁶⁷⁵ further observes that the delegation of this power to the Community is not absolute for it is exercised subject to the participation of each Member State in the Council, and recourse to the ECJ. However, the ECJ acts as the watchdog of the Community’s legality but not of the interests of the Member States.⁶⁷⁶ The Partner States in the EAC are strongly advised to amend the Treaty and provide elaborate provisions on the exercise of treaty making power with the outside world by the Community to avoid questions of legality, i.e. whether they are binding on the Partner

⁶⁶⁹ A/4169 as cited in Bowett, D.W, pg 341.

⁶⁷⁰ Sarooshi, D, op. cit. pg 18.

⁶⁷¹ The two main treaty mechanisms by which one or more states can confer powers on international organizations are, namely, by use of a constituent treaty or on a more ad hoc basis by use of a treaty that is separate from the constituent treaty.

⁶⁷² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports, 1996*, as cited in Sarooshi, D, pg 18.

⁶⁷³ Lasok, D, et al, op. cit. pg 110.

⁶⁷⁴ Ibid.

⁶⁷⁵ Lasok, D, et al, op. cit. pg 111.

⁶⁷⁶ Ibid.

See also Clapham, C, et al, op. cit. pg 192 where it is reiterated that the EU influence is growing on the world stage, especially in international trade, where the European Commission has exclusive competence to negotiate on behalf of its members. The Commission also speaks for all its members when it negotiates with potential new members.

States, bearing in mind that the Community has already concluded a number of international agreements.⁶⁷⁷

Terlinden⁶⁷⁸ contends that, generally, in the absence of clearly defined working relationships, the Regional Assemblies (RAs') dependence on the executive bodies hinders their effective parliamentary performance. And wherever RAs do possess rights vis-à-vis the regional decision making bodies, these do not provide for effective accountability.⁶⁷⁹ The mismatch in the relationship between RAs and their executives is particularly visible in the area of legislation. The Councils and the Summits possess legislative functions furthering their executive powers. Protocols⁶⁸⁰ and treaties endorsed by Summits and Councils become international law. Except for the case of the EAC, these legislative functions are even exclusive.⁶⁸¹

Braude⁶⁸² argues that, at the moment, EAC protocols carry more authority, which effectively means that legislative powers lie effectively in the Secretariat and Summit. Such concurrent or exclusive legislative powers of the executive undermine the division of powers. Regional parliamentary bodies are structurally barred from fully exercising their supposed democratic roles and control functions.⁶⁸³ In the above referred case of *Calist Andrew Mwatela and others v EAC*, the Court re-asserted the principles of separation of powers and institutional balance between the various organs of EAC.⁶⁸⁴ In essence, it adopted the position of the ECJ that each of the principal organs of the regional entity must be allowed to fully exercise its Treaty mandate, and, therefore, act as checks and balances of each other.⁶⁸⁵

⁶⁷⁷ See "e-EAC newsletter", Update Special Issue No. 2008/15, op. cit. pg 5 where the concluded Economic Partnership Agreement (EPA) Framework Agreement between EU and EAC is reported.

⁶⁷⁸ Terlinden, U, op. cit. pg 11.

⁶⁷⁹ Ibid.

⁶⁸⁰ Protocols are approved by the Summit on recommendation of the Council in terms of Article 151.2 of the Treaty.

⁶⁸¹ Terlinden, U, op. cit. pg 11.

⁶⁸² Braude, W, op. cit. pg 146.

⁶⁸³ Ibid.

⁶⁸⁴ Deya, D, op. cit. pg 58.

⁶⁸⁵ Ibid.

It is submitted, that whenever the Summit and/or the Council assume legislative functions, the Assembly should be involved through a modified version of the co-decision procedure,⁶⁸⁶ which is prominently used in the EU. Under the modified co-decision procedure, a proposal⁶⁸⁷ is sent to the Assembly⁶⁸⁸ by the Council.⁶⁸⁹ At this stage the Assembly may approve the proposal by a simple majority. However, if it does not approve the proposal, it will send it back to the Council, with amendments or reasons therefor. The Council may consider the suggested reasons or amendments and amend the proposal accordingly. The revised document will only be sent back to the Assembly, if it is approved by the Council through an absolute majority vote. By an absolute majority vote, the Assembly may or may not approve it. If the proposal does not pass this vote, it lapses. It is hoped that such a process will enhance the Assembly's legislative powers and convert it from a place of discussion and debate to a major political actor involved in determining the overall direction of the Community.⁶⁹⁰ Hanlon⁶⁹¹ argues that the co-decision procedure encourages the principal organs to engage in inter-institutional discussion and negotiation. Most importantly, the Council, if it wishes to pass a piece of legislation, is obliged to take seriously the role of the Parliament.⁶⁹²

(iii) Working methods

(a) Frequency of working meetings

Given the wide scope of the Assembly's business, the Treaty should provide for four statutory ordinary meetings every year, instead of a single meeting.

⁶⁸⁶ See Hanlon, J (2003) *European Community law* pg 24 where it is stated that the European Parliament was given further legislative power through Article 251 of the Treaty of European Union. The purpose of this mechanism is to give greater recognition to the joint involvement of the Council and Parliament. It should be noted though, that it does not give direct power to Parliament. The ultimate power of Parliament under this procedure is that it can veto legislation; so its power is a negative one.

⁶⁸⁷ It may be a protocol or any legislative instrument other than a Bill. Bills will continue to follow the normal procedures under the Treaty and existing rules of procedure.

⁶⁸⁸ Treaties are not subjected to this procedure because of the simple fact that it is now almost a universally accepted practice that most of the treaties are initiated, discussed, negotiated, agreed upon and adopted at forums other Parliaments. These forums in form of international conferences or high level meetings are mostly either ministerial or summit meetings.

⁶⁸⁹ In this case, the Council is deemed to act for itself where the initiative is its own or on behalf of the Summit.

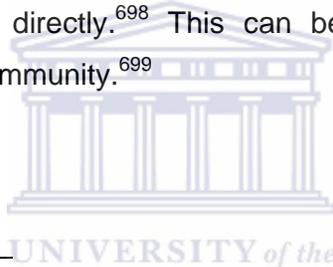
⁶⁹⁰ Peterson, J, et al, op. cit. pg 96.

⁶⁹¹ Hanlon, J, op. cit. pg 25.

⁶⁹² Ibid.

(b) Citizen's right to petition the Assembly and civil society participation

The structure of the Assembly as it exists does not give room for a private citizen of the Community to petition it on matters under the jurisdiction of the Community which in one way or another have a direct bearing on his or her life. It is advisable for the Assembly to provide an avenue for citizens to petition it.⁶⁹³ It is also instructive that by engaging with civil society organizations, the work of the EALA would be enormously enriched. Hughes⁶⁹⁴ argues that parliaments and civil society must structure their working relationships in a more co-operative, transparent and mutually supportive manner than has hitherto been the case.⁶⁹⁵ Hartley⁶⁹⁶ contends that, in EU, the citizen,⁶⁹⁷ acting individually or in association with others, has the right to petition on any matter within the Community's fields of activity which affects him directly.⁶⁹⁸ This can be a valuable means of putting pressure on the Community.⁶⁹⁹



⁶⁹³ See also Byers, M (ed) (2000) *The Role of Law in International Politics: Essays in International Relations and International Law* pg 117 where it is observed that post hoc ratification cannot ensure adequate public scrutiny of a government's behaviour in its dealing with foreign governments. The government, as an agent of domestic actors, enjoying the relative secrecy of international negotiations, may find it relatively easy to pursue partisan, short-term goals at the expense of its larger constituency. The necessity has, therefore, been felt to allow other voices to be represented in the negotiation process, mainly non-governmental organizations (NGOs) who represent domestic voices. For this reason, a right to be represented or consulted during such negotiations, or at the very least a right to be heard before agreements are signed, should be acknowledged especially for those who may personally be adversely affected.

⁶⁹⁴ Hughes, T (ed), op. cit. pg 9.

⁶⁹⁵ See also Hughes, T (ed), op. cit. pg 17 where it is further argued that parliaments must acknowledge and embrace the legitimate and constructive role that civil society, including NGOs, trade unions, business organizations, academics and religious organizations, play in a healthy plural society. All these stakeholders possess unique qualities and qualifications, and these should be utilized for the improvement of parliaments' deliberative, legislative and oversight roles. Consequentially, rather than exclude civil society and NGOs, parliaments should reach out to all elements of civil society and encourage their participation in their parliamentary process.

See also Sachs, A "Participatory democracy" (2009) 32 *New Agenda* pg 34 where it is opined that public involvement may be of special importance for those whose strongly held views have to cede to the majority opinion in the legislature. Minority groups should feel that even if their concerns are not strongly represented, they continue to be part of the body politic with the full civic dignity that goes with citizenship in a democracy.

⁶⁹⁶ Hartley, T.C (2007), op. cit. pg 31.

⁶⁹⁷ Article 194 of the Treaty on European Union.

