



EAST AFRICAN COMMUNITY

EAC Treaty and Challenges to the Community

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EAST AFRICAN COMMUNITY:
EAC Treaty and Challenges to the Community

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Non governmental and governmental organizations, national and international Development Organisations, the East African Business Sector as well as the Civil Society are increasingly interested in getting information about the East African Community, especially about EAC-Treaty and Challenges to the EAC. The EAC Secretariat intends to meet these expectations through different publication series.

In the series "Occasional Papers," members of the Secretariat write about themes of common interest. However, the views expressed are those of the authors and do not necessarily represent those of the East African Community, the Secretariat or the Partner States.

This Occasional Paper is divided into two parts. In Part A the Counsel to the Community, Hon. Wilbert T. K. Kaahwa provides an overview about the EAC-Treaty. In Part B he discusses selected challenges of the East African Community.

It is hoped that, this Study will contribute to provide some of the information about EAC and will be used as a working and discussion paper for Civil Society, stakeholders of the Private Sector as well as professionals and students from universities in East Africa. The Study is also expected to generate debate on those salient issues it raises. Therefore any comments on this document would be welcome for consideration in the works of Secretariat.

Hon. N. Amanywa Mushega
Secretary General
East African Community

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PART A: THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY: AN OVERVIEW*

1.0 INTRODUCTION

The signing of the Treaty for the Establishment of the East African Community in Arusha, Tanzania on November 30th, 1999, its entry into force on July 7th, 2000 and the formal launching of the Community on January 15th, 2001 marked a culmination of seven years of committed efforts by the erstwhile East African Co-operation Member States of Kenya, Uganda and the United Republic of Tanzania in re-kindling their tested long co-operation¹.

Upon its establishment in 1993, a Permanent Tripartite Commission for East African Co-operation was mandated to inter alia, identify areas of co-operation and to propose the most appropriate regional arrangement for these states. The process of identifying areas of co-operation got impetus with the launching, in 1997, of the first East African Co-operation Development Strategy (1997 - 2000). The Agreement Establishing the Permanent Tripartite Commission together with the Development Strategy were the key blueprints of the renaissance of the region's integration process.

In April 1997, the East African Co-operation Summit of Heads of State directed that in order to give more substance to, and widen the scope of co-operation, that Agreement should be upgraded into a Treaty for Co-operation. Consequently, a Treaty-making process, involving experts from the three Member States' governments, the Secretariat of the Commission for East African Co-operation and the general public, was embarked upon. The process was based on negotiation, pre-negotiation, drafting and the tapping of views from the peoples of East Africa through the mass media and other communicative methods. It was, for purposes of treaty-making, quite a unique process. It started with an outline of the proposed content prepared by the Secretariat. The outline, after having been considered by the Member States, gave rise to an initial draft prepared by the Secretariat and a Consultant. It is this draft that was used as a working text for negotiations by the governments and in respect of which, through seminars, workshops and expression of views in writing, contribution by the public was catered for. The process ended with the signing of the Treaty.

*This is based on an Article published in the African Yearbook of International Law, Vol. 7 1999

¹East African Co-operation was an inter-governmental arrangement established in 1993 to steer the newly rekindled spirit of co-operation between the Republic of Kenya, the Republic of Uganda and the United Republic of Tanzania. It ceased with the entry into force of the Treaty.

The Treaty seeks to strengthen the Partner States' economic, social, cultural, political and other ties for their fast balanced and sustainable development by the establishment of an East African Community². It is, to that extent, designed to achieve clear economic and geo-political objectives principally through the enhancement of co-operation in identified key areas.

Kenya, Tanzania and Uganda have a lot of experience in matters of integration having been partners in the defunct East African Community. Two of the three states are members of the Common Market for Eastern and Southern Africa (COMESA), Kenya and Uganda are members of the Inter-Governmental Authority on Development (IGAD) while Tanzania is a member of the Southern Africa Development Community (SADC). The three states also subscribe to the common vision of African unity as stipulated in the Charter of the Organisation of African Unity and the Constitutive Act of the African Union.

Against that background this overview addresses the following four basic attributes of the Treaty:

- Integration factors underlying the Treaty;
- The Legal and Institutional framework created by the Treaty;
- Areas of Co-operation provided for in the Treaty;
- Organs and Institutions of the Community; and
- Operationalisation of the Treaty.

²Preamble.

2.0 INTEGRATION FACTORS UNDERLYING THE TREATY

In the development of the integration process in East Africa it has been realised that the following broadly-categorised basic factors must obtain in order for Member States to effectively integrate:

2.1 Formative Factors

Successful integration requires a positive environment characterised by among other factors, a strong political will and commitment and the existence of viable regional structures. The Treaty is anchored on the existence of these factors which find expression in its several provisions.

Among the three states such basic factors do obtain. Close social, cultural, economic and formal constitutional integration in East Africa is not a new phenomenon. Twenty years after the dissolution of the last scheme of East African integration, a scheme which had spanned over fifty years, it is not at all surprising, that the East African states which are geographically contiguous, whose populations have from time immemorial been socially and culturally inter-related, and which had enjoyed economic integration and uniquely, joint common services such as railways, harbours, post and telecommunication services common customs exercise and income tax services, and a common legislative arrangement, should, after reflection, have sought a revival of the past, but one which takes into account present realities.³

2.2 Implementation Principles and Strategies

Given the nature of the three states' levels of economic development implementation of co-operation projects and programmes has to be based on such principles as the Principle of Asymmetry, the Principle of Complementarity, the Principle of Variable Geometry and the Principle of Subsidiarity⁴

³In East Africa formal integration processes started with, among other things, the construction of the Kenya-Uganda Railway, 1897 - 1901, the establishment of the Customs Collection Centre, 1900, the East African Currency Board, 1905, the Postal Union, 1905, the Court of Appeal for Eastern Africa, 1909, the Customs Union 1919, the East African Governors' Conference, 1926, the East African Income Tax Board, 1940 and the Joint Economic Council, 1940. These initial processes culminated in the systematic establishment of formal organizations, to wit, the East African High Commission (1947-1961), the East African Common Services Organisation (1961 - 1966) and the previous East African Community (1967-1977).

⁴The Treaty in its Article 1 defines these principles as follows:

"principle of asymmetry" means the principle which addresses variances in the implementation of measures in an economic integration process for purposes of achieving a common objective;

"principle of complementarity" means the principle which defines the extent to which economic variables support each other in economic activity;

"principle of subsidiarity" means the principle which emphasises multi-level participation of a wide range of participants in the process of economic integration;

"principle of variable geometry" means the principle of flexibility which allows for progression in co-operation among a sub-group of members in a larger integration scheme in a variety of areas and at different speeds.

2.3 Consolidation and Development Factors

It is the general projection of the Treaty that as the integration process takes root, the following key consolidation factors, among others, have to be concurrently addressed.

(a) Decision-making/considerations

In order to obviate problems in decision-making at various levels, the Treaty provides for such time-frames as would accommodate East African Community Partner States in the accomplishment of certain targets e.g. the progressive establishment of a Customs Union and the establishment of a Common Market⁵. From a general point of view, a mechanism for decision-making at regional level that emphasises consensus is also provided for in the Treaty.

(b) Common Market issues

In order to address initial matters relating to balanced/unbalanced development, trade balance/imbalance and the sharing of benefits and to avoid a "Stag Bull" syndrome, the Treaty provides that the establishment of the Common Market shall be progressive. This would allow for sufficient initial preparation.

Besides, provisions have been made for safeguard measures to ameliorate any state that may be disadvantaged through the application of provisions relating to Co-operation in Trade Liberalisation and Development and Monetary and Financial Co-operation⁶.

(c) Funding

The Treaty provides for the Partner States' joint funding of the budget of the Community. This will be through equal contributions⁷. Other sources of funding include receipts from regional and international donations and any other sources as may be determined by the Council of Ministers⁸.

Other resources of the Community shall include such extra budgetary resources as:

- grants, donation, funds for projects and programmes and technical assistance; and
- income earned from activities undertaken by the Community⁹.

As a legal entity, the Community should also be able to borrow externally in its own name.

