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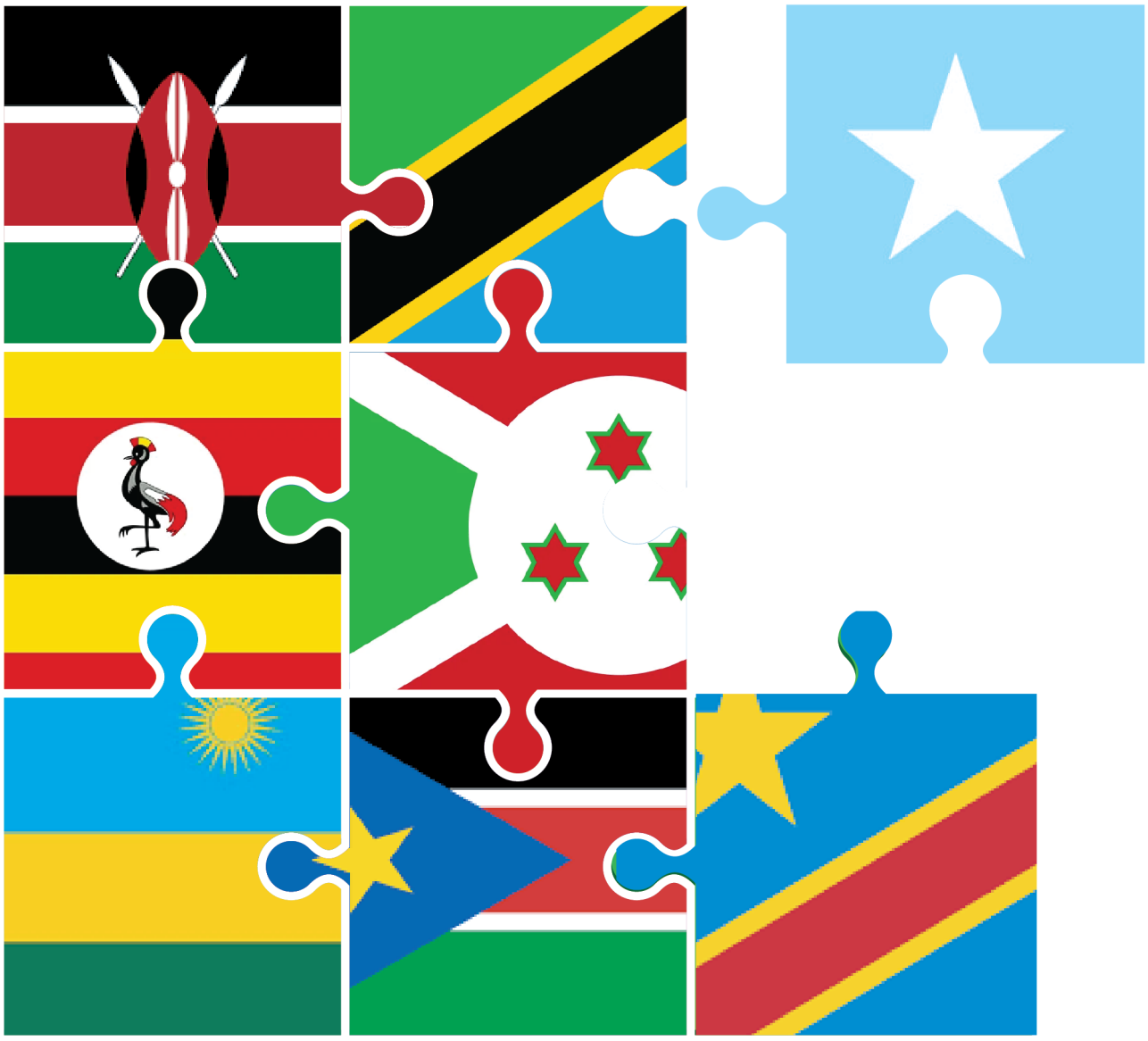
# SOMALIA'S ACCESSION TO THE EAST AFRICAN COMMUNITY:

## LEGAL REVIEW, OPPORTUNITIES AND CHALLENGES



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## About the Author

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# 1. Executive summary

Somalia has been seeking admission into the East African Community (EAC) since 2012. As the 23rd Ordinary Summit set for 24 November in Arusha, Tanzania closes in, Somalia is hopeful it will become the eighth member state. Since he was elected president of Somalia for the second time in May 2022, Hassan Sheikh Mohamud has engaged his fellow EAC leaders in a bid to fast-track Somalia's admission, making it clear during his speech at the previous summit that "Somalia belongs to East Africa."

Somalia's potential accession signifies a pivotal leap in the bloc's expansion across East Africa and the Great Lakes Region, creating a vast internal trade market. EAC accession would accelerate its integration into the region and bring substantial economic gains for both Somalia and its neighboring states. Boasting the longest coastline in mainland Africa, stretching over 3,000 kilometers, Somalia would provide the bloc with access to the Arabian Peninsula, offering vast opportunities for the regional market. Only three EAC member states currently have direct access to the sea. Accession into the bloc would also offer Somali entrepreneurs enhanced investment opportunities and improve governance in line with the EAC's regional integration components.

However, Somalia is still recovering from the protracted civil war and suffers from violent extremism, corruption and recurrent constitutional crises. Its profound and ongoing security dilemmas raise critical concerns about the EAC's readiness to ensure regional stability. The EAC criteria for admitting new countries emphasizes principles of good governance, democracy, the rule of law, human rights and social justice, areas where Somalia faces notable deficits.

Despite these challenges, Somalia has made great progress towards establishing functional governance structures and combatting terrorism, albeit against persistent security threats posed by groups like al-Shabaab. While it grapples with the democratic prerequisites outlined in the EAC Treaty, ongoing efforts suggest a trajectory toward overcoming these obstacles, signaling a potential for future alignment with the community's foundational principles.

With Somalia on the verge of securing EAC membership, this report investigates the opportunities and challenges it would face from regional integration. It outlines policy recommendations and the potential impact accession would have on the nation's legal framework. Moreover, it outlines potential socio-economic dividends, underlying concerns and the evolving dynamics pivotal in shaping Somalia's integration within the East African Community.

## 2. Introduction

The East African Community (EAC) is a nascent supranational community[1] composed of seven partner states in East Africa: Burundi, DR Congo, Kenya, Rwanda, South Sudan, Tanzania, and Uganda. On June 6, 2023, the Extra-Ordinary Summit of the EAC adopted the Report of the Verification of the Application of the Federal Republic of Somalia to join the community. The verification report established the country's level of conformity with the criteria for admitting foreign countries as provided in the treaty for the Establishment of the East African Community. If Somalia is accepted, it will become the 8th member of the EAC partner states. This report will analyze the effect and policy implications on the implementation of the treaty in Somalia.

## 3. Methodology, Content and Structure

This report is based on the writer's review of the treaty and its protocols and laws, decisions of the East African Court of Justice, and scholarly reviews and studies about the community. To help the reader understand the EAC's impact on Somalia, the report will describe the EAC, its structure, the powers of its organs, and the relationship of its laws and institutions with those of the partner states. It will then discuss the EAC's objectives, implementation procedures of the treaty, the role of the courts, and the four stages of the integration. The report will also summarize the challenges and opportunities presented by joining the EAC and provide some policy recommendations. But first, let me say a few words on what Somalis should expect immediately after accession.

## 4. Accession to the community

Once the president signs the treaty,[2] Somalia will be required to take specific implementation steps to make the laws of the treaty part of the country's domestic laws with all the attendant legal consequences. The EAC partner states have adopted a dualist approach[3] regarding the implementation of the treaty. In a dualist approach, the treaty and any of its provisions are effective in the partner state only upon passing domestic legislation which translates it into national laws. Article 8 of the treaty gives new partner states 12 months from the day of signing to secure enactment of legislation that gives effect to the treaty. In particular, the domestic legislation must confer upon the EAC "the legal capacity and personality required for the performance of its functions" and "confer upon the legislation, regulations and directives of the community and its institutions as provided for in this treaty, the force of law within its territory."