⁶⁹⁸ The right extends to non-citizens residing in a partner state as well as to companies having their registered offices there.

⁶⁹⁹ Hartley, T. C (2007), op. cit. pg 31.

4.2.8 THE SECRETARIAT

4.2.8.1 STRUCTURE

The Secretariat is the executive organ of the Community.⁷⁰⁰ The service of the Community with regard to the Secretariat consists of three major offices⁷⁰¹ and such others as are deemed necessary by the Council. Under Article 67.2 of the Treaty, the Secretary-General (SG)⁷⁰² is appointed by the Summit upon nomination by the relevant Head of State under the principle of rotation.⁷⁰³ The SG serves a fixed five year term. Deputy Secretaries-General (DSGs)⁷⁰⁴ are appointed by the Summit on a rotational basis and serve a three year term, renewable once. The Counsel to the Community, who is the principal legal adviser, is appointed on contract. All staff of the Community are appointed on contract.

4.2.8.2 FUNCTIONS

Under Article 71 of the Treaty, the Secretariat is responsible for: initiating, receiving and submitting recommendations to the Council; forwarding of Bills to the Assembly through the Co-ordination Committee; the initiation of studies and research related to, and the implementation of, programmes; and the strategic planning, management and monitoring of programmes.⁷⁰⁵ Where the SG thinks it is appropriate, he or she may act on behalf of the Community.⁷⁰⁶

⁷⁰⁰ Article 66.1 of the Treaty.

⁷⁰¹ These are Secretary General, Deputy Secretaries General and Counsel to the Community.

⁷⁰² The SG is the principal executive officer of the Community, and as such he or she becomes the Head of the Secretariat, Accounting Officer of the Community and Secretary of the Summit.

⁷⁰³ Upon appointment of the SG the Partner State from which he or she is appointed forfeits the Deputy Secretary General under Article 67.2 of the Treaty.

⁷⁰⁴ The Council determines the number of Deputy Secretaries General.

⁷⁰⁵ Other responsibilities include undertaking investigations, collection of information or verification of matters relating to the Community; co-ordination and harmonization of policies and strategies; general promotion and dissemination of information on the Community to stakeholders; the submission of reports on the activities of the Community to the Council; general administration and financial management of the Community; mobilization of funds from development partners and other sources for implementation of the projects; the submission of Community budget to the Council for consideration; proposing draft agenda for the meetings of the organs of the Community other than the Court and the Assembly; the implementation of the decisions of the Summit and the Council; organisation and keeping records of meetings of the organs of the Community other than the Court and the Assembly; custody of the property of the Community; establishment of the practical working relations with the Court and the Assembly; and any matters provided by the Treaty.

⁷⁰⁶ Article 71.2 of the Treaty.

Under Article 72 of the Treaty, the staff of the Community shall not seek or receive instructions from any Partner State or any other authority external to the Community.⁷⁰⁷ The Partner States shall not by law of any of the Partner State confer any power or impose any duty upon an officer, organ or institution of the Community without the consent of the Council.⁷⁰⁸

4.2.8.3 ANALYSIS

(i) Structure

(a) Secretary-General and Deputy Secretaries-General

In general, when one looks at the responsibilities placed on the Secretariat as initiator, planner, manager, monitor, fundraiser, custodian, promoter, co-ordinator and implementer of the projects and the development programmes of the Community, it becomes glaringly apparent that the current structure of the Secretariat needs to be reformed. Kaahwa⁷⁰⁹ states that the Secretariat is served by a three tier staff cadre, that is, the executive staff,⁷¹⁰ the professional staff,⁷¹¹ and the support staff.⁷¹² For a long time the Secretariat had a SG and two DSGs⁷¹³. Initially this system worked curiously well for two principal reasons: one, the Community was still in an infant stage and it had not assumed a lot of activities; two, with three Partner States, the top three positions at the Secretariat were easily filled.⁷¹⁴ Then the post for DSG in charge of political federation was created to spearhead the fast tracking of the Community towards a political federation, which is the ultimate goal of the entire integration process in the region. With the accession of Burundi and Rwanda, the staffing system is not tenable anymore. The structure should

⁷⁰⁷ They are required to refrain from any actions which may adversely reflect on their position as international civil servants. The Partner States undertake to respect the international character of the responsibilities of the institutions and staff of the Community and shall not seek to influence them in the discharge of their duties.

⁷⁰⁸ Article 72.2 of the Treaty.

⁷⁰⁹ Kaahwa, W.T.K "The Secretariat of the East African Community" (2003)4 *The East African Lawyer* pg 30.

⁷¹⁰ The SG and DSGs.

⁷¹¹ These include Counsel to the Community and other lawyers, economists, information and public relations officers, accountants, internal auditors, human resources officers, information technologists, statisticians, engineers, librarians, etcetera.

⁷¹² These are secretaries, registry staff, accounts assistants, etcetera.

⁷¹³ DSGs for Projects and Programmes as well as Finance and Administration.

⁷¹⁴ Coincidentally, and may be through an unwritten informal understanding, at the entire Community level the allocation of top positions in three of the principal organs seemed to follow the principle of geographical distribution: EALA-Speaker (Tanzania), EACJ-President (Kenya) and Secretariat-SG (Uganda).

reflect the responsibilities of the Community.⁷¹⁵ A restructured Secretariat will be able to efficiently and effectively carry out its mandate, and quell the perception that its existing structure is one of the stumbling blocks in implementing the agreed upon programmes.⁷¹⁶

The prevailing practice enshrined in the Treaty, that requires the office of SG to be a rotational post, reduces its vitality. It is submitted that the SG should be appointed, by the Summit, from among any of the qualified East African citizens with a proven track record of performance. The term of office of the Secretary General should run concurrently with the term of office of the Deputy Secretaries General. In other words, the SG should enter office with his or her 'team' to ensure consistency and collective responsibility. Members of the team (SG and DSGs) should not be dismissed by their national governments during their term of office, but the whole team must resign *en bloc* if a vote of no confidence is passed by the Parliament.⁷¹⁷ Individual team members can be compelled to retire, through a process administered by the Court, on grounds of serious misconduct or because he or she no longer fulfils the conditions required for the performance of his or her duties.⁷¹⁸ In this way, when the Secretariat blunders, necessary actions are taken, as opposed to the present system, where the top 'leadership' of the Secretariat is seen, by the Summit/Council, as an extension of their Governments, and which is a recipe for incompetence, non-performance and maladministration.⁷¹⁹

⁷¹⁵ See Peterson, J, et al, op. cit. pg 144.

⁷¹⁶ See also "e-EAC newsletter", Issue No.2008/12, op. cit. pg. where Hon. Kaahwa said that the issue of sovereignty at the national level was at the core of the implementation bottlenecks the EAC was experiencing. He said that the issue of sovereignty should be revisited so that decisions are more binding and their implementation more expeditious.

⁷¹⁷ See Hartley, T.C, op. cit. pg 12.

⁷¹⁸ Ibid.

⁷¹⁹ See also Lawrence, R.Z (2007) "International organisations: the challenge of aligning mission, means and legitimacy" pg 4 where it is stated that international organisations have a tendency to develop traditions in which national origin rather competence plays a key role in appointment and advancement. Under these circumstances, national governments may find it difficult to complain about the performance of or about the dismissals of the nationals of the other countries thereby weakening accountability <
<http://www.cid.harvard.edu/citrade/GTN/CURRENT%20RESEARCH/wto%20Int'l%20Orgs.pdf> >
accessed on 7May 2009.

With the current membership of the Community consisting of five Partner States, the rotational principle loses its 'glamour' as a Partner State has to wait for twenty years for its turn to field a SG. Given the non-rotational nature of the office of SG, reality dictates that Partner States will demand to be represented at the next high level position, that is, at the DSG level, regardless of the fact that the Secretariat is meant to be a formally apolitical supranational administration.⁷²⁰ It is prudent to achieve a broad balance in the 'representation' of partner states in the upper reaches⁷²¹ of the Secretariat for purposes of acceptability at national level. Every Partner State should be allowed to nominate one person for appointment to the office of DSG. However, the nominated person must not be unacceptable to the other Partner States.⁷²² The nominated officials, before being formally appointed by the Summit, must be vetted, through confirmation hearings to verify their suitability, by the Assembly. The SG or DSGs must not engage in any other occupation whether gainful or not during their term in office, though in practice certain academic practices may be allowed.⁷²³

It is, therefore, contended that the structure of the Secretariat, given its multiple roles, should be portfolio based. As indicated above, there are more than 25 sectoral formations, and it would be desirable to cluster these formations in five portfolios.⁷²⁴ Each portfolio will be headed by a DSG in which case 'expertise is matched to portfolio'.⁷²⁵ Given the fact that the current sectoral formations indicate the priority areas⁷²⁶ that the Community has chosen to inform its integration process, it is only prudent and pragmatic for their supervision to be managed from right at the top of the Secretariat in order to give them the necessary impetus that they deserve in achieving the

⁷²⁰ See Peterson, J, et al, op. cit. pg 73.