⁵ Articles 75, 76

⁶ Articles 78, 88

⁷ Article 132(4)

⁸ Ibid

⁹ Article 133

2.4 Political and Socio-Economic Convergence Factors

Adequate provisions have been inserted in the Treaty to ensure some kind of regional structural adjustment is undertaken in order to harmonise various economic structures with the ultimate objective of having political and socio-economic convergence. Likewise provisions that spur on the convergence of social policies regarding employment, social welfare, schemes, health, education, environment, women-in-development, human rights etc have been incorporated.

2.5 Private Sector Participation and Involvement

Throughout the Treaty-making process it was realised that on the basis of the need for people-driven and people-centred development the peoples of East Africa should play an active role in determining the progress of the new Community.

This is pivoted on the premise that the role of Government in modern market-oriented economic integration processes should be that of a facilitator while the actors are the private sector and the civil society. To this extent the Treaty is designed to enable the private sector to fully participate and shape the processes of economic integration. For example, it has provisions aimed at removing policies and regulations that impede cross-border investments and those which inhibit the free movement of the factors of production. It also seeks to enhance capacity building in the private sector in order to ensure that the Community is in the main process of the people and not restrictively of governments.

3.0 THE LEGAL AND INSTITUTIONAL FRAMEWORK CREATED BY THE TREATY

The most significant attribute of the Treaty is the establishment of the East African Community. The Community is established in a manner reflective of intended systematic development of a Customs Union and a Common Market as transitional stages to and integral parts thereof, subsequently a Monetary Union and ultimately a Political Federation¹⁰.

The key features of the new international organisation are the following:

3.1 Membership

Initial membership comprises Kenya, Tanzania and Uganda¹¹. It is, however, envisaged that any foreign country may apply to join, to participate in or to be associated with the Community¹². In considering an application by a foreign country to become a member of, be associated with, or participate in any of the activities of the Community, such a foreign country's:

- acceptance of the Community as set out in the Treaty;
- adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice;
- potential contribution to the strengthening of integration within the East African region;
- geographical proximity to and inter-dependence between it and the Partner States;
- establishment and maintenance of a market driven economy; and social and economic policies being compatible with those of the Community are matters that shall be taken into account¹³. These entry requirements are deliberately necessary to ensure that the long-range economic and geo-political interests of the founding members are not compromised by any new entrants.

The Treaty also envisages participation in the activities of the Community at observer level by any foreign country, inter-governmental organisation or civil society organisation¹⁴.

3.2 Legal Capacity of the Community

The Treaty provides that the Community shall be a body corporate with perpetual succession. The Community, as a body corporate, shall have power to perform any

¹⁰ Preamble, Article 2(2)

¹¹ Article 3(1)

¹² Article 3(2)

¹³ Article 3(3)

¹⁴ Article 3(5)

of the functions conferred upon it by the Treaty. It can also do all things, including acquiring and managing property and borrowing, that are necessary or desirable for the performance of those functions¹⁵.

3.3 Objectives of the Community

The Community aims at widening and deepening co-operation among the three states through the development of policies and programmes in various fields for their mutual benefit with a view to achieving economic, social and political integration. The main aspiration is the creation of a bigger market in the region whose purposes will include attraction of investments, expansion of business, encouragement of competition and innovation and creation of employment.

In the fulfilment of this objective, the Community shall ensure:

- (a) the attainment of sustainable growth and development of the Partner States by the promotion of a more balanced and harmonious development of the Partner States;
- (b) the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development within the Partner States and which would in turn, raise the standard of living and improve the quality of life of their populations;
- (c) the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States;
- (d) the strengthening and consolidation of the long standing economic, social, cultural and traditional ties and associations between the peoples of the Partner States so as to promote a people-centred mutual development of these ties and associations;
- (e) the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development;
- (f) the promotion of peace, security and stability within, and good neighbourliness among the Partner States;
- (g) the enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development; and
- (h) the undertaking of such other activities calculated to further the aims and objectives of the Community, as the Partner States may from time to time decided to undertake in common¹⁶.

¹⁵ Article 4

¹⁶ Article 5

In short, the three Partner States agree to give up part of their sovereign rights in several aspects of development including the political, economic, legal and socio-economic ones.

3.4 Principles of the Community

The fundamental principles that shall govern the achievement of the objectives of the Community shall include:

- (a) mutual trust, political will and sovereign equality;
- (b) peaceful co-existence and good neighbourliness;
- (c) peaceful settlement of disputes;
- (d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;
- (e) equitable distribution of benefits; and
- (f) co-operation for mutual benefit¹⁷.

There is another set of principles that shall govern the practical achievement of the objectives of the Community. These, meant to be operational in nature, include:

- (a) people-centred and market-driven co-operation;
- (b) the provision by the Partner States of an adequate and appropriate enabling environment, such as conducive policies and basic infrastructure;
- (c) the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology;
- (d) the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stakeholders in the process of integration;
- (e) the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds;
- (f) the equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations;
- (g) the principle of complementarity; and
- (h) the principle of asymmetry¹⁸.

¹⁷ Article 6

¹⁸ Article 7

The Partner States further undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

3.5 Domestication of the Treaty by the Partner States

The Partner States shall:

- (a) plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community;
- (b) co-ordinate their economic and other policies to the extent necessary to achieve the objectives of the Community; and shall
- (c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of the Treaty¹⁹.

In this regard the Partner States will secure the enactment and effective implementation of such legislation as will domesticate the Treaty within their respective national jurisdictions. Accordingly Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty²⁰.

3.6 Duration of the Treaty

The Treaty shall have perpetual duration²¹.

3.7 General Provisions

The Treaty, like similar instruments has general, transitional and final provisions which address divers matters including the following:

- (a) Official language of the Community²²;
- (b) Status, Privileges and Immunities²³;
- (c) Transition and Transfer of Assets from the East African Co-operation to the East African Community²⁴;
- (d) Saving provisions²⁵;

¹⁹ Article 8(1)

²⁰ Article 8(2), (3), (4), (5); The Partner States have already enacted enabling laws which, by domesticating the Treaty, should obviate a possible dichotomy between Community law, on one hand, and Municipal laws, on the other

²¹ Article 144

²² Article 137 - under this provision, although the official language shall be English, Kiswahili, shall be developed as a lingua franca; see also Article 119(d)

²³ Article 138

²⁴ Article 140, 141

²⁵ Article 162

- (e) Sanctions to cater for circumstances where a Partner State defaults in its financial and other obligations²⁶;
- (f) Cessation of membership through processes of withdrawal, suspension and expulsion of a Partner State²⁷; and
- (g) Amendment of the Treaty²⁸.

²⁶ Article 143

²⁷ Articles 145, 146, 147, 148, 149

²⁸ Article 150

4.0 AREAS OF CO-OPERATION PROVIDED FOR IN THE TREATY

The Treaty in an effort to avail a modus operandi for the achievement of the objectives of the Community provides for the establishment or enhancement of co-operation in the following broad areas:

- Trade Liberalisation and Development;
- Co-operation in Investment and Industrial Development;
- Co-operation in Monetary and Financial Matters;
- The development of the Infrastructure and Services;
- The development of Human Resources;
- The development of Agriculture and Natural Resources; and
- Provision of a Conducive Environment for Development.

4.1 Trade Liberalisation and Development

This is mainly addressed through the provisions on:

- the development and adoption of an East African Trade regime²⁹;
- the establishment, of a Customs Union³⁰; and
- the establishment, of a Common Market³¹.

