The Mediator
East African Community

Consolidated Report of the Mediator

Proposals for
the Permanent and Equitable Division
of the Assets and Liabilities of the
Corporations and the General Fund Services
of the East African Community

October 1981

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Corporations and the General Fund Services
of the East African Community

October 1981

The Mediator
East African Community

International Conference Centre
15 rue de Varembé
1211 Geneva 20

28 October 1981

The Hon. Amir Jamal,
Minister of Finance
United Republic of Tanzania
Dar es Salaam, Tanzania

The Hon. S. Tewungwa,
Minister for Regional Co-operation,
Republic of Uganda
Kampala, Uganda

The Hon. Dr. Z.T. Onyonka,
Minister for Economic Planning
and Development
Republic of Kenya
Nairobi, Kenya

Dear Ministers:

I have the honour to present to the Governments of Kenya, Tanzania and Uganda the Consolidated Report of the Mediator on his Proposals for the Permanent and Equitable Division of the Assets and Liabilities of the Corporations and the General Fund Services of the East African Community. It reflects, in substance, the analysis and conclusions of the March and December 1980 reports as well as the additional fact-finding of 1981, and the Mediator's final recommendations. The Consolidated Report, moreover, elaborates on several aspects of methodology and on alternatives for dividing assets and liabilities. The Appendices, which deal with the facts regarding the EAC institutions, include all additions in findings up to September 1981.

This is my final report. It should enable the Partner States to proceed with negotiations and to reach an early agreement.

May I take this occasion to thank the Ministers and officials of the Partner States for the co-operation they extended to me and my associates over the three and one-half year period since the Mediation started. I would also like once more to express my appreciation of the services of the consultants and technical experts who supported me in an undertaking of unusual complexity and difficulty.

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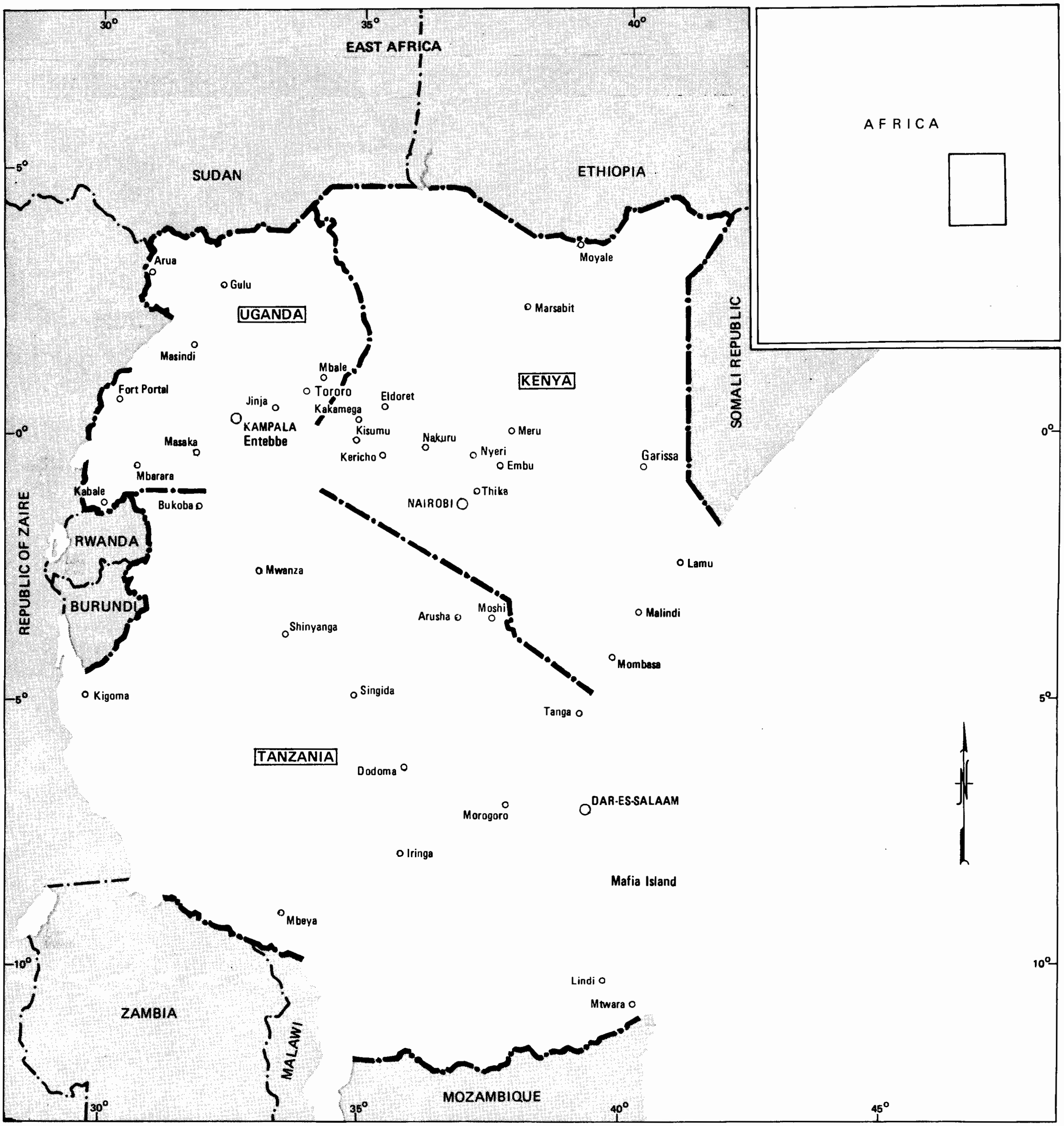
Finally, I would like to express the belief that the negotiations which are about to begin reflect a renewed spirit of co-operation among the countries and the hope that they will speedily be brought to a conclusion which will signal a new era of prosperity and progress in East Africa.

Yours sincerely,

Victor Umbricht

Victor H. Umbricht
Mediator
East African Community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LIST OF ABBREVIATIONS

The following abbreviations are used throughout this Report:

Air Tanzania	- Air Tanzania Corporation
CIDA	- Canadian International Development Agency
EA Aeradio	- International Aeradio (East Africa) Limited
EA Airways	- East African Airways Corporation
EAC	- East African Community
EA Cargo Handling	- East African Cargo Handling Services Limited
EADB	- East African Development Bank
EA Extelcoms	- East African External Telecommunications Company Limited
EA Harbours	- East African Harbours Corporation
EA P&T	- East African Posts & Telecommunications Corporation
EA Railways	- East African Railways Corporation
GAD	- United Kingdom Government Actuary's Department
GFS	- General Fund Services
IBRD	- International Bank for Reconstruction & Development
IMF	- International Monetary Fund
Kenya	- Republic of Kenya
Kenya Airways	- Kenya Airways Corporation
Kenya Cargo Handling	- Kenya Cargo Handling Services Limited
KPA	- Kenya Ports Authority
Kenya Railways	- Kenya Railways Corporation
MAB	- Mediator's Auditing Board
ODA	- United Kingdom Overseas Development Administration
Simbair	- Simbair Limited
Tanzania	- United Republic of Tanzania
THA	- Tanzania Harbours Authority
The Treaty	- Treaty for East African Co-operation, 1967
Tanzania Railways	- Tanzania Railways Corporation

LIST OF ABBREVIATIONS (continued)

Uganda	-	Republic of Uganda
Uganda Airlines	-	Uganda Airlines Corporation
Uganda Railways	-	Uganda Railways Corporation
UNDP	-	United Nations Development Programme
WG1	-	Working Group 1 of the Mediator's Auditing Team
WG2	-	Working Group 2 of the Mediator's Auditing Team

Consolidated Report of the Mediator.

Proposals for
the Permanent and Equitable Division of the Assets and Liabilities
of the Corporations and General Fund Services
of the East African Community

INTRODUCTION

Contents of this Report

1. On 25 January 1978 the United Republic of Tanzania, the Republic of Uganda and the Republic of Kenya (the "Partner States") appointed a Mediator to make recommendations for the permanent and equitable division of the assets and liabilities of the Corporations, the Subsidiaries and the General Fund Services ("GFS") referred to in this Report as the "Community institutions" of the East African Community ("EAC"). The Mediator was also asked to submit proposals for the future of the East African Development Bank ("EADB"), on which he has reported separately. The Mediator agreed to be available to help the Partner States to reach a settlement on the basis of his recommendations, if they so desired.

2. Funds to meet the costs of the mediation have been made available by the International Bank for Reconstruction and Development ("IBRD") out of the unused balance of a loan made by the IBRD to the EAC and by substantial contributions from the United Nations Development Programme ("UNDP"). The IBRD disbursed the funds on the basis of budgets submitted by the Mediator.

The Mediator has already submitted the following reports:

a) Proposals for the Permanent and Equitable Division of the Assets and Liabilities of EAC Corporations and the General Fund Services (with Appendices), dated March 1980;

b) Supplementary Report on the above Proposals (with Appendices and Memoranda from the Partner States), dated December 1980; and

c) The Mediator's Report on Matters of Fact Raised at the Fact-Finding Meetings in Nairobi, 8-14 July 1981, dated 14 September 1981.

This Consolidated Report takes into account the discussions since the mediation began in January 1978, including those at the Ministerial meeting of 6 August 1981. It incorporates all findings of fact contained in the previous reports and revises them where justified. It is complete and self-contained.

3. The Consolidated Report is divided into the following Parts:

Part I deals briefly with the origins and disintegration of the EAC, the EAC's efforts to cope with the disintegration, the appointment of a Mediator and his terms of reference.

Part II describes the Community institutions which were the subjects of the mediation.

Part III describes the organisation of the main fact-finding phase of the mediation, the difficulties encountered and the methods used to surmount them.

Part IV describes the methodology used in the valuation of assets.

__Part V__ sums up the Mediator's conclusions with respect to the value and location of assets, and the value of long-term loan liabilities.

__Part VI__ deals with the choice of criteria for an "equitable and permanent division" of assets and the Mediator's recommendations.

__Part VII__ suggests methods of providing compensation for in-equities in the actual physical distribution of assets.

__Part VIII__ proposes alternative ways of dividing long-term loan liabilities.

__Part IX__ deals with outstanding claims against the EAC institutions.

__Part X__ deals with pensions and related matters.

__Part XI__ suggest possibilities for future co-operation among the Partner States.

__Part XII__ summarises the findings and proposals of the Mediator.

PART I

HISTORICAL BACKGROUND

Beginning of the Community

101. The territories which now comprise the sovereign States of Kenya, Tanzania and Uganda have a long history of co-operation in a broad range of economic activities. As far back as the 1890's, the British authorities,in what were then the Protectorates of Uganda and Kenya,recognised the advantages of operating common rather than separate services in these contiguous territories. The Uganda Railway, serving both countries, was completed in 1901. Customs were administered as a common service from the outset, and the postal services were integrated in 1909. Tanzania, under its former name of Tanganyika, was gradually brought into the common services system when, after World War I, it came under British administration as one of the "mandated" territories of the League of Nations. The first step towards the "community" type of organisation was taken in 1926, when machinery for administering matters of common interest was set up in the form of periodic conferences of the Governors, supported by a permanent secretariat in Nairobi. This step stimulated the unification of services. A number of common research stations and a meteorological office were set up within the next few years, and the Posts and Telegraphs Departments of the three countries were merged in 1933. In 1946 the EA Airways and the East African Directorate of Civil Aviation were established, and in 1948 the Tanganyika Railway and Port Services were amalgamated with Kenya-Uganda Railways and Harbours to form the EA Railways and Harbours Administration.

102. The tendency towards the economic integration of the three territories was further strengthened in 1948 by the establishment of the East African High Commission, with its own executive and legislature to deal with matters of common interest in place of the Governors' Conference. In 1961, when Tanganyika attained its independence, and Uganda and Kenya were in sight of theirs (attained in 1962 and 1963 respectively), the High Commission was replaced by the East African Common Services Organisation ("EACSO"). In order that the EACSO should be able to meet the expenses of those common services that were not expected to be self-supporting, a General Fund was created into which was to be paid three per cent of all customs and excise revenue collected in the three countries and 20 per cent of a tax on the profits of all companies engaged in manufacturing or finance.

103. The expectation that the EACSO would pave the way for the political federation of the three States was not fulfilled. In the early years of independence the trend towards economic integration weakened as the result, partly of the emergence of strong feelings of separate national identity, partly of the impression in Uganda and Tanzania that Kenya, as the most industrialised of the three countries and as the State in which most of the common services had their headquarters, benefitted disproportionately from integration, and partly of the cumbersome EACSO procedures, which required important decisions to be taken by some five ministerial committees. These latter met only infrequently. Separate currencies and national banks were established and trade restrictions were imposed.

104. In an attempt to check these separatist influences, a Commission under the chairmanship of Professor Kjeld Philip of Denmark, composed of Ministers from each of the three Governments, was appointed in late 1965 to examine ways in which East African co-operation could be strengthened. The recommendations of the

Philip Commission, as it has since become known, were embodied in the Treaty for East African Co-operation ("the Treaty") which was signed by the Presidents of the three Republics at Kampala on 6 June 1967. The Treaty set up, in place of EACSO, the EAC, of which the common market was an integral part. The EAC passed separate acts establishing the railway, post and telegraph, port and airlines corporations and each Partner State enacted its own legislation conferring legal capacity on the EAC and its institutions. The Treaty als created EADB in order to reduce the substantial industrial imbalances among the States. The Treaty came into force, and the Community into existence, on 1 December 1967.

Disintegration of the Community

105. Within a few years, however, the divergent economic and political courses pursued by the three countries began to impose increasing strains on the Community structure. These strains were aggravated by the deterioration of the international economic situation that began in 1973, with its resultant pressures on budgets and balances of payments. The effect of these developments was to loosen economic ties and to undermine the operation of the Community's common market and economic services. They also fostered some dissatisfaction in the Partner States about the sharing of the costs and the benefits of the regional services,and created the feeling,in some cases,that they could do better alone. In this atmosphere, Governments began to intervene in day-to-day operations, investment planning, and the hiring and firing of personnel. Difficulties in transferring funds led to a de facto division of many services and magnified the difficulties they faced, as did, in due course, refusals by national legislatures to appropriate funds. The impact on the efficiency of Community institutions and on the morale of the staff was severe. The exchange of information between regional and central headquarters diminished, and central accounting broke down.

106. Decentralisation of the operations of the various Corporations and the GFS was completed at different times, but in all cases by early 1977. In February 1977, Tanzania closed its border with Kenya, thus bringing the Common Market to an end. The EAC finally collapsed in June 1977, when the three Governments failed to approve the GFS budget for the year beginning 1 July 1977, thus cutting off support, not only for the various service agencies depending on this source of finance, but also for the administration and headquarters of the EAC itself. By this time the regional headquarters of the Corporations were already acting as _de facto_ national corporations and administering the former common services, and by the end of the year legislation had been introduced in all three countries giving them _de jure_ status.

107. Some years before the final dissolution of the EAC, it was realised that these piecemeal unilateral decisions, which disrupted the functioning of the EAC Corporations and the GFS institutions before arrangements had been made for a smooth transition to a new system, were creating serious problems for the Partner States. For example, trade among the Partner States declined; States were deprived of access to vital services for which they had previously relied on an EAC agency in another State; and payments due to East African creditors of the disintegrating Community institutions' services fell into arrears. The external relations of the Partner States were also affected. The common services had largely been financed by external credits which were direct obligations of particular Corporations of the GFS, although many of them were jointly and severally guaranteed by the three Partner States. As the Community disintegrated, the Corporations found it increasingly difficult to maintain the service of their external debt, and there were actual defaults on some loans which impaired the creditworthiness of the Partner States.

Efforts to Cope with the Disintegration

108. The Demas Commission. In an effort to try to avert a complete collapse,the Partner States, in November 1975, set up a commission under the chairmanship of Mr. William Demas, the Jamaican Chairman of the Caribbean Development Bank, to review the 1967 Treaty and to make recommendations on the future structure of the EAC. However, the commission adjourned in November 1976 without being able to reach agreement on any recommendations.

109. The Coopers & Lybrand Report. Also in 1975, following discussions of the problem of debt service among the Partner States, IBRD and the U.K. Government, the British Ministry of Overseas Development engaged a London firm of accountants Coopers & Lybrand ("C&L") to investigate and report on the assets and liabilities of the EAC Corporations as at 31 December 1974. C&L's terms of reference, which were drawn up by IBRD, required the firm to list and value the assets and liabilities of the EAC as far as possible in terms of their geographical location in the three Partner States of the EAC. They were to complete their task within three months, even if it proved impossible to fulfill their terms of reference completely within that period. The investigation did not cover the GFS. The letter of engagement stated that the EAC had agreed to give C&L full access to all relevant information and to provide them with all requisite assistance. The emphasis on classifying assets and liabilities as far as possible by Partner States was based on the realization that, if the Corporations collapsed, the service of their external debts would have to be assumed by the Partner States, and the view that, at least as a temporary measure, it would be reasonable to expect each State to meet a proportion of the debt service corresponding to its actual holding of the assets financed by these debts.

110. C&L, which started work in October 1975, submitted its report to the Secretary General of the EAC on 30 January 1976.The report noted that the books and records were in many cases inadequate to enable them to fulfill their terms of reference completely, and that some of the accounts were in draft and unaudited. Although the geographical analysis of fixed assets and stocks generally presented little difficulty, there remained a number which could not be readily allocated. Even these, however, with very few exceptions, could be allocated by using some "arbitrary,but commonsense bases of allocation". C&L's conclusion was that, leaving aside the few exceptions, the net assets of the Corporations and their Subsidiaries (after deducting loans and providing for restoring fixed assets to proper working order, where necessary) totalled E.A. Shillings 6,139.5 million. Of this total, the report "allocated" Shs. 2,864.7 million to Kenya, Shs. 2,565.4 million to Tanzania, and Shs. 625.0 million to Uganda, leaving Shs. 84.4 million unallocated. This "allocation" or "analysis" was, of course, simply a determination of the value of EAC assets, as of 31 December 1974, that were actually located, or might reasonably be deemed to have been located in each Partner State. The conclusion was not intended as a recommendation as to how, in a final settlement of the affairs of the Corporations, their assets and liabilities should be equitably divided.

111. The Damry Mission. In 1976, the prospect of Community default on its debts to IBRD became real and imminent. To avert such default, a mission headed by Mr. Purvis N. Damry, then Secretary of the IBRD, visited East Africa in May 1976 to discuss with representatives of the Partner States the proportions in which the latter would divide among themselves the service of IBRD and other external loans to three of the Corporations: EA Railways,EA Harbours and EA P&T. The Partner States agreed on a formula whereby they would divide debt service in proportion to their actual holdings of the fixed assets of the

Corporations in question. This formula and its possible implications are discussed below (para. 628 to 630). Suffice it to say here that the Partner States considered this so-called "Damry Formula" as no more than an interim settlement to avoid the interruption of debt service pending a permanent and equitable assignment of assets and liabilities.

The Appointment of a Mediator

112. During the Annual Meeting of the IBRD in 1977, the Ministers of Finance of the three Partner States, acknowledging that the EAC as conceived in the 1967 Treaty of East African Co-operation had come to an end, explored with IBRD staff the way in which the IBRD might help their Governments to reach a permanent and equitable settlement of the EAC's affairs. The Ministers suggested that the IBRD itself might act as mediator for this purpose. The IBRD considered that such a role would be inappropriate for it as a principal creditor of the EAC. It offered, however, to lend its good offices in the selection of a mediator and the organisation of a mediation.

113. Negotiations to this end took place in Washington from 28 November to 7 December 1977 between the IBRD and representatives of the Partner States. From a list drawn up by the IBRD, they chose Dr. Victor Umbricht, former head of the Swiss Treasury and diplomat, as an acceptable mediator, and agreed on terms of reference to be negotiated with him. They asked the IBRD to administer a joint account on behalf of the Partner States from which the expenses of the mediation would be paid, and to allow part of the uncommitted balance of one of its loans to EA Railways to be used to provide funds for this account. At the same time, UNDP indicated its willingness to provide up to $ 500,000 towards the costs of the mediation.

114. After approval of the proposal by the Executive Directors of the IBRD, on 25 January 1978, the IBRD and the three Partner States signed a letter of agreement in which the latter authorised the IBRD to engage Dr. Umbricht to provide mediation services in accordance with terms of reference approved by them, and undertook to afford him and his "Team" all assistance, facilities, information, access, privileges and immunities necessary to carry out their task. On 26 January 1978, the IBRD, acting in accordance with this letter of agreement and as Executing Agency for UNDP, entered into a contract with Dr. Umbricht for the provision of the services described in the terms of reference. The terms of reference appear as Appendix "A".

115. The salient provisions of the terms of reference are as follows:

a) The Partner States acknowledge that "the Community and its institutions has for all practical purposes ceased to perform its functions".

b) The Mediator was to recommend "proposals for the permanent and equitable division of the assets and liabilities of the EAC Corporations and the General Fund Services", and "thereafter assist the Partner States in reaching a definitive settlement on the basis of these recommendations".

c) The Mediator was expected to submit his overall mediation report within a year, with a view to obtaining the final agreement of the Partner States within a further three months. He was also asked to submit recommendations and obtain final agreement among the Partner States on the EADB within five months. Moreover, he was to send quarterly progress reports to the Partner States.

d) Each Partner State undertook to "provide the Mediator, or cause him to be provided, with all data, reports and studies available in its territories as may be necessary in his opinion for the proper execution" of his work. Each Partner State was to appoint a liaison officer to facilitate the Mediator's work within its territories and to ensure his ready access to all data.

e) The Mediator was authorised to obtain relevant information from the creditors and debtors of the Corporations and the GFS institutions.

<u>Report on the EADB</u>

116. On 11 October 1978, in accordance with his terms of reference, the Mediator submitted a report and recommendations on the structure and operations of the EADB. The report affirmed that the EADB had an important role to play in East Africa despite the dissolution of the EAC. It proposed that significant consultancy, promotional and agency services be added to EADB's functions and that its financing activities be expanded. It held out the prospect that, in due course, the EADB could help to create economic ties among a larger number of East African countries; in this way, the original Partner States could make an important contribution, not only to their own development, but also to that of a broader area.