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1. The author describes the EAC as a nascent supranational entity only because it had not yet reached its ultimate goal of federation, which may take decades if that goal is ever reached.
2. It is not entirely clear whether the president would sign the treaty prior to compliance with the constitutional requirement of getting approval of Somalia's executive branch (the Council of Ministers) and the Parliament. The President's signature would amount to ratification only if the two steps outlined in the Provisional Constitution were followed prior to his signature, namely: that the treaty is proposed by Somalia's Council of Ministers and approved by the House of the People of the Federal Parliament. If the president were to sign the treaty without following the constitutional procedure, this signature only serves as a tool to initiate the ratification process.

Article 8 of the treaty further provides, "the partner states undertake to make the necessary legal instruments to confer precedence of community organs, institutions and laws over similar national ones." The directive in Article 8 of the treaty requires partner states to adopt all the laws of the community and prevents the treaty from self-executing as would happen in a monist public international law.

## 5. Partner State Constitution, Laws and the Treaty

Somalia's Provisional Constitution mentions treaties in two articles. Article 140 on "International Obligations" says, "until the treaty imposing a treaty obligation in effect on the date that this Constitution comes into force expires or is amended, that treaty obligation remains in effect." Despite the clumsy wording, this article merely addresses what would happen to existing treaties on the day the Provisional Constitution becomes effective.

More importantly, Article 90 on "The Responsibilities and Powers of the President" says, "the powers and responsibilities of the President of the Federal Republic of Somalia are to . . . sign international treaties proposed by the Council of Ministers and approved by the House of the People of the Federal Parliament." Thus, for any treaty to have the effect of law in Somalia, a law must be passed in accordance with the constitution. As such, Somalia's Provisional Constitution also adopts a dualist approach. The treaty gets the force of the law (gets ratified) only after the Council of Ministers proposes a legislation adopting the treaty, the House of the People of the Federal Parliament passes such legislation, and the president signs it.[4] Consistent with the requirement of the legislative process under the Provisional Constitution to ratify treaties, Article 8 of the treaty requires partner states to adopt the laws of the community.

*"Unfortunately, Somalia's constitution remains provisional and many of its articles are likely to be modified. In particular, the articles of the Provisional Constitution that address power division between the federal and member state governments remain unclear with no concrete actions taken since completion of the draft document*

Unfortunately, Somalia's constitution remains provisional and many of its articles are likely to be modified. In particular, the articles of the Provisional Constitution that address power division between the federal and member state governments remain unclear with no concrete actions taken since completion of the draft document. Given the recent proposal by Somalia's National Consultation Council of modifying the core structure of the federal government (changing it from parliamentary to presidential), it is anyone's guess whether the articles pertaining to ratification of treaties will remain intact upon finalizing the Provisional Constitution. Based on the constant friction between the Somali federal government and member states, it is not inconceivable that the power to enter and ratify treaties with foreign nations will be hotly contested during the ratification of the constitution.

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3. In a dualist approach, the treaty and any of its provisions are effective in the partner state only upon passing a domestication legislation. A monist approach would make treaties effective upon accession. Furthermore, the EAC treaty requires harmonization of the laws of the partner state with the laws of the community. Integration takes place through the harmonization of laws and the associated creation of the requisite infrastructure. For example, new partner states will be required to domesticate the EAC Rules of Origin during the implementation of the customs union, the first integration milestone. The Rules of Origin classify various agricultural products in accordance with an internationally-adopted classification system. Upon passing the Rules of Origin legislation, the partner state is further required to create the classification system for all products that may originate from the partner state and to create systems to verify them at the ports of export.

4. The EAC treaty requires that the EAC laws be domesticated and that the partner state laws be harmonized with the treaty, its protocols, and other laws. Thus, accession and ratification of the treaty are merely the start of a lengthy process of integration. Curiously, the ratification process does not involve the Upper House of the Parliament. It is not clear whether the omission of the Upper House is deliberate or an oversight.

The Provisional Constitution's explicit legislative ratification process is in sharp contrast to the Kenyan Constitution's ambiguous ratification process. Article 94(5) of the Kenyan Constitution says, "no person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation." Read in isolation, this article would seem to endorse legislative ratification of treaties.

Other relevant articles, however, seem to make international law part of domestic law without any specific action from legislators. For example, Article 2(5) says "the general rules of international law shall form part of the law of Kenya." Similarly, Article 2(6) says "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Although the Kenyan Constitution does not explicitly define the meaning of the term ratified, it is commonly used in Kenyan jurisprudence as an executive act. Conversely, the Constitution refers to ratification in the context of a legislative act (see Articles 71, 144(9), and 144(10)) or a referendum (see Article 263). Nonetheless, the Kenyan General Assemble resolved these conflicts by enacting the Treaty Making and Ratification Act, which explicitly requires legislative involvement in making or adopting any treaty that will have the force of law in Kenya. As such, Kenya adopted a dualist approach in incorporating international laws and treaties into its domestic laws.

Unlike Kenya's Constitution, the Tanzania Constitution (under Article 63(3)) grants the National Assembly the power to "deliberate upon and ratify all treaties and agreements to which the United Republic is a party and the provisions of which require ratification." Article 63(3) further provides that the General Assembly has the power to "enact law where implementation requires legislation" without explicitly stating whether and when the implementation of treaties and other international agreements would require legislation. Nonetheless, Tanzania takes a dualist approach to the incorporation of international law such as the EAC treaty into its domestic laws.

## 6. The Supranational Nature of the Treaty[5]

*"Although Somalia's Provisional Constitution is silent as to the relationship between treaties and Somalia's laws, the treaty provides such hierarchy by creating a supranational entity by implication*

Although Somalia's Provisional Constitution is silent as to the relationship between treaties and Somalia's laws, the treaty provides such hierarchy by creating a supranational entity by implication. The supranational nature of the EAC can be implied from Article 5 of the treaty, which enumerates the objectives of the community. According to paragraph 1 of Article 5, the objective of the treaty is "to develop policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit."

5. For a critical review of the supranational nature of the EAC, please see: Tomasz P. Milej, "What Is Wrong about Supranational Laws? The Sources of East African community Law In Light of the EU's Experience," at https://www.zaoerv.de/75_2015/75_2015_3_a_579_618.pdf, last visited November 16, 2023.

Article 8 of the EAC treaty requires partner states to work in close collaboration with EAC institutions in the coordination of their economic and other policies to achieve the objectives of the community and "to make the necessary legal instruments to confer precedence of community organs, institutions and laws over similar national ones."

Thus, for at least the areas of cooperation listed in Article 5, the partner states can be considered to have conferred their powers to the EAC. The supremacy of the laws of the community over any conflicting partner state laws is strong evidence that the EAC is a supranational entity. Further, by asserting specific areas of competence and making its laws superior to corresponding laws of the partner states, the EAC creates a framework in which the exclusive competence of the partner states ends where the competence of the EAC begins.

*"Despite the supranational nature of the treaty, no accession, ratification, domestication, or any other parliamentary legislation can make a treaty superior to the country's constitution unless the constitution itself provides for such a hierarchy*

Despite the supranational nature of the treaty, no accession, ratification, domestication, or any other parliamentary legislation can make a treaty superior to the country's constitution unless the constitution itself provides for such a hierarchy. Somalia's Provisional Constitution provides that "the constitution of the Federal Republic of Somalia is the supreme law of the country." Therefore, notwithstanding the supranational nature of the EAC, the laws of the community are subject to the Provisional Constitution. Therefore, in enacting legislation that domesticates the treaty (or harmonize the local laws with any of the EAC's laws, regulations, protocols, or any other annex to the treaty), such legislation must also be consistent with Somalia's constitution.

Similar to Somalia's Provisional Constitution, the constitutions of the EAC partner states generally provide supremacy of their constitutions. For example, Article 2(1) of Kenya's constitution provides that "[t]his Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government." Similarly, Article 5 of the Tanzania Constitution provides that if "the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void, or is inconsistent with this Constitution" then the Court may declare that such law or action is void or it may "afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine."

The supranational nature of the treaty and the supremacy of the partner state constitutions over the treaty create a coherent regime of laws. As a condition of membership, the treaty requires partner states to adopt as their own the treaty and the laws enacted under it. The treaty makes the laws of the community superior to any conflicting partner state law.