The Treaty is not oblivious of the fact that, given the different levels of development in the Partner States' respective economies, imbalances may arise with the application of measures towards co-operation in trade liberalisation. It, therefore, provides for:

- (a) A progressive development process towards the conclusion within four years after the coming into force of the Treaty of a Protocol establishing a Customs Union details of which will include the following:
 - The application of the principle of asymmetry;
 - The elimination of internal tariff and other charges of equivalent effect;
 - The elimination of non-tariff barriers;
 - Establishment of a common external tariff;
 - Rules of origin;
 - Dumping;
 - Subsidies and Countervailing duties;
 - Security and other restrictions to trade Competition;

²⁹ Article 74

³⁰ Article 75

³¹ Article 76

- Duty drawback, refund and remission of duties and taxes;
 - Customs Co-operation;
 - Re-exportation of goods; and
 - Simplification and harmonisation of trade documentation and procedures³².
- (b) A progressive establishment of the Customs Union over a transitional period and subject to such requirements as the Council of Ministers may determine³³.
- (c) A progressive establishment of a Common Market³⁴.
- (d) The taking of such measures that address imbalances arising from the application of the provisions for the establishment of a Customs Union and a Common Market³⁵.
- (e) The possibility of any of the Partner States to take necessary safeguard measures to cater for events of serious injury occurring to its economy following the application of the provisions on co-operation in trade liberalisation and development³⁶.

For transitional purposes the need for such cushioning is bound to be inevitable.

It is instructive to note that with the aspiration of working towards the establishment of the Customs Union the Partner States have committed themselves to certain matters that exude the spirit of convergence. This is borne out by provisions that:

- with effect from a date to be determined by the Council, the Partner States shall not impose any new duties and taxes or increase existing ones in respect of products traded within the Community and shall transmit to the Secretariat all information on any tariffs for study by the relevant institutions of the Community³⁷;
- except as may be provided for or permitted under this Treaty, the Partner States agree to remove all the existing non-tariff barriers on the importation into their territory of goods originating from the other Partner States and thereafter to refrain from imposing any further non-tariff barriers³⁸; and that
- the Partner States shall refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Partner States³⁹.

³² Article 75(1)

³³ Article 75(2)

³⁴ Article 76(2)

³⁵ Article 77

³⁶ Article 78

³⁷ Article 75(4)

³⁸ Article 75(5)

³⁹ Article 75(6)

Behind these provisions one notices that the Treaty recognises the need to make the region a competitive single market for both local and foreign investment, business and trade. Developments in this regard will provide opportunities for increased exports and investments to the wider East African market as well as jobs for the East African labour force. Cross border investment opportunities are targeted not only on the East African Market but also on the markets of the neighbouring countries and beyond.

Work towards the conclusion of a Protocol on the Establishment of the Customs Union within, as required, four years of the signing of the Treaty⁴⁰ has reached significant levels. Through a High Level Task Force established by the Council of Ministers in the second half of 1999 convergence has been reached on most of the identified cornerstones of the Customs Union as stipulated in the Treaty⁴¹.

4.2 Co-operation in Investment and Industrial Development

Future East African economies will depend on the development and adaptation of technologies to boost production and diversification. It is acknowledged that competitiveness can only be sustained on the basis of constant improvement and innovation of existing industries and establishment of new ones. The development of technological capacity in the region is a prerequisite for sustained economic growth and development and an incentive to increased foreign as well as local investment. This remains a challenge as far as the creation of a single market and investment area is concerned.

The Treaty, taking cognisance, of such foresightedness, therefore, provides for co-operation in investment and industrial development that would, inter alia, promote self sustaining and balanced industrial growth, and encourage the development of indigenous entrepreneurs⁴².

In order to avail impetus to that general provision it lays down as strategic and priority areas such matters as:

- the development of an East African Industrial Development Strategy;
- the promotion of linkages among industries within the Community;
- the facilitation of the development of small scale and food and agro-industries;
- the rationalization of investments and investment incentives;
- the promotion of industrial research and development; and
- the avoidance of double taxation⁴³.

⁴⁰ Article 75(7)

⁴¹ op. cit. footnote 32

⁴² Article 79

⁴³ Article 80

The Treaty further provides for the development of a common policy in standardisation, quality assurance, metrology and testing that would enhance the standard of living of the peoples of the Community, promote trade and improve productivity⁴⁴.

4.3 Monetary and Financial Co-operation

In relation to the provision Trade Liberalisation and Industrial Development are those provisions whereby the Partner States will undertake to co-operate in Monetary and Financial matters in order to establish monetary stability within the Community⁴⁵. The fundamental aspects of co-operation in this regard will be based on:

- (a) co-operation in monetary and financial matters and maintenance of the convertibility of the Partner States' currencies as a basis for the establishment of a Monetary Union⁴⁶;
- (b) the harmonisation of Partner States' macro-economic policies especially in exchange rate policy, interest rate policy, fiscal and monetary policies together with macro-economic co-ordination within the community⁴⁷;
- (c) Banking and Capital Market Development⁴⁸; and
- (d) the removal of obstacles to the free movement of capital within the Community⁴⁹.

As is the case with Trade Liberalisation and Development, the Treaty provides for the approval of any safeguard measures which a Partner State may take to remedy any adverse effects arising out of the application of provisions on Monetary and Financial Co-operation⁵⁰.

4.4. Co-operation in the Development of Infrastructure and Services

The Treaty obliges the Partner States to ensure co-ordinated and complementary transport and communications policies and to improve and expand the existing transport and communication links and establish new ones as a means of furthering the physical cohesion of the Partner States. This is with a view to facilitating movement of traffic and to promote greater movement of persons, goods and services within the Community⁵¹.

It, therefore, provides for aspects of integration in roads and road transport, railways and rail transport, civil aviation and civil air transport, maritime transport and ports,

⁴⁴ Chapter Thirteen

⁴⁵ Chapter Fourteen, Articles 82 - 88

⁴⁶ Article 82

⁴⁷ Article 83, 84

⁴⁸ Article 85

⁴⁹ Article 86

⁵⁰ Article 88

⁵¹ Article 89

inland waterways transport, multimodal transport, freight, booking centres, cargo handling, postal services, telecommunications, meteorological services and energy⁵².

4.5. Co-operation in the Development of Human Resources

The Treaty seeks to develop human resources in the region. Provisions geared towards human resource development include those on:

- (a) the fostering of co-operation in education and training and the development of science and technology⁵³;
- (b) the free movement of persons, labour, services, right of establishment and residence⁵⁴;
- (c) co-operation in health, culture and sports and social welfare including the development of mass media programmes on the Community and development and promotion of indigenous languages especially Kiswahili as a lingua franca⁵⁵; and
- (d) enhancement of the role of women in socio-economic development⁵⁶.

Under this broad area, the Treaty once again, realizing the Partner States' different levels of socio-economic development, provides for the conclusion of a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence at a time to be determined by the Council⁵⁷. It is under this Protocol that the Community will determine appropriate measures for the realisation of free movement of the said factors.

Provisions in this area also vindicate the involvement of the human factor, as a cornerstone of progress, in the building and development of the Community. These provisions, through providing for the creation of an enabling environment for such participation, the strengthening of the private sector and engendering of co-operation among civil organisations in the region, anchor the Treaty's foundation for the participation of all stake holders and sections of the East African society, including women, the youth and the marginalized and disadvantaged peoples, in the activities of the Community⁵⁸

In catering for the enhancement of the role of women the Treaty has realised that women in East Africa play an important role in the economic, social and political development of the region. This is mainly through their activities as producers of goods and services, keepers of family health, first teachers of the children and guardians of morals.

⁵² Chapter Fifteen

⁵³ Articles 102, 103

⁵⁴ Chapter Seventeen

⁵⁵ Chapter Twenty One

⁵⁶ Chapter Twenty Two

⁵⁷ Article 104(2)

⁵⁸ Chapter Twenty Five

4.6. Co-operation in the Development of Agriculture and Natural Resources

The Treaty upholds the important roles Agriculture and Food Security, Environmental Management, Natural Resources, Tourism and Wildlife management play in the socio-economic development of the Partner States. In order to determine the scope of co-operation in these vital areas the Treaty:

- (a) obliges the Partner States to undertake schemes and measures for the achievement of food security and rational agricultural promotion that would promote complementarity and specialisation for sustainable agricultural programmes⁵⁹; elaborate paragraphs provide for co-operation and development in such areas as Seed Multiplication and Distribution, Livestock Multiplication and Distribution, Plant and Animal Diseases Control, Irrigation and Water Catchment Management and Food Security⁶⁰;
- (b) enjoins the Partner States to co-operate for the efficient management and utilisation of natural resources within the Community and for the preservation, protection and enhancement of the environment⁶¹; the paragraphs hereunder address, among other pertinent aspects, the prevention of illegal trade and movement in toxic chemicals, substances and hazardous wastes⁶²; and
- (c) provides for an undertaking by the Partner States to develop a collective and co-ordinated approach to the promotion of quality tourism and wildlife management within the Community⁶³.