117. The Mediator's recommendations for the revival and strengthening of the EADB have been incorporated in a new intergovernmental agreement that has replaced the relevant provisions of the 1967-Treaty. The Partner States have taken the recommended initial steps to make their decisions known, to reinvigorate the staff and to bring a wider range of experience into the management of the EADB. The Mediator records his satisfaction with this speedy agreement on EADB's future which, in his opinion, reflects a recognition of common interests which

PART II

THE COMMUNITY INSTITUTIONS

General

201. The mediation covered four corporations, three corporate subsidiaries, 24 services financed by or through GFS, and three bodies corporate established by EAC legislation, all of which are listed in an annex to the Mediator's terms of reference. Appendices to this Consolidated Report describe in some detail each of the Corporations and their subsidiaries and the GFS. It may be helpful, however, to give at this point a brief indication of the nature of each. The following information is drawn mainly from the 1972 EAC Handbook.

202. The apex of the EAC was the East African Authority, consisting of the Presidents of the Partner States. An East African Committee of Ministers, consisting of one East African Minister from each state, residing at EAC Headquarters, assisted the Authority in day-to-day matters. A Secretary General was the principal executive of the Authority. Five Councils were responsible for the Community's principal activities. The East African Legislative Assembly enacted legislation affecting the EAC institutions.

203. The services of the EAC fell into two groups, the Corporations and the General Fund Services. The Corporations were required to pay their own way, by charging customers the full cost of the services provided; capital for expansion came either from earnings or from borrowing on their own credit (with, when needed, the guarantee of the Partner States). The GFS were

non-self supporting. Their funds were provided primarily by the EAC as a whole, through appropriations from common revenues, approved by the Legislature, supplemented from time to time by loans and grants.

204. The following paragraphs provide brief background notes on the Corporations and GFS.

EA Railways

205. a) In 1948 the Tanganyika Railways and Port Services were amalgamated with the Kenya and Uganda Railways and Harbours to form the East African Railways and Harbours Administration. The 1967 Treaty provided for separate rail and harbour corporations, and EA Railways was established on 1 June 1969.

b) EA Railways, which had its headquarters in Nairobi, operated all public rail services in East Africa with the exception of the "Tazara Line" between Dar es Salaam and Zambia which was opened in 1975. EA Railways also operated marine services on Lake Victoria and Lake Tanganyika and some road services in Tanzania and Uganda.

c) By the end of 1975 the operations and accounting of EA Railways had been largely decentralised. The rail link between Kenya and Tanzania was closed in that year and Tanzania region ceased to process information on the Railways'computer in Nairobi. At the end of July 1976, the joint collection of revenue in respect of rail travel between Kenya and Uganda ceased, and from then on each country collected revenue in respect of travel within its own borders only.

d) The regions ceased to remit funds to headquarters, and it was not easy even to pay staff salaries. On 10 August 1976, with the exception of a few senior officers, all staff working at the headquarters were transferred to the regions.

e) Following the closure of the headquarters, each Partner State set up its own national corporation to run the railways within its own territory.

EA P&T

206. a) Postal and telegraph services were first established in Kenya, Uganda and Tanganyika in the 1890s, although they were not combined under one department until 1933, and the national systems remained financially independent until 1948.

b) Following the establishment of the East African High Commission on 1 January 1948, the postal and telegraph department became a self-contained, self-financing service under the High Commission. EA P&T was established as a Corporation within the EAC on 1 December 1967.

c) Under the 1967 Treaty, EA P&T had a monopoly of postal, telephone, telex and radio communication within and between the three regions. It was also responsible for overseas mail; overseas telecommunications were handled by its subsidiary EA Extelcoms, although certain links with Mozambique, Rwanda and Burundi were operated by EA P&T.

d) Up to 1971, in accordance with the Treaty, the Corporation's headquarters were situated in Kampala, but the headquarters' functions were then divided between Kampala and Nairobi. From early 1976 onwards the regions began to make their own decisions independently, and eventually new national corporations were established in each of the Partner States.

EA Extelcoms

207. a) In 1964 EA Extelcoms acquired the East African branch of Cables and Wireless Limited, which had operated telecommunication services in the area since 1910.

b) Originally 40% of the share capital was owned by Cables and Wireless Limited, but in 1974 EA Extelcoms became a wholly owned subsidiary of EA P&T. In exchange for a franchise fee, paid to EA P&T, the company operated all external telecommunication services in East Africa.

c) After 1 April 1975 the Partner States were paying for their own operations, and the co-ordinating role of the headquarters ceased on 30 June 1977. In Tanzania and Uganda the operations of EA Extelcoms have been taken over by newly formed P&T corporations, but in Kenya they are managed by a new company, Kenya External Telecommunications Company Limited.

EA Harbours

208. a) EA Harbours came into existence as an EAC Corporation on 1 June 1969 following the dissolution of the EA Railways and Harbours Administration in accordance with the Treaty.

b) EA Harbours was responsible for the operation of the sea ports of the Partner States; ports situated on inland waterways were controlled by EA Railways. Although there were other smaller ports, the principal ports administered by EA Harbours were Mombasa in Kenya and Dar es Salaam in Tanzania.

c) All handling of cargo at the ports was carried out by Cargo Handling, a company incorporated in Kenya. Its share capital was held 5/6ths by EA Harbours and 1/6th by EA Railways.

d) EA Harbours' headquarters in Dar es Salaam supervised the principal ports of Dar es Salaam and Mombasa, which in turn supervised the smaller ports in their respective regions. During 1975 and 1976 the regions ceased to remit funds to headquarters, and staff were gradually repatriated. Following the closing of headquarters on 12 March 1977, separate harbour authorities were set up in Kenya and Tanzania.

EA Cargo Handling

209. a) From 1952 the company which became EA Cargo Handling provided shore handling services at the East African seaports, and from 1964 took over stevedoring. It was owned 5/6ths by EA Harbours and 1/6th by EA Railways.

b) The head office of EA Cargo Handling was at Mombasa, though the branches in Mombasa and Dar es Salaam operated as separate units from 1971. It ceased to function as an EAC institution at the end of 1976.

c) EA Cargo Handling operated under a number of agreements, the last of which provided that it should perform cargo handling services at the ports solely for EA Harbours. EA Cargo Handling provided the plant and machinery necessary to perform its services exept for floating and shed cranes, which were supplied by EA Harbours, which also provided the port buildings, tugs and lighters.

d) New agreements have now been concluded in Kenya and Tanzania between the former branches of EA Cargo Handling and the respective new port authorities.

EA Airways

210. a) EA Airways began operations in 1946, and until 1963 received assistance from the British Overseas Airways Corporation. The airline became a corporation under the EAC in 1967.

b) EA Airways was an international as well as a domestic airline, and was a member of the International Air Transport Association. Its principal international routes were from East Africa to Europe, India and the Middle East and to other African countries. It had sole traffic rights in respect of domestic flights within the Partner States. Its headquarters were at Embakasi Airport near Nairobi.

c) In 1976 the headquarters ran short of cash. In January 1977 the National Bank of Kenya refused to extend overdrafts, and Shell withdrew credit for aviation fuel. Airways was unable to meet its debts and on 27 January 1977 all aircraft were grounded. On 15 February 1977 all staff were made redundant.

d) In Kenya liquidation proceedings were started and in Tanzania and Uganda the Public Trustee and the Ministry of Transport, Communications and Works respectively took charge of the assets of the Corporation.

e) In all three Partner States new national airline corporations have been set up - Kenya Airways, Air Tanzania and Uganda Airlines.

Subidiaries of EA Airways

211. EA Airways had a wholly owned subsidiary, Simbair Limited, which handled certain charter operations, and a 51% interest in EA Aeradio, which was concerned, among other things, with:

a) the installation, repair and maintenance of aircraft radio and radar equipment;

b) the operation of the airlines communications network in East Africa;

c) commercial printing; and

d) acting as sales and service agents for telephones, audio visual telecommunications and medical and scientific equipment.

GFS

212. a) The GFS had a Central Secretariat which formed the headquarters of the Community and which

- provided the management machinery for the GFS-employees
- serviced the Common Market and the Ministerial Councils
- coordinated the activities of the Common Services.

The Common Services covered activities in the sectors of communications (for,e.g. safety of aviation),of meteorology, of a dozen medical, agricultural and industrial research centres,of training schools and of scientific higher education.

b) The 1967 Treaty provided that the principal source of revenue for the GFS should be customs and excise duties and income tax. The EAC, which collected these duties and income tax for East Africa as a whole, paid into the General Fund as much of the money collected as was necessary to balance the GFS budget, arranging that each Partner State's contribution from each of these two sources should be in proportion to the amount collected in its territory.

c) In 1973 the Partner States decided to split up the East African Income Tax Department, which thus ceased to be an EAC institution, and to administer their own income tax systems. As a result, the GFS was left with customs and excise duties as its principal source of revenue. The three Partner States agreed that their contributions to the Fund from this source should be in the following proportions:

Kenya 48.14%
Tanzania 31.32%
Uganda 20.54%

These proportions appear to have remained unchanged up to the dissolution of the EAC.

d) The functioning of the GFS was impaired by restrictions on currency movements and the general increase in dissatisfaction with the EAC as the 1970s progressed. The refusal of the Partner States to approve the GFS budget for the year ended 30 June 1978 effectively signalled the break-up of the EAC. Most of the former GFS institutions have now become government agencies or departments of the Partner States in which they are located.

PART III

FACT-FINDING: ORGANISATION AND PROBLEMS

Technical Advice

301. The objectives of the fact-finding work were:

a) to establish as complete a list of EAC assets and liabilities as possible:, and

b) to value all assets and liabilities.

302. Recognising the need for authoritative advice on the general principles to be followed in valuing the EAC assets and on the problems that might arise in the course of the work, the Mediator, as one of his first actions, set up a Mediator's Auditing Board ("MAB") composed of internationally recognised experts on accounting, engineering and financial matters. He also asked for the MAB's views on criteria for allocating assets and liabilities and on evaluating information. The composition of the MAB is given in Appendix "B".

303. In order to gather the data necessary for the mediation, a number of technical experts were seconded to the Mediator from various auditing and engineering firms. They were divided into two working groups (referred to as "Working Group 1 and 2" or "WG1" and "WG2") and started work in the three Partner States in July 1978. The two Working Groups produced draft reports on data and figures which were distributed to the three Partner States for comment in February 1979.

304. The Mediator also sought the assistance of a number of international organisations and other specialists to help to evaluate data and to advise on making estimates where data were not available.

305. A list of the experts, consultants and advisers who have assisted the Mediator and thus contributed to this Report is given in Appendix "B".

Information Gaps and Estimates

306. The reports of the Working Groups were in some respects incomplete and inaccurate. This was because the Partner States had failed to provide all the data which the Mediator had requested and to which he was entitled under his terms of reference, which required each of the three Governments to provide "all data, reports and studies available in its territory". In several instances information was not provided because of the reluctance of a Corporation or service to supply it or to make the necessary effort to produce it. For example, two of the Corporations produced no physical inventories at all. The Mediator realises, however, that the preparation of complete information would in any case have been extremely difficult because:-

a) accounting at certain EAC institutions, which had been inadequate for many years, had largely broken down as the EAC collapsed;

b) many records were missing;

c) former staff were not available;

d) inventories were often incomplete or unpriced; and

e) certain inventories were not taken until 1978 and 1979, and had to be adjusted back to the "division dates"

He recognises, that, in general, all parties made great efforts to overcome these difficulties, though not always with complete success.

307. The Mediator considered that, in view of the breakdown in accounting at the Community institutions, it was essential to count and evaluate all physical assets owned by the EAC. He requested that this be done promptly and repeated the request to the three Governments orally and in memoranda, letters and progress reports, in particular the memorandum dated 5 May 1978 entitled "Points for consultation and information with regard to the East African Community Mediation". To his regret, the Mediator found that the response to his requests was in some cases disappointing, particularly from Railways. Kenya Railways made no attempt to count either fixed assets or stores; Tanzania Railways and Uganda Railways, after a good deal of work, produced physical counts of fixed assets and stores with which, however, neither they nor the Mediator were fully satisfied. At EA P&T the result was little better.

308. The Mediator, concerned at the size and number of the gaps in information, and having received critical comments in May 1979 from the Partner States on the draft reports of WG1 and WG2, decided to call formal fact-finding meetings for all of the Corporations and the GFS. The purpose of these meetings was to examine the data gathered, and, if possible, to fill the gaps identified by the Governments and the working groups themselves.

309. The first formal fact-finding meetings were held in Nairobi between 17 and 31 May 1979 and were attended by representatives of the three Partner States and of the national institutions which had taken over the functions of the Community institutions. Separate bilateral and multilateral

meetings took place for each of the Corporations and for the GFS. The multilateral meetings were chaired by the Mediator, the bilateral ones by one of his representatives.

310. After the Mediator had submitted his first Comprehensive Report in March 1980 and a Supplementary Report in December 1980, the Partner States addressed various memoranda to him in which they raised a number of questions of fact and expressed reservations on the completeness and accuracy of the lists of assets and liabilities and on their valuation. The Mediator forwarded copies of these memoranda to the Partner States and requested their help in unearthing the information necessary to clear up these questions. A further series of fact-finding meetings was held in July 1981.

311. Although substantial progress was made at some of these meetings, and the various reports were amended in many respects, numerous gaps still remain in the data.

312. The Mediator wishes again to remind the three Partner States that he was unable to obtain all the fully detailed and precise factual information he needed. The information gaps that still remain fall into two categories:

a) Gaps in areas where, although information has been produced, it is incomplete, unreliable, or unverified. The Mediator has endeavoured to fill these gaps by estimates which he has derived from such sources as comparisons with earlier years, international suppliers, his advisers, international bodies and the Crown Agents. The areas in which the Mediator had to resort to estimates are indicated in Appendix "M". These so-called "gaps" are in reality no longer gaps, since they have been filled by well-documented estimates. While it is legitimate to ask whether these estimates come as close to reality as possible, or whether they exceed or fall short of the true figures, the Mediator is confident that these estimates are sound, and that the differences between them and the true figures are negligible.

b) Gaps relating to assets which, although they may in fact exist, were omitted from the Mediator's Reports because they had not been brought to the attention of his experts. These experts relied on lists or other documents supplied to them by the officials in the three countries responsible for providing the necessary information. While the experts reviewed these lists with the officials in question in order to ascertain as far as possible whether they were complete, such review could not guarantee their completeness, and the experts could not be expected to search for assets the existence of which they had no reason to suspect. Two letters from the Uganda Government, the first dated 23 April 1981, and the second 31 July 1981, gave specific lists of suspected omissions, chiefly relating to EA Airways and the GFS (DCA and Meteorology). Much has been done to verify the existence of assets in this second category, mainly through fact-finding meetings and consultation with the experts. The Mediator described his findings in an additional report on facts, sent to the Governments on 15 September 1981.

Miscellaneous Items

313. It is likely, however, that some assets, (possibly stores, spares, furniture, vehicles, typewriters, secretarial supplies, generators, microfilm unit, printing press, etc.) should have slipped through the net. There are many reasons for this, especially:

a) While carelessness in compiling lists of assets may have been responsible for some omissions, many were no doubt due to the inadequacy or collapse of the day-to-day accounting in the EAC institutions, which led to assets being recorded in the books incorrectly or not at all.

b) Purchases of small items of equipment were treated as operating expenses in the Corporations' accounts, so that they did not appear in the inventory of assets.

c) Items issued from stores and deleted from the stores' records may have still been on site at the division dates.

d) Certain assets, such as vehicles and consumable EA Airways' stores, may have been lost at the time of the break-up.

e) Because the experts were unable, within time available, to visit all the sites of the EAC institutions, unrecorded assets at, say, railway depots or research stations may have gone undetected.

314. A similar problem faced the committee entrusted with the division of assets and liabilities between India and Pakistan at the time of partition in 1947. That committee also was confronted with a multitude of smaller, unidentified assets and resolved the problem by creating a category of "Miscellaneous Items", allocated in the same proportions as other assets. The Mediator, as foreshadowed in his previous Reports, now proposes to follow the same course and to increase the value of total net assets by 2% to represent "Miscellaneous Items" - still un-identified for whatever reason. This increase will then be charged to the Partner States in proportion to the geographical distribution of assets.

Claims

315. In order to obtain as complete a picture as possible of the liabilities of the EAC, the Mediator caused advertisements to be placed in local and foreign journals requesting all those with outstanding claims against the Community institutions to submit details directly to him or to one of the Partner State Governments. There was a good response to these advertisements. However, for reasons, which are discussed more fully in Part IX of this Report, it has not proved possible to determine the acceptability of many of these claims and the position has been only partly clarified.

PART IV

METHODOLOGY FOR THE ASCERTAINMENT OF NET ASSETS

Introduction

401. The following paragraphs describe the methodology followed by the Mediator in framing his proposals for the division of net assets. The methodology applied in the division of long-term loans and pension liabilities is described in Parts VIII and X of this Report respectively. For the purposes of this Report, net assets are defined to include all fixed assets (movable and immovable), investments and current assets less current liabilities and provisions. They do not include long-term loan liabilities or the related sinking funds.

402. The Mediator has kept the Partner States informed of the main principles of methodology which he intended to apply. Special reference is made in this contect to his memoranda of 5 May 1978,and of 5 February 1979 entitled "Note on some aspects of Methodology", and to the March report 1980 which were all reviewed in conversations with the Partner States.

403. It may nevertheless be helpful in this Part IV to give a broad description of the guiding principles which the experts were advised to follow. These principles were largely based on the advice received by the Mediator from the MAB, international organisations, and engineering and accounting firms. The Mediator also took account of the conclusions reached in similar international settlements, particularly in the case of the partition between India-Pakistan in 1947.

Accounting Dates and Division Dates

404. The Partner States take the view that the EAC effectively came to an end on 30 June 1977 with their refusal to vote the budget for the GFS for the fiscal year 1 July 1977 to 30 June 1978. The Mediator agrees, however, that the EAC institutions did not all cease to operate as EAC institutions on that or any other particular date, but rather that they ceased to operate at times and in circumstances which differed from one institution to another.

405. The Mediator has treated the EAC institutions (except EA Airways, for which see below) as, in principle, institutions of the EAC until 30 June 1977. This would therefore have been the appropriate date (the "division date"), on which to base his division of the assets of all the EAC institutions, had it not been that the latest dates for which accounts were available for the Corporations and their subsidiaries (the "accounting dates") were in all cases earlier, and in some cases considerably earlier, than 30 June 1977. The Mediator therefore instructed the Working Groups to update the accounts at the accounting dates in each case to a date as close to 30 June 1977 as the data available to them would permit. He has taken the dates thus determined, which in four cases are earlier than 30 June 1977, as the appropriate division dates. The accounting and division dates are set out in the table below. The accounts for the accounting dates were all unaudited, except in the case of EA P&T.

	Accounting date	Division date
EA Railways	31 December 1974	30 June 1977
EA P&T	31 December 1975	31 December 1976
EA Harbours	31 December 1976	30 June 1977
EA Airways	31 December 1975	15 February 1977
EA Extelcoms	31 March 1977	31 March 1977

	Accounting date	Division date
EA Cargo Handling	31 December 1976	31 December 1976
G F S	30 June 1977	30 June 1977

The Mediator has chosen 15 February 1977 as the division date for EA Airways, since that was the date when EA Airways declared its staff redundant and ceased to act as a going concern.

406. The criterion for the choice of division dates, which, incidentally, are not mentioned in the Mediator's terms of reference, was, therefore, not the day when the operational break-up occurred, but the date up to which the assets and liabilities had to be considered clearly as those of the EAC and not of the separate countries.

407. The Governments and the Mediator accepted division dates earlier, but not more than six months earlier, than 30 June 1977 for certain Community institutions, but only because better information was available for these dates.

408. The reasons for selecting the specific dates were as follows:

a) EA P&T: 31 December was the end of the normal accounting year. Although the last accounts prepared for the Corporation as a whole were for the year ended 31 December 1975, accounts were prepared for all three regions for the year ended 31 December 1976, and were combined to produce accounts for the Corporation. No subsequent information was available, and so 31 December 1976 was accepted as the division date.

b) EA Harbours: 31 December was the end of the normal financial year, and the Corporation was preparing accounts for the year ended 31 December 1976 when the mediation began. WG1 was able to obtain sufficient information to update those figures to 30 June 1977.

c) EA Extelcoms: 31 March was the end of the normal financial year, and accounts were prepared for 31 March 1977.

d) EA Railways: It is fair to say that, as fas as operations were concerned, each Region of EA Railways was to a considerable extent acting independently after 31 December 1975, and also that the accounting information available after 1974 is very scanty. However, certain intracorporation payments from country to country continued, the Headquarters' bank account was kept running until the second half of 1976, and equipment and rolling stock which had been paid for out of EAC funds continued to arrive. There was thus considerable evidence that the Corporation was operating as an EAC institution long after 31 December 1974.

As explained above, the Mediator considers that the EAC continued in existence until 30 June 1977. Different division dates were chosen only in cases where there was no date closer to 30 June 1977 for which acceptable accounts could be prepared.