⁷²¹ See Peterson, J, et al op. cit. pg 144.

⁷²² See Hartley, T. C, op. cit. pg 12.

⁷²³ See Hartley, T.C (2007) op. cit. pg 12.

⁷²⁴ See "e-EAC newsletter", EAC Update Special Issue No.2008/15 pg 3 where it is reported that Dr. Aman Kaborou, EALA Member, from Tanzania, warned against creating a top heavy EAC of politicians and bureaucrats and urged prudence in developing a structure and mechanism that strengthened the role of the ordinary people in the EAC integration process. < <http://www.eac.int/downloads/e-newsletter.html> > accessed on 20 March 2009.

⁷²⁵ Peterson, J, et al, op. cit. pg 79.

⁷²⁶ See *UNECA II*, op. cit. pg 60 where UNECA states that institutions are important in regional integration with the caveat that it is important to adopt a strategic approach to regional integration by prioritising areas of action.

objectives of the Community. DSGs will be assisted by Directors-General (DGs), as is the case now, but with modified responsibilities, depending on the nature of the sectoral formations under the respective DSGs. Then support departments would be created that cut across the entire spectrum of the Secretariat's work, such as, finance, administration, internal audit, communications, public relations, etc.

The number of DGs will depend on how the sectors have been re-organised but initially two DGs per DSG seem ideal. DGs may wish to head directorates that will consist of units. This is not necessary, as the Community is advised to move away from traditional, bureaucratic, and hierarchically based structures to more open and flexible administration.⁷²⁷ It involves focusing resources on core tasks, decentralising responsibilities whenever possible, devoting considerable attention to financial control, and establishing modern, incentive driven personnel systems.⁷²⁸ The stop-gap measures that are adopted by the Summit to plug the loopholes in the structure of the Secretariat are not helpful and are bound to exacerbate the problem.⁷²⁹ The existing institutional structure demands a complete overhaul. The administration of the existing customs union, and the envisaged common market in 2010, two advanced stages in the integration chain, require a comprehensive approach and a robust institutional framework to handle the challenges associated with their operationalisation.⁷³⁰

⁷²⁷Quinlivan, A, et al (2001) *Kinnock's Administrative Reform : A Cultural Perspective* as cited in Peterson, J, et al , op. cit. pg 161.

⁷²⁸ Ibid.

⁷²⁹ See *the Final Communiqué of the EAC Summit of Heads of State* (Ref EAC/SHS EX.7/A/2008 as annexed to the Report of the 7th Extraordinary Summit of Heads of State (Ref. No .EAC/SHS EX.7/R/2008 held in Kampala, Uganda, on 22nd October, 2008 pg. 18 where during the consideration of the Progress Report of the Council on the Comprehensive Roadmap for the Integration of Burundi and Rwanda in EAC, The Summit endorsed the decision of the Council to split the position of DSG (Projects and Programmes) into two, namely, DSG (Planning and Infrastructure) and DSG (Productive and Social Sectors). It was further decided that, one of these positions, should be filled up immediately by the incumbent DSG through re-designation. The other position shall be filled up by one of the new Partner States through appointment upon expiry of the initial contracts of two DSGs in April 2009.

⁷³⁰ See "e-EAC newsletter", Update Issue No. 23 dated 10 February 2009 "8th round of EAC CM negotiations in Kisumu, Kenya" pg 3 where it is reported that during the 8th round of the EAC Common Market negotiations ended on 6 February 2009, the members of the High Level Task Force concurred that, as the Community progresses from a Customs Union to a Common Market, there will be a need to undertake institutional review for effective functioning of the Common Market. It is further reported that during the open ceremony of the negotiations Hon. Amason Jeffah King, Kenyan

(b) Staff

The contract nature of the Community jobs may keep away talented, experienced and capable people, given the volatility of the labour market.⁷³¹

The Community is advised to devise a system which is able to re-assure capable staff to stay, based on merit and good performance, without compromising the work of the Community.⁷³² Kaahwa observes that the backbone of every international organisation is its civil service, i.e. the permanent staff working for it.⁷³³ Retaining talents is one of the key challenges in human capital management in modern organisations.⁷³⁴ In other regional integration communities, such as, the EU, “the reliance on contract staff is being reduced”⁷³⁵ as it results in high staff turnover.

Since the accession of Burundi and Rwanda, twenty two staff members have been recruited from those two Partner States to join the Community.⁷³⁶

Although the Community’s wish is to maintain a broad geographical balance among its staff,⁷³⁷ merit and experience should be the critical considerations

Minister of EAC Affairs, said that “it is imperative that as the Community moves into deeper integration of the Common Market, the EAC institutions need to be reviewed if we are to achieve Common Market.”

⁷³¹ See also “Attracting talent” (2009) 14 *Business Brief* pg 48 where it is noted that finding the talent appears to be the biggest challenge for most organisations.

⁷³² See also, “Attracting talent”, *ibid*, where it is observed that the biggest influence on human capital management is the performance review. It allows employees to see the link between their jobs and the organizational goals; something that is best supported by regular and specific feedback from managers. While an organization can have excellent leadership and defined objectives, when an effective review process is not in place, staff members are unable to gauge their performance, identify problem areas, advance their careers and ultimately realize their full potential.

⁷³³ Kaahwa, W. T.K, *op. cit.* pg 34.

⁷³⁴ See also Sacht, J “Human resources in the age of talent” (2009) 14 *Business Brief* pg 52 where it is contended that human capital management is a new business paradigm that considers people to represent a capital asset, rather than a set of costs. It is the foundational concept for talent management, in that leaders must adopt a new mindset and practices to replace the century-old imperative for cost control.

⁷³⁵ Peterson, J, *et al*, *op. cit.* 160.

⁷³⁶ See “Arusha Times”, dated 21 February, 2009 “East Africa: Worst Financial Crisis Hits EAC” < [allAfrica.com/allAfrica_com-East Africa Worst Financial Crisis Hits EAC \(page 1 of 1\).html](http://allAfrica.com/allAfrica_com-East Africa Worst Financial Crisis Hits EAC (page 1 of 1).html)> accessed on 3 March 2009; See also the Community, Issue no. 7, dated October 2008 “EAC Partnership Fund” pg 14.

⁷³⁷ See also United Nations (UN) (1998) *Image & Reality: Questions and Answers About the United Nations*, pg 7 where it is stated that when recruiting the UN Secretariat staff, in addition to observing the criteria on the highest standards of efficiency, competence and integrity, due regard is also paid to recruiting the staff on as wide a geographical basis as possible to reflect the whole membership of the UN, so that it will be responsive to the diverse political, social and cultural systems in the world and that member states will have confidence in it.

in making appointments. Nationality should not matter when a new occupant is appointed to a specific post.⁷³⁸ The Secretariat is expected to be an institution of high efficiency and technical competence⁷³⁹ which is pro-active and able to provide a self-propelling impetus to the Community.⁷⁴⁰ This is critical, as the Summit⁷⁴¹ has embarked on the fast tracking of regional integration.⁷⁴²

With a staff of about 120,⁷⁴³ the staffing level of the Secretariat is worryingly low,⁷⁴⁴ given the number of projects and programmes that the Secretariat is either directly managing or involved in through monitoring, evaluation, or providing advisory or co-ordination services.⁷⁴⁵ The mandate of the Secretariat has expanded over time without the corresponding expansion of its capacity in terms of professional cadre of staff, thus overstressing the capacities of such staff.⁷⁴⁶ This leads to poor implementation which, in turn,

⁷³⁸ See Peterson, J, et al, op. cit. pg 159.

⁷³⁹ Kaahwa, W. T. K, op. cit. pg 30.

⁷⁴⁰ Kaahwa, W.T.K, op. cit. pg 32.

See also "e-EAC newsletter", Issue No. 2, pg 2 where the staff of the Community are called upon to adopt and operate a broader viewpoint and ambition, projecting a truly East African character as opposed to being extensions of individual Partner States' bureaucracies and vested interests.

⁷⁴¹ See Braude, W, op. cit. pg 114 where it is stated that the Summit meeting in August 2004 called for a speedier process of integration. This arose from a concern that customs union negotiations alone had taken four years to complete. A fast track committee, set up to investigate the practicality of fast tracking the entire integration process, released a report in November 2004 that suggested that fast tracking could lead to a political federation as early as 2013.

⁷⁴² See Braude, W, op. cit. pg 121 where it is observed that the business community feels the technical process of integration needs more work to enable integration to go faster contrary to the Heads of State who want the issue of political federation resolved first because they feel that this will allow the technical process to go faster.

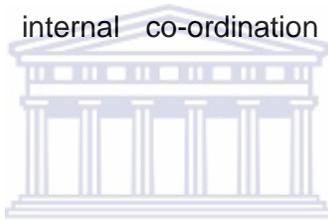
⁷⁴³ See "Arusha Times", op. cit.