4.7 Provision of a Conducive Environment for Development

The envisaged establishment and development of the East African Community calls for the provision of a conducive environment to spur on the intended development. Accordingly, the Treaty:

- (a) incorporates firm legal cornerstones indicated in Part 2.0 hereinabove;
- (b) provides for co-operation in political matters⁶⁴;
- (c) provides for co-operation in Legal and Judicial Affairs⁶⁵; and
- (d) provides for the establishment and enhancement of relations with other regional and international organisations and development partners⁶⁶.

⁵⁹ Chapter Eighteen

⁶⁰ Ibid

⁶¹ Chapter Nineteen

⁶² Ibid

⁶³ Chapter Twenty

⁶⁴ Chapter Twenty Three

⁶⁵ Chapter Twenty Four

⁶⁶ Chapter Twenty Six

4.7.1 Co-operation in Political Matters

For purposes of underlying the Community's role and laying a foundation for the eventual establishment of a Political Federation the Treaty obliges the Partner States to:

- (a) define and implement common foreign and security policies;
- (b) foster and maintain an atmosphere that is conducive to peace and security through co-operation and consultations with a view to preventing, better managing and resolving disputes and conflicts between them; and
- (c) establishment of a framework for co-operation in defence⁶⁷.

4.7.2 Co-operation in Legal and Judicial Affairs

In order to promote the achievement of the objectives of the Community, the Treaty obliges the Partner States to undertake appropriate steps towards:

- (a) the revival of the publication of the East Africa Law Reports⁶⁸, law journals and such other publications as will promote and exchange of legal and judicial knowledge;
- (b) the harmonisation of municipal laws in the regional context; and
- (c) the establishment of common syllabi for the training of lawyers and judicial officers⁶⁹.

This would be in tandem with the Partner States' general undertaking to ensure the implementation of the Treaty⁷⁰.

4.7.3 Relations with other Regional and International Organisations and Development Partners

Under the present Co-operation Arrangements cognisance is taken of existing regional co-operation agreements and arrangements jointly and severally binding the East African Co-operation Member States. In order to perpetuate this, in appreciation of the fact that regional groupings aim at bringing about faster economic development and in order to underscore the role of development partnership, the draft Treaty obliges the Partner States to, among other things;

- (a) honour their commitments in respect of multinational and international organisations; and
- (b) foster, as a Community, co-operative arrangements with other organisations whose activities have a bearing on its objectives⁷¹.

⁶⁷ Articles 123, 124, 125

⁶⁸ Law Reports of the decisions of the erstwhile Court of Appeal for East Africa and the High Courts of Kenya, Uganda and Tanzania published between 1957 and 1977.

⁶⁹ Article 126

⁷⁰ See part 2.5 of this Article

⁷¹ Article 130(2), (4)

Although Co-operation is ongoing at different levels in most of the areas under the more comprehensive current arrangement, the Treaty has brought in a focus towards a progressive achievement of economic and ultimately political federation.

5.0 THE ORGANS AND INSTITUTIONS OF THE COMMUNITY

The East African Community, like similar other regional organizations, has various organs and institutions charged with the implementation of the provisions of the Treaty and the achievement of the objectives of the Community⁷². These organs and institutions will, largely on the basis of the principle of separation of powers exercise executive, judicial and legislative powers.

5.1 Organs of the Community

Besides such other organs of the Community as the Summit may establish, there are the following seven basic organs are established:

(a) The Summit

The Summit consists of the Heads of State of the Partner States. Its role is to give general directions and impetus as to the development and achievement of the objectives of the Community. Unlike the Authority under the defunct East African Community, the Summit has its functions limited to overall policy direction. Implementational and operational policy decisions are made by organs subordinate to the Summit⁷³.

(b) The Council

The Council of the Ministers, consisting of the Ministers responsible for Regional Co-operation and such other Ministers as each Partner State may determine, is the major policy organ in as far as implementation of the Treaty provisions and programmes is concerned.

Apart from assisting the Summit in the performance of its functions, the Council directs, promotes, monitors and keeps under constant review the efficient functioning and development of the Community. The Council, will among other things initiate and submit Bills to the Legislative Assembly, consider the Budget of the Community, make staff and financial rules and regulations and submit annual reports to the Summit. The Council has powers to make legally binding regulations, issue directives, take decisions and make recommendations. These powers are for crucial purposes of ensuring that decisions are taken on time and that implementation is effectively monitored⁷⁴. To ease the discharge of its obligations the Council may establish from its membership such Sectoral Councils as may be necessary⁷⁵.

⁷² The organs and institutions are established by Article 9

⁷³ Chapter Four

⁷⁴ Chapter Five

⁷⁵ Article 13(3)(i); At the time of writing two Sectoral Councils, on Legal and Judicial Affairs, on Defence Affairs, have been established.

(c) The Co-ordination Committee

The Co-ordination Committee comprises Permanent Secretaries responsible for Regional Co-operation and such other Permanent Secretaries as each Partner State may determine. It is responsible for ensuring consistency and complementarity of projects and programmes as agreed by the Council. It facilitates the speedy implementation of the decisions of the Council. The Co-ordination Committee may also on its own initiative submit to the Council reports and recommendations on the implementation of the Treaty⁷⁶.

(d) The Sectoral Committees

The Sectoral Committees, are established by the Council on the recommendation of the Co-ordination Committee. They are primarily responsible for the preparation of comprehensive implementation programmes and setting out priorities for different sectors of co-operation. They are also charged with monitoring and keeping under constant review the implementation of the Community's sectoral programmes⁷⁷.

Currently the established Sectoral Committees are seventeen. They are the Agriculture and Food Security Committee; Capital Markets Development Committee; Committee on Energy; Committee on the Facilitation of Movement of Persons, Immigration, Labour/Employment and Refugees; Committee on the Environment and Natural Resources; Committee on Legal and Judicial Affairs; Committee on Lake Victoria Development Programme; Committee on Tourism and Wildlife Conservation; Finance and Administration Committee; Fiscal Affairs Committee; Gender and Community Development Committee; Inter-Parliamentary Committee for East Africa; Interstate Defence Committee; Interstate Security Committee; Monetary Affairs Committee; Trade, Industry and Investment Committee; and Transport, Communications and Meteorology Committee.

(e) The East African Court of Justice

The role of the East African Court of Justice is ensure the adherence to law in the interpretation and application of the Treaty. The Court is competent to accept and adjudicate upon all matters pursuant to the Treaty. The Court may also be called upon to give advisory opinions regarding questions of law arising from the provisions of the Treaty. The Court is empowered to determine the legality of any act, regulation, directive, decision, action or matter as shall have been referred to it by any Partner State, the Secretary General of the Community or by any legal and national persons. It can also handle disputes between the Community and its employees. Notwithstanding its broad

⁷⁶ Chapter Six

⁷⁷ Chapter Seven

jurisdictional base, the regional Court is not designed to deny national courts their respective jurisdictions in accordance with the respective municipal laws.

Initially the Court's jurisdiction is rationed to cater for only those matters closely related to the application of the Treaty. This is tantamount to a departure from the jurisdiction the Court of Appeal for East Africa had in the region's jurisprudential development. However, it is envisaged that the Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date.

This important Court, which was launched on November 30th, 2001, is intended among other things, to create public confidence. It is important for the public to know that the Partner States and the organs and institutions of the Community cannot get away with any wrongdoing under the Treaty. Its Judges have therefore been appointed by the Summit from among persons recommended by the Partner States who are of proven integrity, impartiality and independence and who fulfil the conditions required in their own countries for the holding of such high conditions required in their own countries for the holding of such high judicial office, or who are jurists of recognised competence in their respective Partner States⁷⁸.