Cost Incurred after the Division Dates

409. As explained in paragraph 405 above, the Mediator proposes that, for the purposes of the mediation, each EAC institution be deemed to have ceased to exist on its respective division date. He has, accordingly, determined and valued the

assets and liabilities as at that date. He regards events before the division dates to be the consequences of EAC decisions, and therefore to have been endorsed by the three Partner States, even though they may have had unequal effects on the different States. After the division dates, however, each Partner State had no control over the actions of the EAC institutions beyond its borders, and the Mediator does not take the view that he should take such actions into account in his mediation proposals. He does not, for example, consider the amounts realised in Kenya and Tanzania by the sale of EA Airways' DC9 aircraft to be relevant to the mediation, and has valued the DC9's, like all aircraft and spares, at the open market price on the division date. He is also of the opinion that, after the break-up of the EAC, the operations of the EAC institutions and the treatment of their staff and assets were the concern of the individual Partner States only. Consequently, he has taken no account of:

a) costs of repatriating staff as a result of the break-up of the EAC;

b) claims for accrued leave pay, terminal bonuses or any other benefits arising out of the cessation or change in condition of employment of any former EAC employee;

c) costs incurred after the division dates by an EAC institution (or Partner State) in maintaining the assets of the former Community;

d) costs incurred by an EAC institution (or Partner State) in completing projects in progress at the division date; and

e) interest accrued after the division dates.

The Mediator proposes that the liabilities covered by b) above should be assumed by each Partner State in respect of its own nationals, and that there should be no consequential financial adjustments between States. This principle was followed in earlier cases of the division of assets and liabilities among countries other than those of East Africa.

The Ascertainment of Net Assets

410. To enable the Mediator to work out proposals for a permanent and equitable division of the assets and liabilities of the Community institutions, it was necessary first to:

a) ascertain the net assets of the Community institutions at the division dates and their location; and

b) value the net assets at the division dates.

The Mediator did not regard it as part of his function to examine the justification of transactions or procedures followed. His role was limited to an examination of the state of affairs of the Community as he found it at the time of the break-up.

411. As mentioned in paragraphs 303 and 304, the Mediator engaged technical, financial and accounting consultants of many disciplines to gather and check information on the assets and liabilities of the EAC. He also relied on the obligation of the Partner States to make available all data, reports and studies needed for the mediation. The Mediator repeatedly asked for lists of the physical assets of the EAC corporations as part of the necessary data. As indicated in Part III, he faced unexpected problems in completing the fact-gathering stage of his work and, as the Partner States are aware, some of the information is still not available or is too incomplete or too unreliable to allow firm conclusions to be drawn. These gaps have been covered by estimates and by the inclusion of a category "Miscellaneous items" (paras. 313 and 314). Detailed comments on the problem of ascertaining the assets and lia-

The Valuation of Net Assets

412. In valuing the assets, the Mediator had the benefit of the advice of the MAB and of engineering firms. Because the assets were acquired at different times and, as a result of inflation, at widely different costs, he valued them on the basis of fair current values.

Fixed Assets

General Principles

413. With certain exceptions, stated below, fixed assets have been valued at depreciated replacement cost at the date of valuation. Fixed assets, which may be movable, such as locomotives, or immovable, such as bridges or port structures, are those tangible assets which, in an operating concern, are held with the object of earning revenue and not for sale in the normal course of business. The comparable assets of other types of agency, such as the research institutes of the GFS, are also termed fixed assets. Before adopting this basis of valuation, the Mediator considered the following alternatives:

a) historic cost, which he rejected because it takes no account of inflation and therefore grossly undervalues the older assets:,

b) replacement cost (undepreciated), which is unsuitable because it takes no account of the age of the assets;

c) net realisable value, which is inappropriate except in the case of EA Airways, since the question was not one of winding up the operations of the EAC, but simply of transferring them to national institutions;

d) capitalised estimated future earnings or discounted future cash flows; if the Mediator had chosen either of these complicated bases of valuation, it would have been extremely difficult to obtain the data on which to base the calculations, apart from the necessarily imprecise nature of estimates of future rates of return and cash flows.

414. The Mediator therefore concluded that depreciated replacement cost was the most appropriate and easily understandable basis of valuation,and his discussions with the Partner States have led him to believe that they share this view. Depreciated replacement cost has the great advantage of being a relatively straightforward method of attributing fair values to assets purchased at different times. The cost of assets acquired over a period of time will have changed for a number of reasons, including inflation. The Mediator considers that the value of these assets to their owners is their current replacement cost, reduced to take account of their age and remaining useful lives. Depreciated replacement cost meets these requirements. Assets acquired many years apart are therefore valued on a consistent basis which is fair to all Partner States.

415. Replacement cost has been taken as the cost of a replacement asset of equivalent performance. Where it was not possible to obtain replacement costs (for example where no identifiable equivalent could be procured today),the value was determined by applying an appropriate inflation factor to the original cost. The Mediator has not taken into account the prices that would be realised by a break-up or forced sale of the assets. The assets have been valued on the basis of their function at the division dates, and no allowance has been made for alternative uses.

Mechanical Assets

416. Mechanical assets, such as machinery, cranes, locomotives, rolling stock and fork-lift trucks, have been valued at depreciated replacement cost by reference to international prices.

Buildings and Civil Engineering Works

417. Buildings, earthworks and other civil structures have also been valued at depreciated replacement cost, but on the basis of local construction costs. These costs were reasonably uniform throughout the Partner States over the period when the great majority of the assets were constructed, but, in recent years, particularly from 1973 onwards, they have diverged significantly, so that the cost of constructing similar assets differs substantially among the Partner States.

A consequence of these different rates of increase of costs is that if, for example, buildings, most of which were constructed before 1972, had been valued at actual replacement cost in each Partner State at the division date, identical assets built in different Partner States at much the same original cost would have been valued at very different amounts for the purposes of the mediation. The Mediator considered that such differences in valuation were not justified. He concluded, for reasons of equity, that:

a) as costs were closely comparable in the Partner States up to the end of 1972, the different rates of inflation after that date should not be allowed to distort the valuation. Thus, all assets constructed before 1972 were valued at 1972 costs adjusted for inflation in Kenya up to the division dates;

b) the actual costs of all assets constructed after 1972 were also adjusted for inflation up to the division dates, using the Kenyan rate.

The Kenyan cost index was chosen because, having risen least, its use would have least effect on the relation between the values of locally constructed assets and the values of assets the costs of which were mainly in terms of foreign exchange.

418. The technical experts considered it appropriate to value the permanent way and river and lake piers of EA Railways, constructed before 31 December 1974, at a uniform rate throughout the three Partner States.

419. It should be stressed that no asset valued on the above bases has a replacement cost below actual cost. The effect of the Mediator's method of valuation is that the replacement costs of assets in Tanzania and Uganda are not as much above the original costs as they would be had the local inflation rates been applied.

Aircraft and Aircraft Spares

420. Aircraft and aircraft spares have been valued at open market value at 15 February 1977 because, unlike the other Corporations, EA Airways is no longer trading. The values ascribed to the aircraft and spares which have been sold may differ from amounts subsequently realised. This is because the valuations were made as at dates earlier than those ofthe sales and take no account of forced sales; indeed, the Mediator's terms of reference do not require him to take account of events after the collapse of the Community. A consistent valuation would not be possible if such events were taken into consideration.

Land

421. The question of the valuation of land is complex. Systems of land tenure differ markedly among the Partner States. Whereas there is more or less a free market for land in Kenya, dealings in land in Tanzania and Uganda are subject to control. The laws under which the Corporations acquired land differed from time to time and from country to country and the rights of compensation are by no means clear.

422. The Mediator had adopted the principle that land paid for out of EAC funds should be valued and included in the mediation along with the other fixed assets. The Working Groups therefore tried to find out what land was owned by the EAC institutions, how much of it had been donated and how much purchased, and what the value of the purchased land was. However, although they visited land offices, the land departments of the EAC institutions, inspected title deeds and valuation rolls, and consulted many people familiar with land problems in East Africa, they were unable - and so were the Partner States - to establish which sites had been paid for and how much had been paid.

423. They came to the conclusion that the amount of land purchased was very small in relation both to the EAC land as a whole and to the total net assets of the EAC. WG2 concluded that the value of land purchased by EA P&T in any of the regions was unlikely to exceed Shs. 3 million. WG1 reported that "the amount of land held by EA Railways purchased out of Corporation funds is small and probably not material in the context of the mediation excercise". They had also established that between 1971 and 1977, EA Railways had paid only Shs. 0.1 million in compensation in Tanzania and only Shs. 0.5 million on improvements to land. The management of EA Harbours in Dar es Salaam and Mombasa informed WG1 that the Governments

had donated the port sites. In their report on the GFS, WG2 stated that "it would be virtually impossible to confirm that all land was donated and not purchased"; but as far as they could tell, practically all land was donated.

424. In a few cases land was paid for out of EAC funds, so that it would have been justifiable to value such land and include it in the mediation along with other fixed assets. The Partner States were unable, however, to identify either the land so purchased or the payments made for it. Such evidence as the Working Groups were able to obtain from land records and officials indicated that the total of purchased land was insignificant and might thus be ignored.

425. The Mediator is thus satisfied that virtually all of the land owned by the EAC was donated by the Partner State Governments or their predecessors, so that the EAC paid nothing for it. He therefore proposes that the land be allocated to the Partner State in which it is located at no cost and thus in effect be excluded from his mediation proposals.

Permanent Way

426. The Mediator was informed that certain sections of EA Railways' permanent way had not been adequately maintained because of lack of repair equipment. Depreciated replacement cost values, being based on age alone, do not take account of inadequate maintenance. Therefore, in order to obtain first hand technical advice on this matter, in June 1979, the Mediator retained engineering experts for the special purpose of making a comprehensive inspection of EA Railways' permanent way in each Partner State. These experts were instructed to carry out a detailed physical survey of the system. The valuations made by these engineers have permitted the adjustment of the preliminary valuations submitted by the Mediator's consulting

engineers to take account of the actual physical condition of the permanent way at the division date. In Uganda the 1979 inspection found that the permanent way had not been adequately maintained. It was concluded that the value of the permanent way had been higher in 1977 than in 1979 and that the valuation had to take this into consideration.

Earthworks

427. No depreciation was applied to EA Railways' earthworks which, in general, hold their value over a long time. However, the engineering experts who inspected the permanent way concluded that an adjustment was justified to take account of damage caused by heavy rainfall in certain areas before June 1977. The value of earthworks has been reduced accordingly.

Depreciation

428. Apart from the assets mentioned in paragraphs 421-427, (aircraft,land, permanent way, earthworks),all of the fixed assets have been depreciated on a straight line basis, using their average working lives as assessed by the consultant engineers, down to a residual value. No account was taken of any regional variations (for example, greater corrosion in coastal areas) within a Corporation's area of operations. The rates of depreciation and the residual values vary for different types of assets and are set out in the Appendices on each EAC institution. Fixed assets which the consultant engineers consindered no longer useful were given zero value or only a scrap value

Working Lives

429. The working lives of assets used in this Consolidated Report, especially the 40 to 60 years for buildings, are based on the judgment of the experts and the advice of international engineering firms. The Mediator is aware that there is room for differences of opinion where matters of judgment are concerned. However, after further consultations with both the original and other experts, he sees no reason to change his estimates of working lives.

Installation Costs for Plant and Machinery

430. The experts approached this problem as follows:

a) If the equipment ran on rails, for example, a dockside or gantry crane, then the stationary parts of the installation, such as the foundations and crane rails or the steel supporting structures, were valued separately in accordance with the assets registers;

b) the foundations and pipework assemblies of oil and water tanks were valued together with the tanks; and

c) the rates per square metre at which workshops such as engine repair sheds were valued reflected the additional value of the equipment foundations.

The plant and machinery itself was valued by reference to international prices. The labour cost of installing the plant was not taken into account, as it was an insignificant part of total installation cost.

Capital Work in Progress

431. Work in progress was valued at cost. In a few cases actual cost was not known, and was estimated by taking a proportion of the amount sanctioned for the project equal to the proportion of the work completed at the division date. The Mediator considers this method fair; any inaccuracy due to it is likely to be negligible as far as the mediation is concerned.

432. On the advice of international organisations, the Mediator ruled that for projects "where the ground had not been broken" at the division dates, no account should be taken of preliminary costs already incurred for such purposes as drawings, surveys, travelling expenses, and professional fees. Although it is standard accounting practice to capitalise such costs, the Mediator was advised that, in view of the break-up of the EAC and the fact that many of the projects were subsequently abandoned or substantially modified, it would be most difficult to establish appropriate figures. He therefore excluded preliminary and planning costs for projects not yet started at the division dates.

Investments

433. Investments were valued at market value where possible; where no quoted price could be obtained, market price was estimated by reference to the quoted prices for similar securities. The investments of EA Airways in Simbair and EA Aeradio have been valued at estimated realisable value.

Stocks and Spares

434. Stocks were valued, as far as possible, in accordance with the accounting policies of the EAC institutions, i.e. normally at the lower of original cost and net realisable value, an internationally accepted accounting principle. There are differences in the bases of valuation used from Corporation to Corporation and even, sometimes, within a Corporation, but the Mediator is satisfied that, as far as the mediation is concerned, these differences are insignificant.

435. Consideration was at first given to valuing stocks at current replacement cost, but the Mediator, on the advice of the MAB, deemed this to be inappropriate because:

a) the results would have been unreliable because of the inaccuracy of the stock records; and

b) it would not have made much difference, since most non-obsolete stores are turned over fairly quickly.

436. Although the total value of stocks and spares was not unduly large in comparison with that of fixed assets, they presented great difficulties to the experts because, as was well known to the Partner States, accounting in this area left much to be desired. This was especially true of EA Railways, EA P&T, EA Airways and the GFS. The experts made use of such records and computer printouts as they were able to obtain, including published accounts for the years when the EAC was functioning normally. In the case of EA Railways and EA Airways, the Mediator also obtained the views of independent experts and international agencies on the levels of stores and spares which organisations of their size, complexity and

geographic location might be expected to hold. After further consultation with the experts, the Mediator is convinced that the figures used in this Report are the best available and that they are sufficiently accurate for the purposes of the mediation.

Debtors

437. Debtors have been included in net assets as, in general, they relate to the regional operations of an EAC institution; they have been included net of bad debt provisions, except for debts due from departments of Partner State Governments and EAC institutions, which have been included at their book value with no allowance for bad debts.

438. The methodology adopted for allocating debts among the Partner States was to give credit to that regional branch of an EAC institution which the Mediator considered most likely to collect the debt. Because of the breakdown of the EAC, it was believed that any Partner State Government owing a debt to an EAC institution would prefer to settle it by making payment to the branch or successor of that institution in its own territory, rather than by transferring funds to another country. The Mediator has therefore allocated debts on the assumption that all amounts owed to the EAC by the Kenya Government will be paid to the appropriate organisation within Kenya, all amounts owed to the EAC by the Uganda Government will be paid in Uganda, and all amounts owed to the EAC by the Tanzania Government will be paid in Tanzania.

439. It was not possible to reconcile all inter-corporation balances within the same Partner State for lack of information. However, the largest balance, that owed by EA Harbours to EA Cargo Handling in Mombasa, has been agreed.

440. It was suggested that all debts that have not yet been acknowledged, several years after the EAC's collapse, should be written off. From a purely commercial point of view, this suggestion may have some merit. However, most of the outstanding debts included in the net assets of the EAC institutions are local; insofar as a Corporation fails to recover a debt, a local debtor gains. It is inappropriate that the other Partner States should share in a loss due to the failure of the Corporations in any one State to collect debts within that State. The Mediator holds that this view should apply, not only to company debt, but also to staff debtors, who have registered hundreds of claims, but have so far not been in a hurry to settle their own liabilities towards the EAC institutions.

Short-term Liabilities

441. Trade creditors have been deducted from assets as, in general, they relate to the regional operations of an EAC institution, and have for the most part been settled by the region in question, except for those of EA Airways and the GFS, which are no longer in operation. Certain other short-term liabilities, including the overseas creditors of EA Airways and overdrafts of EA Railways and EA P&T with the Crown Agents, are dealt with separately in Part VIII of this Report.

Rates of Exchange

442. Before they became independent and for some years after, the common currency of Kenya, Tanzania and Uganda was the East African shilling. In the mid-1960s each of the Partner States established its own central bank and the Kenya shilling, Tanzania shilling and Uganda shilling were adopted as national

currencies. These currencies were at par with each other at that time and remained so officially until January 1979. In converting foreign currencies to shillings, the Mediator has used the rate ruling on the relevant date. A list of rates of exchange at 30 June 1977 used for the purposes of this Report is set out in Appendix "C". These rates are based on the closing middle market rates for pounds sterling as quoted in the London Financial Times and differ only slightly from the official IMF rates.

Transfer of Assets

Assets Proposed for Transfer

443. The Mediator's experts had originally established a list of assets to be transferred from Kenya to Uganda. These assets may be summarised as follows:

	Shs.m
Railways:	
8 locomotives	28.5
Equipment	0.9
	29.4
G F S:	
Equipment	1.0
	30.4

This transfer was envisaged because these assets properly belonged to Uganda and it was assumed that they would be transferred without delay.

444. The assets have not been transferred, and Uganda no longer wishes to receive the locomotives and equipment, as they have deteriorated during the period of over three years since they were valued.

445. Since Kenya could have transferred these assets to Uganda a long while ago, but did not do so, the Mediator considers that the EA Railways locomotives and equipment should remain in Kenya's possession and that Kenya should be charged with their value. The Kenyan authorities have expressed willingness, if the Partner States agree upon an equitable division of assets, to comply with this and to keep "some of the locomotives... to assist with the movement of Ugandan goods through Kenya". The 8 locomotives, the Hollam grader and the 2 D8 caterpillars will thus remain in Kenya and their value at 30 June 1977 has been charged to Kenya.

446. The Mediator still recommends, however, that the GFS equipment listed in Appendix "N" be transferred from Kenya to Uganda. The value of these assets - Shs. 1 million - has been charged to Uganda.

Rolling Stock

447. On several occasions, the Mediator drew attention to the difficulties that had been encountered in determining:

a) how many coaches and wagons were in the system;

b) where they were;

c) where they should have been.

Numbers and Location of Rolling Stock

448. Although for many years coaches and wagons had moved freely round the East Africa railway system, crossing the borders between Kenya and its Partner States at Malaba and Taveta, or carried across Lake Victoria on ferries, by 1975 the lake services had been suspended and the rail link between Kenya and Tanzania closed. Neither route has yet been reopened and, for the purposes of assessing the numbers of coaches and wagons in each Partner State, Tanzania may be considered isolated. The same cannot be said for Kenya and Uganda, as rail movements across the border continue to this day.

449. The Mediator accepts that, however many coaches and wagons EA Railways had in Tanzania on the division date, the same number (subject to any subsequent additions and disposals which are outside of the mediation) is still in Tanzania's possession.

450. As explained in paragraph 47 of Appendix "E", the Mediator allocated the rolling stock to each country on the basis of the best estimates that could be made of the numbers of coaches and wagons normally operating in each Partner State. These estimates were as follows:

	Nos. of coaches and wagons
Kenya	6,109
Tanzania	3,987
Uganda	1,087
	11,183

The Mediator is unaware of any transfers of rolling stock between Tanzania and the other Partner States after 1975 and is therefore satisfied that Tanzania has control over the rolling stock for which it has been charged.

451. As far as Kenya and Uganda are concerned. the daily border crossings of wagons make it difficult to know where rolling stock is at any given moment.The only recent attempt in either country to count the rolling stock was made by Uganda and indicated rather fewer than 300 wagons; however, as explained in paragraph 4 of Appendix "M", this count was incomplete, and in any case covered only wagons operating inside Uganda, whereas the number (1,087) attributed to Uganda on the division date includes passenger coaches and may include wagons carrying imports and exports between Kampala and Mombasa.

452. In the Mediator's proposals, Kenya and Uganda are charged with 6,109 and 1,087 coaches and wagons, respectively. Specific coaches and wagons (of appropriate sizes, quality and specifications) sufficient to make up these numbers, adjusted as necessary for disposals since the division date, should be identified as belonging to each country and brought under its control, though not necessarily by means of physical transfer. Neither WG 1 nor the technical experts appointed in summer 1979 had access to sufficient documentation to make this identification. The Mediator therefore proposes that the Kenyan and Ugandan railway managements resolve the matter in bilateral negotiations with the assistance of an independent expert. Should the Partner States so wish, the Mediator will propose the names of suitable experts. In making the division of rolling stock, the condition, age and type of unit should be taken into account and also, as far as they are compatible, the requirements of the two railway systems.

Fair Division of Rolling Stock

453. The next problem to consider was whether this division, based on the de facto distribution at a particular date, was equitable, or whether some further physical transfer of rolling

stock should be proposed. It was well known that, during the long history of EA Railways and its predecessors, the quantity of rolling stock in each country had not been constant but had fluctuated in response to the seasonal demands of the different regions.

454. In a letter dated 18 June 1975, the Chief Traffic Manager of EA Railways suggested that an appropriate allocation of wagons to Tanzania, based on a survey of ton-miles for 1972 and 1973, would be 28.8% of the fleet. As the Mediator has already allocated Tanzania 36% of the rolling stock by numbers and 26% by value, he considers that there is no case for a further transfer of wagons to, or from, Tanzania.

455. In the case of Uganda, however, geographical location is an inadequate basis for assessing requirements. The principal use of the railway by Uganda was, and is, for the transport of Ugandan exports down to Mombasa and of Ugandan imports to Kampala. As 80% of the line between Kampala and Mombasa is in Kenya, at any one time most of the wagons carrying Ugandan imports and exports will be in Kenya. There will also be wagons standing in Mombasa waiting to load or unload Ugandan goods and, although the rolling stock was not specifically designated as "Kenyan" of "Ugandan", it would be reasonable to attribute some proportion of the wagons in the Nairobi workshops to Ugandan traffic.

456. Table 12 of EA Railways statistical computation entitled "Interstate and Internal Goods Traffic 1971-74 (by Region of Origin and Destination)" records the freight carried for each country in 1971 as follows:

	Tons '000	%
Kenya	2,569	61
Uganda	1,619	39
	4,188	100

However, the average length of haul for Ugandan goods (1,033 kms) was considerably greater than for Kenyan goods (459 kms), so that Uganda required more rolling stock per ton of goods carried. If the 1971 statistics are expressed in ton-kilometres, they indicate that Uganda made appreciably more use of the wagon fleet than Kenya, as follows:

	Goods Carried	
	Kenya	Uganda
	Ton/km.m	Ton/km.m
Internal	1,179	56
Kenya to Uganda	-	1,055
Uganda to Kenya	-	562
	1,179	1,673
	41%	59%

The above figures relate to the year 1971 only, and the proportions may well have changed in later years. Furthermore, wagon standage time would be proportionately greater for the shorter haul Kenyan traffic. However, they indicate that a considerable number of the wagons in Kenya were being used for Ugandan traffic, and it is certain that Uganda still has a substantial requirement for wagons.