⁷⁴⁴ See *UNECA II*, op. cit. pg 20 where it is observed that resource constraints appear to be especially binding in staffing. Except the West African Economic and Monetary Union, most regional economic communities appear to have small and lean secretariats, with an average of 55% of total employees in general staff grades, even though the programmes run by the regional economic communities tend to be technical. Low salaries may explain the poor employment rates of the professional staff: 40% of the professional staff earn more than \$20,000 a year, and another 40% earn \$10,000–\$20,000. Regional economic communities also face high staff turnover, which may have serious implications, especially for small communities.

⁷⁴⁵ See Braude, W, op. cit. pg 146 where it is reported that there are 22 sectoral committees and each has links to national departments. A problem arises when the 22 committees need to be aware of each other's activities, which requires much co-ordination. Such co-ordination is still very weak. Further staffing is required for this purpose, because the committees must also be able to connect with layers above and below them and in this way connect with national and regional issues. Hence the Secretariat needs increased capacity in areas of co-ordination, planning and institutional linkages.

⁷⁴⁶ See *EAC Development Strategy*, op. cit. 25. It is also further stated that in many areas the Secretariat is thin on the ground with departments understaffed. The optimal utilisation of existing staff to cope with existing mandate is also yet to be addressed.

results in delayed completion, hence negatively impacting on the financial health, as well as the proper functioning and development, of the Community.⁷⁴⁷ The problem is compounded by poor implementation at national level.⁷⁴⁸ Under the Treaty the Partner States are responsible for the actual execution of most of the programmes initiated by the Secretariat.⁷⁴⁹ The formation of specific Ministries responsible for EAC affairs in each of the Partner States is not yielding the expected results, as they seem to be mired in the usual bureaucratic malaise characterizing the functioning of states.⁷⁵⁰ Braude⁷⁵¹ reiterates the need for the EAC Ministers to be based in Arusha so that they improve relations between the EAC and national structures, facilitate entry into national departments, and push the EAC views in national politics.⁷⁵² Partner States are strongly urged to strengthen national institutions charged with implementing regional projects and programmes, whereas, as Braude⁷⁵³ argues, internal co-ordination with the Secretariat itself is



⁷⁴⁷ See *EAC Development Strategy*, op. cit. pg 24 where it is observed that the Secretariat has a mandate of monitoring the implementation of decisions made. However, its follow up of decisions is not exemplary. There are two challenges in this area, namely, the capacity of the Secretariat and its limited legal executive authority for enforcement in terms of implementation of Community programmes.

⁷⁴⁸ See *the 17th Meeting of the Council of Ministers*, op. cit. pg 37 where it was noted that the Council Decision Ref: EAC/CM9/48 adopting the Inter University Council of East Africa (IUCEA) decision that East Africa students attending a University in a Partner State university other than his or her own be charged the same fees as the locals has not been adhered to. The Co-ordination Committee, therefore, recommended to the Council to urge Partner States to implement the Decisions of the Council of Ministers. Some of the similar pleas that were given by the Co-ordination Committee, in the same meeting, include formation of the Forum for Ministers responsible for labour; ratification of the Protocol on the establishment of the East African Science and Technology Commission; and the settlement contributions to budget of the Community as soon as possible.

⁷⁴⁹ See Khumalo, N (2008) "Economic integration requires new strategies" where he observes that lack of national mechanisms to co-ordinate, implement and monitor integration policies and programmes poses a big challenge to regional economic communities < allAfrica.com > accessed on 19 October 2008.

⁷⁵⁰ See *UNECA II*, op. cit. pg 21 where UNECA states that partner states are the primary stakeholders and have an important role ensuring that common agreed principles are implemented at national level but the national implementation has been weak, with few countries having established effective integration mechanisms.

⁷⁵¹ Braude, W, op. cit. pg 147.

⁷⁵² See Braude, W, op. cit. pg 244 where he also observes that links between the Secretariat and the layers of bureaucracy that stand between it and the respective national, provincial and local governmental officials in the partner states will have to be negotiated and formalized. This means that an information supply chain to communicate information and decisions effectively from regional to national level and *vice versa* have to be effected.

⁷⁵³ Braude, W, op. cit. pg 245.

necessary to ensure that information and decisions are absorbed by the relevant bodies.⁷⁵⁴

Connected to all this is the issue of funding, not only of the Secretariat but of all the organs and institutions of the Community. Lack of sufficient funding is hampering the work of the Secretariat in particular, and the entire Community in general.⁷⁵⁵ The situation has been exacerbated by the failure of Partner States to honour their contribution obligations.⁷⁵⁶ For the integration process to bear any fruits, and hence realise the objectives for which the Community was formed, the Partner States should meet their financial obligations fully, as agreed, and strive to find other additional, better funding mechanisms.⁷⁵⁷ *WCSDG*⁷⁵⁸ states that regional resource mobilisation is required for both investment and adjustment. This is particularly important when integration involves countries which are at very different levels of development.⁷⁵⁹ Regional financial institutions are also vital in order to channel resources to regional investment. Donors and international organisations⁷⁶⁰ should also

⁷⁵⁴ Ibid, where the author insists that policy co-ordination relies on effective structures and linkages, both horizontal and vertical. The multi-faceted nature of regional integration, where a range of sectors or stages are being implemented across a number of partner states, means that attention should be paid to devising an effective policy and institutional co-ordination framework that operates within the regional secretariat and between the Secretariat and partner states.

⁷⁵⁵ See "Arusha Times", op. cit. where it is reported that EAC is facing its worst financial crisis due to non-payment of contributions by Partner States. Only 34% of the USD 23.4 million EAC annual budget for the financial year 2008/2009 had been remitted to the Secretariat. This has resulted in failure to meet operational costs, run some projects and even unable to pay staff salaries.

⁷⁵⁶ See "e-EAC newsletter", EAC Update Issue No. 24, op. cit. pg 5 "EALA Holds Sessions" where it is reported that EALA has formed a Select Committee to probe, among other things, the delayed remittances of contributions by EAC Partner States for financial year 2008/2009 where only USD 11.8 million out of USD 23.4 million has been remitted to EAC.

⁷⁵⁷ See "e-EAC newsletter", EAC Update Issue No. 23, op. cit. pg 3 where it was observed that the current mode of financing of EAC through equal sharing of the budget of EAC has proven unsustainable and, therefore, it calls for serious consideration of innovative ways of financing the Community. It was further observed that the EAC could learn best practice from EU that has successfully been able to run its institutions from some funds from the Partner States whereby a certain percentage of the revenues are channeled direct to the EU.

⁷⁵⁸ *WCSDG*, op. cit. pg 74.

⁷⁵⁹ *WCSDG*, op. cit. pg 74 where it is observed that the Structural and Cohesion Funds (SCF) in EU have helped promote upward convergence of poorer areas within the Union.

⁷⁶⁰ See "The Community", Issue No. 7, op. cit. "EAC Partnership Fund gets boost" pg 14 where it is reported that the Steering Committee of the EAC Partnership Fund (EPF), comprised of EAC, Canada, Denmark, EU, Department for International Development (DFID), Finland, France, Germany (GTZ), Japan (JICA), Norway, Sweden and World Bank, met on 22 May 2008 to approve USD 2.8 million towards EAC Partnership Fund Projects and programmes for the first quarter of 2009 and USD 9 million for the medium to long term period-up to 2011. Some of the projects undertaken under the Partnership Fund are multilateral trade negotiations, EAC re-branding project, integration of

support countries efforts' to develop common regional strategies for promoting social and economic development.⁷⁶¹

Peterson observes that the European Community was able, at the end of the 1960s, to move away from the system of national contribution linked to each country's Gross National Product (GNP) to a system of 'own resource', whereby the revenue available for financing European policies legally belonged to the Community and could not be withheld.⁷⁶² Braude⁷⁶³ argues that the most effective source of recurrent funds may be a tax on trade.⁷⁶⁴ Much as problems relating to sufficient resources need to be addressed, it is important that the Secretariat efficiently and appropriately manages the funding of the Community.⁷⁶⁵

(ii) Interrelationship with other organs.

The Secretariat is required, under the Treaty,⁷⁶⁶ to establish practical working relations with the Court and the Assembly. Also, as an organ of liaison among the EAC Partner States, the Secretariat should serve to co-ordinate EAC intra-organ activities, and those national activities that relate to the objectives of the Community.⁷⁶⁷ The achievement of the Community will depend on how cohesive and co-ordinated its organs and institutions are in discharge of their duties.⁷⁶⁸ However, this has not always been the case. The other organs, specifically the Court and the Assembly, seem to be forgotten in some of the Community activities. They are not adequately consulted. The information at

Rwanda and Burundi into the EAC and the ongoing negotiations towards the establishment of the EAC Common Market.

⁷⁶¹ Ibid.

⁷⁶² Peterson, J, et al, op. cit. pg 97.

⁷⁶³ Braude, W, op. cit. pg 249.

⁷⁶⁴ Ibid, the EAC has now opted for a 1.5% tax on partner's customs revenues, which will, in theory, provide around USD 22 million annually. However, this mode raises a debate around political influence based on the size of financial contribution. This can prove divisive as was shown in the former EAC when Kenya felt that it was paying more and was, therefore, entitled to greater benefits.