*“As confusing as the co-existence of a supranational law and a supreme law of the land (the national constitution) may seem, the two can co-exist if one simple rule is satisfied: the supranational law is constitutionally valid*

As confusing as the co-existence of a supranational law and a supreme law of the land (the national constitution) may seem, the two can co-exist if one simple rule is satisfied: the supranational law is constitutionally valid. If the supranational law is constitutionally valid, it supersedes any contradictory national law. Any constitutionally invalid supranational law will either not be implemented (through the use of variable geometry principle as discussed below) or, if necessary to integration and is desired, the domestic constitution would be amended.

# 7. The EAC Structure

The EAC has four core organs: the Summit, the Council of Ministers, the East African Court of Justice (EACJ), and the East African Legislative Assembly. Each organ has specific powers and responsibilities as outlined in the treaty. Any resemblance between the names of the four core organs of the EAC and those of traditional government branches is not coincidental; the core organs perform similar functions as government branches.

The EAC also has other organs that perform limited integration functions under one of the core organs. Discussion of these organs is beyond the scope of this overview paper.

## 7.1 The Summit

The most powerful organ of the EAC is the Summit, which is the highest decision-making organ of the EAC and is composed of the heads of state or government of the partner states who often act unanimously. The Summit is responsible for providing overall strategic direction and impetus towards achieving the objectives of the community. It also has the power to make regulations, issue directives, take decisions, make recommendations, and give opinions in accordance with the provisions of the Treaty for the Establishment of the EAC.

The Summit plays a crucial role in ensuring that the EAC achieves its objectives and goals by ensuring that there is coherence in the implementation of programs and projects across different sectors, and that there is proper alignment between the decisions taken by the Council and their implementation by other organs and institutions of the Community.

## 7.2 The Council

The Council is the central decision-making and governing organ of the EAC. Its membership constitutes Ministers or Cabinet Secretaries from the partner states whose dockets are responsible for regional cooperation. The Council meets twice a year, one meeting immediately preceding the annual Summit. The Council meetings assist in maintaining a link between the political decisions taken at the Summit and the day-to-day functioning of the Community.

Regulations, directives, and decisions taken or given by the Council are binding to the partner states and to all other organs and institutions of the community other than the Summit, the Court, and the Assembly. The Council plays a crucial role in ensuring that regional cooperation is effective and efficient. It considers the budget of the community, initiates and submits bills to the Assembly, and provides guidance for program implementation through its powers to make regulations, issue directives, and take decisions. It also aligns decisions taken by the Summit with their implementation by other organs and institutions of the community, and regularly reviews progress towards achieving the objectives of the community through its bi-annual meetings.

### 7.3 The EACJ

The EACJ is the judicial organ of the EAC and ensures adherence to the law in the interpretation and application of the provisions of the treaty[6]. The EACJ has jurisdiction over the interpretation and application of the treaty.

### 7.4 The Assembly

The Assembly is the legislative organ of the EAC and has the function of furthering EAC objectives through its legislative, representative, and oversight mandate. The Assembly has the power to legislate or make other recommendations on any matter that the Council refers to it. Members of the assembly may also initiate legislative proposals through motions or bills. The Assembly also has the power to discuss any matter that may be of interest to the community, including its budget and annual report.

## 8. The EAC Legal Framework

The source of laws in the EAC are the treaty, protocols[7] , the acts of the Assembly, decisions of the EACJ, and formal directives and decisions of the policy organs (the Summit and the Council) of the community. Inclusion of EACJ decisions as a source of law in the community should pique the curiosity of legal practitioners in Somalia. It should be remembered that the founding partner states of the EAC (Kenya, Tanzania, and Uganda) are common law countries where judges make (or more accurately discover) laws through court decisions and where legal precedence under the doctrine of stare decisis creates a source of law. It is true that judges (even in common law jurisdictions) are supposed to interpret the law. However, it is in the process of interpreting the law that judges discover or make new laws.[8] The EAC has adopted common law.

Given that the EAC protocols form an integral part of the treaty, it stands to reason that domestication of the treaty domesticates any protocol annexed to it at the time a new partner state accedes to the community. However, any amendment to the treaty and any protocol enacted after accession is subject to specific ratification of the partner states under Articles 150 and 151of the treaty.

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6. For a User Guide of the Court, see "Court Manual: A Practical Guide to the Law and Practice of the East African Court of Justice," at https://eacj.org/wp-content/uploads/2023/02/EACJ-Manual.pdf, last visited November 16, 2023.
7. Protocols form an integral part of the treaty under Article 151.
8. Curiously, the treaty allows the EACJ to provide an advisory opinion regarding questions of law, a highly disfavored device in common law jurisdictions and prohibited in the United States, the most advanced common law jurisdiction in the world. Advisory opinions are disfavored because the courts do not want to adjudicate before there is any dispute.

# 9. The EAC Areas of Competence

The main competences of the EAC are listed in Articles 75-126 of the treaty and include:

- trade liberalization and creation of customs union and common market (Articles 75-78);
- investment and industrial development (Articles 79 and 80);
- standardization of quality assurance (Article 81);
- free movement of capital (Articles 82-86);
- infrastructure and services (Articles 89-101);
- development of human resources, research and development (Articles 102 and 103);
- movement of people/labor (Article 104); agriculture and food security (Articles 105-110);
- environment (Articles 111-114);
- tourism (Articles 115 and 116);
- health/culture (Articles 117-120);
- the role of women (Article 121);
- political matters (Articles 123-125); and
- legal and judicial affairs (Article 126).

The comprehensive nature of the competences of the EAC suggests that it is designed to become a full-fledged supranational entity with jurisdiction over most aspects of the community once the last milestone of the integration is implemented.

# 10. The EAC Implementation Procedure and Integration Principles[9]

Article 8 of the treaty requires partner states to designate a minster responsible for the implementation of the treaty; create conditions favorable for the development and achievement of the objectives of the community and the implementation of the provisions of this treaty; coordinate with other partner states as necessary; and abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this treaty. Article 14 requires the Council to "promote, monitor and keep under constant review the implementation of the programmes." Articles 18 and 21 create a Coordination Committee and a Sectoral Committee to implement the decisions of the Council. Article 49 empowers the Assembly to "discuss all matters pertaining to the community and make recommendations to the Council as it may deem necessary for the implementation of the treaty." The partner states agree (under Articles 122 and 127) to engage women, the private sector and civil society in the implementation process. Thus, both the Council and Assembly play a role in monitoring the implementation process.

9. Although the treaty does not explicitly define the terms "implementation" and "integration," the two terms are similar and may sometimes be used interchangeably. However, carefully reviewing references to the two terms in the treaty suggests that they define a continuous process and differ only in the stage of adopting the treaty. Partner states implement the treaty through legislation and integrate into the community through the performance of the actions required by the implementation legislation. Thus, whereas an implementation step may call for the creation of an institution, the corresponding integration step would be the steps taken to create such an institution.

*“The EAC requires partner states to harmonize their laws to the treaty by amending national laws or drafting new national laws*

Because of the dualist nature of the treaty, its implementation process primarily relies on harmonization mechanism. The EAC requires partner states to harmonize their laws to the treaty by amending national laws or drafting new national laws. Since the focus of the EAC implementation procedure is national laws rather than the supranational laws of the community, it is the activities of the partner states that determine the scope of the action of the provisions of the treaty and its protocols. Such focus on partner state laws allows the partner states to control the implementation and regional integration process consistent with the fundamental and operational principles of the treaty, as discussed next.

Articles 6 and 7 list fundamental and operational principles of the EAC. Under Article 6(d), the fundamental principles that govern partner states include, “good governance including adherence to the principles of democracy, the Rule of Law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples [sic] rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.” Under paragraph 2 of Article 7, as an operational principle, “[t]he partner states undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.” Notwithstanding some incoherence and repetition of the core principles in articles 6 and 7, the treaty commits to the fundamental and operational principles that govern the achievement of the stated objectives of the treaty and to the principles of international law governing relationships between sovereign nations. In particular, the operational principles govern the practical integration achievements of the objectives of the EAC. Each of the key principles is briefly discussed below.

## 10.1 The Principle of Good Governance

The principle of good governance is one of the pillars of the EAC architecture and is considered to be a steering principle necessary for the achievement of the integration objectives. To enhance good governance at the community and partner state levels, the EAC adopted the principle of subsidiarity[10] as a mechanism of the constitutive integration of the treaty. The principle of subsidiarity calls for starting at the lowest level of the community capable of achieving an objective. This principle is adopted as a guard against the community’s encroachment on the partner states’ sovereignty. Indeed, Article 7 includes “people-centered and market-driven co-operation” as one of the principles that govern “the practical achievement of the objectives of the community” and which reaffirms democratic principles of the treaty.