457. Nevertheless, the Mediator does not recommend that more than 1,087 coaches and wagons be allocated to Uganda. There is no convincing reason for proposing that additional coaches and wagons be physically transferred to Uganda, as there is no need for them to be based there, nor does Uganda have the facilities to maintain them. Instead, the Mediator proposes that they remain in Kenya and belong to Kenya; he has, therefore, charged Kenya with their value.

458. Uganda continues to need to use these extra wagons to carry imports and exports, and Kenya has indicated that it will continue to make sufficient rolling stock available. The Mediator draws the attention of the Partner States to the United Nations Declaration on the Principles relating to the "Transit Trade of Land-locked Countries", to which all three are cosignatories. These principles, which are set out in paragraph 1108, are designed to ensure unrestricted access to the sea for land-locked countries such as Uganda. Uganda should pay the reasonable cost of the services provided by Kenya, including maintenance charges, unless the two countries agree to treat the cost as part of the compensation due from Kenya to Uganda (paragraph 712).

PART V

THE VALUE OF NET ASSETS AND LONG-TERM LIABILITIES

Valuation and Location of Net Assets

501. Using the methodology described in Part IV, the Mediator concluded that the total value of net assets of the Corporations and the GFS on 30 June 1977 amounted to Shs. 11,896 million.

The Mediator took note of the geographical distribution of these total assets among the three Partner States on the division dates, and of the fact that some of them (e.g. the three ships transferred from Kisumu, Kenya, to Mwanza, Tanzania in May 1978) had subsequently been transferred from Kenya to Tanzania. He holds that some movable assets located in Kenya properly belong to Uganda and recommends that these assets be transferred as quickly as possible. In anticipation of this transfer, he has assigned their value of Shs 1 million to Uganda. After these minor adjustments, the existing distribution of the assets among the Partner States may be summarised as follows:-

	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
EA Railways	5,760	3,039	1,901	820
EA P&T	1,627	729	531	367
EA Harbours	2,896	1,650	1,246	-
EA Airways	215	84	60	71
EA Extelcoms	343	225	72	46
EA Cargo Handling	135	31	104	-
G F S	920	420	282	218
	11,896	6,178	4,196	1,522

Miscellaneous Items

502. The figures given in the previous paragraph take no account of the probability that there were EAC assets which were not brought to the Mediator's attention at all.

503. As indicated in paragraph 314, the Mediator has decided to allow for such omissions by introducing a new category of "Miscellaneous Items" to which he has assigned a value of 2% of the total net assets, and has increased each country's share by the same percentage. While this is an arbitrary figure, related to unknowns, the total amount of Shs. 238 million, which corresponds to this 2%, does not seem unreasonable. Nor does it seem unreasonable to add 2% to the net assets of each Partner State, since there is no way of knowing where the omitted assets are located; there are probably some in each Partner State. On this basis, therefore, the Mediator concludes that the geographical distribution of net assets is as follows:

	Assets Shs.m	Plus	Miscellaneous Items Shs.m	Equals	Total Shs.m	
Kenya	6,178	+	123	=	6,301	51.9%
Tanzania	4,196	+	84	=	4,280	35.3%
Uganda	1,522	+	31	=	1,553	12.8%
	11,896	+	238	=	12,134	100%

It should be repeated -- and explicitly recognised -- that this distribution is based primarily on the facts of physical location at the time of the break-up of the Community and, except for the few assets to be transferred and the assignment of an amount for unknown items, does not result from any decision of the Mediator.

Valuation of Long-Term Liabilities

504. As in the case of net assets (i.e. all assets less short-term liabilities), the Mediator examined the accounts of each individual Community institution in order to determine its long-term liabilities. He is satisfied that he has obtained a complete schedule of all long-term loans. The amount outstanding is shown in Appendices "O-Q", both by institution and by creditor country. The total comes to Shs. 2,864 million, made up as follows:

	Shs.m
EA Railways	1,208
EA P&T	491
EA Harbours	851
EA Airways	92
EA Extelcoms	50
EA Cargo Handling	27
G F S	145
	2,864

505. Details of how these individual figures were arrived at are given in the appendices on the individual EAC institutions. They include overseas assets and short-term liabilities which the Mediator has dealt with separately from other net assets. Among them are the overdrafts of the EA Railways and EA P&T headquarters with the Crown Agents (concerning which agreement had already been reached among the Partner States) and, more importantly, the overseas and short-term liabilities of EA Airways (which are dealt with below).

Overseas Assets and Liabilities of EA Airways

506. The following overseas assets and liabilities are taken account of in the figure of Shs. 92 million for EA Airways in the table in paragraph 504.

	Shs.m	Shs.m
Assets		
VC 10 aircraft and spares	90,2	
B 707 aircraft and spares	36,4	
Buildings	0,6	
Overseas bank accounts	23,0	150,2
Liabilities		
VC 10 loan	62,1	
B 707 loan	41,7	
Commercial and staff creditors	23,4	
Provisions	23,0	
Net balance		150,2
		Nil

As explained in Appendix "H", there is considerable uncertainty concerning the value of the above assets and liabilities. The liquidation of EA Airqays is proceeding in Kenya and overseas countries and it is not clear to what extent the assets may be recovered. Similarly, the validity of many of the above liabilities has yet to be established. The Mediator does not possess satisfactory information about them. He has, therefore, by including the overseas creditors in an amount of Shs. 23.4 million, effectively assumed equal amounts for the overseas assets and liabilities of EA Airways, which thus balance out and have no effect on the division of other loans. Instead, they will be handled by the Liquidator in Kenya on behalf of Kenya. Kenya's final position will not be affected by this procedure. On the one hand, it is improbable that the liquidation will result in a surplus; on the other, if there is a deficit, the creditors will have to be satisfied with the proceeds of the liquidation, i.e.,with a liquidation dividend.

Assignment of Long-Term Liabilities

507. The Mediator considers that long-term liabilities should in principle be divided among the Partner States in proportion to an equitable division of net assets. Therefore, if the assets of the EAC were in fact already physically divided in equitable proportions (i.e. if the actual geographical division of assets were considered fair), the total debt of Shs. 2,864 million would be divided in the same proportions as net assets (paragraph 503); if the long-term debts constituted a fungible pool of liabilities, then these liabilities would have to be divided as follows:

(Figures in Shs.m)		Total Net Assets	%-age	Total Liabilities
Kenya		6,301	51.9	1,486
Tanzania		4,280	35.3	1,011
Uganda		1,553	12.8	367
	Total	12,134	100.0	2,864

508. As part VI indicates, however, the actual division of assets on 30 June 1977 cannot be considered equitable and long-term liabilities must therefore be distributed in proportions different from those shown above. As explained in Part VIII, the long-term liabilities are not fungible, and should therefore be divided on some other basis.

PART VI

PROPOSALS FOR AN EQUITABLE DIVISION OF NET ASSETS

The Problem

601. The task of identifying and evaluating the assets of the Community met with many obstacles. None of these obstacles, however, presented such difficulties as the search for acceptable criteria for an equitable distribution of assets. The question the Mediator faced was how much of the total assets of about Shs. 12,000 million "belonged" in some sense to each Partner State, or in other words, what was the fair share of assets for each Partner State.

602. The task of proposing an equitable division might have been easier if the liabilities of the EAC institutions had more or less equalled the assets. This was not the case, however, for to be set against the approximately Shs. 12,000 million of assets,there were only about Shs. 2,900 million of long-term debt to be allocated. That is, for every Shs. 100 of assets which might be assigned to a country, only about Shs. 25 had to be "paid for" in terms of liabilities to be assumed. The country assigned the largest amount of assets would therefore have an advantage over those assigned smaller amounts. There was consequently a tendency in the Partner States to interpret any proposed unequal division of assets as entailing a generous element of "gift" to one matched by an element of "sacrifice" for another. Thus, any particular division of assets could be regarded as benefcial to one country and correspondingly detrimental to the others.

603. The following paragraphs deal with the alternative criteria for an equitable division of assets that the Mediator examined.

The "Lessons" of History

604. The history of the Partner States is, in principle, a source of guidance for the Mediator, But, like all history, it is made up of many threads which are not easily unravelled. A variety of interests influenced the course of events in East Africa in the past century: local (i.e. territorial) interests; the growing power of the European settlers, especially in Kenya; commercial considerations of trade between the United Kingdom and East Africa; humanitarian concern about the slave trade; international rivalry for control of the headwaters of the Nile; the bureaucratic preoccupations first of the Foreign Office and then of the Colonial Office, and others. This mixture of influences, often inconsistent if not actually contradictory, appears in the reports and other writings of the colonial administrators, whose impact on events, in an era when communication and movement were slow, was very great. Different administrators often saw events differently. Then there are the frequent White Papers and reports of various Commissions which, while reflecting the same diverse influences, often express more objective views.

605. The railways, which constitute the lion's share of the Community's assets, provide an example. Uganda's view that the railway line across Kenya originally had little, if anything, to do with Kenya, finds support in the report of the East Africa Royal Commission 1953-55 (Cmd 9475, June 1955) which states that the railway was intended, not to develop Kenya, but solely to provide a link between Mombasa and Uganda. Sir Edward Grigg, Governor of Kenya, said in 1927 that "it is uncontestable that the Uganda Railway made the

Colony of Kenya...Imagine the territory peopled by very few sparse and primitive tribes, very few of whom had any settled habitation... Into this empty paradise, only at the beginning of the century there enters the British Government and British colonists all on the back of the Uganda Railway - which alone made it possible - for the railway is the beginning of all history in Kenya. Without it, there would be no history in Kenya. This country was really nothing but a corridor".

606. The Governor of Uganda, commenting (CMD 9801 of February 1956) on the above cited report of the East Africa Royal Commission 1953-55, quoted with approval the statement of a Member of Parliament in 1896 that the Uganda Railway was "an example of faith in the future". To that Governor, the dream was one of "economic development", which the Railway, constructed far in advance of need, had helped to "create". The then General Manager of the East African Railways and Harbours Administration saw the matter differently. Commenting on the same Royal Commission Report, he said that "generally the development of railways in East Africa has been in line with the economic and social development over the first half of the century". On the other hand. the Royal Commission itself said that "the Central Line in Tanganyika was primarily built for strategic reasons, and the Uganda Railway on philanthropic and political grounds in which the issue to suppress the slave trade played a very important part". The Commission called attention to the fact that the debt of £ 5,500,000 incurred in the construction of the Uganda Railway, was cancelled by Parliament in 1938 "on the grounds", as the Annual Report of the Railways put it in 1939, "that the sum in question had been spent by the Home Government for political reasons and that it would be a severe hardship on the present users of the railway to be called upon to pay this grant". Of course, whatever the reasons for the original building of the main railway lines, they were

607. What has been said about the dubious usefulness of the historical record for the mediation applies to the colonial period prior to independence in 1962/63.The years following independence are hardly relevant. As Uganda put it in its letter to the Mediator of 27 June 1980, "when in 1967 the Community was formed from the East African Common Services Organisation, there was hardly any new infrastructure added to the body (of the) Community thereafter. The obvious exception was of course the headquarters complex of the East African Community at Arusha". In short, the history of the origins and development of the Community does not unequivocally point to a criterion of an equitable division of assets and liabilities.

608. Because of the absence of historical evidence, the Mediator was forced to consider various alternative criteria for an equitable distribution.

CONSIDERATION OF ALTERNATIVES

A. Equal Sharing of All Assets

609. It may be argued that an equitable division of assets of the Community institutions would call for their division among the three Partner States in equal portions, as though each held one-third of the total equity of the Community's institutions. Uganda, in particular, strongly advocated this view in the earlier stages of the mediation on the grounds, not of any specific clause in the constitution of the Community, but of the important role of Uganda's imports and exports in the growth of the Community services, especially the railways and ports.

610. There is considerable evidence that the EAC was regarded as a partnership among three equal sovereign nations. The three Partner States were equally represented on the governing institutions of the Community; the Authority, the Legislative Assembly, and the various Ministerial Councils. Decisions had to be taken unanimously, or not at all. The Partner States were also equally represented on the boards of directors of the Corporations. Decisions about the location or relocation of the various headquarters, including that of the GFS, reflected a desire to equalise the benefits derived by the host countries from the presence of these headquarters. This evidence, however, may be interpreted as supporting the idea of political, rather than economic equality. No doubt, the fact (paragraph 643) that the Partner States insisted on equal Quotas when they joined the IMF in 1962-63 may be taken as implying that at that time the ideas of economic and political equality were linked but, as indicated in paragraph 643 below, the Quotas subsequently diverged considerably.

611. Only one of the acts creating the EAC institutions has any reference to ownership, or to "interest" in the normal corporate sense. The charter of the East African Development Bank specifies that its capital is to be represented by shares and that the shareholdings of the Partner States are to be equal. One might infer from this exception that the other EAC institutions were regarded as EAC property and not as the property, in any sense or proportions, of the individual Partner States. No doubt, they were free to divide the assets and liabilities equally whenever they wished, but there seems to be nothing in the EAC's legal history to support the view that equal sharing, with its corollary of equal division, was obligatory; it is not even referred to in the discussions leading up to the creation of the EAC.

612. It may be argued that the specific provision in the EADB charter that share capital should be equally divided implied that the "ownership" of the other EAC institutions was not equally divided; if this were so, some reference to such unequal division might have been expected in the charters of those institutions. Alternatively, it might have been thought that, in the absence of a reference to ownership in the EAC charters, equality would be assumed; for it is a generally accepted principle that, in a partnership, the absence of a reference to each partner's share is taken to mean that their shares are equal.

613. However, it is also assumed in such cases that the contributions of the partners are equal, as are the benefits they derive from the partnership. Thus there might be an argument for equal shares if the contributions of the Partner States towards the creation of the assets had been equal. This was clearly not so (paragraphs 617-621). The Partner States made few financial contributions to the creation of the EAC's assets, most of which were in fact created long before the EAC was established. Of course, the users of services in the Partner States provided the Corporations with revenue from which they financed part of their development. Thus, Uganda and Kenya paid fees to the Port of Mombasa and paid the rates charged by the railways linking Mombasa to the interior; they received corresponding services in return. It would however, be impossible to try to unravel these direct and indirect "contributions"; all that can be said is that there is no reason to suppose that, either for each service, or for the services as a whole, they would have been equal.

614. Similarly, an equal interest might have been inferred if the needs of the Partner States were more or less equal and if assets were placed in a particular State solely to meet the needs of that State. However, the needs of the territories for different services differed according to their economic situation and prospects. Moreover, as shown above (paragraphs 604 to 605), many of the assets were originally created for reasons unrelated to the needs of the territories in which they were located, although their subsequent development may have been more closely related to local needs. Some assets, such as those of the GFS, were jointly financed by contributions from the Partner States; other assets, belonging to the Corporations, were paid for by external loans jointly guaranteed by the Partner States. But such joint financing was not equal financing.

615. Nor was the servicing of external loans, insofar as they called for service by the Partner States rather than by EAC agencies, shared equally. The Damry Formula, with its unequal reimbursements (paragraph 628), is a case in point. Moreover, if there had been any presumption of equal interest, it might have been expected that the financing of the GFS budget would have been equally divided among the Partner States. As shown below, however, it was decidedly unequal.

616. To sum up, there is no evidence either that the Partner States intended to share equally in the assets and liabilities of the EAC institutions (except the EADB) or that they made equal "contributions" to the creation of the assets, or derived equal "benefits" from them. It is therefore impossible to draw any conclusion with respect to "interest" in the corporate or other entitites of the EAC. The Mediator therefore abandoned the idea of a division of assets among the three countries either in equal shares or in any other proportions predetermined by agreement among

them. He had to conclude that, while the joint ownership of the assets was hardly in doubt, it was not equal ownership, which would have meant that each Partner State should be assigned one-third of both assets and liabilities.

B. Contributions Towards Financing Assets and Operations

617. If they are ascertainable, the contributions of the Partner States towards the creation or acquisition of the EAC'S assets would clearly offer a plausible basis of an equitable division.

618. The records of such contributions are scanty. Most of the assets were created long before the EAC was established, some before the end of the 19th century. They were largely financed, first by the colonial powers, and then by the Corporations or their predecessors, either from earnings or from external credits. In the absence of a clear division of the ownership of those Corporations among the Partner States, it is impossible to divide "credit" for such financing among the States. Some of the external credits were guaranteed by all three Partner States "jointly and severally", usually at the insistence of the lenders, notably the IBRD, and not as the result of agreement among the Partner States.

619. It is true that the GFS was financed by separate contributions from the Partner States. The assets of the GFS, however, represented only a small part of total Community assets. As shown in the previous Part, they accounted for only 7.7% of total assets on 30 June 1977. Few GFS assets were created after 1 December 1967, the GFS headquarters building at Arusha being the only important single item.

620. According to the Treaty, the GFS was to be financed by customs and excise duties and income tax. In 1973, however, the Income Tax Department was split and the excise and customs duties became the sole source (except for some minimal cash contributions from the Partner States). The proportions in which the burden was shared by the States was also changed from time to time; Kenya's percentage varied between 45% and 50%; Tanzania's, between 27% and 35%; and Uganda's between 16% and 31%. The last agreed "interim formula", for 1976/77, was: Kenya 48.14%; Tanzania, 31.32%: and Uganda, 20.54%. How these proportions were arrived at is not clear in the documentation available to the Mediator.

621. All circumstances considered - the small size of GFS assets, the small volume of operations compared to those of the Corporations, and the absence of exact information about how national contributions were determined -it is difficult to see any basis for applying the proportions in which the Partner States supported the GFS to the division of assets. Thus, the Mediator concluded that efforts to assign equitable interest in Community assets on the basis of actual contributions were futile. The difficulty arises because the problem of dividing the assets in the event of a break-up of the common services system was not given any consideration, either in the colonial era or in the period during which the Partner States wholeheartedly supported the Community. As Kenya put it in its memorandum of 4 September 1980, "prima facie, the proper basis for determining the equity rights in assets is the proportion in which actual contributions may have been made to the creation of these assets. In the case of the self-contained Corporations, there were either no such contributions, (those bodies having been financed partly by retained earnings and partly by borrowings wholly serviced by revenue earnings) or, where contributions have been made, they were either so

slight as to have little relevance to present assets or were so long ago as to be now difficult of ascertainment". The Mediator concluded that contributions to the creation and maintenance of assets does not provide a yardstick for the division of assets.

C. Geographical Location

622. The failure to find in the history of the EAC unambiguous clues, in the shape either of a legal agreement or of identifiable contributions to its assets, to the disposition of its assets in the event of dissolution, makes it necessary to find some other criterion or criteria to judge the fairness of the existing geographical distribution of assets.

623. There is no doubt that, in determing the scale and location of the EAC assets installed in each Partner State, the needs of that State for their services played an important role. In this sense the de facto distribution of assets is an obvious starting point for a search for a principle of equitable division.

624. Although, as has been noted in the section on historical background, the motives for the creation of what developed into the common services were complex, it seems reasonably clear that, between the First and Second World Wars, the needs of the individual colonies were usually the dominant consideration in decisions about the scale and location of service assets.

625. "East African" considerations had considerable influence before 1920, however, and also in the final years of British rule after World War II, when much stress was laid on colonial

cooperation and federation. Some of the EAC assets were accordingly created to serve the East African region as a whole and not primarily the area in which they were located. Nevertheless, a considerable proportion, and possibly the majority, of the assets of the EAC were created to meet the needs of, and might thus be said to "belong" to, the country in which they are located.

626. The question of what is meant by "a considerable proportion", however, is central to the mediation, which would not have been proposed if the Partner States had not recognised that physical location did not tell the whole story. It was realised, for example, that:

a) The seaports are located in Kenya and Tanzania, but the port capacity created must certainly have taken into account the imports and exports of Uganda.

b) The railway repair facilities were placed in Nairobi, but were on a scale large enough to meet the needs of all three countries.

c) Each headquarters building had of necessity to be located in one particular country, although an attempt was made to distribute such buildings as evenly as possible among the three countries.

d) Budgetary contributions in unequal proportions from all three countries, as well as joint and several guarantees, had contributed to the creation of the assets and facilities of the GFS.

e) The location of movable assets, such as airplanes, rolling stock and ships, on the division dates was the result partly of normal operational exigencies, which might have called for a different distribution, and partly of the disruptions which preceded the break-up of the Community in mid-1977.

627. The principle that geographical location reflected ownership might have been acceptable in spite of these reservations if each country had been required to "pay" fully for the assets which were located in it. It has been pointed out, however, that they had largely been paid for years ago, from contributions from the colonial authorities, from the surpluses of the Corporations themselves and from borrowings serviced by the Corporations. What remained to be "paid for" were the outstanding long-term liabilities, which amounted to only about 25 per cent of the value of the assets. This inequality of assets and liabilities lies at the heart of the issue of fairness.