(f) The East African Legislative Assembly

The East African Legislative Assembly, which was also launched on November 30th, 2001 and which has already embarked on serious parliamentary business, has twenty seven members elected by the National Assemblies of the Partner States. In addition, it has five ex-officio members consisting of the Ministers responsible for regional co-operation from each Partner State, the Secretary-General and the Counsel to the Community. The Assembly is the Community's legislative organ. It is also charged with among other functions, liaising with the National Assemblies of the Partner States on matters relating to the Community, debating and approving the Budget of the Community, considering annual reports of the Community and discussing all matters pertaining to the Community. It will, to this extent be the people's mouthpiece on matters relevant to the efficient functioning of the institutions and of the Community as a whole thereby exercising an oversight role.

In order to fulfil or comply with the operational principle of popular participation and to reflect the people-centred approach of the Community, the views of the National Assemblies' debates shall be taken into account in the Community Assembly. Reports on debates of the Community Assembly will also have to be passed to the National Assemblies for their consideration⁷⁹.

⁷⁸Elaborate provisions on the creation, jurisdiction and conduct of work of the Court are contained in Chapter Eight

⁷⁹Chapter Nine spells out the mechanism for the creation and modus operandi of the Legislative Assembly

The Treaty by creating a people-based and people-constituted regional Assembly will enable the East African people participate in decision-making at the supra-national level and, to that extent, serve to further develop human resources and economic advancement.

(g) The Secretariat

The Secretariat, headed by the Secretary General of the Community, is the principal executive organ of the Community. As such, it is charged with the strategic planning, management and monitoring of the Community's programmes and implementation of the Council's decisions. It is expected to be an institution of high efficiency and technical competence. The appointments to key positions at the Secretariat are expected to be on merit in order to ensure that a functional and effective key organ is in place⁸⁰.

5.2 Institutions of the Community

The institutions of the Community shall be such bodies, departments and services as may be established by the Summit⁸¹. Upon entry into force of the Treaty, the East African Development Bank and the Lake Victoria Fisheries Organisation and the surviving institutions of the former East African Community were deemed to be institutions of the new Community⁸². Surviving institutions of the former East African Community are defined to mean the East African Civil Aviation Academy, Soroti, the East African Development Bank, the East African School of Librarianship and the Inter-University Council of East Africa⁸³.

⁸⁰ Chapter Ten

⁸¹ Article 9(2)

⁸² Article 9(3)

⁸³ Article 1

6.0 OPERATIONALISATION OF THE TREATY

Following the incorporation of the Treaty in the Partner States' Municipal Law and the creation and operationalisation of the new organs, the basic challenges to the Community remain the sustenance of political will, the timely and purposeful implementation of the Treaty on the basis of the Development Strategies, the co-ordination of activities of the various organs and institutions for a common goal, the effective and purposeful involvement of the peoples of East Africa as a driving force of the Community and the establishment of a reliable resource base including financial viability.

It is worth noting that following, the signing of the Treaty the Governments have addressed the critical issue of its implementation. Accordingly the Council of Ministers has formulated a programme, containing key landmarks, for the operationalisation of the Treaty.

Implementation will be based on decisions (pertaining to various aspects of co-operation) by the Council of Ministers. Some of the decisions may result in the conclusion of annexes and protocols which shall spell out the objectives and scope of, and institutional mechanisms for co-operation and integration. Each annex and protocol shall form an integral part of the Treaty⁸⁴.

Some of the envisaged annexes have been finalized. These include Rules of Procedure for the Summit of Heads of State; Rules of Procedure for the Council of Ministers; Protocol on Decision-making by the Council of Ministers; Rules of Procedure for Co-ordination Committee; Procedure for the Admission of New Members into the Community; Procedure for the Granting of Observer Status; Protocol on Standardization, Quality Assurance, Metrology and Testing; and Protocol on Combating Illicit Drug Trafficking. In addition to these, Rules of Procedure of the Legislative Assembly and Rules of the Court of Justice have been finalised by the Assembly and Court respectively.

⁸⁴ The Treaty currently provides for the conclusion of Protocols on:

- decision-making by the Council (Article 15(4));
- the operationalisation of the extended jurisdiction of the Court of Justice (Article 27(2));
- the establishment of a Customs Union (Article 75(1))
- the establishment of a Common Market (Article 76(4));
- Standardisation, Quality Assurance, Metrology and Testing (Article 81(4));
- The Free Movement of Persons, Labour, Services and Right of Establishment and Residence (Article 104(2)); and
- Combating Illicit Drug Trafficking (Article 124(5)(e))

7.0 CONCLUSION

On the whole, the Treaty represents the broad consensus of the Partner States and peoples of East Africa. It is an enabling document, which provides the basis for the development of dynamic co-operation in the social, economic and political fields as well as boosting the region's capacity as a solid bloc in its trade and other relations with the rest of the world.

Its provisions are a pointer towards the attainment of such pre-requisites of development in today's world as the promotion of peace and security in the region; the enhancement of good governance, democracy, the rule of law, social justice and observance of human rights; the creation of a regional market which will optimize economies of scale; the facilitation the movement of persons, capital, goods and services; the attraction of international and cross-border investments; the promotion of the role of the private sector and civil society; the promotion of sustainable environmental management of shared resources; the development of human resources, science and technology etc.

PART B: CHALLENGES FACING THE EAST AFRICAN COMMUNITY*

1.0 OBJECTIVES OF THE COMMUNITY

The EAC aims at widening and deepening co-operation among the Partner States in, among other areas, political, economic, social, cultural, health, education, science and technology, defence, security, legal and judicial affairs for their mutual benefit. This will be achieved through the establishment of a Customs Union as the entry point of the Community, a Common Market, subsequently a Monetary Union and ultimately a Political Federation of the East African States⁸⁵.

In the pursuit of this cause the Community shall, for the benefit of the Partner States, and on the basis of its stated fundamental principles and operational principles⁸⁶ ensure:

- (a) the attainment of sustainable growth and development by the promotion of more balanced and harmonious development;
- (b) the strengthening and consolidation of co-operation in agreed fields that would lead to equitable economic development and which would, in turn, raise the standard of living and improve the quality of life of their populations;
- (c) the promotion of sustainable utilisation of natural resources and the taking of measures that would effectively protect the natural environment;
- (d) the strengthening and consolidation of the long standing economic, social, cultural and traditional ties between the peoples of East Africa;
- (e) the mainstreaming of gender in all its endeavours and the enhancement of the role of women in cultural, social, political, economic and technological development;
- (f) the promotion of peace, security and stability within, and good neighbourliness;
- (g) the enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development; and
- (h) the undertaking of such other activities calculated to further the aims and objectives of the Community, as the Partner States may from time to time agree upon⁸⁷.

**This part of the occasional paper was presented at a Tanganyika Law Society Seminar on "Continuing Legal Education" held at AICC, Arusha on February 8th, 2002.*

⁸⁵ Preamble to the Treaty for the Establishment of the East African Community, Article 2 of the Treaty

⁸⁶ *op.cit.* footnotes 17 and 18

⁸⁷ *op.cit.* footnote 16

In short, the three Partner States have agreed to give up part of their sovereign rights in several aspects of development including the political, economic, legal and socio-economic ones for purposes of integrating their economic and, ultimately, political pursuits.

In an effort to avail a purposeful *modus operandi* for the achievement of these objectives the Treaty provides for the establishment and enhancement of a co-operation in the following broad areas:

- Trade liberalisation and development⁸⁸;
- Co-operation in investment and industrial development⁸⁹;
- Co-operation in monetary and financial matters⁹⁰;
- The development of the infrastructure and services⁹¹;
- The development of human resources, science and technology⁹²;
- Movement of persons, goods and services⁹³;
- The development of Agriculture and Natural Resources⁹⁴; and
- The provision of a conducive environment for development (which encapsulates co-operation in political matters, the ensuring of firm legal cornerstones, co-operation in legal and judicial affairs and the establishment and enhancement of relations with other regional and international organisations and development partners).⁹⁵

The accomplishment of the objectives of the Community, is based on five year development strategies. The current (2001 - 2005) Development Strategy prioritises, the operationalisation of the organs of the Community, macro-economic policy co-ordination, harmonisation of fiscal and monetary policies, trade liberalisation and development, enhancement of supply capacity in productive sectors, the development of areas of common economic interest, the development of infrastructure and support services, the development of an adequate and reliable energy supply in the region among other activities.