⁷⁶⁵ Kaahwa, W. T. K, op. cit. pg 32.

⁷⁶⁶ Article 71.1(o) of the Treaty.

⁷⁶⁷ Kaahwa, W. T. K, op. cit. pg 33.

⁷⁶⁸ Ibid.

their disposal, such as, study reports, or even their involvement in these activities, are not as satisfactory as expected.⁷⁶⁹

The breakdown of communication has sometimes led to a frosty relationship.⁷⁷⁰ These organs, with their respective mandates, would wish to be accorded ample opportunity to become full partners in the integration process. For instance, the Parliamentarians have declared that the Economic Partnership Agreement (EPA) Framework Agreement that was initialled between the EU and EAC in November 2007 was a raw deal, poorly negotiated, and did not involve Parliamentarians.⁷⁷¹ They had resolved that EALA and the National Parliaments should engage the EPA negotiators, that is, Ministers and technocrats, to register their respective concerns⁷⁷² before

⁷⁶⁹ See "New Vision" (Kampala), dated 6 October 2008 "East Africa: Secretariat Not Supportive-EA MPs" where it is reported that the EALA has blamed the slow progress in fast-tracking of the common market on lack of support from the Community's Secretariat and inadequate co-ordination between the two bodies. The legislators further said that EAC has not adequately consulted the regional parliament nor the national parliaments in negotiations of the common market. These observations were made during the annual Inter-Parliamentary Meeting (Nanyuki IV) in Kigali, Rwanda. < [allAfrica.com/allAfrica-com-EastAfricaSecretariatNotSupportive-EA MPs](http://allAfrica.com/allAfrica-com-EastAfricaSecretariatNotSupportive-EA_MPs) (Page 1 of 1).html > accessed on 10 October 2008.

⁷⁷⁰ Nangale, G, op. cit. pg 70 where the author recounts that a motion was floated in the Assembly and accepted to form a Probe Committee to examine the circumstances which led to resignation of the Clerk and recommend to the Assembly the procedure to be followed by the officers of the Assembly when resigning. Apparently the Clerk had resigned even before completion of his probation period. There had been delays in scheduling Assembly meetings, information had not been forthcoming from the Executive and progress on legislation had been limited. The resignation of the Clerk sparked off a lot of concern as to how the Assembly would continue to operate. Members felt that the environment at the Executive was not conducive for fostering a good working relationship. The failure of communication had rendered the legislative work difficult.

⁷⁷¹ See "e-EAC newsletter", Update Special Issue No. 2008/15, op. cit. pg 5.

See also ODI/ECDPM "Interim EPAs in Africa: what's in them? and what is next?", op. cit. pg 1 where it is observed that there is no clear pattern that shows the poorer countries have longer to adjust than their richer ones, or that the EPAs are tailored to development needs. It is further observed that the picture that emerges is entirely consistent with the hypothesis that countries have a deal that reflects their negotiating skills: that countries that are able to negotiate hard with knowledge of their interests have obtained a better deal than those lacking these characteristics. Cote d'Ivoire and Mozambique will face challenges that are among the largest and will appear the soonest. Cote d'Ivoire, for instance, will have removed tariffs completely on 60% of its imports from the EU two years before Kenya even begins to start reducing its tariffs as per the EPA.

⁷⁷² These concerns include issues of Development Chapter in EPA, flexibility and exceptions in market access, periodic reviews, specific reviews, dispute settlement, poor approach to the Singapore issues and relevant institutions.

See also Braude, W, op. cit. pg 316 where EALA is of the view that Singapore issues would pose a threat to the ability of the governments to freely determine national and sub-regional policies.

See also Ochieng, C.M.O "The EU-ACP Economic Partnerships Agreements and the 'development question': constraints and opportunities posed by Article XXIV and the special and preferential treatment provisions of the WTO" (2007) 9 *Journal of International Economic Law* pg 1 where the author argues that Article XXIV and special and preferential treatment (SDT) provisions of the WTO present a number of constraints and opportunities to the design and the scope of the proposed

the final signatures to the comprehensive EPA Agreements.⁷⁷³ Ogalo⁷⁷⁴ argues that, with respect to the EAC, there is total separation of powers in the real sense between the Executive and the Court as there is no formal mechanism through which there is a flow and exchange of information.⁷⁷⁵ Although in the allocation of tasks, the judicial arm, unlike its legislative or executive counterparts, is not expected to participate directly in the day-to-day political governance,⁷⁷⁶ there still needs to be a formal mechanism of engagement.

This is a sad reality for the EAC. As a regional grouping that is striving to reap the economies of scale, its governance structures are expected to be inclusive. A synergistic approach to the management of the affairs of the Community is required where its organs and institutions, acting as a collective, provide leadership, direction and control of the regional integration process.⁷⁷⁷ WCS DG⁷⁷⁸ observes that the principles of participation and of democratic accountability are an essential foundation. Representative bodies,

economic partnerships agreements between the EU and the ACP countries. He further argues that were the EU's negotiating position to prevail, ACP and other developing countries would likely suffer an 'erosion of developmental principles' embedded within the WTO. The differences between the two groups over the desirability and/or applicability of negotiating free trade agreements between developed and developing countries under the 'strict' jurisdiction of Article XXIV, and of negotiating agreements on services and the 'Singapore Issues', amount to the contestation over the principles of reciprocity and SDT within WTO, and of the scope of WTO.

See also "EPAs: a threat to south-south trade?" in "Bridges Weekly Trade Dialogue", dated February 2008, where it is reported that the EPAs being negotiated between the EU and ACP countries contain some provisions with serious repercussions on developing countries, for instance, according to the EU any more favourable treatment that the region or any of its individual member states grants to 'any major trading economy' under a free trade agreement concluded after the signing of the EPA. Brazil presented to the WTO General Council, on 5 February 2008, that these so called 'MFN clauses' imposed by EU had the potential to undermine initiatives aimed at integrating developing countries with into the world trading system, including on-going negotiations on the Global System of Trade Preferences, and the efforts some developing countries are making to extend duty-free and quota-free market access to the LDCs.

⁷⁷³ See "e-EAC newsletter", Update Special Issue No. 2008/ 15, op. cit. pg 5; See also Braude, W, op. cit. pg 311 where it is reported that the EPA Agreement will subsist for a 25 year period and Article 37 declares that a Comprehensive EPA will be signed by 31 July 2009.

⁷⁷⁴ Ogalo, D. W, op. cit.

⁷⁷⁵ Ogalo, D. W, op. cit. where it is stated that recognising this problem the EALA passed a resolution calling for establishment of practical working relationship between the Court, the Assembly and the Executive. Unfortunately it never took off because of the bad working method of the Secretariat. The Court therefore has a problem relating to the Executive.

⁷⁷⁶ See Addo, M.K (ed), op. cit. pg 3. It is further stated that theirs is the isolated task of adjudicating on disputes and often overseeing the compliance of the other two branches with the law.

⁷⁷⁷ See "The Community", Issue No. 7, op. cit. "Amb. Onen calls for dynamic, harmonious operations of EAC organs and institutions", pg 6.

⁷⁷⁸ WCS DG, op. cit. pg 73.

such as regional parliaments, have an important role. Regional integration should be advanced through social dialogue between representative organisations of workers and employers,⁷⁷⁹ and wider dialogue with other important social actors, such as business organisations⁷⁸⁰ and civil society⁷⁸¹, on the basis of strong institutions for democratic and judicial accountability.⁷⁸²

With a combined population of more than 93 million, the EAC region has a considerable human resource base to stimulate and sustain the development

⁷⁷⁹ See also Baert, F, et al, op. cit. pg 55 where it is reported that the Southern African Trade Union Co-ordination Council (SATUCC), a sub-regional labour organisation is involved in SADC since its formation in 1983. The main scope of SATUCC is to establish a regional trade union movement that would influence SADC policies at regional and national levels. In 1995, the SADC Council of Ministers established the SADC Employment and Labour Sector, based on a tripartite structure, including representatives from the government, business and trade unions. The Extra-ordinary Summit in 2001 agreed on a new structure for SADC institutions, and therefore, the Employment and Labour Sector was included in the Social and Human Development Programme. The main achievement of SATUCC is the development of a Social Charter on Fundamental Rights of Workers in the Southern Africa which is ratified by nearly all SADC countries.

⁷⁸⁰ See also *the 17th Council of Ministers Meeting*, op. cit. pg 21 where it is reported that the Summit has directed the Council to consider the request by the East African Business Council (EABC) to be institutionalised in the Community's institutional framework. The Council is still working on the Summit's directive, that is, on how to involve EABC in the mainstream EAC policy making programmes and activities. The private is a key player given its dominant role in the economy hence its merits attention from the executive.

⁷⁸¹ See also Braude, W, op. cit. pg 22 where he contends that one of the best defences against political unaccountability and consequent political instability is a vibrant, empowered and organized civil society. Civil society should likewise seek access to regional processes, and build regional civil structures, relationships and partnerships, both in terms of particular issues and around the overall regional project.