The Damry Formula

628. The question of the relation between assets and liabilities arose in 1976 when, following the Damry Mission earlier referred to (paragraph 111), the Partner States agreed on a provisional formula by which they would divide among themselves the servicing of the external debts of three Corporations: EA Railways, EA Harbours and EA P&T. This formula required the Partner States to divide the servicing of the debt of each of these Corporations (including their subsidiaries) in proportion to their actual holdings of the fixed assets of that Corporation, as estimated in the Coopers & Lybrand report issued earlier in 1976. Applying this formula, the Partner States agreed that they would meet the debt service of EA Railways, EA Harbours and EA P&T in the following unequal proportions:

	Kenya	Tanzania	Uganda
for EA Railways	48%	37%	15%
for EA Harbours	51%	49%	-
for EA P&T	47%	28%	25%

629. The question arises how far the Damry formula might serve as a precedent on which to base the mediation. For this purpose its scope would, of course, have to be extended to include the orther EAC institutions and to take account of current liabilities and assets other than fixed assets. The fundamental objection to its use, however, is that it depends entirely on geographical location which, for the reasons given above, cannot unreservedly be accepted as a guide to a permanent settlement. It was for this reason that the Partner States themselves recognised that the "Damry Formula" was an interim arrangement designed solely to avoid an interruption of debt service pending a permanent division of the assets and liabilities of the Community. In a letter dated 26 May 1976 notifying Mr. Damry of their acceptance of his proposal, the three Ministers of Finance stated that they would adhere to his formula:

"a) pending the outcome of the work of the Treaty Review Commission.

b) until otherwise mutually decided among the Partner States

c) without prejudice to the position of any Partner State in relation to the recommendations of the Treaty Review Commission, and

d) without prejudice to the results of any examination of the Report on the East African Corporation by Coopers & Lybrand."

630. It followed that, while <u>de facto</u> geographical location was an obvious starting point for a division of assets, it did not necessarily reflect equity. There were installations in some territories that had been created to service assets in other territories as well, and some belonging in one country which happened on the division date to be in another. Thus, to assign the assets according to their location would be to the advantage of one or other Partner State and the disadvantage of the others. It was clear, therefore, that the mediation would have to include measures to compensate the latter at the expense of the former.

D. "Communal" Assets

631. The question of compensation arises primarily in respect of what may be called "communal", "support", or "total system" assets, created with reference to the requirements of East Africa as a whole rather than of a particular territory. These obviously included such facilities as the railway workshops in Nairobi, the EA Airways' repair facilities, the EA Extelcoms installations, the GFS, the EAC institutions' headquarters buildings and, perhaps less obviously, the Indian Ocean seaports, which had to have capacity to handle Uganda's traffic, and part at least of such movable assets as lake shipping and rolling stock. The question arose whether each Partner State had an "equitable interest" in such assets, and whether that interest provided a basis for dividing their value fairly among the three.

632. One approach to this question was to allocate the value of such "communal" assets among the Partner States in proportion to the benefits each received from them, and to allocate the other assets in accordance with their geographical location. This approach raised a number of problems, among them

a) It was difficult, if not impossible, to draw a sharp line between "communal" assets and others. While it could be maintained that the term should be confined to assets which provided support for operations outside the territory in which they were located, a difficulty arose with respect to aeroplanes, locomotives, rolling stock, ships and other vehicles which moved from one territory to another. It was, indeed, arguable that all EAC assets were "communal" assets.

b) How could the "benefits" which a Partner State received from "communal" assets be evaluated? It might have been possible to relate the value of EA Harbours' installations at Mombasa and Dar es Salaam to the foreign trade of the Partner States passing through those ports. The division of the value of the railways' central workshops would have had to be based, however, on assumptions regarding the numbers of locomotives and rolling stock "normally" located in each country.

c) At what base period should the valuation be made? In the last years of the Community, its services were not operating normally. What year or period was "normal"?

d) Although the concept of the "equitable interest" of a Partner State, during such a "normal" period, in a facility located outside its borders was by no means the same as that of the cost of establishing a new facility for itself after the break-up of the Community, the two concepts would inevitably be confused and lead to controversy.

633. The concept of "communal" assets appeared at first to offer a fruitful basis for dividing assets equitably, but it eventually had to be recognized that it was difficult to define such assets precisely, and that efforts to divide the value of each separate asset of this type into three parts corresponding to the equitable interests of the Partner States, would present serious technical problems and produce at best highly controversial results.

E. Economic "Need"

634. Although the attempt to base a division of assets on the actual contributions of the individual Partner States to investment in EAC assets proved to be futile, it suggested a promising line of approach. This was to try to estimate on what scale each Partner State might have been willing to contribute, or could reasonably have been required to contribute, if investment in EAC assets had been financed solely by contributions from each State. In considering how much it was worthwhile to invest in a particular asset, each Partner State would have had regard primarily to the economic benefits it expected to derive from that asset. Its estimate of this economic benefit could be regarded as a measure of its economic need for that asset.

635. In making such an estimate for any particular asset, each State would have considered such factors as population, area to be served, foreign trade, and the location and nature of agricultural, industrial and service activities. These and a variety of other economic considerations would have played a part in the decisions of individual States on such matters as a railway expansion, the acquisition of rolling stock, the size of a port investment, or the location of telephone and telegraph facilities.

636. Clearly, however, an analysis of the economic benefits derived by each Partner State from each separate type of EAC asset would call for elaborate and time-consuming economic studies outside the terms of reference of the Mediator. Moreover, such studies were bound to depend on questionable assumptions and could only have produced highly controversial results, especially as, in the case of some assets, political or strategic considerations might have been significant.

637. Although it would be very difficult to assess the benefits a State derived from any particular asset, it can certainly be argued that the benefits each Partner State obtained from the assets of the EAC institutions as a whole, and therefore the amount it could reasonably have been required to contribute to the creation of those assets, corresponded in some measure to that State's economic condition. Thus, the benefit a Partner State received from EAC services and the investment it would have been willing to make to obtain those services must have been broadly in proportion to such factors as its population, the volume of its internal and external trade, its Gross National Product and other such factors. It would, however, be going too far to assume that the proportion was exact.

638. This approach naturally led to a consideration of whether there was some readily available and simple measure of a country's economic needs or status. Such partial indicators as foreign trade, government revenues, or GNP, seemed to capture, although very imperfectly, one aspect or another of the relative economic standing of the Partner States but none captured the whole pricture. It was evident that some composite indicator was needed, which was likely to provide a better measure of demand for EAC services as a whole, and in this connection it was relevant to recall that the founders of the International Monetary Fund ("IMF") had been faced with a

F. International Monetary Fund Quotas

639. The Quotas of the IMF provide a measure of economic standing which combines a number of the individual indicators mentioned above and may thus be thought of as a measure of economic need for the services of the EAC as a whole.

640. As stated in a recent IMF publication[1], the Fund's system of Quotas constitutes "one of its central features". The Quotas are members' subscriptions. They are "used to determine the voting power of members, their contributions to the Fund's resources, their access to these resources and their share in allocations of SDRs". Thus, the financial structure of the Fund, a key aspect of its decision-making structure, and the use of its resources are all directly related to the Quotas of its members.

641. The Quota assigned to a member of the IMF reflects its economic size, or strength, and its financial position, in relation to other members of the IMF. It is a measure of its economic standing. Quotas are expressed in terms of Special Drawing Rights ("SDRs") and are calculated by a complicated formula which takes account national income, reserves, imports and exports, population, GNP and their variations over a period of time. The elements that make up the formula and

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1) This and the following paragraphs are drawn largely from The International Monetary Fund: Purpose, Structure and Activities (Washington, April 1980), pp. 13-15. See also Rudolph Kroc, The Financial Structure of the Fund (IMF Washington, 2nd edition, 1967), p. 3; Joseph Gold, Membership and Non-Membership in the International Monetary Fund (Washington, 1974), pp. 169-79; "Fund Members' Quotas Govern Subscriptions, Drawing Rights, votes", IMF Survey, Volume 7, 1978, pp. 121-25: "Multiformula Method Adds Flexibility in the Calculation of Members' Quotas", ibid., pp. 166-68.

the weight given to them have been revised and refined from time to time. After 35 years of refinement, the IMF Quota has acquired a high degree of sophistication and universal acceptance as a measure of relative economic status. There is no other formula which is internationally recognised for this purpose.

642. Article III, Section 2(a) of the IMF's Articles of Agreement requires that the Quotas of all members be reviewed at intervals of not more than five years. Several general increases have been agreed among the members of the Fund in order to bring IMF Quotas into line with the growth of the world economy and of the consequent need for additional international liquidity. In addition, the IMF's Articles allow it to approve a special increase in the Quota of a particular member if justified by a change in that member's economic position in relation to other members. It is important to note that, under Article III, Section 2(d), the Quota of a member of the IMF "shall not be changed until the member has consented" to the change.

643. When the three Partner States became independent and joined the IMF in 1962/63, the Quotas for each proposed by the IMF differed slightly. However, at the request of the Partner States, the IMF set their Quotas at exactly the same amount, SDR 25 million, equivalent to US$ 25 million, the small adjustments for which this called being allowed by IMF policy. Five years later, in 1968, following a general review of Quotas, the economic ranking of the Partner States was still considered to be about the same, and their Quotas were set at SDR 32 million of US$ 32 million. This was the situation when the EAC came into existence at the end of 1967. Thereafter, the Quotas diverged as a result of differences in the economic development of the Partner States. The following

table shows the Quotas at five-year intervals from independence until the second quarter of 1978, when new Quotas were applied following a general review.

Quotas in SDRs (US$): Percentages of Total Quotas

	Kenya	Tanzania	Uganda
At Independence (1962/63)	25m (25m) 33.3%	25m (25m) 33.3%	25m (25m) 33.3%
1968	32m (32m) 33.3%	32m (32m) 33.3%	32m (32m) 33.3%
1973	48m (57.9m) 36.9%	42m (50.7m) 32.3%	40m (48.3m) 30.8%
1978	69m (89.9m) 39.7%	55m (71.7m) 31.6%	50m (65.1m) 28.7%
Average '68/'73/'78	36.7%	32.4%	30.9%

In accordance with Article III, Section 2 (d) of the Fund's Articles, these Quotas were accepted by the Partner States.

644. If there is merit in the use of IMF Quotas as a factor in determining an equitable division of assets, the question arises as to which base date to use. It may be argued that, since the Mediator's terms of reference call for an equitable division at mid-1977 and since the 1978 Quotas are based on 1977 data, the 1978 Quotas might be the most appropriate yardstick for the situation at June 1977.

645. There may also be good reasons for selecting the 1973 Quotas 1973 being midway between the inception of the EAC in 1967 and its dissolution in 1977. These 1973 Quotas incidentally correspond almost exactly to the average of the Quotas fixed in the three years 1968-1973-1978. The merit of these 1973 - or average - Quotas is that EA Railways which accounts for over

50% of the EAC assets ceased for all practical purposes to operate as an EAC Corporation at the end of 1974, and that the 1973 Quotas are those nearest to this date. Moreover, the other EAC institutions began gradually to disintegrate at that time. It can thus be argued that the years 1973-1974 were the last "normal" period of EAC activity.

646. Still another possibility would be to measure economic needs at the creation of the EAC in 1967, and therefore to use the IMF Quotas of 1968 as a guide to an equitable division of assets and liabilities. At that time, there was a clear political will in favor of a Community, and it can be argued that relative economic need at that time formed the basis of the partnership. The choice of the appropriate set of Quotas depends on the relative weight attached to each of these considerations.

647. Whichever is used, it should be noted that although the IMF Quotas are not an ideal measure of need for the purpose of the mediation, they are the best available. Just as a partial indicator may miss some essential factor influencing a particular country's need for assets of the Community type, so a composite indicator like the IMF Quota, designed to be applicable to all countries, may overstress some and understress other factors determining that need.

648. To sum up, economic need for, or benefit derived from, the services of the Community is a measure of the interest of each Partner State in its assets. It would be difficult, time-consuming, and perhaps fruitless to attempt an examination of need for each of the services from locust control to port-storage or to communications. Instead, it is reasonable to conclude that each State's interest in the global pool of assets was roughly proportional to its economic strength. A

search for acceptable indicators of economic strength suggests that, while many provide guides to one aspect or another of the economies of the three States, all of them have significant weaknesses as bases for dividing the assets of the EAC. The IMF Quotas, by combining some of the most important individual indicators, place a comparison of the three Partner States on a broader basis than any partial indicator. They thus provide a useful, though by no means perfect, measure of relative economic benefit.

649. It is necessary to emphasize that "need" is here used in the sense of effective demand, and not of "lack". It has been suggested that the use of the IMF Quota implies that "to him that has, more shall be given; and to him that has less, even that little shall be taken away". However, as the Partner States themselves have stated, the purpose of the mediation is not to propose a redistribution of wealth among the Partner States so as to bring about greater equality, but the much narrower one of equitably dividing such assets as rolling stock, workshops and stations and port facilities, without regard to the effect the proposed division will have on the distribution of wealth among the Partner States.

G. Economic Damage

650. The Mediator gave thought to whether economic damage or economic loss due to the disintegration of the EAC should be taken into account in a fair division of assets and liabilities. Certainly there was damage and loss. The absence of stores or repair facilities in one or other of the Partner States made maintenance more difficult and hastened the deterioration of equipment. The costs of such stores and repairs were greater than would otherwise have been the case. The disruption of transport, communications and trade and the

erection of barriers to the movement of people and of money affected (though not equally) the economies of all the Partner States, reducing employment, income and the rate of growth. It is true that countries with certain facilities were able to benefit from them while those without them had to pay for them, sometimes excessively. It was argued that these losses and gains should be taken into account in dividing assets and liabilities.

651. The Mediator sees his task, as defined by his terms of reference as confined to valuing the net assets of the EAC at the time of its dissolution, i.e. June 1977, and considering how far the de facto geographical distribution of assets at that time was equitable. Insofar as the process of breaking up had already affected the value of EAC assets at that time, e.g. by causing neglect of maintenance through lack of access to repair shops, it has been taken into account in the valuation of assets already described, and insofar as the de facto distribution of assets was inequitable, the Mediator has taken account of it in his proposals.

652. The Mediator realises that the value of the various assets may have changed appreciably since the "division dates". Clearly, however, he cannot consider what losses one or other Partner State has sustained for this reason. He also realizes that, even before the final dissolution of the EAC in 1977, the three countries had suffered various degree of economic damage from the gradual deterioration of the operation of the EAC institutions which is not reflected in the valuation of the assets. This damage is spread over the whole economies of the Partner States in such shapes as business losses due to less efficient services, loss of employment, and slower economic growth. Besides the economic damage that has resulted from the less efficient operation of what were formerly EAC

services, there is damage due to newly erected barriers to trade, financial transactions and the movement of people between the three countries. An assessment of this damage, as well as lying outside the Mediator's actual terms of reference, would call for a type and scale of enquiry that it would have been totally impracticable to include in those terms, or to complete within a reasonable period of time. It would be difficult, if not impossible, even after exhaustive study, to separate economic loss attributable to the breakdown of the EAC from economic loss due to other factors.

653. Moreover, even if this difficulty could be overcome, and agreement reached on the amount of damage each Partner State had suffered as a result of the breakdown of the EAC, the question of compensation that would then arise could not be settled without imputing degrees of responsibility for the breakdown. This is a delicate issue better left to future historians than to the Mediator.

H. "Inverting" Geographical Location

654. In part, as an effort to deal with the issue of "economic damage", it has been suggested that equity be measured in inverse proportion to the value of assets located in a Partner State, on the grounds that since June 1977 the Partner States have in effect "rented" the EAC assets and have derived economic benefits from them, the benefits being the greater, the greater a country's holding of these assets.

It is certainly true that "inverting" the results of geographical location would compensate the "have nots" at the expense of the "haves", as can be seen from the following table, which compares the actual geographical distribution of assets with a distribution in inverse proportion to actual geographical location.

	Kenya	Tanzania	Uganda
Assets held	6,301m	4,280m	1,553m
Actual %-age distribution	51.9%	35.3%	12.8%
Inverse %-age distribution (or inverse equity in %)	15.3%	22.6%	62.1%
Consequent Equity in Shs.m	1,857m	2,742m	7,535m
Excess/(shortfall) of assets actually held	4,444m	1,538m	(5,982)m

655. There is no convincing argument that inverting the percentages yields a more reasonable measure of equity than present geographical distribution itself which, in the Mediator's view, is not a fair measure of equity. On the contrary, measurement by inversion is equally unfair. It simply reflects a swing of the pendulum, another exaggeration. More important, however, there is no rationale underlying inversion, which has no basis in history, in "ownership", in financial contributions or in need. It represents distribution rather than an equitable division. It is based on the idea of compensation for the availability or non-availability of EAC assets in a Partner State after 1977, i.e. for economic damage or gain resulting from the break-up of the EAC. As explained above (paragraphs 650-658), the Mediator does not consider economic damage or gains after 1977 as a factor to be taken into account in determining an equitable division of assets and liabilities at the division dates.

656. At the same time, the Mediator wishes to remind the Governments that, to the extent that the geographical distribution of assets on 30 June 1977 was inequitable, Partner States that enjoyed excess assets gained in the years that followed

and those that suffered from a deficiency, lost. This is an unfortunate consequence of the break-up of the Community which the Partner States may consider taking into account in reaching agreement on compensation during negotiations, although it may not be easy to estimate such compensation.

The Mediator's Proposal

657. The Mediator's findings with respect to the de facto distribution of net assets among the Partner States are given in Part V of this Final Report. For the reasons given in this Part VI, physical location is only a partially satisfactory measure of equity. The Mediator's next task, therefore, was to find a criterion or criteria of the fairness of the de facto distribution. As a result of the review of various alternatives described above, the Mediator concluded that the relative "economic needs" of the Partner States for the services provided by the EAC, as determined by such factors as their geographical size, population, output and trade, provided a reasonable criterion. A consideration of possible measures of such need suggested that the IMF Quotas provided a composite indicator which reflected the relative demand of the Partner States for EAC services, and hence also the relative benefit they derived from those services. They were not to be taken, however, as precise measures of relative need.

658. The Mediator was thus left with a de facto division of assets and a standard of fairness to be applied in judging that de facto division. Actual geographic location gave weight to the fact that, whatever the origin of the services, their expansion took place primarily by reference to territorial considerations and thus reflected "historical" or past needs. On the other hand, IMF Quotas are composite indicators reflecting the relative need for EAC services. To the extent

that a difference exists between the results of geographical location and present economic need, the former has to be corrected by the latter.

659. There remain two questions. The first is, which Quotas to use. A case may be made (as suggested in paragraphs 643 to 646) for the Quotas of 1978 or 1973 or 1968 or the average of the Quotas of 1968/73/78. On balance, the Mediator recommends the average Quotas, which differ only negligibly from the 1973 Quotas, because they cover the full lifetime of the EAC Community and reflect the economic changes which occurred during that lifetime.

660. The second question is how much weight to give to economic "need" in correcting the existing geographical distribution. The Mediator could find no clear basis for deciding on relative weight. After considering alternatives and consulting his advisers, he decided to attach equal weights to the existing distribution of assets and to economic "need" - 50% to geographical location and 50% to the average IMF Quotas. This solution is not inevitable in the sense that logic leads to it. It is a practical compromise which has the merit of fairness, simplicity and reasonableness. The Partner States should judge the situation in this light, in a spirit of co-operation and compromise, recognising that all parties will gain from a fair solution.

661. The following table compares the actual distribution of assets at the breakdown of the Community in mid-1977 with a division based on his recommendation that equal weight be given to the geographical location of the assets and to the relative economic "need" of the Partner States as reflected in their average Quotas:

Line 1 represents the de facto distribution of net assets set out in paragraph 503 of this Report.

Line 2 shows what the distribution of net assets would be if the division was made entirely on the basis of average IMF Quotas.

Line 3 indicates the division on the basis of a 50/50 mix of location and Quotas as proposed by the Mediator. Finally,

Line 4 shows the excess or shortfall of net assets actually held by each State compared, with the division proposed by the Mediator as in line 3 (50/50 mix). Kenya and Tanzania have an excess of net assets while Uganda has a deficit.

	Total	Kenya	Tanzania	Uganda
	Shs.m	Shs.m	Shs.m	Shs.m
1. Geographical distribution	12,134 (100%)	6,301 (51.9%)	4,280 (35.3%)	1,553 (12.8%)
2. IMF Average Quotas distribution	12,134 (100%)	4,453 (36.7%)	3,931 (32.4%)	3,750 (30.9%)
3. Equal weights to geographical distribution and IMF Quotas[1)]	12,134 (100%)	5,362 (44.2%)	4,106 (33.8%)	2,666 (22.0%)
4. Excess/(deficit)				
1-3 (location and average Quotas)		939	174	(1,113)

662. The de facto net assets holdings of Kenya and Tanzania are respectively Shs. 939 million and Shs. 174 million higher than would be required by a division on the basis of the equal mix of location and need, proposed by the Mediator, and Uganda's holdings is correspondingly Shs. 1,113 million lower. It follows that, in the interest of equity, Kenya and Tanzania should compensate Uganda for its shortfall of Shs. 1,113 million in

1) Adjusted for transfer assets.

the proportions in which they hold excess assets. These proportions are: 84.4% for Kenya, 15.6% for Tanzania.

663. The conclusion that Uganda has a shortfall of Shs. 1,113 million obviously rests on the choice of weight to be attached to economic need. A weighting other than 50% : 50% would be to the advantage of one or two Partner States and to the disadvantage of the others. Giving more weight to the existing geographical location would be advantageous to the countries already holding a greater portion of assets (Kenya and Tanzania); giving greater weight to the IMF Quotas would benefit the country holding fewest assets (Uganda). The advantage or disadvantage varies with the weight given to economic need.

664. It was suggested to the Mediator that it might be of interest to have calculations of the distribution of assets that would result from the use of the 1968, 1973 or 1978 Quotas instead of the average Quotas, and from various mixes of the three criteria of location, Quotas and "equality". He has accordingly made some calculations of this kind which are attached as Appendix "T".

665. It may be helpful to state again that the Mediator, in his search for a formula for the equitable division of the assets of the Community, considered all practical alternatives and discussed them with advisers. He has had to conclude that a combination of geographical location and economic "need" provides an equitable basis for the division of assets and liabilities, and that giving a 50% weight to need has the merit of reasonableness, simplicity and fairness.

The Case of India and Pakistan

666. In the course of his work the Mediator reviewed the discussions on the division of assets and liabilities which took place on the occasion of the partition of India in 1947 (and in which frequent references were made to the earlier division of assets between Burma and India). Of course, the partition of a single sovereign Dominion into two parts was vastly different from the division of a Community made up of three sovereign entities which had existed before they joined to form a Community. Nevertheless, there were many similarities between the terms of reference in the two cases and between the factors taken into consideration.