⁸⁸ Articles 74-78

⁸⁹ Articles 79 - 81

⁹⁰ *op.cit.* footnote 45

⁹¹ Articles 89 - 101

⁹² Articles 102 - 103, 117 - 122

⁹³ *op.cit.* footnote 54

⁹⁴ Articles 105 - 116

⁹⁵ Articles 123 - 131

2.0 ACHIEVEMENTS TO DATE

The achievements of the Community since the revival of the integration process, through the period of the negotiations and coming into force of the Treaty, are fourfold as follows:

2.1 Institutional Achievements

Achievements have included the upgrading of the 1993 Agreement Establishing the Permanent Tripartite Commission for East African Co-operation into the Treaty, the establishment of Sectoral Councils and Sectoral Committees to articulate each agreed area of co-operation and the launching of the Development Strategies. In November 2001 the East African Court of Justice and the East African Legislative Assembly were formally launched and became operational pillars of the Community.

2.2 Measures aimed at Confidence-Building and the Strengthening of an East African Identity

There have been developments meant to foster the feeling of integration among the people and to facilitate an East African identity. These have included the introduction of the East African Community flag, the East African passport and currency convertibility. In the area of the movement of persons these have included the introduction of temporary passes, the proposed re-introduction of the Interstate Passes, the abolition of charges on temporary importation of private vehicles across regional borders, and the establishment of special immigration counters for East African travellers at the region's airports.

In political matters, achievements have included the signing of Memoranda of Understanding on Co-operation in Defence and Foreign Policy Co-ordination.

In legal and judicial affairs, the starting of a project on harmonisation of municipal laws in the East African Community context and the harmonisation of regional judicial training syllabi and activities have been prominent.

The last five years have also witnessed growth in the encouragement of the participation of the civil society, professional, women and private sector organisations in the integration process. To this extent, organisations such as the East African Business Council, the East African Trade Union Council, the East Africa Law Society, the East African Magistrates and Judges' Association, the East African Youth Council, the East African Association of Investment Promotion Agencies, the Joint Research Council for East Africa, the East African Tourism Council and an East African Communications Regulatory Organisation have been set up.

The formulation of the East African Private Sector Development Strategy and the promotion of the informal (small-scale industries) sector in East Africa are ongoing.

2.3. Development of Economic, Service and Social Sectors

Positive steps have been taken and in some cases results realised in such key areas as Trade and Investment, Transport and Communications and development of Lake Victoria as an economic zone. In this regard suffice it to highlight the following:

(i) Trade, Industry, Investment and Customs

Trade

- Implementation of tariff reduction whereby Kenya applies 90% and Tanzania and Uganda 80% tariff reductions; and
- Completion of study on cross-border trade in agricultural products.

Industry

- Ongoing harmonisation of standards and specification of goods and services; 207 Standards have already been harmonised, out of which 91 East African Standards have been adopted and notified to WTO; and
- Completion of Study on the EAC Industrial Development Strategy.

Investment

- Establishment of the East African Association of Investment Promotion Agencies; and
- Publication of the Investors Guide to East Africa.

Customs

- Adoption of a standardised single entry document; and
- Preparation of a draft Protocol on the Establishment of the Customs Union during last year; the Treaty requires the conclusion of this protocol by November 30th, 2003.

(ii) Harmonisation of Monetary and Fiscal Policies

- Progress in the development of a macro economic framework for the region to guide towards economic convergence and macro economic stability;
- Convertibility of the Partner States' currencies;
- Harmonisation of banking rules and regulations;
- Harmonisation of VAT rates, which now range between 16% and 20%;
- Institutionalisation of Finance Ministers' Pre- and Post-Budget consultations, regular sharing of information on budgets, tax proposals,

trade and economic performance, including the reading of Budget Statements on the same day; and

- The conclusion of the Tripartite Agreement on Avoidance of Double Taxation.

(iii) Capital Markets

- Harmonisation of policies and trading practices and regulations in the three Stock Exchanges under the auspices of the East African Securities Regulatory Authorities (EASRA); and
- Establishment of the Capital Markets Development Committee to oversee development of the capital markets, particularly cross-listing of stocks.

(iv) Transport and Communications

Road Network

- The conclusion of a Tripartite Agreement on Road Transport;
- Implementation of the East African Road Network Project; and
- Establishment of Task Forces to study the Harmonisation of Road Transit charges and to address Road Safety issues in the region.

Railways

- Identification of projects on the State of Railways in East Africa; and
- (Identification of a project on the construction of the Tanga-Arusha-Musoma-Port Bell/Jinja Railway, which would make substantial impact on the efficiency of the East African railways system.)

Posts and telecommunications

- Implementation of the Cross-Border Telecommunication Connectivity Project; and
- Implementation of the East African Postal Automation Project.

Civil Aviation

Implementation of the East African Civil Aviation Safety Project.

Inland Waterways Transport

- Conclusion of a Tripartite Inland Waterways Agreement; and
- Completion of the Study on the Assessment of the Status of Lake Victoria Ports.

(v) Energy

- Identification of projects on East African Energy Master Plan, including Fossil Fuels, New and renewable Sources of Energy and Power; and

- Initiation of Power Interconnectivity Project to facilitate cross-border flow of electricity supply in the border towns.

(vi) Natural Resources and Environment

Environment

Conclusion of a Memorandum of Understanding on Co-operation on Environment Management.

(vii) Tourism

- Completion of the first phase of the Study on the Development of Regional Tourism in East Africa;
- Establishment of the EAC Tourist Council; and
- Identification of Regional training centres/schools on Tourism; and

(viii) Development of Lake Victoria and its Basin

Implementation of Regional Strategy and Action Plan for the Control of the Water Hyacinth and other invasive weeds;

- Ongoing development of the Institutional and Legal Arrangements for the Sustainable Development of Lake Victoria and its Basin; and
- Ongoing Study on Economic Potentials and Constraints to the Development of Lake Victoria and its Basin as an Economic Growth Zone.

(ix) Education and training

Revitalisation of the Inter-University Council for East Africa. As a result of the integration and revitalisation processes, the Inter-University Council has secured, from the Ford Foundation, a grant of 28 scholarships per year for ten years. It has also embarked on the streamlining of admission of students into universities and harmonisation of tuition and scholarships.

(x) Science and technology

Implementation of a strategy for reinforcement and improved co-ordination of scientific research capacities in East Africa.

(xi) Health

Establishment of joint Committees on:

- Health Regulations and Standards framework;
- HIV/AIDS, TB and Malaria control;

- Joint disease surveillance and control and data bank;
- Co-operation among the Partner States' medical associations.

Ongoing activities in respect of which progress is at a fairly advanced stage include the following:

- Studies on the Establishment of an East African Trade regime;
- Work on the harmonisation of the Partner States' investment codes;
- The harmonisation of the last two digits of the Customs Classification Code;
- The Study on the Safety of Navigation on Lake Victoria;
- The Study to develop a comprehensive East African Agricultural and rural Development Strategy;
- Development of an East African Power Master Plan;
- Development of Regional Programmes for the Control of Cholera, Yellow Fever and HIV/AIDS; and
- Development of a Regional Gender and Community Development Strategy and Programme.

3.0 CHALLENGES

The Treaty as an instrument of international law raises a few points of interest in as far as its general implementation is concerned. It has a provision for a general undertaking as to implementation. According to this provision:

"1. The Partner States shall:

- (a) plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;*
 - (b) co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and*
 - (c) abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.*
- 2. Each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular:*
- (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and*
 - (b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.*
- 3. Each Partner State shall:*
- (a) designate a Ministry with which the Secretary general may communicate in connection with any matter arising out of the implementation or the application of this Treaty, and shall notify the Secretary General of that designation;*
 - (b) transmit to the Secretary General copies of all relevant editing and proposed legislation and its official gazettes;*
 - (c) where it is required under this Treaty, to supply to or exchange with another Partner State any information, send copies of such information to the Secretary General.*
- 4. Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.*

5. *In pursuance of the provisions of paragraph 4 of this Article, the Partner States undertake to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones.*⁹⁶

It is against this general undertaking that the challenges facing the Community, which principally have to do with the implementation of the Treaty, can best be examined. The challenges can be seen under five broad categories, i.e. legal, political, economic, social, and financial.