See also United Nations (1998), op. cit. pg 6 where it is observed that the UN framework provides opportunities to involve other actors whose co-operation is increasingly vital for solution of global problems. Some 1,520 non-governmental organizations (NGOs) active in economic and social development have 'consultative status' with the UN Economic and Social Council, the main policy making body on social and economic matters, and their representatives may be invited to address its meetings. These NGOs speak for broad international and national constituencies and are increasingly influential on UN work playing a prominent role at UN conferences, advancing the views of their constituencies ranging from women rights to food security.

⁷⁸² Ibid. It further states that the creation of tripartite or wider councils and forums at regional level such as the Consultative Economic and Social Forum of MERCOSUR or the European Economic and Social Committee provides an important institutional framework for such a dialogue.

See also the Economic, Social and Cultural Council (ECOSOCC) which is an organ of the African Union (AU), under the Constitutive Act of AU. Among other things, it is mandated to promote the participation of African civil societies in the implementation of the policies and programmes of the AU < <http://www.africa-union.org/ECOSOC/home.htm>. > accessed on 30 March 2009.

See also Cilliers, J "The Pan African Parliament: a plenary of parliamentarians" (2004) 13 *African Security Review* where the role of ECOSOCC as a bridge between Africa's leaders and the African people has been noted.

See also Habib, A, et al (2006) "African integration and civil society: the case of the African Union" pg 4 where it is argued that civic participation should be an integral component of Africa's integration agenda, and encouragingly AU has distinguished itself to a people-centred and participative programme. It has institutionalised this through the establishment of ECOSOCC < <http://www.transformation.ukzn.za/archive/tran059/5905.pdf> > accessed on 6 May 2009.

of a viable single market and investment area, currently with a combined GDP of USD 28 billion.⁷⁸³ This potential cannot be fully tapped and realised if the organs of the Community, the engine of the integration process, are not able to put in place mechanisms for a meaningful and practical working relationship. The EAC also needs a strong institutional framework, which is at peace with itself, in order to attract investment. Creating a fertile investment climate in which domestic markets can flourish is the only way that long term dividends will be paid to both local and foreign investors.⁷⁸⁴

The recently held Strategy Retreat, the first in almost ten years of existence of EAC, should be formalised and included on the annual calendar of the Community.⁷⁸⁵ In addition to this, the Secretariat should establish permanent

⁷⁸³ See *Corporate Tanzania: The Business, Trade and Investment Guide 2007/2008* "Outlook on the effects of a completed EAC for the region's economy" pg 31.

⁷⁸⁴ See Issa, O "How to attract foreign investment" in "African Business", Issue No. 351, dated March 2009, pg 42.

See also Ibru, C "Boosting competitiveness across the continent" (2009) 7 *Africaninvestor* pg 33 where it is contended that *"to ensure Africa maintains its upward swing in terms of growth, governments on the continent have to help foster competitiveness by promoting policies affecting monetary, financial, fiscal and trade issues; increasing political and policy stability; reducing corruption and tax evasion; improving administration of justice and bureaucracy; supporting businesses by promoting entrepreneurship, skilled labour, investment in technology and sound management policies; and providing infrastructure by the provision of quality education, health, environment, water, energy and roads"*.

See also "Private investment for public infrastructure" in "BusinessinAfrica", dated March 2009, pg 26 where it is observed that one of the biggest challenges facing Africa is that of infrastructure. If African economies are to modernize, then they need all sorts of new economic infrastructure-from roads, railways, airports, seaports to power generation plants, as well as social infrastructure, such as, schools, hospitals, and the like.

See also Issa, O "Investment: the importance of judicial reform" in "African Business", Issue No. 352, dated April 2009, pg 38 where it is argued that a weak or ineffective judicial system can have a severe and direct impact on investment climate. A healthy business environment is as much about investor confidence as it is about opportunities and resources. Difficulties with enforcing contracts and obtaining commercial justice are often cited as reasons not to invest in Africa and can act as a real obstacle to domestic enterprise. It further stated that judicial reforms include facilitating improvement to access commercial justice system, strengthening judicial procedures, establishing dedicated commercial courts and modernizing judiciaries through provision of training and technology.

See also "e-EAC newsletter, Issue No.24, op. cit. 2 where it is contended that the advantage of a rich legacy of socio-economic, political and cultural interactions in East Africa should be consolidated by strong, first rate formal institutions embracing a learning attitude, continuously internalizing new knowledge, innovation and good practices to drive the integration process.

⁷⁸⁵ See "e-EAC newsletter", EAC Update Issue No. 24, op. cit.pg 1 "Summit Chair Convenes Historic Meeting to Usher 'New Look' EAC" where it is reported that a Strategy Retreat for Key Organs and Institutions of the East African Community was held in Kigali, Rwanda from 9-10 February 2009. The Retreat, the first of its kind brought together the top leadership, Ministers, Permanent Secretaries, Heads and Senior Officials of Government, EAC Organs and Institutions; and representatives of the business community and civil society. The Retreat was convened by H.E. President Paul Kagame of Rwanda and Chairman of the Summit of Heads of State of the East African Community. The Retreat

'bilateral' meetings with the other organs in order to attend to specific issues that are peculiar to each organ. As it is increasingly becoming apparent that the EAC engine is not running smoothly, there is a need to remedy the situation,⁷⁸⁶ that is, avoid communication breakdown or full-scale inter-institutional battles⁷⁸⁷ which eat away the required efficiency and effectiveness in service delivery. Governance that leads to fairer outcome should be based on democratic and participatory decision making processes.⁷⁸⁸ It has been argued that this problem of a dysfunctional relationship among the organs of the Community is partly explained by its strong intergovernmental nature.⁷⁸⁹ Nevertheless, there is a compelling need to ensure that the Secretariat does not abdicate its statutory duty of establishing and maintaining a practical working relationship among the organs of the Community.⁷⁹⁰

In a wider context, the Community's visibility should be felt in the political, social and economic life of the people of East Africa, otherwise its relevancy would be questioned.⁷⁹¹ Internal conflicts within Partner States have

was held against the background of deepening EAC integration and maintaining a harmonious working relationship among its organs and institutions to meet new challenges and expectations of regional integration within the fast evolving world economic and social order. The Strategy Retreat with a theme "Collaborative Work Culture in the EAC Organs and Institutions for a Stronger East Africa" focused on a review of the current operations of the EAC organs and institutions, sharing of views and insights on their effectiveness under their respective mandates under the Treaty, and drawing of lessons from other similar organizations in terms of collaborative work ethic < <http://www.eac.int/downloads/e-newsletter.html> > accessed on 3 March 2009.

⁷⁸⁶ See e-EAC newsletter, Update Issue No. 24, op. cit. pg 3.

⁷⁸⁷ Peterson, J, et al, op. cit. pg 61.

⁷⁸⁸ WCSDG, op. cit. pg 76.

⁷⁸⁹ See Fanta, E, op. cit. pg. 19 where the author argues that each of the regional organisations that have been set up in Eastern Africa, including EAC, are organized following a very strong intergovernmental system where all the decisional power is concentrated in the hands of states and governments. The roles attributed to Secretariats or Commissions are always limited to implementation of the decisions made at a higher level and never include any decisional capacity.

⁷⁹⁰ See also Mchumo, A.S, op. cit. 10 where it is observed that the introduction and sustenance of a mechanism for cordial and collaborative interfacing and interrelationships among the organs and institutions of the Community remains unassailable. Although the Treaty spells out the different functions of the organs with particular reference to the their establishment and roles, a standard interpretation of the Treaty would indicate that the intention of the Partner States is that the organs and institutions should play their roles with one ultimate objective- development of the Community for benefit of the peoples of East Africa.

⁷⁹¹ See Hartley, T.C, op. cit. pg 16 where the author argues that the Commission, in this case the Secretariat, can achieve a great deal so long as it retains the confidence of the Partner States. Its greatest asset is its impartiality. Partners are able to accept its role when they believe that it stands above national rivalries.

debilitating effects on the functioning of the Community. For instance, the Community was ineffectual, if not completely absent, in the ensuing conflict resolution and management efforts following the disputed 2007 Presidential Elections results in Kenya.⁷⁹² Yet under the standard operating procedures of the Community, most of its organs, if not all, cannot meet or engage in anything without the presence and participation of the representatives of all the Partner States.⁷⁹³ Braude⁷⁹⁴ contends that elections cycles and referendums can prove very disruptive to normal government business and even more for regional affairs, which are often the first to be rescheduled or reprioritized because they do not immediately affect domestic constituencies. The lesson from the EAC experience is that national political events delay both legislative and policy cycles.⁷⁹⁵

It is hoped that these issues will be seriously considered, in order to achieve a better functioning Community with independent but well interlinking organs and institutions capable of realising its objectives through faster decision making processes and enhanced rapid delivery systems of the regional programmes and projects.⁷⁹⁶ These key players must ensure an inclusive

See also Braude, W, op. cit. pg 28, where the author contends that the Secretariat must build a presence on the ground in the Partner States, but to do so will have to win political and financial support from Partner States for such a departure from the current EAC roles of co-ordination and administration. This move would help co-ordination, information flow, immediate problem solving, liaison, integration of regional systems and processes into national structures, and, finally, raising the EAC profile among government officials and the public.