667. In the Indian case, a committee was appointed:

a) to compile lists of assets by broad categories, showing value and location;

b) to make recommendations as to the division of assets. ("The general principle would be to assure the greatest good of the two states, but if there were disputed claims for fixed assets, like plant and machinery, the removal of which might be detrimental to the interests of the other Government, the factors of each case should be reported for consideration by the Partition Council");

c) "to make recommendations in regard to financial settlement between the two Governments arising from the above..."

The Committee's final report stated that "a proper listing of assets ... was an almost impossible task, because of absence of records, inventories not maintained or not complete or not properly priced, impracticability of determing values in certain areas". For assets not properly identifiable, a broad category of "Miscellaneous Items" was established, with a global valuation. The division of assets was ultimately decided on the basis of:

a) geographical location,

b) financial compensation for "needs", and

c) division of liabilities in proportion to assets held.

Similar considerations were followed in the earlier division of assets between Burma and India.

668. In the end, many ad hoc decisions were made which, while some may have been individually objectionable to one or other Dominion, were accepted as parts of an overall agreement which was considered fair.

PART VII

COMPENSATION FOR INEQUITY IN THE DISTRIBUTION OF NET ASSETS

701. Kenya and Tanzania need to compensate Uganda for the latter's shortfall of assets in order to achieve the recommended equitable division. Uganda's deficit of Shs. 1,113 million should be made up by Kenya to the extent of Shs. 939 million and by Tanzania to the extent of Shs 174 million, a ratio of 84.4% to 15.6% (paragraph 661).

Some Alternative Methods of Compensation

702. The form or forms which compensation is to take can be decided only by the Partner States, and therefore will be among the principal subjects of the negotiations. Nevertheless, it may be helpful to suggest some alternatives which they may wish to consider, to comment on them and to make recommendations.

Payment of Cash

703. The quickest and simplest way of compensating Uganda is by cash payments (in convertible foreign currencies). Once the amount is agreed upon and paid there remains no question for future interpretation or consideration which might create new tensions. Uganda can use the cash received as it sees fit, without further consultation. The question of compensation is thus disposed of, to the benefit of all concerned.

704. If the immediate cash payment of the full amount of compensation imposes too heavy a burden, then the Partner States might agree on installments to be paid in cash over a specified period, and on the interest payable on the outstanding balance.

705. If the decision is that Kenya and Tanzania compensate Uganda in cash for their respective shares of its shortfall, Uganda will receive Shs. 1,113 million in cash while retaining Shs. 629 million in long-term debt. The total position for the three Partner States showing debt assumed and cash paid or received, will then be as shown below.

	Ref.Para.	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
Long-term debt assumed	801	2,864	1,266	969	629
Cash payments/ (receipts)	661	-	939	174	(1,113)
Total debt and payments/(receipts)		2,864	2,205	1,143	(484)

Details of the allocation of long-term debt are set out in Part VIII of this Report and in Appendices "O" to "Q".

Assumption of Long-Term Debt

706. Another possibility is the assumption by Kenya and Tanzania of some of the long-term debt which Uganda would have to accept in consequence of the proposed equitable division of assets. Part VIII of this Report notes that the outstanding long-term debt of the EAC institutions amounted to Shs. 2,864 million. Uganda's equitable share of this debt would be Shs. 629 million. This amount is less than Uganda's shortfall of net assets and in principle, therefore, all of it could be transferred

707. The transfer of external debt which Uganda would otherwise have to assume would have advantages similar to those of a cash transfer. That is, it would be simple and quick, although subject to agreement with creditors, and would not leave any matters to be negotiated in the future.

708. Unfortunately, debt is not a fungible pool which can be divided and reassigned at convenience. There are limitations, some imposed by the debtors and some by the creditors. Some of these limitations are mentioned in Part VIII, in which the Mediator suggests some criteria for the assignment of external debt and calls attention to other relevant factors. The conclusion is that Uganda could effectively transfer Shs 498 million of debt, an amount arrived at by deducting from Uganda's overall debt burden of Shs. 629 million, the amount of loans allocated specifically of Shs. 131 million (paragraph 811). Such a full transfer would, however, raise other problems.

709. From Uganda's viewpoint, the transfer of debt has one potential serious disadvantage. Several aid-giving countries may be willing in due course to ease the burden of debt owed to them by the Partner States. The country with the highest debt would stand to gain most from such concessions by the creditors. The transfer of debt might thus prove to impose only an illusory burden on Kenya and Tanzania insofar as they assumed debt on which they might have to make no, or greatly reduced, service payments, while continuing to enjoy their excess of assets. Thus, while this form of compensation cannot and should not be ruled out, it should be limited to IBRD loans, for which a change of terms is unlikely.

710. If this alternative proposal of compensation partly in cash and partly by a reallocation of Uganda's share of IBRD loans is accepted, Uganda would assume debt totalling

Shs. 276 million and would receive cash totalling Shs. 760 million (Shs. 1,113 million shortfall less redistributed IBRD loans of Shs. 353 million). The total position, taking account of debt and cash, would then be as shown below:

	Ref.Para.	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
Long-term debt with IBRD loans redistributed	813	2,864	1,564	1,024	276
Cash payments/(receipts)	816	-	641	119	(760)
Total debt and payments/ (receipts)		2,864	2,205	1,143	(484)

Further Transfer of Assets

711. A third method of compensating Uganda would be by the physical transfer of assets in addition to the small amounts already moved or which the Mediator recommends should be moved. Railway wagons, ships and spare parts are possibilities. This could also, in theory, be accomplished quickly. However, the Mediator understands that substantial additional physical transfers of assets would not be welcome. In any event, there are further obstacles. The assets in question are ageing, and with each passing month their value becomes more debatable. Transfer of assets would thus raise the question of their valuation, and would inevitably evoke comparisons with the capacity, quality and price of comparable new goods. Moreover, the range of potential transfers is limited and offers no real solution to the problem. Although the Mediator does not believe that it would be easy to arrange or effect transfers of sufficient magnitude, this is a matter for the Partner States to review during negotiations.

Provision of Goods and Services

712. Uganda has need of many services which Kenya and Tanzania could provide. For instance, for an agreed period of time:

a) Uganda might be charged reduced freight rates or allowed free carriage of goods to or from Indian Ocean seaports.

b) Ugandan goods might be given free port warehousing facilities in Mombasa or Dar es Salaam.

c) Repair facilities for Ugandan locomotives and rolling stock might be provided in the railway workshops in Nairobi.

d) Maintenance services might be provided for Uganda Airlines.

e) Uganda might be allowed to use the Longonot earth satellite station free or at reduced rates.

f) Uganda might be given free use of ships, tankers and port facilities on Lake Victoria, or charged very low rates.

g) Uganda might be provided with other needed goods or services.

The Partner States may wish to consider these and possibly other alternatives during their negotiations.

Provision of Credit for Goods and Services

713. Tanzania and Kenya might also provide Uganda with credit for the purchase of goods and services on commercial terms. With respect to both sales of, and credit for, goods and services, the same thorny question arises as in the case of transfers of assets - the question of pricing.

Provision of Facilities or New Capital Assets

714. Uganda needs buildings in Kenya and Tanzania for official and other purposes, in the capitals, the seaports and elsewhere, which could be provided by those countries if suitable buildings already exist, or which they could finance by grants. Such buildings might be provided free, or credit given for their construction. More important, development projects in Uganda might be financed by external loans for the repayment of which Kenya and/or Tanzania assumed responsibility. Although such a device might create difficult problems for international agencies, it should be explored both with them and national aid agencies. Such exploration is feasible, however, only if negotiations among the Partner States dispose them to undertake unequivocal commitments: by Uganda, commitments to carry out the loan projects; and by Kenya and Tanzania, to repay the loans.

715. The direct provision of new capital assets by Kenya and Tanzania raises questions about pricing, which might well take some time to negotiate and, even after agreement, be the source of recurrent dissension. However, the suggestion that Kenya and Tanzania, jointly or severally, agree to service external credits for productive projects in Uganda would reduce this difficulty; for such an arrangement would have

the great advantage for all parties that, because the project would be evaluated and supervised by an external agency, it would not need to become a subject of controversy among the Partner States. Unreserved agreement by the Partner States on some compensation in this form is likely to weigh heavily in the counsels of potential providers of financing.

Claims and Counter-Claims

716. During the past few years, the Partner States have brought claims and counter-claims against one another. Although it may be possible, as part of an overall settlement of the division of assets and liabilities, for each to relinquish some of its claims, this method of compensation obviously raises delicate political issues.

The Mediator's Recommendation

717. None of the suggested devices may provide enough to cover Uganda's shortfall. A combination of these and other alternatives may therefore be needed. The choice is not easy, since it raises issues of national and political sensitivity as well as economic considerations affecting the welfare of the Partner States.

718. The Mediator proposes that the first option be a full settlement of compensation owed to Uganda in cash. To the extent that cash transfers fall short of a full settlement, he recommends an IBRD-debt transfer and then, the external financing of new productive facilities in Uganda by loans to be serviced by Kenya and Tanzania. The other alternatives mentioned above should only be considered if any shortfall should remain after cash payments, the assumption of debt and the external financing of new facilities.

PART VIII

DIVISION OF LONG-TERM LIABILITIES

Introduction

801. In Part V, it was shown that long-term debt outstanding at 30 June 1977 totalled Shs. 2,864 million. It was also proposed that this sum should be allocated among the three Partner States in proportions corresponding to an equitable division of net assets, which totalled Shs. 12,134 million as of that same date. Since the actual geographical distribution of assets was not considered equitable, the Mediator proposed in Part VI that physical location be modified by "need", as measured by the average IMF Quotas. The result was a recommendation that, in a fair distribution of net assets, Kenya would receive 44.2%, Tanzania 33.8%, and Uganda 22.0% (paragraph 661). These percentages, when applied to the total long-term debt, would give the following results:-

	Net Assets Shs.m	%-age	Long-Term Debt Shs.m
Kenya	5,362	44.2	1,266
Tanzania	4,106	33.8	969
Uganda	2,666	22.0	629
Total	12,134	100.0	2,864

802. As indicated in Part VII, however, the ultimate division of long-term liabilities will depend on the manner in which Kenya and Tanzania compensate Uganda for its shortfall of assets. If the Partner States accept the Mediator's recommen-

dation that the compensation be paid entirely in cash, the long-term debt assumed by each Partner State should be in direct proportion to its equitable share of net assets. If, on the other hand, part of the compensation is settled by a re-allocation of some of Uganda's share of the long-term debt, Kenya and Tanzania will have to repay a greater proportion of the outstanding loans and Uganda a smaller proportion.

The Mediator's Guidelines

803. The Mediator adopted the following guidelines in approaching the division of long-term debt.

a) It is desirable that loans payable in one of the Partner States should be assigned to that State to eliminate the necessity for cash payments between Partner States. If a loan is payable partly in a Partner State and partly abroad, this applies only to the part payable locally.

b) In the case of certain minor debts, such as the overdrafts of EA Railways' and EA P&T with the Crown Agents and the EA P&T loan from Cables and Wireless, the Partner States have already agreed on a division of the outstanding balances and in most cases have already paid off the creditors. The Mediator proposes these agreements be implemented unaltered.

c) For the convenience of foreign private creditors, which are relatively small, the Mediator decided not to divide their loans, but to allocate them to the most appropriate Partner State. He has done the same with the small outstanding loan from the Government of Zambia, which has been allocated to Tanzania, where the funds were spent.

d) Two-thirds of the dollar loans secured on the EA Airways' DC9 aircraft have been allocated to Kenya and one-third to Tanzania since, on the division dates, two of the three DC9 aircraft were in Kenya and the third in Tanzania.

e) The remainder of the loans, amounting to Shs. 2,068 million, which are substantially loans from Government agencies and international organisations, raised more difficult issues.

804. The Mediator considered allocating loans to the country in which the assets they financed were located. This proved quite impractical. In the first place, some of the loans had been used for general purposes, such as spares or working capital, and even when they had financed specific assets, it was often impossible to locate the assets. Secondly, apart from the fact that some assets, even though located in a particular country were intended to benefit East Africa as a whole, this principle would have favoured whichever Partner State happend to have the greatest proportion of older projects financed by loans which had been entirely or largely repaid by the division dates, or of projects financed by the Corporations from internal funds.

805. The next approach considered was to assign each loan, as a whole, to one Partner State or another in such a way that each State assumed the total debt burden allocated to it in accordance with the principles stated in paragraphs 801 and 802. This method also proved impractical, for the outstanding loans have different interest rates and maturities, and the service payments are due in different currencies. To allocate undivided loans, it would be necessary to reduce all loans to a common denominator by calculating their present value at the division dates. Such a calculation, however,

would entail the selection of a discount rate for each loan, an exercise which would be subject to considerable debate. Moreover, in view of IBRD's option to decide in which currency loan repayments are to be made at the time they are due, it is impossible to calculate the exact net present value of IBRD loans.

806. The Mediator was therefore led to conclude that the amount of each loan outstanding on the division dates should be divided pro rata among the three Partner States. This would mean that each Partner State would receive its fair share of loans with more or less attractive terms.

807. The Mediator had to confront another issue. As noted in Part VII, it is quite possible that certain creditors may agree to ease the terms of their loans to the EAC institutions, as part of a general East African settlement. In this event, Uganda would be unfairly penalized, and Kenya and Tanzania would receive benefits to which they were not entitled, to the extent that debts transferred to them by Uganda were forgiven by the creditors. Since the terms of IBRD loans are not likely to be eased, only those loans could be taken over without risk of such an unfair situation arising.

808. Accordingly, two alternative proposals are suggested to the Partner States. Alternative A assumes that all loans are divided among the three Partners, and that none of the loans is reassigned. Alternative B assumes that Kenya and Tanzania will take over Uganda's share of debt payable to the IBRD.

Proposal for Equitable Division

Alternative A: No Reallocation of Uganda's Debt

809. In Part VII of this Report, the Mediator proposed that Kenya and Tanzania compensate Uganda for its shortfall of net assets by cash payments. If this proposal is accepted, each State will, after the payments, be holding its equitable proportion of net assets and will therefore have to assume a corresponding portion of long-term liabilities (paragraph 801). The suggested division of the individual loans on this basis is set out in Appendix "P".

810. The division of individual loans among the Partner States follows the general guidelines set out above. Therefore:

a) loans payable within a Partner State have been assigned to that State;

b) minor debts which have already been settled or which the Partner States agreed to divide have been allocated in a accordance with these agreements;

c) loans from foreign private creditors and the small loan from the Government of Zambia have not been subdivided but allocated to the most appropriate Partner State, according to the purpose of the loan;

d) the dollar loans attaching to EA Airways' three DC 9 aeroplanes follow the allocation of the aeroplanes;

e) the remaining loans, other than those from the IBRD, which are principally from overseas governments and international agencies, have been divided in the same proportions as the equitable division of net assets (paragraph 801); and

f) IBRD loans have been allocated among the Partner States in the proportion necessary to bring the total amount of all loans allocated to each country up to its equitable share of long-term debt.

811. The proportions in which loans from the IBRD have been divided in accordance with the above principles, are calculated as follows:

	Ref.Para.	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
Equitable division of loans	801	2,864	1,266	969	629
Less loans allocated on specific basis	810 a-d	796	359	306	131
		2,068	907	663	498
Less other international loans (not IBRD)	810 e	657	290	222	145
IBRD loans	810 f	1,411	617	441	353

The above table indicates that, after taking into account all other loans, some of which are assigned on a specific basis and others in proportion to net assets, the IBRD loans, amounting to Shs. 1,411 million, should be divided in such proportions[1)] that each country takes on total liabilities in proportion to its equitable share of net assets, i.e. Kenya 44.2%, Tanzania 33.8% and Uganda 22.0% (paragraph 661).

1) These proportions would be: Kenya 43.7%, Tanzania 31.2%, Uganda 25.1%.

Alternative B: Reallocation of Uganda's Portion of IBRD Loans

812. Alternative B differs from Alternative A in that Uganda's obligation to pay its share to IBRD is taken over by Kenya and Tanzania as part compensation for Uganda's shortfall of net assets. As indicated in paragraph 811, the total amount owing to IBRD at the division dates was Shs. 1,411 million, of which the share assigned to Uganda was Shs. 353 million.

813. The Mediator proposes that this amount of Shs. 353 million should be divided between Kenya and Tanzania in proportion to their excess net assets[1), as follows:

	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
Debt burden before transfer (paragraph 811)	2,864	1,266	969	629
Transfer from Uganda	-	298	55	(353)
Adjusted debt burden (Appendix "Q")	2,864	1,564	1,024	276

Kenya and Tanzania may prefer, however, that Kenya should take over all the reassigned IBRD debt, or that Tanzania should take over enough to extinguish the entire balance it owes Uganda. This will be for the Partner States to decide.

814. The only change in the division of individual loans from that set out in Appendix "P" is in the allocation of IBRD loans, the division of which is calculated as follows:

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1) Kenya 84.4%, Tanzania 15.6% (paragraph 662).

	Ref.Para.	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
IBRD loans divided as above	811	1,411	617	441	353
Transfer from Uganda	813	-	298	55	(353)
Adjusted division (Appendix "Q")		1,411	915	496	-
		100%	64.8%	35.2%	-

Each individual IBRD loan will also be divided between Kenya and Tanzania in the above proportions.

815. The division of the individual long-term loans on the above basis is set out at Appendix "Q" and may be summarised as follows:

	Ref.Para.	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
Loans allocated on a specific basis	810 a-d	796	359	306	131
IBRD loans	814	1,411	915	496	-
Other international loans	810 e	657	290	222	145
Adjusted debt burden	813	2,864	1,564	1,024	276

Uganda's Shortfall of Net Assets

816. Part VII of this Report dealt with the way in which Uganda might be compensated for its shortfall of net assets. If Uganda's share of IBRD loans is assigned to settle part of the shortfall, this will still leave a balance to be paid in cash (or some other way) as follows:

	Shs.m
Uganda's shortfall of net assets	1,113
less reallocation of IBRD loans	353
Remaining shortfall	760

On the basis of the figures in paragraph 813, this remaining shortfall would have to be met by Kenya and Tanzania in proportion to their excess assets (paragraph 662) as follows:

	%	Shs.m
Kenya	84.4	641
Tanzania	15.6	119
	100.0	760

Payments since the Division Dates

817. The Mediator has divided the loan liabilities at the division dates. He proposes that any payments made by one or other Partner State before those dates should stand for the purposes of the mediation. However, loan repayments made by each country after the division dates, under the Damry formula or under the interim arragements for repaying the loan from Societa Italiana per Condotte D,Acqua ("Condotte"), should be credited to it as payments on account of its final liability as calculated in paragraphs 801 or 813. The Mediator has not been able to obtain a complete picture of what repayments have been made since the division dates; furthermore, because of such matters as exchange rate fluctuations, he is unaware of the precise amount currently outstanding on each loan; in any case, further interim payments may well have been made before a mediation agreement is concluded. The Mediator addressed a request to the Partner States in April 1981 for detailed

information on such payments up to end December 1981 so that the necessary adjustments can be made to calculate the final liability figures.

Consultation with Creditors

818. The Mediator calls attention to the fact that many of the loans are guaranteed, jointly and severally, by the Partner States. The Mediator considers that, with the break-up of the EAC, these joint contingent liabilities have become inappropriate. He therefore proposes that joint and several guarantees be eliminated; indeed he thinks it would be unwise, now that the EAC has ceased to exist, to expect one Partner State to guarantee the liabilities of another.

819. The Mediator also calls particular attention to the fact that any agreement reached among the Partner States with regard to the allocation of loans or guarantees will require the agreement of their creditors. When the Partner States have agreed on a division of long-term loans and guarantees, they will need to so inform the creditors and to seek their consent.

PART IX

C L A I M S

Introduction

901. In order to obtain as complete a picture as possible of the state of affairs of the EAC institutions, the Mediator arranged for a notice to be published in July, August and September 1978 in the following newspapers inviting creditors to submit details of their trade claims against former EAC institutions:-

- the Official Gazettes of Tanzania, Uganda and Kenya;
- the Frankfurter Allgemeine Zeitung, West Germany:,
- the Financial Times, London;
- the Commerce America (U.S. Department of Commerce), Washington;
- the Commerce Business Daily (U.S. Department of Commerce), Washington;
- the Journal of the U.K. Department of Trade, London; and
- the Official Journal of the European Communities, Brussels.

Copies of the announcement were sent at the same time to the Partner States.

902. All trade claims addressed to the Mediator in response to this notice were also submitted to the Partner States, who were responsible for examining them to ascertain whether they were justified. This was done in some, but far from all, cases. The result is that no clear overall picture of claims has emerged. Apart from the failure or inability of the EAC institutions

to take a position on some of the claims, there were further difficulties, including:

a) There was a large number of claims, many of them for very small amounts;

b) some of the claims were not quantified;

c) some of the claims did not specify against which EAC institution they were made;

d) some of the claims related to periods after the cut-off date;

e) some of the claims did not specify the period to which they related;

f) many of the claims were for pensions, which have been dealt with separately in the mediation, or were for staff claims for costs and benefits arising out of the break-up of the EAC which the Mediator considers should be left for the individual Partner States to settle;

g) certain claims against EA Airways for lost baggage exceeded the maximum amount permitted by the IATA regulations;

h) some of the claims were from stockholders in respect of local loans in defaults;

i) in some cases the creditors' figures provided by the EAC institutions did not give enough detail to determine whether a claim was already reflected in the books.

Summary of Claims

903. The following paragraphs summarise the somewhat confused position on claims. As far as possible claims from loan stock-holders, claims from staff affected by the break-up of the EAC and pension claims have been eliminated.