10. The principle of subsidiarity calls for the multi-level participation of a wide range stakeholders in the process of integration.

Both the court of First Instance and the Appellate Court of the EACJ have made it clear that principles of good governance and the rule of law are the same concepts and apply to all persons and institutions (public and private), including the state itself. The rule of law principle requires adherence to the supremacy of the law and equality under the law.

## 10.2 The Principle of Asymmetry (or Variable Geometry)

The EAC adopted the principle of variable geometry[11] which allows a subset of its partner states to integrate more than others in various areas of community competences. The principle of variable geometry is not a rule of exclusion. Rather, it is simply a tool to allow implementation of the treaty at various speeds. The outcome of this rule is that new partner states are given space and time to implement the provisions of the treaty at their own pace. The framers of the treaty appear to adopt the principle of variable geometry as a tool of flexibility as well as a tool to blunt the requirement of consensus at the Summit. Without this principle, some heads of state may be reluctant to agree to certain integration steps. This principle assures them that each partner state will control the pace of its integration.

The principle of variable geometry has created some consternation within the community. For example, in 2013, Kenya, Uganda, and Rwanda held meetings on a customs union, a common market, regional investment, infrastructure development, and removal of non-tariff barriers but excluded Tanzania and Burundi, using lack of will as a pretext. Thus, the principle of variable geometry, while providing flexibility to the integration, has the potential to create discord and apparent inequalities among the partner states. Detractors of the principle also point out that it creates a potential escape route for unwilling partner states. Nonetheless, the principle has been adopted to promote gradual integration.

Despite the allusion that the principle of variable geometry would allow partner states to control the pace of integration, there are some clauses within the protocols that seem to suggest that partner states may not entirely be free to control the integration pace. For example, Article 54 (on Settlement of Disputes) of the EAC common markets protocol provides that "partner states guarantee that: (a) any person whose rights and liberties as recognized by this protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and (b) "the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress." None of the protocols establishing the customs and the monetary union stages includes similar language.

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11. The principle of variable geometry allows for progression in the co-operation among a sub-group of partner states in a larger integration scheme. It is commonly used in free trade blocks to blunt the challenges that come from unanimity requirements at the highest organ of the community that could otherwise allow one country to derail the objectives of all other countries. In those communities, such as the EU, the unanimity requirement is reserved for some key decisions while all other decisions are allowed to be made under the principle of variable geometry. For example, the UK (pre-Brexit) did not adopt the Euro as its currency but was not in violation of the EU regulations. On the other hand, Turkey has been denied membership of the EU primarily because of opposition from Greece. Thus, while membership requires unanimity under EU regulations, other union decisions (such as a common currency) may be adopted using variable geometry principles. The EAC adopted a similar principle. Under the guise of this principle, Kenya, Rwanda and Uganda decided in 2013 to fast track certain integration projects (a single customs territory, a single tourist visa, and the use of national IDs to travel between them), which Tanzania and Burundi were not ready for. Such partial integration is possible only with the adoption of the variable geometry principles. Admission of new members to the EAC requires unanimity.

For example, the Settlement of Disputes Article on the EAC customs union Protocol (Article 41) merely requires partner states to affirm adherence to some generalized principles for the administration and management of disputes. Similarly, the Dispute Settlement Article in the EAC monetary union Protocol (Article 28) provides that any dispute between partner states will be settled in accordance with the provisions of the treaty. Thus, it appears that granting the specified right of redress to potential litigants under the EAC common markets Protocol (Article 54) is a deliberate choice of the treaty and may be a warning to partner states. However, as further discussed below, the right of redress of Article 54 of the EAC common markets Protocol, or any other provision of the treaty with direct effect on the partner states, is limited to the extent that the national constitution of the partner state allows. Thus, Article 54 of the EAC common markets does not necessarily guarantee substantive redress of the dispute related to the rights and liberties as recognized by the protocol.

## 10.3 The Principle of Trade Complementarity

The EAC has also adopted the principle of trade complementarity using an economic approach. Under Article 1 of the treaty, the principle of complementarity is defined as "the extent to which economic variables support each other in economic activity." Under this principle, the EAC calls upon relevant institutions of the community and partner states to act when and where their counterparts are unable or are less equipped to do so. For example, under Article 80, the EAC requires partner states to adhere to the principle of complementarity "in order to enhance the spread effects of industrial growth and to facilitate the transfer of technology." The treaty also contemplates promotion of complementary transport and communications policies (Article 89) and complementary national agricultural programs (Article 105) to ensure implementation of various treaty objectives. If not collaboratively implemented, this principle may adversely affect under-developed nations.

## 10.4 The Principle of Equitable Distribution of the Benefits

The framers of the treaty also found it judicious to adopt the principle of equitable distribution of the benefits of the community. This principle finds impetus in the former EAC (Kenya, Uganda and Tanganyika, later Tanzania) that existed in various forms during colonial and post-colonial periods, the last of which finally collapsed in 1973. By 1973, the EAC had adopted zero-tariffs for community products and a Common External Tariff in its customs union framework, which led to Kenya's products dominating the community.

The framers of the EAC acknowledged that lack of adequate community policies to address the issues related to trade imbalances as the cause of the collapse of the former EAC and adopted the principle of equitable distribution of the benefits of the community (a fair and proportionate distribution of benefits). However, it is unclear how the community will enforce this principle once equity issues are raised by the partner states.

## 10.5 Human Rights

The EAC's treatment of issues related to human rights violations is somewhat convoluted. At first blush, the treaty's approach and remedies appear to be inadequate. First, it does not impose respect for human rights as a prerequisite for accession to the community[12] despite the treaty's reference to the African Charter on Human and Peoples' Rights (ACHPR) as a normative framework for the EAC. Worse yet, the treaty does not grant the EACJ jurisdiction over issues related to human rights violations. Instead, it leaves the determination of the EACJ's jurisdiction on human rights to "the Council at a suitable subsequent date" under Article 27(2). Handing the Council an open-ended authority to address human rights jurisdiction of the EACJ amounts to requiring a human rights protocol, which requires unanimity at the Summit.

Despite all the obstacles, the EACJ did not shrink from its judicial authority and used its law-making powers (under common law) to uphold fundamental rights and promote freedom under the EAC. In doing so, the EACJ abandoned its textual interpretation of the treaty in favor of a contextual interpretation emphasizing the treaty's objectives and obligations to declare that the EACJ will not abdicate from exercising its jurisdiction of interpretation of the treaty if the EACJ is faced with allegations that include human rights violations as long as the court can find a cause of action distinct from the human rights violations.[13] In its interpretation of Article 6(d) of the treaty (which lists several treaty objectives including "promotion and protection of human and peoples [sic] rights in accordance with the provisions of the African Charter on Human and Peoples' Rights"), the EACJ made it clear that violations of any of the treaty objectives under Article 6(d) establishes a legal foundation for jurisdiction under Article 27(1) because these objectives are serious government obligations. It appears that the EACJ is intent on finding a way to provide a remedy to human rights violations despite the treaty's skittishness in creating venues for such a remedy.

12. According to Article 3 of the treaty, "the matters to be taken into account by the partner states in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the community, shall include that foreign country" and lists six factors. One such factor is "adherence to universally acceptable principles of good governance, democracy, the Rule of Law, observance of human rights and social justice." However, the four principles enumerated in this factor form one of six factors listed as "the matters to be taken into account by the partner states in considering the application by a foreign country to become a member" of the community. As such, observance of human rights is not pre-requisite for accession. It is merely a desirable trait.
13. This is the sort of statutory construction that the so-called "activist" courts often adopt.

# 11. EACJ and Partner State Courts

*"The Somali judicial system is incapable of meeting the EAC requirements. Thus, upon accession, Somalia will need to create a judicial system capable of providing the requisite civil dispute resolution forum for the community*

The treaty requires partner states to put in place a mechanism to deal with disputes and disagreements that will inevitably arise between and among individual citizens, organizations, and businesses. The Somali judicial system is incapable of meeting the EAC requirements. Thus, upon accession, Somalia will need to create a judicial system capable of providing the requisite civil dispute resolution forum for the Community. This cannot exist without a robust criminal justice system where the rule of law is prevalent and community citizens are adequately protected. Thus, to implement the treaty, Somalia will need to draft and pass substantive and procedural criminal and civil legislations, build the infrastructure necessary for a functioning court system, expand territorial reach of the courts to all regions of the country, hire and train a substantial number of judges and court personnel, hire and train national and regional prosecutors, create minimum ethical and competence criteria for lawyers, and hire and train police forces and correctional officers.

