JURISDICTIONAL OVERLAPS IN TRADE AND INVESTMENT DISPUTES SETTLEMENT IN THE EAC: REFLECTIONS ON THE EAST AFRICAN COURT OF JUSTICE'S ' CONSTRAINED JURISDICTION'

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Abstract

This study seeks to examine the jurisdiction of the East African Court of Justice (EACJ) to hear and determine trade and investment disputes within the East African Community (EAC) in line with its principle of having a people-centred and market-based community. The research is anchored on the hypothesis that the jurisdiction of the EACJ to determine commercial disputes arising out of trade and investment activities within the region is constrained. The study establishes that there exist parallel dispute resolution mechanisms whose effect is to constrain the jurisdiction of the EACJ to hear commercial disputes within the EAC. This in turn affects both the consistency and predictability of trade and investment jurisprudence in the EAC. These mechanisms include the East African Committee on Trade Remedies, the EAC Competition Authority, arbitral tribunals within national

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jurisdictions of Partner States, and dispute resolution mechanisms of other regional economic communities (RECs) where EAC Partner States are also members. The study recommends treaty amendments to restate the Court's jurisdiction and also to accord it exclusive original and appellate jurisdiction in matters of relevance to trade and investment.

Keywords: regional integration, East African Community, East African Court of Justice, parallel jurisdiction, dispute resolution mechanisms, trade and investment

1. Introduction

Article 9(1)(e) of the Treaty Establishing the East African Community 1999, (the Treaty) establishes the East African Court of Justice (EACJ) as an organ of the Community. Article 23(1) states that the Court shall be a judicial body with the power to ensure adherence to the law in interpreting, applying and complying with the Treaty. The jurisdiction and role of the Court are stated in Article 27(2) of the Treaty.[1]

The EACJ has original jurisdiction over interpretation and application of the Treaty except where the Treaty confers such jurisdiction to national courts of Partner States.[2] Further, the EACJ has arbitral and advisory jurisdiction.[3] Article 32 of the Treaty gives the Court jurisdiction to hear and determine any matter arising from an arbitration clause contained in a contract or agreement.[4]

Through the 2015 Protocol to Operationalise the Extended Jurisdiction of the EACJ, the EAC Council of Ministers extended the jurisdiction of the EACJ to preside over disputes arising from the implementation of the Customs Union[5] and Monetary Union Protocols.[6] As such, the EACJ has jurisdiction over disputes arising from the implementation of other instruments created by the Treaty. For instance, the EACJ can determine disputes arising from the Protocol on the Establishment of the East African Customs Union (Customs Union Protocol) and the Protocol on the Establishment of the East African Community Common Market (Common Market Protocol) since they are integral parts of the Treaty.[7]

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[1] Treaty Establishing the East African Community, 30 November 1999, 2144 UNTS I-37437, Article 27.

[2] EAC Treaty, Article 27.

[3] EAC Treaty, Article 32.

[4] EAC Treaty, Article 32(a).

[5] Protocol on the Establishment of the East African Customs Union Protocol 2004.

[6] Protocol on the Establishment of the East African Community Common Market, 2009 and the Protocol on the Establishment of the East African Community Monetary Union, 2013.

[7] Article 5(2) of the EAC Treaty states that '[i]n pursuance of the provisions of paragraph 1 of this Article, the partner states undertake to establish among themselves and in accordance with the provisions of this treaty, a customs union, a common market, subsequently a monetary union and ultimately a political federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the partner states to the end that

However, the Customs Union Protocol and the Common Market Protocol also provide for parallel dispute settlement mechanisms that compete with the jurisdiction of the EACJ to hear and determine trade and investment issues. It is in this regard that this paper seeks to examine the extent to which the jurisdiction of the EACJ in trade and investment is constrained by the presence of these parallel dispute resolution mechanisms in the Customs Union Protocol and the Common Market Protocol.

Neither the Treaty nor its additional Protocols define what 'trade and investment' means. However, this paper adopts the meaning that refers to cross-border trade and investment within the EAC. That is to say, all matters relating to sale of goods and services, investment, free movement of labour, goods, capital and services, and connected matters within the EAC.[8]

2.0 The concept of jurisdictional overlap

Jurisdictional overlap connotes a situation where a dispute can be submitted to more than one tribunal or institution for resolution.[9] In regional integration arrangements, just as is the case with national or global arrangements, parties to a trade agreement always have a choice between diplomatic or political channels, and legal means to solve any dispute arising from their transactions.[10] Karen Alter and Liesbet Hooghe opine that diplomatic or political dispute settlement mechanisms allow the parties to retain control of the settlement process.[11] Dispute settlement mechanisms of this nature include

there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities, the benefit of which shall be equitably shared.'