⁷⁹² See "New African", op. cit. pg 16 "More speed, more speed, urges Annan" where it is reported that Mr. Kofi Annan, former UN SG, who was the Chairman of the African Union Panel of Eminent African Personalities, observed that in February 2008, Kenyan political adversaries, aided by the African Union and its international partners, negotiated a historic power sharing settlement to peacefully resolve the dispute over the results of 2007 presidential elections. Under the framework of the Kenya National Dialogue and Reconciliation, the political parties also concluded several agreements aimed at ending the violence, restoring fundamental rights and liberties, addressing the humanitarian crisis, promoting reconciliation, resolving the political crisis, and tackling long term issues affecting the nation.

See also "Kenya's example" in "New African", op. cit. pg 10.

⁷⁹³ See *Calist Andrew Mwatela and others v EAC*, op. cit. pg 13 where it is observed that Rule 11 of the Rules of Procedure for the Council of Ministers provides that the quorum of the session of the Council of Ministers shall be all Partner States representation.

⁷⁹⁴ Braude, W, op. cit. pg 22.

⁷⁹⁵ Ibid.

⁷⁹⁶ See "e-EAC newsletter", Update Issue No. 22, dated 27 January 2009 "EAC Launches Treaty Review Process" pg 1 where it is reported that the 6th meeting of the Sectoral Council on Legal and Judicial Affairs was held in Mombasa, Kenya from 23-24 January 2009 to consider proposed amendments for the EAC Treaty < <http://www.eac.int/downloads/e-newsletter.html> > accessed on 3 March 2009.

process, so that foundations are built for the steps necessary to achieve the goals of integration.⁷⁹⁷ With a robust and sound institutional framework, the key pillars⁷⁹⁸ of the East African integration would be ably anchored to tackle socio-economic and political challenges facing the region.⁷⁹⁹

4.2.3 CONCLUSION

The chapter has tried to show the importance of strong institutions in the process of regional integration in East Africa as “the quality of institutions ‘trumps’ everything”.⁸⁰⁰ But it has been pointed out that, for the institutions to work better in furtherance of the intended objectives of the Community, they need to be anchored in a well designed institutional framework. The chapter has shown how key organs of the Community are riddled with structural weaknesses which hamper the supposedly expected optimal functioning of the Community. Best practices have been borrowed from the EU, with modifications to properly fit in locally and have a meaningful impact, since “because of the special socio-political and economic circumstances prevailing in the different African sub-regions, the EU blueprint of institutional design can not be followed to the letter”.⁸⁰¹ The chapter contains suggestions that point to an alternative architecture for the Community in places where structural loopholes have been spotted. These suggestions form part and parcel of the next and final chapter which deals with conclusions and recommendations.

⁷⁹⁷ Braude, W, op. cit. pg 207.

⁷⁹⁸ See *EAC Development Strategy*, op. cit. pg 32. These are co-operation in political matters, defence and security; completion of the implementation of the Customs Union Protocol; establishment of the East African Common Market; laying the foundation for the East African Monetary Union; and laying the foundation for establishing a East African Federation.

⁷⁹⁹ See also Shivji, I.G (ed), op. cit. pg 140 where it is contended that due to different levels of economy of the Partner States, there is a need to ensure that the integration process does not exacerbate any existing imbalances among them.

⁸⁰⁰ Rodrik, D, et al (2002) “Institutions rule: the primacy of institutions over geography and integration in economic development” as cited in UNECA II, op. cit. pg 51.

⁸⁰¹ *UNECA II*, op. cit. pg 61.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

This paper has shown the vitality of institutions in regional integration. It is apparent that regional institutions are important pillars in regional economic integration processes, especially in most of Sub-Saharan Africa, and particularly in East Africa where state institutions are not functioning at their expected optimal capacity.

The paper observes that the underlying institutional framework determines the quality of decision making processes within an organisation, such as the EAC. The paper further makes an observation that one of the main problems afflicting the EAC is the endemic weaknesses in its institutional framework.

The paper reveals the dominance of the executive (the Summit and the Council) in the integration process, leaving little room for other organs, especially the Assembly and the Court, to exercise, freely, fully and without interference, their already circumscribed mandates.

The paper observes that the Community's institutional framework needs to be systematically and extensively re-organised and strengthened, in order to effectively and efficiently meet the challenges of regional integration, and attain the objectives thereof. It further observes that enhancing and instilling effectiveness and efficiency in the Community entails funding, and that it should be preferred notwithstanding the costs involved to pursue it.

5.2 RECOMMENDATIONS

Now that it is evident that the Community's institutional framework is characterised by endemic weaknesses that hamper its proper and optimal functioning, steps need to be taken to rectify the anomalies. The following recommendations are submitted:

A sufficient number of ordinary meetings of the Summit, say four per year, must be convened to enable the Summit, as the ultimate source of authority,

to meet fairly regularly and iron out problems facing the Community, in order to enhance and deepen the integration process. It is further recommended that the Council should meet every month, whereas the Sectoral Councils may meet as often as it is practicable.

The decision making process, in the EAC Summit as well as in the Council, should provide for three modes, namely, consensus, simple majority votes and absolute majority votes, depending on the subject matter. Matters within the competence of the Community should be categorised accordingly. However, only a few matters should be reserved for the category of decision making by consensus. For instance, issues, such as, giving general direction, as well as admission of new Members, may be decided by consensus, whereas all other issues may be divided between the other two modes. The exclusive use of consensus needs to be abandoned.

The incoming Chairperson of the Summit should be required to present his/her programme of action at the commencement of the Chairpersonship, so that at the end of the tenure it can be determined whether the mandate has been fulfilled as expected, for instance, the number of decisions agreed on, or the number of decisions implemented, during the tenure. This requirement may be inserted in a Protocol to have the force of law.

The Council should be assisted by a permanent Secretariat, which is a relatively small and ostensibly politically neutral body, providing it with vital logistical, technical and administrative support on a daily basis. With the establishment of the permanent Secretariat, the Sectoral Committees which are established under Article 9.1(d) of the Treaty will cease to exist.

The paper reiterates the need for the EAC Ministers to be based in Arusha so that they improve relations between the EAC and national structures, facilitate entry into national departments, and push EAC views in national politics.

It is imperative that the Co-ordination Committee, as overseer of the activities of the Secretariat of the Council, should be re-constituted in a permanent form in order to be able to give guidance on the daily work of the Secretariat. In this case the members of the Co-ordination Committee should be permanently stationed in Arusha, Tanzania, the Headquarters of the Community. This Committee should use a mode, known as “the A-point procedure”, to forward matters to the Council for decision making. A-points are ‘agreed points’, at Committee level, which are passed *en bloc* and without discussion by the Ministers at the beginning of each Council session. B-points are those issues sent to Ministers that do require further discussion. This arrangement should inform the agenda of each Council meeting, that is, it should be divided into parts A and B.

It is recommended that entrenching the independence of the EACJ is a critical step that must be taken by the Partner States. Guaranteeing and ensuring that the judiciary is insulated from interference by the executive is absolutely essential. In this case, independent judicial commissions of Partner States may exercise the power of nomination of Judges for the EACJ, with appointment by the Summit being merely a formality process. Appointment may also be done by the Parliaments of the respective Partner States, or such Parliaments may vet, and subsequently confirm, the appointment of such Judges. Alternatively, there is a need to establish a Regional Judicial Service Commission to deal with all matters of the Court. It is further recommended that the Judges should be the ones to elect the President and Vice-President of the Court, as well as the Principal Judge and Deputy Principal Judge in case of the First Instance Division.

The Community should continue to ensure the quality of individual judges as this has a direct bearing on their independence and affects the esteem in which the Court is held. This includes the need to ensure that the Judges appointed are persons who have exhibited a high degree of competence in judicial work or as jurists. High academic credentials would certainly be in order, though not a *sine qua non*. Also a Judge should be assisted by at least one legal secretary whose main task is to carry out legal research, and to

help in the preparation of opinions or other legal writing. This enables the judge to write well researched judgements.

Judges at the EACJ should enjoy a renewable tenure of office in order to enrich the Court and avoid a situation where the Court would perpetually have a new composition. This is undoubtedly not a positive and healthy development since relevant experience at that level matters for justice to be properly administered.

It is recommended that the presently deferred original, appellate and human rights jurisdiction of the Court should be operationalised as soon as possible. It is further recommended that the human rights jurisdiction needs to be removed from the Court. A separate regional court should be established to take charge of the equally important human rights issues within the integration framework. It is further recommended that the Partner States should harmonise their human rights laws.