For its part, the treaty created the EACJ as the judicial organ of the community charged with settlement of disputes arising out of the treaty, regulations, directives, decisions, or actions of the partner state and institutions of the community on the grounds that it is unlawful or infringes on provisions of the treaty.[14]

Article 24 of the customs union Protocol (on dispute settlement) also creates a Committee on Trade Remedies whose decisions with respect to settlements of disputes related to rules of origin, anti-dumping, subsidies, and other disputes related to integration are final. The decision of the committee is reviewable by the EACJ only on grounds of fraud, lack of jurisdiction, or other illegalities and only based on a request by a partner state, not by an aggrieved person.

The ouster of the EACJ from jurisdiction on some issues arising out of integration during the customs union stage does not extend to the common markets and monetary union stages. For example, Article 54 of the EAC common markets Protocol provides that "partner states guarantee that: (a) any person whose rights and liberties as recognized by this protocol have been infringed upon, shall have the right to redress, even where this infringement has been committed by persons acting in their official capacities; and (b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is seeking redress." As such, the national courts have jurisdiction in adjudicating all disputes arising out of the community at all stages of integration.

14. Talkmore Chidede and Louis Gitinywa, "Dispute settlement in the East African community (EAC)" at Dispute settlement in the East African community (EAC) - tralac trade law centre, last visited November 16, 2023.

The treaty grants the EACJ original jurisdiction over the interpretation and application of the treaty (Article 27). Article 31 also grants the EACJ jurisdiction to hear and resolve disputes between the community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations. According to Article 30, any person who is a resident in a partner state may refer for determination by the EACJ, the legality of any act, regulation, directive, decision or action of a partner state or an institution of the community on the grounds that such act, regulation, directive, decision, or action is unlawful or is an infringement of the provisions of the treaty. In addition to Article 30 not granting EACJ jurisdiction over disputes against the organs of the community brought by individuals, Article 33 allows such disputes to be brought in partner state courts. Article 33 provides that "disputes to which the community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the partner states." Thus, individuals may bring disputes against the EAC organs at the partner state courts. Individuals can also bring disputes against partner states and against institutions of the community (but not the community organs)[15] at the EACJ. Excluding community organs from the jurisdiction of the EACJ further circumscribes the court's powers.

Although the decisions of the EACJ "on the interpretation and application of this treaty shall have precedence over decisions of national courts on a similar matter" under Article 33, Article 30 allows organs of the community to carve out an area of the EACJ's jurisdiction through "an Act, regulation, directive, decision or action" and reserve such jurisdiction "to an institution of a partner state." Thus, Articles 30 and 33 of the treaty establish hierarchy between EACJ and partner state courts and reject the idea that partner state courts do not have jurisdiction over the EAC.

According to Article 34 of the treaty: where a question is raised before any court or tribunal of a partner state concerning the interpretation or application of the provisions of this treaty or the validity of the regulations, directives, decisions or actions of the community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question.

Article 34 of the treaty uses double conditional language as set out by two if clauses (where a question is raised . . . and if it considers that a ruling is necessary) followed by the consequent or the then-clause: "request the Court to give a preliminary ruling on the question.[16]

15. Article 9 of the treaty defines the East African Development Bank, the Lake Victoria Fisheries Organization, and other surviving institutions of the former East African community as community institutions.
16. Grammatically, Article 34 has two if-clauses and one main clause. The two if-clauses are: "where a question is raised" and "if it considers that a ruling is necessary." The main or then clause is: "shall . . . request the Court to give a preliminary ruling on the question." Thus, Article 34 is appropriately read as "if A and B, then C."

The first condition in Article 34 of the treaty asks whether a question "concerning the interpretation or application of the provisions of this treaty or the validity of the regulations, directives, decisions or actions of the community" is raised before any court or tribunal of a partner state. The second condition in Article 34 sets out whether the court or the tribunal of the partner state "considers that a ruling on the question is necessary to enable it to give judgment." If both of those conditions are satisfied (as a consequence of satisfying the conditional statements), Article 34 directs the court or the tribunal of the partner state to "request the [EACJ] to give a preliminary ruling on the question.

First, the EACJ interpreted the treaty's postulation of the first condition of Article 34 (where a question concerning interpretation or application of the treaty is raised to a national court or tribunal hears) as granting partner state courts and tribunals jurisdiction to adjudicate disputes arising out of the interpretation and application of the provisions of the treaty.[17] Under such a reading, the national courts and tribunals also have jurisdiction over questions related to the validity of the regulations, directives, decisions, and actions of the EAC. According to the EACJ, partner states are common users of the protocols, and it would be absurd if partner state courts had no jurisdiction over disputes arising out of the implementation of the protocols. However, for a national entity to be considered a court, the entity should apply the rule of law and be endowed with functional independence. The absence of court attributes (competence, independence, and impartiality) necessarily excludes arbitral tribunals, commissions of inquiries, and tribunals fully controlled by the executive or the legislative branch of the partner state government. Unfortunately, Somalia's courts are not capable of applying the rule of law and are not functionally independent.[18] As such, Somalia does not currently have tribunals that meet the requirements for asserting jurisdiction over the implementation of the treaty under Article 34.

Second, Article 34 requires partner state courts to refer to the EACJ for questions related to the interpretation of the provisions of the treaty and protocols. The EACJ has made it clear that it has a monopoly on the interpretation of the provisions of the treaty and protocols.[19] The only discretion (as set out by the conditional clause: "if it considers that a ruling is necessary") with the partner state courts is determining whether there is a need to interpret these provisions as set forth by the second condition in Article 34. However, a partner state court may interpret the provisions of the treaty if there is a need to interpret them and such interpretation is discoverable through the language of the treaty (via statutory construction) and/or existing EACJ decisions (via stare decisis). Regardless, the EACJ has the ultimate authority to interpret these provisions.

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17. John Eudes Ruhangisa, "Judicial Protection under EAC Law: Direct Actions," in East African Community Law: Institutional, Substantive and Comparative EU Aspects, Chapter 7, pp229-253 (2017).
18. So far, Somalia has failed to create the judiciary protection mechanisms outlined in the Provisional Constitution. While Article 106 of the Provisional Constitution declares, "[t]he judiciary is independent of the legislative and executive branches of government whilst fulfilling its judicial functions," it fails to create mechanisms necessary for judicial independence. Instead, it vests the power to "[a]ppoint, discipline and transfer any member of the judiciary at the Federal level" and "[to decide on remuneration and pensions of members of the judiciary" on a Judicial Service commission, which is yet to be created by the parliament, the Council of Ministers, and the President. Thus, members of the judiciary serve at the pleasure of the president and are therefore not functionally independent.
19. Emmanuel Ugirashebuja, "Preliminary References under EAC Law," in East African Community Law: Institutional, Substantive and Comparative EU Aspects, Chapter 8, pp254-274 (2017).

Third, the EACJ is obligated to provide an answer (in the form of preliminary ruling, i.e., a reasoned judgement under Article 35) to the partner state court's request on the interpretation of the treaty or its protocols but only if there is a live case before the partner state court. Thus, while the EACJ is required to provide advisory opinions to the organs of the EAC, the partner state courts have not been accorded such privilege.

Fourth, the EACJ relied on the use of "shall" in Article 34 as supporting its exclusive jurisdiction on matters related to the interpretation of the treaty.[20] The EACJ reasoned that Article 34 contemplates that the EACJ's preliminary ruling on the interpretation of the treaty would enable the partner state courts "to give judgment" to the dispute. According to the EACJ, expanding its interpretation jurisdiction to the application of the treaty would frustrate partner state courts' need to seek interpretation of the treaty if it cannot apply the treaty to the facts at issue. It is the absurdity of this result that the EACJ relied on the "manifestly absurd" exception of Article 32 of the Vienna Convention and concluded that the application of the provisions of the treaty is the domain of the partner state courts. Thus, while the treaty gives the EACJ and partner state courts jurisdiction over application of the treaty, the EACJ yields to the partner states' jurisdiction if the dispute is brought in front of the national courts.