[8] Meaning given by Organisation for Economic Co-operation and Development (OECD), available at oecd.org, on 17 February 2022.

[9] Kwak Kyung and Marceau Gabrielle, 'Overlaps and conflicts of jurisdiction between the World Trade Organization and regional trade agreements', in Lorand Bartels and Federico Ortino (eds), *Regional trade agreements and the world trade legal system,* Oxford University Press, 2006, 118.

[10] See, for example, Article 19 of the Treaty on the Functioning of the European Union which establishes the CJEU. See also article 5 of WTO dispute settlement understanding for an analysis on how states can make use of diplomatic or political channels in settling disputes.

[11] Karen J Alter and Liesbet Hooghe, 'Regional dispute settlement', in Tanja A Börzel and Thomas Risse (eds), *The Oxford handbook of comparative regionalism*, Oxford University Press, 2016, 1-23.

mediation, good offices[12] and negotiation. Legal means are more public in nature and the decisions made by the tribunals which are in charge of the dispute resolution processes are potentially binding on the parties. Arbitration and adjudication are the two well-known legal means of settling trade-related disputes.[13] In a regional economic integration setting, all these dispute resolution mechanisms are available to the parties to choose the most convenient option. This depends on the gravity of the dispute, the predictability and consistency of the decisions of the tribunal or institution, the proximity of the parties to the tribunal or institution, or the legal and institutional framework governing disputes of that nature.[14]

In Africa, it is common to come across countries that belong to more than one regional economic community (REC). This multiple membership enables the trading parties to have more fora in which they can file their disputes for settlement. For instance, Kenya is a member of the EAC, the Common Market for East and Southern Africa (COMESA), and the Intergovernmental Authority on Development (IGAD).[15] When a cross-border trade dispute arises between a party or entity within the EAC and another one within the COMESA, the parties may decide to submit the dispute to the EACJ or the COMESA Court of Justice, depending on the forum-choice parameters that appear more favourable to them.[16] The parties can also submit the dispute to

[12] Good offices are a diplomatic means for the settlement of disputes (Diplomacy; peaceful settlement of international disputes; judicial settlement of international disputes), per the definition given by the *Oxford Learners Dictionary*, available at oxfordlearnersdictionaries.com, on 17 February 2022.

[13] Herman Verbist, Schäfer Erik, and Imhoos Christophe, 'Settling business disputes: Arbitration and alternative dispute resolution', *International Trade Center,* Geneva, 2016.

[14] Verbist and others, 'Settling business disputes: Arbitration and alternative dispute resolution' 1-84.

[15] This is presently the case, but the agreement establishing a tripartite free trade area among the COMESA, EAC and the Southern African Development Community (SADC) of 10 June 2015 may soon cure this problem of overlapping membership as it seeks to establish a free trade area between the EAC, COMESA, and SADC. The agreement is, however, not yet in force as at May 2022.

[16] Desire Kayihura, 'Parallel jurisdiction of courts and tribunals: The COMESA Court of Justice perspective', 35(3) *Commonwealth Law Bulletin* (2010) 583-592. The author has served as registrar of the COMESA Court of Justice. The parameters informing the choice of the forum may include the proximity of the court to the parties, likelihood to obtain a favourable judgment, proximity to witnesses and evidence, among others.

alternative dispute resolution (ADR) mechanisms that are available to them.[17] In the event that these parties decide to use ADR or the COMESA Court of Justice, the EACJ is denied an opportunity to hear that dispute and its role in the economic integration of the region becomes peripheral.

Further, most Partner States to RECs in Africa are also parties to global trade instruments such as the Marrakesh Agreement Establishing the World Trade Organisation (WTO),[18] which have their own dispute resolution mechanisms. The result is that there is jurisdictional overlap between the institutions and tribunals that parties to trade can submit to.[19] Indeed, all EAC Partner States are also member states of the WTO.

RECs draw their mandate from Article XXIV of the General Agreement on Tariffs and Trade (GATT). Paragraph 12 of this Article empowers members to ensure the observance of the obligations in the covered agreements either through their regional or local territories. However, the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO (Dispute Settlement Understanding) gives the WTO Dispute Settlement Body (DSB) some supremacy on disputes arising from obligations covered in its agreements. This, in essence, requires WTO Member States to submit their disputes to the DSB without exception. This brings about jurisdictional overlap and in the process denies other similar tribunals and courts the opportunity and chance to hear and determine such disputes.

[17] To further problematise this point, the African Continental Free Trade Agreement is in force. It has its own primary dispute settlement mechanism which, according to scholars, tends to also empower the RECs DSMs in such trade and investment matters, thus creating a further overlap of jurisdiction. In addition, EAC Partner States are members of the WTO, meaning, they are subject to the compulsory jurisdiction of the WTO DSM. What criterion would a partner state use to refer a matter to the WTO DSM and not AfCFTA DSM or EACJ?