EA Railways

904. A summary of the position in respect of EA Railways is as follows:-

a) Kenya

The value of claims received totalled some Shs. 22.9 million, of which Shs. 18.5 million, for rates, was from the City of Nairobi Council. The Mediator has not adjusted the figures in EA Railways' accounts for these claims, as he does not know whether they are already included in the amount of Shs. 112.2 million shown under the heading of demands payable under creditors (Appendix"E", paragraph 85). Furthermore, except for the rates claim, which it accepts, Kenya has neither accepted nor rejected any of the claims received.

b) Tanzania

Claims received locally amounted to some Shs. 20.3 million, of which Shs. 15.4 million was from EA Harbours (Shs. 11.3 million in respect of Kenya region) and Shs. 2.9 million was for audit fees. Apart from the audit fees, which have been accepted, Tanzania has been unable to confirm that any of the claims are payable. The Mediator has included in his figures the relevant portion of a claim for £ 1,200,556 from the Crown

Agents in respect of Tanzania Region's agreed share of EA Railways' overdraft, part of which was incurred after the division date.

c) Uganda

The Mediator has included in his figures the relevant portion of a claim for £ 1,381,551 from the Crown Agents in respect of Uganda Region's agreed share of EA Railways' overdraft. No adjustment has been made for the few other claims received, the largest of which is a claim of Shs. 0.2 million for wrongful dismissal on which, as far as the Mediator is aware, the court has not yet ruled.

EA P&T

905. The largest of the few claims made against EA P&T was one of only Shs. 1.2 million from International Aeradio Limited. Most of the other claims were from foreign post and telegraph corporations. The Partner States have not informed the Mediator that they accept any of these claims. Moreover, he has been unable to determine how far the claims are already reflected under creditors. Consequently, he has not adjusted the figures in this Report for claims against EA P&T.

EA Harbours

906. The Mediator has increased creditors of EA Harbours by Shs. 13.4 million to cover claims from contractors for work at Mombasa (Shs. 3.2 million) and Dar es Salaam (Shs. 10.2 million). All other claims have been excluded, as they have not been accepted by the Corporation.

EA Airways

907. As EA Airways has ceased operating and, in Kenya, is being liquidated, many claims against EA Airways were received in response to the Mediator's advertisement. They have been dealt with as follows:-

a) Kenya and Overseas

The Mediator received claims against EA Airways amounting to approximately Shs. 110 million. The total is mostly made up of two claims, as shown in the following table:-

	Shs.m
Claim from IATA (to 15 February 1977)	69.0
Claim from BAC (to 15 February 1977)	23.5
Others (approximately)	17.5
	110.0

These figures differ considerably from the provisional figures of the Liquidator in Kenya; however, it has not been posible to make a satisfactory reconciliation between the two sets of figures. The problems concerning EA Airways' creditors are discussed more fully in Appendix "H".

b) Tanzania

Tanzania has made a thorough investigation of claims, for which the Mediator is grateful. It has accepted most of the claims as valid. The Mediator had to exclude some of these claims, however, mostly because they related to expenses incurred after the break-up. This reduced the Tanzania claims as follows:

	Shs.m	Shs.m
Creditors paid	36.1	
Creditors paid by ATC	0.1	
Payments made for refund	0.2	
Creditors outstanding (principal list)	20.5	
Claims for refund of tickets		
(a) initial list	2.7	
(b) additional list	1.7	
Claims from former employees	7.0	
Supplementary lists		
(a) ticket refunds	0.6	
(b) creditors	1.5	
Terminal benefit paid	2.6	73.0
Less claims for repayment of DC9 loan (included in Mediation proposals, Appendix "P")		27.1
		45.9
Less claims which Mediator rejects as inappropriate:		
Claims from former emplyees	7.0	
Terminal benefit paid	2.6	
Commission and other expenses on sale of DC9	2.0	
Cost of repatriating Tanzania Staff from Nairobi	1.1	
Repair of F27S	1.9	
Claims not accepted by Tanzania	0.3	
Other personnel claims (included in Shs. 36.1 m)	0.9	
Apparent duplication	0.5	16.3
Claims not rejected by Mediator		29.6
Current liabilities as per paragraph 67 of Appendix "H" of Mediator's report		29.9
Difference		(0.3)

As the difference is notmaterial,the Mediator does not consider that an adjustment is required.

c) Uganda

Claims against EA Airways in Uganda totalled only Shs. 0.3 million, most of which related to a claim for rent from a company based in Mombasa, Kenya. Uganda has not taken a position on this claim and, as Ugandan officials state that, except for some small baggage claims, EA Airways in Uganda had no outstanding creditors at 15 February 1977, no adjustments have been necessary.

EA Extelcoms and EA Cargo Handling

908. No material claims were received against EA Cargo Handling and EA Extelcoms, so that no adjustments have been necessary.

G F S

909. As with EA Airways, a large number of claims were received against the GFS, most of which have been accepted by the Partner States and included in the accounts of the GFS at 30 June 1977. The Mediator has excluded the following claims received in Tanzania from the figure for current liabilities used in this Report, as they relate either to pensions or to costs consequent upon the collapse of the EAC, which he considered should not be taken into account (see paragraph 409):-

	Shs.m
Claims not accepted	0.9
Compensation for loss of office	23.8
Severance allowance/baggage	0.1
Pensions and gratuities	0.2
	25.0

After making the above deductions and excluding certain other staff claims, the amount of claims included in the GFS accounts is as follows:-

	Shs.m
Kenya	34.5
Tanzania	75.1
Uganda	0.9
Total (Appendix "K", paragraph 38)	110.5

Conclusion on Claims

910. In spite of the uncertainties described above, the Mediator is confident that a lengthy and detailed further examination of claims will not lead to any material alteration in the net assets of the EAC on which the mediation proposals are based.

The Administrator of Claims

911. It is probable that many of the claimants for whom no adjustment has been made do have a valid claim and that further claims may still be received. Furthermore, the Mediator possesses no full picture of the claims directly addressed to the Partner States. Both in the interests of equity and to

preserve the reputations of the Partner States, it is desirable that a procedure for settling contested claims be incorporated into the mediation agreement.

Accordingly, the Mediator suggests that an Administrator of Claims be appointed with power to settle the outstanding claims. He suggests the EADB as a suitable Administrator of Claims, although the Bank may be reluctant to take on this delicate and invidious task, since its role in one or other of the Partner States might be rendered more difficult as a result. Another possibility would be the appointment of an international official or agency, such as a firm of chartered accountants or a fiduciary unit, to handle claims. The cost of engaging such a firm might, however, be out of proportion to the amount of claims outstanding. Claimants can, of course, always resort to the courts; but this is too costly a way to recover small amounts.

Authority of the Administrator

912. a) The Administrator will be responsible for dealing with all commercial claims that have been, or will be, submitted to the Partner States, to the Corporations and to the GFS, and which have not already been included in the mediation agreement.

1) All claims already sent to them or to the Mediator, but which were not recognised in the mediation agreement, will be turned over to the Administrator from the date his appointment takes effect.

2) New claims will be received until 31 December 1982. The Administrator will take steps to make this deadline known.

b) The responsibility and powers of the Administrator will be determined by agreement among the Partner States. This agreement will confirm, on behalf of the Partner States, the Administrator's authority to adjudicate all claims of claimants that accept his jurisdiction. It will also confirm that each Partner State would pay or cause to be paid all amounts due by that Partner State.

c) Individual claimants will confirm their acceptance of the Administrator's authority, in appropriate form, if they wish the Administrator to deal with their cases. Claims not submitted to the Administrator can be pursued outside of the Administrator before appropriate courts.

d) The Administrator's awards will be binding and final on all parties.

Guidelines for the Administrator

913. While the Administrator will be the ultimate arbiter of the outstanding claims submitted to him, he will, within the limits of feasibility,be guided by the following principles:

a) *General*:

1) The Administrator will allocate claims in *local* currencies, if recognised, to the Partner State in which the service was performed.

2) Recognised claims, payable in *foreign* currencies, will be allocated by the Administrator to one or more Partner States, according to the circumstances in each case and keeping in mind an equitable division of assets and liabilities.

3) All joint and several guarantees will be eliminated.

b) EA Airways Claims:

EA Airways' claims will not be dealt with by the Administrator,-neither claims payable in local currency nor those payable in foreign exchange. Such claims will be addressed to, and decided upon by, the appropriate authorities of each Partner State.

Procedural Matters

914. a) The Administrator will be solely responsible for his decisions.

b) He will be assisted by a national from each Partner State as advisor, who will be nominated by his Government from among senior officials of the Department of Justice or the Judicial System, after consultation with the Administrator. These advisors need to be persons of professional ability and worthy of being entrusted with quasi-judicial functions. Their task will be to assess all claims in accordance with guidance from the Administrator, to advise on the justification of claims and to submit recommendations to the Administrator.

c) The Administrator can call on such other advisors as he may need.

d) The Office of the Administrator will be located in one or more places decided upon by the Partner States.

e) Each Government will provide the Administrator with appropriate offices, transport and secretarial facilities in its State.

f) The cost of the Administrator and his secretarial staff will in principle be borne by the three States in equal amounts. However, the Administrator may also adjudicate procedural costs to the claimants, when indicated.

g) The cost of each advisor will be borne by his own Government.

Administrator and EA Airways Claims

915. Claims against EA Airways will be excluded from submission to the Administrator of Claims for the following reasons:

1) Liquidation proceedings against EA Airways are now underway in Kenya. The Liquidator, appointed by a Kenyan Court on the basis of Kenyan Company Law, has already liquidated many of EA Airways' assets and has started paying out liquidation dividends to creditors accepted by him. If submission of new claims or of only partly satisfied old claims were now made to the Administrator, his findings might differ from those of the Liquidator. He could reject as invalid a claim already recognised by the Liquidator; or the reverse might happen. Since the Administrator of Claims is a final arbiter, there is a serious risk (indeed, inevitability) of conflicting decisions by the two authorities. This would have serious repercussions and cause confusion.

2) If the Administrator were to have jurisdiction over claims against EA Airways in Kenya, a difficulty would arise with respect to calculating a possible surplus or shortfall in EA Airways' assets over liabilities. Whereas the Liquidator based his calculation on the sales proceeds of assets, the Administrator would have to follow the valuation of the Mediator's expert which differs significantly from sales proceeds. The implication of this inconsistency on a possible surplus or shortfall in assets is obvious. Still further consequences would follow for the allocation of foreign debts among the Partners.

3) As for Tanzania and Uganda, the Mediator understands that most claims against EA Airways in their countries have been settled. But even if this were not so, the Mediator is convinced that, in the interest of consistency with Kenya's case, the Administrator should have no jurisdiction in these two countries. At first sight, this recommendation might imply that creditors in Kenya will be treated differently from those in Tanzania and Uganda. Creditors (local and foreign) in Kenya might receive only a liquidation dividend, whereas creditors in Tanzania and Uganda may be paid in full, since EA Airways assets in those countries exceed known claims against them. This is indeed so. But it is a consequence of the fact that liquidation proceedings are under way in Kenya, whereas this is not the case in Tanzania and Uganda. At this stage of the process, this situation cannot be changed.

The Mediator recommends that the Partner States accept the proposal that the Administrator of Claims have no jurisdiction over claims against EA Airways and that each Partner State should deal independently with outstanding commercial claims against EA Airways.

PART X

PENSIONS AND RELATED MATTERS

Introduction

1001. The Mediator proposes to deal with those assets and liabilities of the Community institutions which relate to pension schemes, provident funds and gratuity schemes entirely separately from their own assets and liabilities.

Technical assistance to the Mediator

1002. The United Kingdom Overseas Development Administration ("ODA") made available the services of an expert to obtain information about the pension schemes. An actuary from the United Kingdom's Governments Actuary's Department ("GAD"), which has in the past acted as actuarial consultant to the Corporations and the GFS, made a valuation of the pension schemes; his report to the Mediator forms the basis of Appendix "R".

Description of the superannuation schemes

1003. The different types of scheme adopted by the organisations of the EAC are as follows:-

a) Pension chemes. All the Corporations except EA Airways had pension schemes. The pension schemes have liabilities in the form of an obligation to pay pensions to employees who have already retired or who will in the future retire, to pay lump sums to families on the death of employees in service, and to pay pensions to the widows of employees. The schemes may have set aside investments to meet these liabilities. The value of the investments may be greater or less than the liabilities, which can be determined only by periodic actuarial appraisals. The Mediator's proposals take account of the relation between the present liabilities, as assessed by the actuary, and the value of the investments of the various pension schemes.

b) Widows and orphans pension schemes. Two Corporations, EA Railways and EA Harbours, had separate pension schemes for the widows of European and Asian staff only, but the responsibility for paying most of these pensions has been taken over by the UK Government. The residual liability of the two Corporations is insignificant and for this reason, as well as because of the lack of data, has not been included in the mediation figures. Nevertheless, the liability remains, and should be honoured.

c) Provident funds. EA Airways, EA Cargo Handling and GFS maintained provident funds, which are similar to savings banks in that accounts are kept of the contributions paid by each member, the corresponding employer's contributions and the interest credited. The total amount in the individual's account is paid out in specified circumstances, such as death or retirement. The amounts held in provident funds are the property of the members and not of the Community institutions, and therefore should not be included in the mediation.

d) Compassionate gratuity schemes. All the Corporations had gratuity schemes but, except for EA Railways and EA Harbours, the amounts were insignificant. Under these schemes,lump sums may be paid at the discretion of the organisation to non-pensionable staff on retirement or on death in service. However, at least in the cases of EA Railways and EA Harbours, payments have in practice been made to all eligible staff.

Pension schemes

1004. EA Railways, EA Harbours, EA P&T and the GFS administered their own pension schemes. The investments of the pension funds were kept separate from the other assets of these organisations. EA Airways had no pension scheme, EA Cargo Handling had two separate pension schemes, one in Kenya and the other in Tanzania, while EA Extelcoms had three schemes.

Categories of pensioners

1005. The Corporations and GFS pension funds apply to the following categories of pensioners:-

a) pensionable staff and widows covered by the take-over agreement between the three Partner States and the UK Government (see paragraphs 1006 to 1015 below);

b) pensionable staff who are citizens of Kenya, Tanzania or Uganda;

c) pensionable staff who are not covered by the take-over agreement with the UK Government, and who are not citizens of Kenya, Tanzania or Uganda ("non-nationals"); and

d) widows and orphans of pensionable staff who contributed to Railways locally-managed Widows and Orphans Pension Scheme, but who are not covered by the take-over agreement.

UK Government take-over of pensions

1006. The United Kingdom Government has agreed to meet the cost of part of the pensions and other benefits of the following categories of expatriate staff of the Corporations (EA Railways, EA Harbours and EA P&T) and the GFS:-

a) "Designated officers": mainly staff who were engaged through UK Government channels (e.g. the Colonial Office or the Crown Agents) and were designated by the UK Government to receive certain benefits. They are mainly UK expatriates.

b) "Non-designated officers": these, too, are expatriate staff, generally from India and Pakistan, who were employed on terms similar to those of the designated officers, but without entitlement to special benefits from the UK Government.

1007. The UK take-over agreement covers some 2,350 "designated officers" and 5,356 "non-designated officers". In addition, some 1,118 expatriate officers who were employed on local terms of service in the Partner States are not covered by the UK pensions take-over agreements. These pensioners are also mostly of Indian and Pakistani origin. The mediation must take account of the liability for the pensions of these "non-nationals", not covered by the take-over agreements, and also for the pensions of nationals of the Partner States. The corresponding investments of the pension fund must also be taken into account.

1008. The liability accepted by the UK Government in respect of the "designated" and "non-designated" officers covers:-

a) that part of pensions and gratuities paid since 1 April 1971 by the Partner States which is attributable to service with the EAC before 1 July 1962; and

b) the full amount of compensation due for loss of office after 1 April 1971 or, insofar as compensation payments were payable in instalments over five years, instalments payable after that date in respect of loss of office earlier.

1009. The agreements for the UK take-over of EAC pensions are in two stages:-

a) Stage I.

Under Stage I (November 1972) the Corporations and GFS continued to pay the whole of the pensions but, from 1 April 1971 up to the effective date of Stage II, the UK Government reimbursed the EAC for its share of the pensions. After the UK had made several reimbursements, it was agreed that the UK should suspend such payments and hold the balance due (some £ 7 million at 31 December 1977) against the EAC's obligation under Stage II.

b) Stage II.

Under Stage II, which became effective on 1 April 1979, the UK Government assumed the entire responsibility for paying the pensions of those whom it had agreed to cover. A capital sum (almost £ 4 million) is payable by the EAC to the UK Government to cover their share of the pensions,i.e. the post-independence element.

1010. It will be seen that, in principle, the division of the pension liability is the same in both stages. In Stage I the Corporations and the GFS actually paid all pensions, but recovered the share of the payments attributable to pre-independence service from the UK Government. Under Stage II, the UK Government pays all the pensions, but is compensated by the EAC and the Corporations for the post-independence element by the once-and-for-all payment of some £ 4 million.

1011. The final determination of capital sums payable by the EAC to the UK Government depends on calculations by an actuary which cannot be completed until all relevant data are available. The ODA has provided the Mediator with provisional figures (see paragraph 1014 below).

1012. Although the EAC and the Corporations undertook to pay the whole of the pensions up to the effective date of Stage II (1 April 1979), the EAC was unable to meet this obligation after its collapse and, in order to save the pensioners from hardship, the UK Government decided to pay the pensions. The latest information available to the Mediator on amounts paid is as follows:-

a) The UK Government has made ex gratia advances to individual pensioners totalling £ 532,286 as of 30 September 1978.

b) The UK Government has also (up to 30 August 1978) paid £ 1,132,122 to the Crown Agents, which paid pensions on behalf of the EAC, to make good the shortfall of funds remitted by the EAC since August 1977.

1013. Most of the total of £ 1,664,408 under a) and b) would in any event have been reclaimable by the EAC from the UK Government as the pre-independence portion repayable by the UK Government under Stage I. The post-independence element would not, however, have been refundable to the EAC, and the UK Government therefore intends to deduct this element, estimated at £ 0.5 million, from the sum it eventually pays over to the EAC.

1014. It therefore appears, that a residual amount of some £ 2,680,000 will be payable by the UK Government to the EAC, made up as follows:-

	£'000
Balance due from UK Government in respect of its share of pensions payable up to effective date of Stage II	6,963
Less: Capital sum due from EAC to UK Government in respect of their share of pensions payable after Stage II became effective	(3,783)
Estimate of net sum due to EAC under take-over agreements	3,180
Less: EAC share of Stage I *ex gratia* payment made by UK Government	(500)
Balance due by UK to EAC	2,680
Comprising	
EA Railways	1,886
EA Harbours	79
EA P&T	718
GFS	(3)
	2,680

1015. The Mediator's proposals for the disposal of the sum ultimately payable by the UK Government are described below (paragraph 1035) In brief, he suggests that the sum be set aside to provide pensions for non-nationals, and widows and orphans of non-nationals, for whose pensions neither the Partner States nor the UK Government accept responsibility. This proposal depends upon confirmation that the amount ultimately due to the EAC is of the order of the £ 2.7 million suggested above.

Pensions for nationals

1016. The Corporations and the GFS were responsible for pensions of officers who are, or were, nationals of the three States. The Mediator proposes (and understands that this is the intention of the Partner States) that each State should assume responsibility for its own nationals. The pension schemes, insofar as they relate to these nationals, have therefore been dealt with as follows:-

a) GAD has estimated the capital sum required to provide for pensions to be paid after 30 June 1977 to staff who had retired by that date, and for the pension rights accrued as of 30 June 1977 by staff still in active service at that date. This sum therefore represents the capital value of the outstanding benefits attributable to service in the Community organisations up to that date. GAD has also estimated the capital sum required to provide compassionate gratuities for service before 30 June 1977. In the absence of adequate data for Uganda Railways, a broad estimate of Shs. 2 million has been made.

b) The total liability thus arrived at has been allocated among the Partner States in proportion to the pensions in payment and salaries of pensionable staff in each Partner State at 30 June 1977.

Actuarial valuation of liabilities

1017. As the Partner States are aware, an accurate assessment of the pension liabilities of the Corporations and the GFS would take two to three years, and some information might prove to be unobtainable. The Partner States therefore agreed that the mediation should not be delayed while accurate figures were prepared, and that an approximate valuation would be adequate.

1018. The Mediator has therefore based his proposals for the apportionment of pension fund assets and liabilities on approximate calculations of the actuarial liabilities made by GAD. He did consider whether part of the assets of the pension funds should be set aside until a more accurate assessment became available, but decided that this was impracticable, since substantially more accurate information is unlikely to be available fo some years.

1019. A full description of the bases of valuation adopted is given in Appendix "R". In his report to the Mediator, the GAD actuary valued the funds both with and without allowing for possible salary increases after 30 June 1977, thus leaving open the question as to which basis was the more appropriate for the valuation. He pointed out, however, that the proportion of the total liability applicable to each Partner State was more or less the same on either basis. The Mediator considers that the valuation should not allow for salary increases after 30 June 1977 because they would be made only at the discretion of the new organisations and because, as the actuary also pointed out, any allowance for future salary increases must be speculative.