*"Thus, while the treaty gives the EACJ and partner state courts jurisdiction over application of the treaty, the EACJ yields to the partner states' jurisdiction if the dispute is brought in front of the national courts*

Consistent with the EACJ's reliance on the absurdity of it having jurisdiction over application of the treaty, the treaty was later amended to add the proviso in Article 27(1) "that the Court's jurisdiction to interpret under this article shall not include the application of any such interpretation to jurisdictions conferred on organs of the partner states," which leaves application of the treaty provisions to the purview of the partner state courts for cases brought in front of national courts.

In addition to the general jurisdiction over the interpretation and application of the treaty, the 2015 protocol to operationalize the extended jurisdiction of the EACJ grants the court non-exclusive jurisdiction over "disputes on trade and investment arising from the implementation" of the protocols of the customs union, common markets, and monetary union. Given that the authority of the Trade Remedy Committee under the customs union protocol is not co-extensive with jurisdiction over disputes on trade and investment arising from the implementation of the treaty, the extension of the jurisdiction of EACJ under the 2015 EACJ protocol does not appear to affect the authority of the Committee on Trade Remedies under customs union protocol.

20. James Otieno-Odek, "Judicial Enforcement and Implementation of EAC Law," in East African Community Law: Institutional, Substantive and Comparative EU Aspects, Chapter 15, pp467-485 (2017).
EAC-CET-2022-VERSION-30TH-JUNE-Fn.pdf (kra.go.ke)

The treaty does not give the EACJ appellate jurisdiction over decisions from the partner state courts. Instead, it leaves the determination of "such other original, appellate, human rights and other jurisdiction [to] the Council at a suitable subsequent date" under Article 27(2). Legal practitioners have interpreted this section of Article 27 to mean that the Council will propose (and the Summit will adopt) an EACJ protocol that extends the Court's jurisdiction. Indeed, the EAC adopted in 2015 a new protocol for extending the jurisdiction of the EACJ except it did not grant the EACJ appellate jurisdiction over disputes arising from partner state courts. Many practitioners view the new EACJ protocol not to add any new powers that the Court did not previously have based on the treaty and its related instruments and in accordance with the Vienna Convention on the Law of Treaties. The ouster of the EACJ from jurisdiction over disputes arising out of the application of treaty at partner state courts will likely result in inconsistent application of the provisions of the treaty and create confusion and challenges to the EAC integration.

## 12. The Four Milestones of the EAC Integration

The EAC treaty contemplates four integration milestones. The partner states of the community are at various stages of implementing the customs union (2005) and the common market (2010). Implementation of the third milestone (the monetary union original target start date was 2013 and is now 2031) can start only after the first two stages are fully implemented. Completion of the third milestone should pave the way for the fourth and the final milestone of the EAC, a political federation. Given that implementation of the monetary union has not started yet, the contours of the political federation are only generally defined.

Further, in 2017, the EAC Summit interposed a transitional stage between the monetary union and the political federation milestones: namely, EAC political confederation. According to the EAC Secretariat, the partner states shall largely retain their national sovereignty under the proposed EAC political confederation, which will serve as a transitional stage for the political federation.

This fifth milestone is being added in response to concerns regarding whether the implementation of the political federation would lead to loss of sovereignty on the part of the partner states. According to Justice Benjamin Odoki, the chairperson of the Committee of Experts tasked with drafting a model constitution for the confederation, constituent states of the confederation would retain the freedom to join and/or withdraw from the confederation arrangement. The confederal authority will also retain the right to suspend or expel a partner state that violates the confederal constitution. Under a confederal system, the decision-making process is based on consensus or unanimity and the partner states do not lose their sovereignty. As Brexit taught us, regaining full sovereignty even from a political federation is not an impossibility.

## 12.1 The customs union

The EAC customs union (EACU) is the first regional integration milestone and a critical foundation of the EAC. It is immediately applicable to all partner states and the success or failure of this milestone will likely create the conditions for a similar outcome at later milestones. The EACU has been in force since 2005 and is built on three key schemes whose interplay creates order within the community: the Rules of Origin (ROO), Harmonized Commodity Coding System (HS)[21], and a Common External Tariff (CET)[22]. Partner states are required to adopt all three schemes.

The essential purpose of the schemes is to classify products into community and non-community and determine whether it is subject to the CET. The HS code uses the world customs union classification system to determine the classification code of the product. Once a classification code is assigned, the ROO is used to determine the origin of the product to classify it as community or non-community. For manufactured or otherwise processed products, determination of origin may entail determination of the HS code of both the product and its constituent components. Thus, product classification and determination of its origin are the most significant steps of trade regulations under the EAC.

The HS classification code is eight-digit numeric code, the first six of which correspond to chapter, headings, and subheadings. The code is not randomly assigned. Instead, the importer/exporter consults with HS code of the trade zone, which is a detailed, systematically created table of all conceivable products with a chapter, a heading, and a subheading. For example, the HS codes 2002.10.00 corresponds to tomatoes, whole or in pieces, whereas HS codes 2002.90.00 corresponds to other "tomatoes prepared or preserved otherwise than by vinegar or acetic acid." In this example, chapter 0 of both HS codes covers "preparations of vegetables, fruit, nuts or other parts of plants." The heading 02 in both codes specifies "tomatoes prepared or preserved otherwise than by vinegar or acetic acid" and the combination of the heading and subheading 02.10 signifies the type of tomatoes. The last two digits (00 and 00 in both examples) are normally reserved for trade statistics. If such product is non-originating and imported into the EAC, it is subject to the new CET band of 35% as finished goods available in the community.

The ROO provides a set of criteria that can be used to distinguish goods that are produced within the EAC customs territory and are eligible for community preferential tariff treatment from those that attract the CET import duties. Article 14 of the EACU protocol provides that goods are eligible for community preferential tariff treatment if they originate in the partner states. Under Article 4 of ROO, goods originate from a partner state of the EAC if (a) they have been wholly produced or grown in a partner state or (b) they have been "sufficiently worked" (manufactured or processed) in a partner state from materials produced or grown outside of the EAC and imported to the partner state. Examples of the "wholly produced" class of goods include live animals born and raised in the country, products (for example, meat or hide) obtained from such animals.

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21. EAC-CET-2022-VERSION-30TH-JUNE-Fn.pdf (kra.go.ke), last visited November 14, 2023.
22. "Common External Tariff 2022 Version," at https://kra.go.ke/images/publications/EAC-CET-2022-VERSION-30TH-JUNE-Fn.pdf, last visited November 14, 2023.

Article 6 of ROO addresses the "sufficiently worked" class of products. An item is sufficiently worked or processed in a partner state if (a) the product's harmonized code is different from that of its raw materials, (b) the amount of the non-originating materials (often in terms of cost but occasionally in terms of weight) does not exceed a certain threshold of the product, and (c) a specific working or processing has been carried out in a partner state.

The EACU uses various maximum thresholds of non-originating goods allowed in a manufactured or processed originating product. For example, for originating gums, resins and other vegetable saps and extract, the weight of non-originating materials used does not exceed 30% of the weight of the final product.[23] The more common criterion in ROO is for all the non-originating materials not to exceed 70% of the ex-works price of the product (the value of the product including material and other costs related to its production, minus any taxes). For example, for originating finishing agents (such as dye carriers to accelerate the dyeing or fixing of dyestuffs and other products and preparations), all the non-originating materials used does not exceed 70% of the ex-works price the product. The variation in the percentage threshold and the use of weight or ex-works price adds to the complexity of determining whether a product is non-originating and thus subject to CET. An item gets preferential treatment as a community product only if it is originating. Otherwise, CET applies at the importing partner state.

The EACU created four CET bands depending on whether the non-originating imported product is raw materials (0%), intermediate products (10%), finished goods not otherwise available in the community (25%), or finished goods available in the community (35%)[24]. Products in the fourth band (subject to 35% CET) include animal and fish products, horticultural products, refined edible oils, wood products, leather products, ceramics, furniture, iron and steel products, and sugar confectionary. For example, non-originating items with HS code 2002.10.00 (tomatoes, whole or in pieces) are subject to 35% CET because tomatoes are available in the community.