[18] [Marrakesh] Agreement on the Establishment of the World Trade Organisation, 15 April 1994.

[19] Jennifer Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO: What should WTO do?', 42(2) *Cornell International Law Journal* (2009) 193.

3.0 Dispute resolution mechanisms within and across RECs

Parallel dispute resolution mechanisms exist within and across RECs around the world. The most notable institution charged with the responsibility of interpreting and applying instruments establishing the RECs is a court as established by the community's constitutive document. Every REC either has a regional court or a tribunal with the jurisdiction to interpret the treaty establishing the REC. The EACJ carries this responsibility for the EAC, while the COMESA Court of Justice is charged with this responsibility for COMESA. Whereas these regional courts have the power to hear and determine disputes regarding human rights, good governance, treaty interpretation, disputes between the community and its employees, and economic matters, some, for instance the EACJ, have other parallel tribunals established to deal with trade matters alongside it. This denies them an exclusive role which is useful for consistency in jurisprudence making.[20]

In addition to the existence of parallel institutions and tribunals established in the instruments, parties engaged in trade have the liberty to use alternative dispute resolution (ADR) mechanisms such as arbitration, good offices, mediation and negotiation. The regional courts are, therefore, denied the 'original' and/or exclusive jurisdiction to determine trade-related matters and their role in regional integration becomes either peripheral or diminished.

Whereas the multiplicity of dispute settlement mechanisms within a REC offers parties several options to use when they have disputes, Karen Alter and Liesbet Hooghe opine that permanent courts have several advantages over *ad hoc* dispute resolution mechanisms.[21] For instance, whereas permanent courts make decisions whose effect can be felt in subsequent disputes and decisions, arbitration tribunals, mediators, and negotiators are hired to decide particular disputes and the decisions need not affect subsequent disputes.[22] Likewise, whereas adjudicators in permanent courts are appointed to

[20] East African Customs Union, Common Market and Monetary Union Protocols have established other dispute resolution mechanisms. These protocols have not stated that the EACJ has jurisdiction over disputes arising from the implementation of those protocols.

[21] Alter and Hooghe, 'Regional dispute settlement', 1-23.

[22] See generally, Cesare PR Romano, Karen J Alter and Shany Yuval (eds) *Oxford handbook of international adjudication,* Oxford University Press, 2014.

office through mechanisms that the parties to the dispute do not take part in, in arbitration, negotiation, good offices and mediation, the parties have a role to play in choosing the adjudicators. Thus, the decision that the adjudicators arrive at may not strictly reflect the provisions of the law and precedents set in previous decisions.[23]

Alter and Hooghe note that whatever model for dispute resolution parties in a regional set up choose, there are advantages and disadvantages.[24] However, the most important thing is to ensure that there is consistency and that any dispute resolution mechanism that the disputing parties choose should be used not only to achieve the wishes of the Partner States and the disputing parties but also the objectives of the REC. For instance, where one of the objectives of the community is to promote trade and integration, the dispute resolution system should reflect this objective by encouraging the use of the community's court.

The continuity of the dispute resolution mechanism is also crucial in deciding trade disputes arising from such RECs across the globe. Cross-border trade is meant to integrate communities. Thus, whenever disputes arise, Joshua Karton recommends that the resolution mechanism should also follow the same integrationist perspective.[25] Regional courts are established by the treaties establishing RECs and they, therefore, continue to operate for as long as the REC is in place. They do not end after deciding one dispute as is the case with *ad hoc* mediators, arbitrators and negotiators, whose role in the particular dispute, in most cases, ends after determining the dispute. Thus, Alter opines that these regional courts should be given the original or exclusive jurisdiction to decide disputes arising from trade and investment activities.[26]

A major limitation to the role of these regional courts in economic integration is that private citizens and entities are barred from accessing them

[23] Hillman, 'Conflicts between dispute settlement mechanisms in regional trade agreements and the WTO', 193.

[24] Alter and Hooghe, 'Regional dispute settlement', 1-23.

[25] Karton Joshua, 'International arbitration culture and global governance' in Walter Mattli and Thomas Dietz (eds) *International arbitration and global governance*, Oxford University Press, 2014, 74-116.

[26] Karen J Alter, *The new terrain of international law: Courts, politics and rights,* Princeton University Press, 2014.

especially where the defendant is not a Partner State or an institution of the community.[27] Trade is not a preserve of states and intergovernmental organisations. Private entities and citizens are, in fact, the building blocks to complete economic integration in any given REC. It is private citizens who carry out much of the small and large-scale cross-border trade within their REC, as do corporate entities. The daily interactions between these private citizens and corporate entities may lead to disputes which need to be solved in a manner that preserves the relationships between the players in the industry, necessitating unfettered access to the court by both legal and natural persons.