For purposes of giving uniform application and clarity to the Treaty provisions across East Africa on the same matters, Article 34 should make it mandatory for the national courts, especially the superior courts, to refer any matter on the interpretation and application of the Treaty to the Court.⁸⁰²

The Community should enact a clear and distinct provision on the applicable law, or alternatively the Court itself should define 'the applicable law'. Court judgments, as well as application of general principles of law that are recognised in the legal systems of the Partner States, must provide direction for political institutions in the establishment and operation of the Community.

⁸⁰²The EACJ ruling should not only bind the referring court, but all courts of the Partner States with the same issue.

See also Oduol, J.O "Origins of the COMESA Court of Justice" (2003) 4 *The East African Lawyer* pg 29 where the author observes that the Court of Justice is the backbone of a system of judicial safeguards which ensures uniformity and that the law is not interpreted and applied differently in each Partner State. As a shared system, it remains a common system which is always identical for all circumstances.

The size of the Assembly needs to be enlarged to sixty members so that it fully and effectively discharges its legislative and supervisory duties, given the fact that it uses a committee system, a system commonly used by many legislatures, which entails a division of labour among its members. It is further recommended that the parliamentary committees must be fully equipped, in terms of human and material resources, necessary for their various specialised tasks.⁸⁰³

It is recommended that the EAC should take practical steps to remove procedural bottlenecks that curtail the Assembly's power. EALA should be accorded powers to investigate thoroughly, and hold the executives accountable through censure, forced resignation or recommend prosecution, where a crime seems to have been committed. It is further recommended that the Assembly's power should include an entitlement to draw up or revise budgets. It is further recommended that whenever the Summit/Council assumes legislative functions, the Assembly should be involved through a modified version of the co-decision making procedure.

The process of electioneering for membership of the EALA should be controlled and ordered through uniform rules cutting across the five National Assemblies, to limit unnecessary disruptions of the work of the Community. The established principles or guidelines for the conduct of elections should be adhered to by all Partner States within the Community.

It is recommended that, as a long term strategy, direct universal suffrage for the Assembly, should be considered and implemented in order to give the citizens of East Africa a say in the running of the Community's affairs. This would give the Assembly 'democratic legitimacy' as it will have the support of the people on the ground. Similarly, the lifespan of the Assembly, an important body of the Community, needs to be provided for in the Treaty, instead of being left to the Summit to determine through proclamations.

⁸⁰³ See Ang'ila, F (ed) (2003), op. cit. pg 25.

A system of proportional representation, as opposed to the current one, that is, allocation of an equal number of seats, in the Assembly per Partner State is recommended. Due regard should be given to size of economy, population, geographical coverage, etc.

It is recommended that the Community's legislative instruments, such as, Treaties, Protocols and Acts, should be accorded automatic direct applicability in the Partner States. This will ensure the smooth operation of the Community, and, in the process, cut down the delays and bureaucratic inertia at country level.

It is recommended that the Partner States should amend the Treaty and provide elaborate provisions on the exercise of treaty making power with the outside world by the Community to avoid questions of legality, in terms of whether these are binding on the Partner States, bearing in mind that the Community has already concluded a number of international agreements.

A recommendation is made that the structure of the Secretariat should reflect the responsibilities of the Community. The structure of the Secretariat, given its multiple roles, should be portfolio based. It is further recommended that the staffing level of the Secretariat must be sufficiently enhanced to provide a proper functioning machinery that keeps up with the growing workload.

It is submitted that the Secretary-General should be appointed, by the Summit, from among any of the qualified East African citizens with a proven track record of diligent performance. The term of office of the SG should run concurrently with that of the Deputy Secretaries-General (DSG). The team (SG and DSGs) should not be dismissed by their national governments during their term of office, but the whole team must resign *en bloc* if a vote of no confidence is passed by the Parliament.

It is further recommended that each Partner State be allowed to nominate one person for appointment to the office of DSG. However, the nominated person must not be unacceptable to the other Partner States. The nominated

officials, before being formally appointed by the Summit, must be vetted by the Assembly through confirmation hearings to verify their suitability. Each portfolio will be headed by a DSG, in which case 'expertise is matched to portfolio'.

It is recommended that the Community organs and institutions should be appropriately and adequately staffed based on merit and experience criteria. It is further recommended that the mandate of the Secretariat in terms of legal executive authority needs to be enhanced.⁸⁰⁴

It is recommended that Partner States should strengthen their national institutions charged with implementing regional projects and programmes whereas internal co-ordination with the Secretariat itself is necessary to ensure that information and decisions are absorbed by various relevant bodies.

It is reiterated that there is a compelling need to ensure that the Secretariat does not abdicate its statutory duty of establishing and maintaining practical working relationships among the organs of the Community.

It is recommended that the private and civil society organisations should be mainstreamed in the structures of the Community. They broaden the popular participation in the Community and, therefore, enrich its work. It is not enough for their existence to be only mentioned in the Treaty.⁸⁰⁵

⁸⁰⁴ See Braude, W, op. cit. pg 27 where the author reiterates the need for the EAC Secretariat to complete its staff expansion because it must have correct levels and quality of personnel in place before the launch of the common market in 2010 to prevent a repeat of the confusion and lack of capacity that initially accompanied the launch of the customs union.

See also Sako, S (2006) "Challenges facing Africa's regional economic communities in capacity building" (ACBF Occasional Paper No. 5/2006) on building and strengthening trade-related institutional capacity in particular, and effective regional integration capacity building in general < http://www.sarpn.org.za/documents/d0002737/REC_Occasional_Paper_Paper5_ACBF_2006.pdf > accessed on 5 May 2009.

⁸⁰⁵ See also Shivji, I. G (ed), op. cit. pg 141 where it is reiterated that East African should take over the Community from their leaders in order to ensure that a small quarrel among the leadership does not reduce the efforts of millions to naught.

It is recommended that the structure of the Assembly should provide an avenue for private citizens of the Community to petition it on matters under its jurisdiction which in one way or another have a direct effect on their lives.

It is recommended that the Community should strengthen its revenue generating mechanisms and efforts as effective operationalisation of the recommended measures have financial implications.

It is recommended that the Community should make its visibility felt in the political, social and economic life of the people of East Africa to justify its relevancy. Infrastructure development projects, such as roads and railways, have a direct impact on citizens. Their successful implementation will draw citizens closer to the EAC. Similarly the promotion of best practices of good governance⁸⁰⁶ and democracy, advocacy for a culture of political dialogue and tolerance,⁸⁰⁷ and participation of the EAC, as a fair and neutral observer and/or monitor, in the Partner States' Presidential and Parliamentary Elections will send a strong message to the people that it cares and values the local political processes as an impartial agent.⁸⁰⁸ The elections at the Partner States' level invariably determine the composition of the Summit and the Council.

The last, but arguably the most important, recommendation, relates to the continued sustaining of the political will in the integration process. The

⁸⁰⁶ See Kajee, A, et (eds) (2007) *Designing Democracy: Comparing Party Politics in Emerging Regions* pg 19 where it is argued that, in the 21st century, political discourse is dominated by the 'good governance' agenda which advocates political accountability, parliamentary ethics, transparency in business transactions, the protection of human rights, the guarantee of property rights and the supremacy of the rule of law. These principles have become strongly embedded in approaches to democratic reforms and economic growth.

⁸⁰⁷ See also Inglehart, R, et al "How development leads to democracy: what we know about modernisation" (2009) 88 *Foreign Affairs* pg 47 where the authors contend that democracy is unlikely to survive in a society torn by distrust and intolerance.

See also Sachs, A, op. cit. pg 34 where the author opines that a vibrant democracy has a qualitative and not just a quantitative dimension. Dialogue and deliberation go hand in hand. This part of tolerance and civility characterize the respect for diversity.

⁸⁰⁸ See also "Burundi seeks EAC assistance in upcoming general elections" in "Guardian" dated 29 April 2009 where it is reported that the Government of Burundi has underscored the need for East African countries to assist the country to hold free and fair general elections scheduled to take place in 2010. The request was made on Monday 27 April 2009 in Dar-es-Salaam, Tanzania by President Pierre Nkurunziza when he met his counterpart M. Kikwete at State House < <http://www.ippmedia.com/ipp/guardian/2009/04/29/135744.html> > accessed on 30 April 2009.

process goes beyond putting in place a robust institutional framework. Given the tragic experience of collapse of the integration in 1977, which has been amplified by “the explicit and candid acknowledgment in the preambular part of the Treaty”,⁸⁰⁹ the Partner States must abundantly ‘invest’ their political will in the process so that the Community flourishes as envisaged and expected. To this end, Partner States are called upon to fully subject their sovereignty in agreed matters to the jurisdiction of the Community.

If properly implemented, it is believed that these measures would put in place a sound and robust institutional framework which will enable the Community to effectively and efficiently carry out its mandate in order to realise its integration objectives. The reform process would put the Community on a firmer foundation and increase chances of achieving its goals.



⁸⁰⁹ Oloka-Onyango, J (ed), op. cit. pg 135.

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