The EACU adopted a progressive approach to the implementation of the EACU by allowing gradual reduction of tariffs of the community goods to zero for some of the Kenyan products imported into Tanzania and Uganda.[25] It appears that Tanzania and Uganda negotiated this gradual reduction of tariffs on some of the Kenyan products to protect their own industries. Given that Somalia would be signing into an existing treaty, it should receive no worse treatment than any of the original signatories. Indeed, Somali farmers and producers need significantly more protection than those of any of original signatories of the treaty. Thus, gradual reduction of tariffs on selected community products (in particular Kenyan products) should be made available to Somalia.

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23. See First Schedule—List Of Products And Working Or Processing Operations Which Confer Originating Status, PART 1, List Of Products And Working Or Processing Operations Which Confer Originating Status at the end of the Rules of Origin of the Customs Union.
24. https://eagc.org/2022/08/18/the-east-africa-community-publishes-the-new-common-external-tariff-schedule-with-a-new-35-tariff-band/, last visited November 14, 2023.
25. The reader would recognize that Kenya, Tanzania and Uganda were the original signatories of the treaty.

As a remedy against adverse effects caused by the implementation of the EACU protocol, the EAC also adopted a temporary "stay of application" process for the CET rates (see Article 12(3) of the EACU protocol). The stay of application is a request to temporarily use a tariff rate different from the scheduled CET under the treaty for the purpose of allowing partner states to protect or promote certain important industries. For example, to protect a particular industry, a partner state may seek an increase of CET for some specific imported products. For example, Kenya sought an increase of mobile phone CET rate from 0% to 25% to encourage local production of mobile phones.[26]

Similarly, Tanzania sought a stay of application of the CET rate of 25% and the application of 35% rate on imported diapers to protect its local diaper industries. Id. In some instances, a country may want to promote a particular industry and may need to import certain products suitable as raw materials at a lower cost. With promotion of the food industry as a motive, Tanzania sought a reduction of the CET rate from 10% to 0% for certain raw materials used to manufacture food flavors.[27]

The treaty also uses duty drawbacks and duty remissions as mechanisms to support the EACU scheme. A duty drawback is a refund of all or part of any excise or import duty paid in respect of goods exported or used in the manufacture or processing of such goods. It allows partner states, upon exportation to a foreign country, to a drawback of a certain amount of import duties paid for importing the "goods or any material used in the manufacture or processing of such goods." On the other hand, duty remissions are a waiver of duty or refrainment from exacting of duty of goods used for the manufacture of goods for export under Export Promotion Program Office or home consumption as the council may determine under Essential Goods Production Support Program. Qualifying for duty drawbacks and remissions requires significant evidence collection and record keeping on the part of the company importing the goods.

The customs union created the Simplified Trade Regime (STR) to accommodate the need for small scale traders who regularly transact in low value consignments. An approved simplified certificate of origin exempts originating goods valued under US$2,000 from paying import duty in the EAC destination country. Once a trader satisfies the two criteria (originating from a partner state and valued at US$2,000 or less), she fills the Simplified Certificate of Origin. Ordinarily, the customs officers at the exporting side of the border confirm the claimed valuation before allowing the trader to proceed to the importing side of the border. Unless there is reason to suspect that the goods declaration is fraudulent (because the trader declared false values or engaged in an illegal goods-splitting scheme), the process should be simple.

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26. https://taxnews.ey.com/news/2023-1308-east-african-community-implements-tariff-changes-for-the-financial-year-2023-24, last visited November 19, 2023.
27. https://assets.kpmg.com/content/dam/kpmg/ke/pdf/tax/2022/Budget%20brief%202022%20-%20Tanzania.pdf, last visited November 19, 2023.

In summary, the EAC customs union allows sufficient flexibility to level the playing field for the region's producers by imposing uniform competition policy and law and allowing progressive community customs procedures and flexible external tariffs on goods imported from non-EAC countries. It is up to Somalia's negotiators how much protection the country should get for the promotion or protection of local growers or producers.

## 12.2 The Common Market

Article 1 of the EAC treaty defines a common market as "the partner states' markets integrated into a single market in which there is free movement of capital, labor, goods and services." The EAC common market (EACM) is the second regional integration milestone of the EAC and has been in force since 2010.

This stage is aimed at accelerating economic integration by guaranteeing certain freedoms (free movement of goods, labor/workers, services, and capital) and rights (right of establishment and residence) within the community. Underlying the EACM are the customs union created in the previous milestone and the operational principles of the community, namely elimination of tariff, non-tariff and technical barriers to trade; harmonization of standards and trade policies; equal treatment (including non-discrimination) to nationals of other partner states; transparency in matters concerning the other partner states; and sharing of the information for the smooth implementation of the protocol. The concept of a common market involves the elimination of all obstacles to intra-community trade and merging of the national markets into a single market.[28]

The right of establishment and residence in any EAC partner state and the free movement of labor/workers and services within the EAC common market have the potential to create unprecedented movement of people across national boundaries in the EAC. Somalis have been adept at such movement as they have a large presence in most of the nations in the community. Unfortunately, such movement has also the potential to drain skilled Somali workers to more developed nations such as Kenya. Indeed, in addition to having significant numbers of native Somalis in Kenya, our neighbor has attracted significant skilled Somalis to its major cities. This milestone has the potential to exacerbate the problem.

## 12.3 The Monetary Union

The East African Monetary Union (EAMU) is the third milestone of the EAC integration process, following the customs union and common market milestones.

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28. "Single customs territory procedures and manual" at SCT Procedure Manual (2014).pdf (infotradekenya.go.ke), last visited November 14, 2023

The EAMU protocol was signed on November 30, 2013 with a target date of 2024, which has since been delayed to 2031, mostly because the prior two stages of the integration have not been fully implemented. Furthermore, the EAC hasn't yet decided the name or valuation of the new currency although most people expect it to be an EAC Shilling. For individual partner states, the EAMU protocol becomes effective upon domestication under Article 30.

The main purpose of the EAMU is to maintain price stability and foster financial integration in the region by harmonizing monetary and fiscal policies and establishing specified common standards and practices for the financial institutions as provided in Articles 5 and 6 of the EAMU protocol. In particular, Article 5 requires the partner state to "fully implement" the EACU and EACM protocols. Article 26 of the EAMU provides, "[t]he Summit, may on the recommendation of the Council,[sic] admit a partner state which fulfils the requirements of Articles 5 and 6, into the single currency area." Ignoring the confusing punctuations in Article 26 of the EAMU protocol and reading it contextually with Articles 5 and 6, leads to the conclusion that completion of the requirements of the first two milestones of the EAC integration (the EACU and the EACM) is a condition precedent for the admission of a partner state to the Single Currency Area. Thus, the monetary union milestone builds on the common market platform built on the customs union created in the first milestone.

The monetary union milestone triggers some interesting political and economic issues for Somalia. Much of Somalia, in particular the business community, has unofficially adopted the US dollar as its main currency while the Somali Shilling still circulates in small markets. With the implementation of the monetary union milestone, Somalia will face the question of whether to supplant the US dollar and the Somali Shilling with the yet to be named EAC currency. Fortunately, the community's use of the variable geometry as an implementation strategy allows partner states to choose their degree of integration. Thus, Somalia should have the option of not implementing the monetary union milestone while remaining an integral partner state of the community. Indeed, the use of the US dollar has allowed Somalia to maintain price stability, which is the main purpose of the EAMU milestone. Implementation of monetary union may only bring an upheaval without any commensurate benefits to Somalis.

The EAMU protocol authorizes the Council to establish the East African Central Bank (EACB), which will, together with the national central banks of the partner states, form a functionally integrated system of central banks. The EACB will issue legal tender for the EAC region and will be responsible for formulating and implementing monetary policy, conducting foreign exchange operations, and promoting the smooth operation of payment systems.

## 12.4 The political federation (and the political confederation)

The political federation is the fourth and the final milestone of the treaty after the customs union, the common market, and the monetary union. It will be built on three pillars: common foreign and security policies, good governance, and effective implementation of the prior three milestones. The main purpose of the political federation is to strengthen the political and economic ties between the EAC partner states, and to provide a framework for cooperation on issues of common interest. A version of the common security policies has been in play in Somalia through AMISON and ATMIS where forces from Kenya, Uganda, and Burundi (the three contributing EAC countries) have seamlessly integrated under a common command structure.