3.1 Legal and Related Challenges

The Partner States are obliged to ensure not only the ratification of the Treaty but also its domestication within their respective Municipal laws, the timely implementation of its provisions and general adherence to its provisions.

(a) Domestication

Domestication of the Treaty obliges the Partner States to have in place enabling municipal legislation that will serve to:

- accord the Treaty the force of law within their respective territories; and
- enable the Community organs, institutions and laws to take precedence over similar national ones on matters pertaining to the Treaty.

The Partner States have since passed the necessary enabling legislation.

(b) Timely implementation

Timely implementation will require the Partner States' putting in place all the mechanisms and programmes that relate to co-operation in different areas.

(c) Creating of a Community Jurisprudence

The fourth aspect of this challenge is the need to create a Community jurisprudence. The region lacks a homogenous body of applicable laws. By way for comparison one notices that the systematic development of the European Community law comprising rights, duties, powers and enforceable remedies has not only assisted the integration process. It has also assisted in providing for effective supervision over the executive organs of the European Community and for addressing problems that would otherwise be created by the subjection of Community regulations to national constitutional standards.⁹⁷ In the European Community, Community law and the municipal legal systems operate in overlapping spheres whereby the former law is superior to the extent it restricts the sovereignty of the Member States. It is on this basis that the European Court as long ago as 1963 held that nationals of the Member States

⁹⁶ Articles 8

⁹⁷ Through the Treaties establishing the European Coal and Steel Community, the Euratom and the European Economic Community

See Collins, L: *European Community Law in the United Kingdom*
London, Butterworths, 1990 Chapter 1;

Harding, C and Sherlock, A: *European Community Law Text and Materials*
1995, Longmans, Chapters 1 - 4, 9

could derive their fundamental rights from Community law. It stated that:

*“the Community constitutes a new legal order of international law, for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only Member States but also their nationals”*⁹⁸

In a number of cases the European Court has emphasised the supremacy of fundamental rights protected by the European Convention on Human Rights. For example, in *Nold vs Commission*, where the applicant alleged that restrictions imposed by the Commission violated the European Convention, the Court held that

*“international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.”*⁹⁹

Therefore European Community law exists within definitive confines of International law acceptable to all EC Member States.

The position in East Africa is afflicted by yet to be resolved disparities in the legal systems. The legal systems of the three Partner States, though sharing a common source in received English law, are different. Harmonisation of the law has so far been hampered by the sheer magnitude of the exercise, intricacies of conflict of laws, the differences in legal systems and (before the formal establishment of the East African Legislative Assembly) lack of legislative basis. Therefore, the intricate issues of conflict between International and Municipal Law as highlighted in such cases as *the Reparation for Injuries Case*,¹⁰⁰ *the Barcelona Traction, Light and Power Co Case*¹⁰¹ and *Okunda v. East African Community*¹⁰² are yet to be resolved in the East African situation.

A temporary difficulty is that the jurisdiction of the East African Court of Justice, which would be at the forefront of creating an East African jurisprudence, is initially rationed. According to the Treaty the Court shall initially have jurisdiction over the interpretation and application of this Treaty.¹⁰³ It will only have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date.¹⁰⁴

⁹⁸ Case 26/62 *Van Gend en Los v Nederlandse Administratie der Belastingen* (1963) CMLR 105 at p.129

⁹⁹ Case 4/73 (1974) 2 CMLR 338 at p.354

¹⁰⁰ 1949 ICJ Rep 174

¹⁰¹ 1970 ICJ Rep 3

¹⁰² {1970} EA 512

¹⁰³ Article 27(1) cf: Article 23

¹⁰⁴ Article 27(2)

collapse of the defunct East African Community in 1977 was the perception of disproportionate sharing of the benefits accruing from the regional market and lack of a formula for dealing with the problems. If the current regional integration efforts are to be made tenable, some mechanism has to be found to address the issue. However, the strategy for regional co-operation is now different, and the Treaty emphasizes more reliance on market-driven integration.

Secondly, the short run, benefits to accrue from implementation of the Treaty would not be realised at the same time across the region, while the required adjustment costs could be unequally distributed. However, in the long run, all the Partner States and different sections of society would generally benefit. This is the reason why the Partner States had to provide for maximum acceptance of the Treaty. However, it is to be noted that the Treaty provides for safeguard measures which a Partner State may take to remedy and adverse effects arising out of the application of provisions on trade liberalisation and monetary and financial co-operation.¹⁰⁷

Thirdly, in order to effectively monitor socio-economic developments in the Community, there is need for the establishment of a reliable database which covers all aspects of the Co-operation. Such data would provide a complete picture of the impact of the Community to the three Partner States. A process of establishing the database is near completion.

Fourthly, the Partner States as a unit need to forge a bloc whereby they can, as a Community, seek membership in the World Trade Organisation as a regional trading area, participate in AC/EU trade arrangements under the Cotonou Agreement, take advantage of the US \$ 11,000 million market under the US African Growth and Opportunity Act and generally thrive as a bloc.

3.4 Social Challenges

3.4.1 Capacity Building

The Community, in its present form, is arguably a new phenomenon and has wider aspirations than the erstwhile East African Co-operation inter-governmental arrangement. It creates both new organs and wider scope in all areas of co-operation. To that extent, the Partner States are under obligation to ensure the necessary capacity building for success.

3.4.2 Involvement of the People

Throughout the Treaty-making process, it was realised that on the basis of the need for people-driven and people-centred development, the peoples of East Africa should play an active role in determining the progress of the new Community.

¹⁰⁷ Articles 77, 85

This is pivoted on the premises that the role of Government in modern market-oriented economic integration processes should be that of a facilitator while the actors are the private sector and the civil society. To this extent the Treaty is designed to enable the private sector fully participate and shape the processes of economic integration. It has, for example, provisions aimed at removing policies and regulations that impede cross-border investments and those which inhibit the free movement of the factors of production. It also seeks to enhance capacity building in the private sector in order to ensure that the Community is in the main process of the people and not restrictively of governments.

The Community will, therefore, have to live to the expectations of the peoples of East Africa through implementing the Treaty's provisions for:

- the creation of an enabling environment for the Private Sector and the Civil Society;
- the strengthening of the Private Sector; and
- enhancement of co-operation among Business Organisations and Professional bodies.

In this regard, the following key obligations, work in respect of which has started, need to be emphasised:

- (a) *The Partner States agree to promote enabling environment for the participation of civil society in the development activities within the Community.*
- (b) *The Secretary General shall provide the forum for consultations between the private sector, civil society organisation, other interest groups and appropriate institutions of the Community.*
- (c) *For purposes of strengthening the private sector, the Partner States undertake to:*
 - (i) *encourage the efficient use of scarce resources and to promote the development of private sector organisation which are engaged in all types of economic activity, such as, the chambers of commerce and industry, confederations and associations of industry, agriculture, manufacturers, farmers, traders and service providers and professional groups;*
 - (ii) *encourage and sponsor practical and resourceful methods of income generation in the private sector;*

(d) Co-ordination of Activities

The achievement of the objectives of the Community will also depend on how cohesive and co-ordinated its organs and institutions are in the discharge of their respective obligations. Although the Treaty spells out the different functions of the organs with particular reference to the establishment and roles of those organs¹⁰⁵ a primary or literal interpretation (of the Treaty) would indicate that the intention of the contracting parties (the Partner States) is that the organs and institutions should play their roles with one ultimate objective - development of the Community for the benefit of the peoples of East Africa. Therefore, the introduction and sustainance of a mechanism for cordial and collaborative inter-facing and inter-relationships between the organs and institutions remains unassailable.