1020. The actuarial valuation of the liabilities of the pension funds for nationals and their proposed allocation among the Partner States may be summarised as follows:-

	Total	Kenya		Tanzania		Uganda	
	Shs.m	Shs.m	%	Shs.m	%	Shs.m	%
EA Railways	274	175	63.9	78	28.5	21	7.6
EA P&T	244	128	52.4	70	28.7	46	18.9
EA Harbours	53	30	56.6	23	43.4	-	-
G F S	139	75	54.0	44	31.6	20	14.4
	710	408	57.5	215	30.3	87	12.2

1021. The above table was calculated from the amounts of monthly pensions in payment and monthly salaries paid to pensionable staff at 30 June 1977. These amounts were as follows:-

	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
EA Railways			
Pensions in payment	0.74	0.25	na
Salaries, pensionable staff	7.75	3.90	na
Salaries, gratuity only staff	5.11	4.48	na
EA P&T			
Pensions in payment	0.23	0.15	0.26
Salaries, pensionable staff	6.86	3.56	2.65
Salaries, gratuity only staff	na,vs	na,vs	0.07
EA Harbours			
Pensions in payment	0.08	0.06	nil
Salaries, pensionable staff	2.17	1.85	nil
Salaries, gratuity only staff	0.82	na	nil
GFS			
Pensions in payment	0.12	0.03	0.02
Salaries, pensionable staff	10.47	7.06	3.13
Salaries, gratuity only staff	na,vs	na,vs	na,vs

na = not available vs = very small

1022. The above data does not correspond precisely with the incidence of the pension burden - for example, Uganda is assumed to have no liabilities in respect of EA Harbours whereas the pensions of any Ugandans formerly working for EA Harbours become the responsibility of Uganda under the Mediator's proposals. The Mediator is confident that such liabilities must be small and, in view of the deficiency of assets in the EA

Harbours' pension fund, the allocation of investments to Uganda would be minimal. This does not alter the principle that, if Uganda is assuming a part of the pension fund liabilities, it is entitled to a share of the related assets, however small. Uganda may wish to provide details of Ugandans working at EA Harbours (including salaries, ages and years of service) during the negotiations so that potential adjustments may be reviewed.

Assets of the pension funds

1023. The assets of the pension funds on the division dates comprised the following:-

	EA Railways Shs.m	EA P&T Shs.m	EA Harbours Shs.m	G F S Shs.m
Investments registered in London (including cash with the Crown Agents)	93.8	29.8	10.9	15.8
Investments registered in East Africa (including bank accounts)	141.9	204.9	9.7	183.8
Loans	-	-	-	12.1
	235.7	234.7	20.6	211.7

Investments are valued at market value where possible; where it was not possible to obtain a quoted price, market price has been estimated from the quoted prices of similar stocks.

1024. In addition to the above investments, part of the pension funds had been invested in the Corporations themselves, either, as in the case of EA Harbours, through internal loans or, as in the case of EA Railways, through the use of contributions to meet general expenses or for use as working capital. The Mediator proposes, on the advice of his experts, that such investments be considered written off and regarded as part of

1025. The failure to repay these internal loans does not jeopardise the pensioners because the Corporations are revenue earning and can make up the pension fund deficiencies. The case of the GFS pension fund loans (Shs. 12.1 million) is different. GFS no longer exists as an organisation and, in any case, consisted of a large number of non-revenue earning institutions. In order to safeguard the fund from which GFS employees receive their pensions, the Mediator proposes that the loan should be repaid. In the mediation proposals both the liability to repay the loan and the pension fund asset which it represents have been allocated to Kenya.

1026. The Mediator proposes that the pension fund assets be allocated in the same proportions as the liabilities, as shown in paragraph 1020. They may be summarised as follows:-

	Total Shs.m	Kenya Shs.m	Tanzania Shs.m	Uganda Shs.m
EA Railways	235.7	150.6	67.2	17.9
EA P&T	234.7	123.0	67.4	44.3
EA Harbours	20.6	11.7	8.9	-
GFS	211.7	114.3	66.9	30.5
Total	702.7	399.6	210.4	92.7

A detailed list of the pension funds' assets, incorporating the Mediator's proposed division, is given in Appendix "S".

1027. Any excess of a Partner State's liabilities over the value of the assets assigned to it is the responsibility of that Partner State; the Mediator does not propose to take further account of these pension liabilities.

1028. In Appendix "S" the Mediator indicates the division of individual investments which he proposes. As far as possible investments have not been sub-divided,to avoid making a number of parcels of small holdings of stocks. This was done as a simple, practical measure and no issue of principle is at stake. In making the division he allocated in general the East African Government stock to the Partner State which issued that stock. However, in the case of EA P&T, where a high proportion of the assets consisted of investments in Uganda, a transfer from Uganda to Kenya could not be avoided. The Mediator, therefore, proposes that during the negotiations Uganda and Kenya find some way of solving this problem, for example, by means of a cash transfer from Uganda to Kenya, or a reduction in the amount of compensation payable by Kenya.

Surplus/deficiency on the pension funds

1029. The surpluses and deficiencies on the pension funds may be summarised as follows:-

	Assets (paragraph 1023) Shs.m	Liabilities (paragraph 1020) Shs.m	Surplus/ (deficiency) Shs.m
EA Railways	235.7	274.0	(38.3)
EA P&T	234.7	244.0	(9.3)
EA Harbours	20.6	53.0	(32.4)
GFS	211.7	139.0	72.7
	702.7	710.0	(7.3)

The Mediator regards it as the responsibility of each Partner State to decide how best to fund the pensions of its nationals and he therefore makes no proposals for making good the above deficiencies.

Pensions for "non-nationals", including widows and orphans

1030. The assumption by the UK Government of certain pension liabilities under the take-over agreement and the assumption by the Partner States of responsibility for their own nationals leave two classes of persons for whom final liability to provide a pension has still to be accepted:-

a) the "non-nationals" referred to in paragraph 1007, whose pensions were paid partly locally and partly through overseas agents until the EAC and its Corporations ceased to remit funds from East Africa; and

b) widows and orphans of these "non-nationals" (who contributed to the EA Railways' locally-managed widows and orphans' pension scheme but who are not covered by the take-over agreement).

1031. The Mediator has discussed the pensions of "non-nationals" at length with the Partner States and with the UK Government. In December 1978 the Partner State Governments agreed, as an interim measure, that the pensions of "non-nationals" should be paid by the country of their last duty station. This understanding has not been fully carried out, and many complaints have been received that numerous "non-nationals" are still not receiving their pension payments.

1032. The Partner States take the position that they have no legal duty to provide for the pensions of "non-nationals". They consider that the UK Government is responsible for these pensions and, at the request of the Partner States, the Mediator invited the UK Government to state its views on the matter. The UK Government has replied that it has no duty to provide pensions for the "non-nationals", and that these pensions fall clearly within the responsibility of the Partner States.

1033. The present uncertainty creates considerable hardship and suffering for the persons in question and, in the Mediator's opinion, should be resolved by taking these two categories into account in the apportionment of the liabilities of the EAC.

1034. GAD estimates the present value of the liability to provide pensions for "non-nationals" at Shs. 35 million, which ODA considers could be reduced to some Shs. 30 million if invested in UK rather than East African stocks. The figure is subject to revision when more information is available.

1035. The Mediator proposes that the capital sum of some £ 2.7 million payable by the UK to the Partner States (paragraph 1014) should be used to establish a pension fund for the "non-nationals", including widows and orphans. In his opinion, it is desirable that all pensions, including those of widows and orphans, should be increased to compensate as far as possible for changes in the cost of living since they were last reviewed. The Mediator suggests that the UK Government should administer this fund and pay the pensions. As mentioned above, this proposal depends on the confirmation by the UK Government that the final sum payable to the Partner States amounts to some £ 2.7 million. If the amount turns out to be less, the three Governments will have to make alternative arrangements for paying the pensions of non-nationals, including widows and orphans.

Provident funds

1036. No actuarial valuation of the provident funds is required, as the liabilities should *ipso facto* always equal the assets. Moreover, they are the property of individuals, not of the Community institutions.

PART XI

AREAS OF FUTURE CO-OPERATION

Common Services

1101. From time to time it has been suggested to the Mediator that it would be in the interest of the Partner States if several of the services formerly rendered by the EAC were continued on some kind of joint basis, in particular those services for which national boundaries have no significance (meteorology, control of pests and disease, training centres), the demand for which in each Partner State is too small to permit an economic scale of activity in that State alone. It would be to the advantage of the Partner States to avoid a costly proliferation of national institutions in cases where combined efforts would clearly be to the advantage of all concerned. Such arrangements could only be made, of course, after the mediation had been successfully completed.

1102. The Partner States have, in principle, indicated their willingness to consider whether such former EAC-services as the following might be continued:

The Inter-University Committee for East Africa
The East African Examinations Council
The East African Community Management Institute
The East African Civil Aviation Training Center
The East African Civil Flying School
The Posts & Telecommunications Centre Training School

The East African Institute for Meteorological Training & Research

The East African Statistical Institute

Some of these services were partly financed by UNDP regional project funds. UNDP has informed the Mediator that it would welcome any device which would assure the survival and, indeed, the expansion of such institutions, which it would then continue to assist.

1103. The Partner States may also wish to review other fields where joint efforts may be conducive to economy and efficiency by maintaining specific services or by entering into new areas of co-operation, which might include the following:

The East African Meteorological Department;
Certain research institutes;
The East African Directorate of Civil Aviation;
The East African Free Trade Zone;
The expansion of the EADB;
Joint energy projects; and
Joint projects in transport and navigation.

1104. Neither the terms of reference of the Mediator nor the guidelines issued by the Partner States to their representatives envisage that areas of future co-operation are to be reviewed in the negotiations on EAC assets and liabilities. It will thus be for the Governments, in the light of unfolding needs and conditions, to indicate when the time is ripe to take up such subjects.

Uganda as a Land-locked Country

1105. The fact that the break-up of the EAC may have cut one Partner State off from ready access to services for which it previously relied on an EAC facility in another Partner State has been mentioned in many places in this Report. The Partner State thus cut off has to choose between installing its own facility or paying for the services of the original facility on possibly less advantageous terms than before. The first of these alternatives is not open, however, to Uganda, a land-locked country, as regards the port services for which it has always relied on Mombasa and Dar es Salaam. It is therefore of vital importance to Uganda that the break-up of the EAC should not alter for the worse the terms on which it is able to use port facilities in Kenya and Tanzania and the road and rail communications which afford it access to the ports in question.

1106. Uganda raised this issue in the early stages of the mediation. The Mediator considers the formulation of recommendations on this subject as lying outside his terms of reference. He thinks it appropriate, however, to draw the attention of the Partner States to the resolution adopted in July 1964 by the United Nations Conference on the Transit Trade of Landlocked Countries. This resolution, which was supported by Kenya, Tanzania and Uganda, laid down eight principles which were embodied in an International Convention that entered into force on 9 June 1965. Their purpose is to ensure that the trade and economic development of land-locked countries does not suffer as a result of their geographical circumstances.

1107. The Mediator suggests that, when discussing the settlement of Uganda's shortfall of assets, the Partner States may wish to take the UN Resolution into consideration. Some of his suggestions for settling the shortfall (see Part VII of this Report) fall within this context.

1108. The eight priciples of the UN Resolution are given in the following paragraph.

PRINCIPLES RELATING TO TRANSIT TRADE OF LAND-LOCKED COUNTRIES

1109. Principles adopted by the 1964 UNCTAD Conference and ratified in the Convention adopted by the U.N. Conference on Transit Trade of Land-locked Countries on July 8, 1965:

Principle I

The recognition of the right of each land-locked State of free access to the sea is an essential principle for the expansion of international trade and economic development.

Principle II

In territorial and on internal waters, vessels flying the flag of land-locked countries should have identical rights, and enjoy treatment identical to that enjoyed by vessels flying the flag of coastal States other than the territorial State.

Principle III

In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea. To this end States situated between the sea and a State having no sea coast shall, by common agreement with the latter, and in conformity with existing international conventions, accord to ships flying the flag of that State treatment equal to that accorded to their own ships or to the ships of any other State as regards access to sea ports and the use of such ports.

Principle IV

In order to promote fully the economic development of the land-locked countries, the said countries should be afforded by all States, on the basis of reciprocity, free and unrestricted transit, in such a manner that they have free access to regional and international trade in all circumstances and for every type of goods.

Goods in transit should not be subject to any customs duty.

Means of transport in transit should not be subject to special taxes or charges higher than those levied for the use of means of transport of the transit country.

Principle V

The State of transit, while maintaining full sovereignty over its territory, shall have the right to take all indispensable measures to ensure that the exercise of the right of free and unrestricted transit shall in no way infringe its legitimate interests of any kind.

Principle VI

In order to accelerate the evolution of a universal approach to the solution of the special and particular problems of trade and development of land-locked countries in the different geographical areas, the conclusion of regional and other international agreements in this regard should be encouraged by all States.

Principle VII

The facilities and special rights accorded to land-locked countries in view of their special geographical position are excluded from the operation of the most-favoured-nation clause.

Principle VIII

The principles which govern the right of free access to the sea of the land-locked State shall in no way abrogate existing agreements between two or more contracting parties concerning the problems, nor shall they raise an obstacle as regards the conclusion of such agreements in the future, provided that the latter do not establish a régime which is less favourable than or opposed to the above-mentioned provisions.

Interpretative Note

These Principles are interrelated and each Principle should be construed in the context of the other Principles.

** *Special Principle Thirteen* was adopted by a roll-call vote of 111 to none, with 5 abstentions:

In favour: Afghanistan, Albania, Algeria, Argentina, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Burundi, Byelorussian Soviet Socialist Republic, Cambodia, Cameroon, Central African Republic, Ceylon, Chad, Chile, China, Colombia, Congo (Brazzaville), Congo (Leopoldville), Cuba, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Ethiopia, Federal Republic of Germany, Finland, France, Gabon, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Jordan, Kenya, Kuwait, Laos, Lebanon, Liberia, Libya, Luxembourg, Madagascar, Malaysia, Mali, Mauritania, Mexico, Monaco, Mongolia, Morocco, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, Rwanda, San Marino, Saudi Arabia, Senegal, Sierra Leone, South Africa, Spain, Sudan, Sweden, Switzerland, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanganyika and Zanzibar, Upper Volta, Uruguay, Venezuela, Yemen, Yugoslavia.

Against: None.

Abstaining: Australia, Canada, Japan, Liechtenstein, United States of America.

** The Conference adopted these Principles without dissent.

PART XII

SUMMARY OF FINDINGS AND MAIN PROPOSALS

Introduction

1201. Following is a summary of the Mediator's principal findings and proposals.

Total Assets

1202. The Mediator made exhaustive efforts to identify and to evaluate the assets of the EAC institutions, and his experts made carefully considered estimates to fill gaps in information. On this basis, the net assets of the EAC institutions totalled Shs. 11,896 million on the division dates. Aware of the likelihood, however, that in view of the multitude of assets a number of items, some possibly of appreciable size, could have escaped identification, the Mediator consideret it prudent to add 2% to this sum, thus bringing total net assets to Shs. 12,134 million (paragraphs 501-503).

1203. The Mediator is convinced that there is no reasonable likelihood of finding new evidence which would make any significant change in these totals. He therefore recommends that the Partner States accept this total value, and the geographical distribution of the corresponding physical assets, and focus their attention on the crucial issue - the principles on which an equitable division should be based.

Principles for an Equitable Division of Assets

1204. A critical review of practical alternatives for an equitable division of assets led the Mediator to conclude that geographical location and economic need as reflected in the average IMF Quotas over the life of the EAC are valid criteria for a fair assignment. In what proportions to combine them was a question to which he could find no self-evident or logical answer. His proposal that they be given equal weight is a practical solution which has the merit of fairness, simplicity and reasonableness. An equitable division would be: Kenya 44.2%; Tanzania 33.8%; and Uganda 22.0% (paragraphs 657-663).

1205. The proposal is based on the Mediator's best judgment. The Partner States may have different views which they may wish to put forward in the course of the negotiations. To assist them in considering other bases, the Mediator has listed a wide range of alternatives (Appendix "T").

Compensation for Divergence from an Equitable Division

1206. On the basis of the Mediator's proposals, assets located in Uganda fall short of Uganda's fair share by Shs. 1,113 million, and assets located in Kenya and Tanzania exceed their fair share by Shs. 939 million and Shs. 174 million respectively. Kenya and Tanzania should compensate Uganda in those amounts (paragraph 661).

1207. The Mediator has considered various ways in which Uganda might be compensated for its shortfall. He recommends that full compensation be made in cash. To the extent that cash transfers fall short of the amounts required, he recommends, first, a transfer from Uganda to Kenya and Tanzania of all debt which Uganda owes to the IBRD and, secondly, the creation of new productive facilities in Uganda financed by new external debt to be serviced by Kenya and Tanzania. Any remaining shortfall might be made up by one or more of several other suggested methods (paragraph 718).

The Division of Long-Term Debt

1208. The total long-term liabilities of the EAC-Corporations and GFS outstanding at the division dates amount to Shs. 2,864 million (paragraph 504). They include various overseas assets and overseas short-term debts (paragraph 505-506).

1209. If the Partner States accept the Mediator's proposal that full compensation be paid in cash, total long-term debt would be divided strictly in accordance with the equitable division of assets, as indicated in paragraph 801 above. If, on the other hand, debt owed by Uganda to the IBRD is assumed by the other two Partner States as part settlement, the amounts of debt assumed by the three would be adjusted accordingly, as shown in paragraph 813.

1210. Payments on account of long-term loans made after the division dates under the "Damry Formula" or under other interim arrangements should be credited against the burden of debt at the division dates as shown in the Report (paragraph 817).

1211. Contingent liabilities in the form of joint and several guarantees of long-term debts should be eliminated, and replaced by guarantees by individual Partner States of the amount of debt they assume (paragraph 818).

1212. The Partner States can agree among themselves on the division of long-term debt and contingent liabilities, but cannot make the division effective without the consent of the creditors. It will therefore be necessary to consult the external creditors and to seek their consent (paragraph 819).

Other Principal Recommendations

1213. Transfer of Assets. The conclusions are based on the assuption that Shs. 1 million of assets will be physically transferred from Kenya to Uganda (paragraphs 443-446).

1214. Claims. An "Administrator of Claims" should be appointed to examine and to settle the outstanding claims against the EAC institutions. Among such claims should be included contractors' claims against the institutions (para.911-915).

1215. Pensions:

a) Each Partner State should be responsible for paying the pensions of its own nationals (paragraphs 1016-1022).

b) Responsibility for the pensions of "non-nationals" and of their widows and orphans should be taken by the country of last duty station. The Partner States should ask the United Kingdom to administer these pensions (paragraphs 1030-1035).

c) The invested assets of the pensions funds should be divided among the Partner States in proportion to their liabilities under pension and related plans (paragraphs 1026-1028).

d) The capital sum of approximately £ 2.7 million owed to the Partner States by the United Kingdom should be earmarked for pension payments to "non-nationals" and their widows and orphans (paragraphs 1014-1015 and 1035). Since a high proportion of EA P&T Pension Fund assets were invested in Uganda, a transfer from Uganda to Kenya is unavoidable. The two countries should deal with this problem during negotiations (paragraph 1028).

1216. <u>Identification of Railway Coaches and Wagons</u>

The Kenyan and Ugandan railway managements should proceed to identify the 1,087 coaches and wagons allocated to Uganda, with the help of an independent expert. The Mediator's experts were unable to do so for lack of documentation (paragraph 452).

1217. <u>Areas of Future Co-operation</u>

In addition to the foregoing principal proposals, the Mediator suggests that after completion of the negotiations the Partner States would do well to continue certain former EAC services on some kind of joint basis, and to explore new areas of co-operation, in order to deal effectively with problems for which national boundaries have no significance and in order to gain the benefits of scale (paragraphs 1101-1104).

Essentials for a Lasting Solution

1218. The Mediator would like to draw the attention of the Partner States to several considerations that should guide their negotiations.

1219. The first is that the prospects for bringing the mediation to a successful conclusion depend on broad agreement on a satisfactory basis for negotiations. The Mediator wishes to state again that a number of facts affecting the identification and evaluation of assets are shrouded in obscurity. Not all the records of the Corporations and of the GFS have been, or ever will be, brought to light, and it is impossible to avoid using estimates to fill the gaps in information. The facts with respect to records, gaps and estimates are now clearly established in the sense that the Mediator has been open and explicit about the information he has received, what he has had to estimate and how, and what he has done with the information he has compiled. Recognising the likelihood that some assets remain unidentified, he has added a category of "miscellaneous items" to the assets he was able to identify to cover these unknowns. The Mediator is convinced of the soundness of his conclusions with respect to the identification and valuation of assets and liabilities. Much energy and time might be consumed in further small adjustments of particular items which would make no difference in the total picture. He trusts that the Partner States will share this conviction and accept the findings with respect to both assets and liabilities.

1220. The second point concerns the basis on which to judge the fairness of the <u>de facto</u> division of assets. This was the Mediator's most difficult problem, and it is the one difficult issue confronting the Partner States. The Mediator trusts that he has convincingly shown that there is no easy answer to the search for criteria - no answer which immediately commends itself to everyone as reasonable, fair and feasible. The Mediator has examined various possible criteria and found some that were of little value or relevance, some that were useful but not wholly satisfactory, and some that might have been helpful but are so shrouded in historical uncertainties as to be of little use. He has chosen the 50/50 combination of geographic location and economic need as reflected in average IMF Quotas as appropriate for determining an equitable distribution. He commends his proposal as a fair and reasonable one, supported by history and facts. Alternative criteria or mixes of criteria may, of course, be proposed by one or another Partner State.

1221. The third point is that the Partner States have understandably tended to view these criteria for division in terms of advantage or disadvantage. A different formula for an equitable division means a greater or smaller shortfall for one and surplus for another, and consequently a larger or smaller amount to be given or received in compensation. As noted earlier in this Report, the mediation is sometimes seen as a situation in which one party's gain is inevitably another's loss. In the short-run, this view has some validity: under one set of criteria, one country would have to compensate another country more than would be the case under another set of criteria. But this view is short-sighted. All the Partner States have something to gain from a resolution of the issues involved in the mediation. The Partner States have a long history of close economic association. The disruption of those economic ties has been harmful to all three. Their continued disruption will only continue to harm them all. The elimination of the causes of the disruption will enhance the potential of all three countries.

1222. The Mediator's final point is that, as some degree of Solomonic judgment on the division of assets and liability is inevitable, a readiness to compromise will be the key to any agreement. The statesmanship that the Partner States have displayed in the past, and the goodwill with which they entered into the mediation, encourage the Mediator to believe that all parties will be prepared to compromise and thus to arrive at a quick, amicable and mutually beneficial resolution of the matter.