Because of reluctance from partner states from possible loss of sovereignty, the EAC Summit adopted in 2017 a transitional integration milestone before the political federation. In this transitional milestone (called the political confederation), the partner states will largely retain their national sovereignty under a political confederation. The Summit has directed the Council of Ministers to constitute a team of constitutional experts and draft the constitution for the EAC political confederation to be tabled at the Summit. Thus, even though some aspects of the process of establishing a political federation may have started, this milestone will likely come only after a confederation milestone is completed. The nature of the contemplated political confederation is yet undefined. Ordinarily, political confederation entails power sharing similar to that of federation except for the complete retention of sovereignty by member states in the former. Thus, it would seem the political confederation will also be built on the same three pillars as the political federation: common foreign and security policies, good governance, and effective implementation of the prior three milestones.

The EAC is somewhat modeled after the European Union (EU), the only supranational union that has reached a political federation stage. Even with the political, economic, and security benefits that come with the political federation, power-sharing under a federal system is known to create a divisive environment. Indeed, some European countries (most notably Norway and Switzerland) chose not to join the Eurozone and the political union because of their desire not to lose their sovereignty. The United Kingdom, which joined the political union but not the Eurozone, recently left the EU and was forced to negotiate terms for its access to the EU Single Market. Given that modern governance is a European construct and Africa is significantly more heterogeneous than Europe, governments of the EAC partner states will likely have a significantly harder time than their European counterparts to justify joining a political federation, which is also another western construct unrelated to how Africans have historically ruled themselves.

Only time will tell if the political federation stage of the EAC is ever reached. However, it should be noted that the risk of joining the political union is not significantly high because while regaining sovereignty from a supranational union may be arduous, it is not impossible, as shown by Brexit. Indeed, Article 145 of the treaty guarantees partner states the right to withdraw from the community.

The challenges posed by adopting federalism are not unique to the EAC. Somalis have been toying with federation in their own governance for more than a decade with limited success, mostly because the concept is quite foreign to Somalis' view of governance. The west adopted federalism to create a balanced government system with clear delineation of the political powers that are centralized in the federal government and the political powers that are decentralized (retained by the member states)[29]. Instead of focusing on striking the requisite balance necessary in federalism, Somalia's member states are jockeying to retain as much of their political powers as possible. Thus, Somalis risk fragmenting the country if they fail to agree to centralize some of the political powers and create a viable federal government. With that as a backdrop, it remains to be seen how Somalis will deal with the implementation of this milestone. Fortunately, it is decades away and the community will gain enough experience to make an informed decision on the form of federalism that can succeed. The EAC will be a success if it completes the first two milestones and creates a single EAC market. Once the common market is established, a partner state can presumably suspend implementation of the last two integration stages.

# 13. Challenges and Opportunities

Somalis need to be keenly aware of the challenges of becoming an effective member of the EAC. Undoubtedly, Somalia's economic and political conditions as well as its poor track record in governance, human rights, and the rule of law pose significant challenges to its ability to integrate into the community. With the backdrop of disintegration and civil strife of the 1990s followed by a long history of internal armed conflicts (which are still on-going), Somalia faces serious challenges in economic, infrastructure, institutional and human resources necessary to meet the EAC integration demands.

The first stage is the customs union (EACU) whose success forms the foundation of the community. As the first integration stage, the EACU focusses on agriculture and livestock products. This stage seeks eventual elimination of import tariffs within the EAC for community products. It also sets uniform tariffs for non-community goods imported into the EAC.

*Livestock and agriculture, which are highly vulnerable to global crises and shocks such as global warming and drought, are also Somalia's primary economic activities. Because Kenya is the only EAC country that borders Somalia, it will likely provide most of the economic activities and competition in the EAC*

Livestock and agriculture, which are highly vulnerable to global crises and shocks such as global warming and drought, are also Somalia's primary economic activities. Because Kenya is the only EAC country that borders Somalia, it will likely provide most of the economic activities and competition in the EAC. Although Somali farmers and herders may need resilience building more than anything else, competition with Kenyan farmers may pose significant existential challenges. Indeed, Tanzania and Uganda were seriously concerned with competing against Kenya during the creation of the EAC and negotiated specific implementation terms. Somali authorities should similarly be concerned with the significant challenges Somalia's livestock and agriculture industries will face in directly competing against their Kenyan counterparts. Resource disparity has the potential to tilt the EAC livestock and agricultural markets in favor of Kenyan farmers. The EAC's use of the principle of trade complementarity could further complicate this competition. Under this principle, partner states are asked to act when and where their counterparts are unable or are less equipped to do so. The principle specifies promotion of complementary national agricultural programs under Article 105. Thus, Kenya could conceivably use Somalia's inabilities as a pretext to encroach into areas occupied by Somali enterprises. Implementation of the EAC customs union also poses significant economic risks to Somalis including the potential for becoming a dumping ground for excess goods and services from the community.

Some may argue that the EAC integration process will lead to significant development in Somalia. In this context, the treaty is so comprehensive that the required harmonization activities will touch on all conceivable aspects of the law in Somalia. As such, implementation of the treaty will likely transform Somalia into a full-fledged country.

In particular, the treaty requires partner states to create court systems that can deal with disputes and disagreements that will inevitably arise between and among individual citizens, organizations, and businesses in partner states. Meeting such requirements could lead to creation of a justice system that enhances the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, and gender equality, as well as the recognition, promotion and protection of human and people's rights. The EACJ made it clear that partner states' failures to adhere to these principles are justiciable and that it has jurisdiction over them. Thus, the treaty and implementation of its provisions have the potential to accelerate Somalia's development of justice institutions and infrastructure.

Unfortunately, Somalia's current development status is plagued by low income, a weak education system, no manufacturing economy, high energy costs, lack of skilled laborers, a weak healthcare system, a weak agricultural economy with heavy dependence on imported food, a shortage of technological expertise, non-existent ground transportation systems (no roads or trains), underdeveloped airports, weak institutions, and a pervasive culture of dependence and corruption. It is hard to imagine how such a country will not be overwhelmed by its immediate neighbor Kenya, potentially further decimating Somalia's nascent development activities.

# 14. Policy Recommendations

1. The modernization of the Somali economy inevitably requires developing small industries that use local raw materials to create value-added products. Somalia should develop an economic plan for the next 10 years and beyond, identify industries necessary for the plan, and negotiate terms that would protect and promote small businesses engaged in such industries. Somalia should use the plan during the negotiation and the implementation of the EAC customs union.

2. In consultation with economists and the business community, Somalia should create a comprehensive risk minimization plan for local producers as they start to directly compete with their Kenyan counterparts. Somalia should use this plan during the negotiation and the implementation of the EAC customs union.

3. Similar to the treatment received by Tanzania and Uganda, Somalia should secure a prolonged period of implementation of the EAC customs union before the tariffs on the Kenyan goods are reduced to zero.

4. Somalia should seek permission to use suitable tax schemes (such as a stay of application of CET) for non-community goods that directly compete against locally grown or produced products. Of course, Somalia should pay close attention to the discriminatory practices prohibited under WTO regulations related to the most favored nation.

5. With the common market and its associated freedom of movement come the potential for brain drain. Somalia should examine its economic conditions and whether freedom of movement of people will cause brain drain and stagnation of industrialization in the country.

6. Somalia's legislative and executive branches should immediately put in place a plan for creating a court system capable of dealing with disputes and disagreements that will inevitably arise between and among individual citizens, organizations, and businesses in partner states in the EAC. Such a court system requires building significant infrastructure (in terms of space and technologies); enacting and implementing substantive and procedural criminal and civil legislation; expanding territorial reach of the courts to all regions of the country; hiring and training substantial number of judges and court personnel; hiring and training national and regional prosecutors; creating minimum ethical and competence standards for lawyers; and hiring and training police forces and correctional officers. Without this investment in human capital and infrastructure, the implementation of the treaty will not move forward.

7. Somalia should immediately create the constitutionally-mandated Judicial Service Commission, which is necessary to make the federal courts functionally independent as required by the treaty. Given that the Chief Judge of the Constitutional Court is a member of the Judicial Service Commission, the establishment of the Constitutional Court is also an important step in the implementation of the treaty.

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