3.2 Political Challenges

The Treaty has the effect of enhancing political and socio-economic convergence. Adequate provisions have been inserted in the Treaty to ensure some kind of regional structural adjustment is undertaken in order to harmonise various structures with the ultimate objective of having political unity.¹⁰⁶

This type of convergence by independent states necessitates a considerable ceding of sovereignty. During the re-kindling of the integration process and throughout the negotiation and drafting of the Treaty, there has been remarkable political goodwill. The need for sustaining political goodwill and public support is underpinned by the requirement that all the important steps in the implementation of the Treaty will be done progressively on basis of negotiated protocols, the first one being the Protocol on the Customs Union to be followed later by the Protocol on a Common Market and the Protocol on Free Movement of Persons, Labour, Services, Right of Establishment and Residence and others. The successful conclusion of such instruments will continue to depend on political goodwill.

Furthermore, the Partner States are challenged to strive for a common foreign policy and a common defence policy. A common foreign policy has been pivotal to the growth of the Caribbean Common Market (CARICOM). The need for a common political frontage has seen some East Africans argue that the establishment of a Political Federation, rather than the Customs Union, ought to have been the entry point into East Africa's integration process.

3.3 Economic Challenges

There is need to ensure firstly that the integration process does not exacerbate any existing economic imbalances among the Partner States. One of the reasons for the

¹⁰⁵ Articles 11, 14, 18, 21, 23, 27 - 41, 44, 49, 54 - 62, 65, 71

¹⁰⁶ Article 123

(iii) *establish a quality information system which will allow collection, harmonised processing and timely dissemination of data and information; and*

(iv) *encourage and promote the taking of useful decisions by the Council of Ministers and other relevant institutions of the Community in area affecting the private sector and monitor the implementation of such decisions.*

(d) *The Council of Ministers shall establish modalities that would enable the business organisation or associations, professional bodies and the civil society in the Partner States to contribute effectively to the development of the Community.*

(e) *The Council of Ministers shall formulate a business and business related dispute settlement mechanism.*¹⁰⁸

3.5 Availability of Sufficient Financial Resources

A substantial amount of resources will be required to implement the Treaty. In addition to internal mobilisation of resources, there will be a need for a sustained mobilisation of external resources, especially for the development of the infrastructure.

Apart from the resources required for the Community's programmes, substantial resources will also be required for adequate funding of the organs and institutions of the Community, in particular, the Secretariat, the Legislative Assembly and the Court.

The Treaty provides for the Partner States' joint funding of the budget of the Community. This will be through equal contributions. Other sources of funding include receipt from regional and international donations and any other sources as may be determined by the Council of Ministers.¹⁰⁹

Other resources of the Community shall include such extra budgetary resources as:

- grants, donation, funds for projects and programmes and technical assistance; and
- income earned from activities undertaken by the Community.¹¹⁰

In the past, these general sources have been afflicted by the Partner States' own financial constraints.

As a legal entity, the Community should also be able to borrow externally in its own name.

¹⁰⁸ Articles 127, 128, 129

¹⁰⁹ Article 132

¹¹⁰ Article 133

Given the way the Community budget is financed a number of questions arise. For example:

- (a) Is this the best way to finance the Community?
- (b) Are the resources committed by the Partner States and donors adequate?

The answer to these two questions is in the negative.

The experience had during the last five years indicates that:

- (a) Despite the strong political will and hard bargaining in the budgetary process, Partner States find the EAC budget a burden on their national budgets;
- (b) As such contributions to the EAC budget always arrive not only belatedly but sometimes in percentage portions; and
- (c) Donor contributions for studies/research do not only come with strings attached; they also take too long to access and are inflexible for short term requirements of the Community.

The implication of all these factors is that programmes have either to be delayed or postponed, or sometimes abandoned. As a result, therefore, the Community must look for better means of financing its budget (activities) if it has to fulfil its mandate of uplifting the standard of living of the people of East Africa.

During the old East African Community days, the financing of the budget of the Community was not a problem because the EAC through its various departments collected taxes, fees and revenues that financed Community activities. There was an automatic system of funding the Community. The problems with the present financing mechanism, is that it lacks automatism which the General Fund System of the defunct Community had. In this regard it behooves the planners for the Community to ponder over such questions as the following:

- (a) When the Customs Union is established, and revenue is collected at the first point of entry, should an automatic mechanism of financing the Community with a General Fund be established? Can the Partner States therefore fast establish a Customs Union to address this problem?
- (b) Should the formation of a Customs Union take longer than anticipated, can the Partner States fix a certain mutually agreed percentage of their Customs collections to the Community budget?¹¹¹

¹¹¹ See Nahamya, S.G. *The Financing of the East African Community (A Paper presented at the East African Legislative Assembly Seminar, Jinja, Uganda, January 28th - 30th, 2002) - unpublished*

4.0 CONCLUSION

On the whole the resurrection of the Community gives hope to the peoples of East Africa. However the aforementioned challenges are inevitable given the recent history of integration and disintegration in the region.

The answer lies in the resolution recently passed by the East African Legislative Assembly during its second meeting urging the Summit, the Council of Ministers and all organs of the Community to spare no effort in working with and mobilising the East Africans towards the realisation of the terms, objectives and goals of the process of co-operation, as enshrined in the Treaty.¹¹²

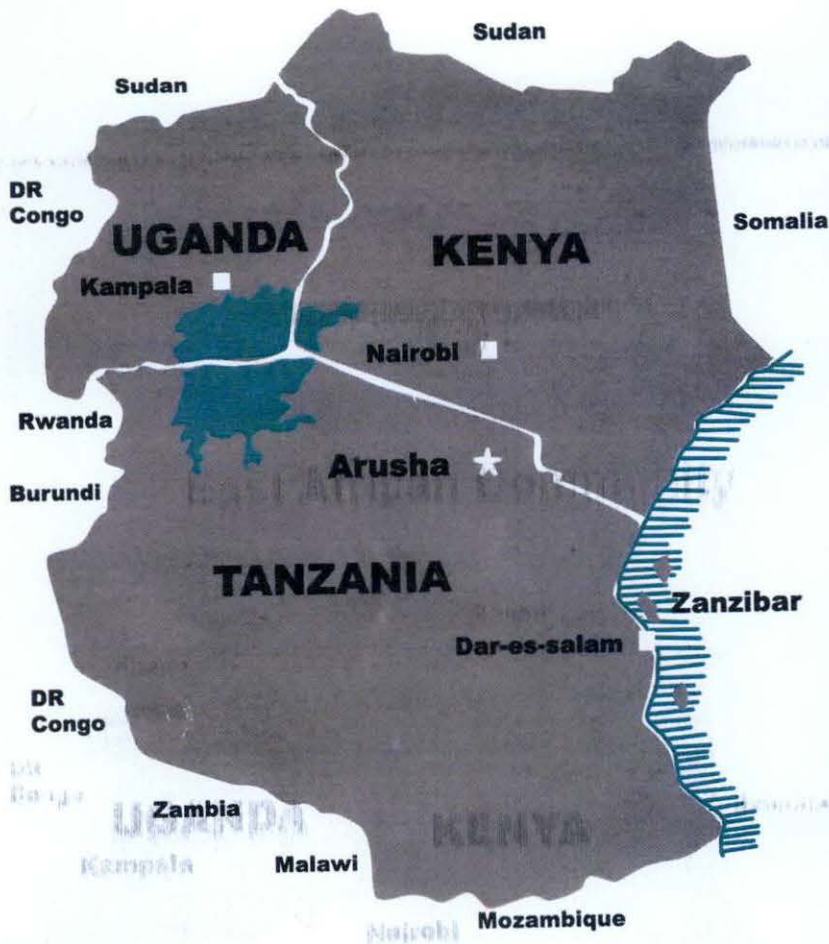
¹¹²Hansard Issue No 1
(First Session - Second meeting of the Assembly)

LIST OF SELECTED EAC PUBLICATION

- **East African Co-operation Development Strategy (1997-2000)**, Arusha 1997
- **The Treaty for the Establishment of the East African Community**, EAC Publication No. 1, Arusha 2000 and 2002
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- **EAC Annual Report 1998/99 —1999/2000**, Arusha 2001
- **EAC News** —News Letter of the Secretariat of EAC, various issues, Arusha



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