The above analysis shows that regional courts have some advantages over quasi-judicial dispute settlement mechanisms. Judicial settlement mechanisms benefit from the institutionalised and judicialised nature of the systems, so that the decisions arrived at are consistent with the provisions of the treaty establishing the REC. On the other hand, decisions of *ad hoc* dispute settlement mechanisms only concern the parties at the time of delivering such decisions.[28] They neither have permanence nor elements of predictability for the future, and many of such tribunals obtain their power from instruments that support the main constitutive document. For example, the EACJ is bound by the EAC Treaty. Good Offices, mediators, negotiators, etc. are not bound by this Treaty.

4.0 EAC Treaty and the jurisdiction gap of EACJ in trade and investment disputes

The jurisdiction of the EACJ is conferred by the EAC Treaty and its Protocols. Article 23 of the EAC Treaty in particular states that the Court 'shall be a judicial body which shall ensure the adherence to law in the in-

[27] For instance, EAC Treaty, Article 30(1) and 32(a); Treaty Establishing the Common Market for Eastern and Southern Africa, Article 26, which states that '[a]ny person who is resident in a member state may refer for determination by the court the legality of any act, regulation, directive, or decision of the council or of a member state on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this treaty.' This means that parties other than a partner state or an institution of the community cannot be sued in the regional court.

[28] Alter and Hooghe, 'Regional dispute settlement', 1-23.

terpretation, application of, and compliance with this treaty'.[29] This position is further cemented by Article 27(1) of the Treaty which gives the EACJ power to hear and determine matters related to the interpretation, application and observance of the Treaty. In this regard, the EACJ is the custodian of all matters regarding the interpretation and application of the Treaty.[30] Yet, the jurisdiction conferred on the EACJ by Article 27 cannot be construed to include the determination of trade and investment disputes to the extent of issuing redress to applicants whose rights under the Treaty have been infringed. The jurisdiction over the interpretation and application of the Treaty is seen here as too narrow a jurisdiction to enable the Court to play any active role towards the facilitation of economic integration within the region and also to ensure that traders and investors find justice in the Court when their rights have been infringed.

In *Alcon International v Standard Chartered Bank of Uganda and 2 Others*,[31] the Applicant petitioned the First Instance Division of the EACJ to interpret and apply Articles 27(2) and 151 of the Treaty and Articles 29(2) and 54(2)(b) of the Common Market Protocol in a case that had stalled in Ugandan courts for over 14 years. The Applicant had obtained an arbitral award of USD 8,858,469.97, but appeals to the Court of Appeal and Supreme Court of Uganda by the Respondents had stalled the process of satisfaction of the award. The Applicant, therefore, requested the EACJ to interpret the provisions of the Treaty and the Common Market Protocol in a manner that enforces and enhances trade and cross-border investments and the resolution of disputes arising from such trade and cross-border investment activities within the EAC.

The Court held that the Treaty does not confer upon it such jurisdiction and that it was clear from the wording of Article 54(2)(a) of the Common Market Protocol that such a dispute was supposed to be determined by the Ugandan national courts. The Court also held that the first and third Respondents were not Partner States or institutions of the Community and could not, therefore, be

[29] EAC Treaty, Article 23(1).

[30] EAC Treaty, Articles 23 and 27.

[31] *Alcon International v Standard Chartered Bank of Uganda and 2 Others* EACJ (2010) Reference No 6 of 2010.

sued before the Court.[32] Article 54(2) of the Common Market Protocol states that disputes arising from the implementation of the Common Market Protocol shall be settled '[i]n accordance with their constitutions, national laws and administrative procedures and with the provisions of this Protocol.' This provision has been construed to mean that national dispute resolution bodies of the Partner States shall be used in solving disputes arising from the implementation of the Common Market Protocol, to the exclusion of the EACJ.

The EACJ had previously taken the same position in *Modern Holdings (EA) Ltd v Kenya Ports Authority,*[33] where the Claimant averred that the Respondent failed to clear its consignment due to the 2007/2008 post-election violence in Kenya. Thus, the Claimant approached the EACJ seeking a finding that the continued holding of the consignment by the Respondent and its agents was contrary to the spirit of integration within the EAC and also seeking damages from the Respondent as a result of the losses. The Court declined to entertain the reference on the finding that the Kenya Ports Authority was a parastatal of the Republic of Kenya and could not be sued under Article 30(1) of the Treaty. Article 30(1) states that '[s]ubject to the provisions of Article 27…, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.' Hence, other private or domestic public parties cannot be sued in the EACJ.

From the decisions of the EACJ thus far, the EACJ has declined to hear any commercial dispute even when the substratum of the matter is the interpretation and application of the Treaty as envisaged under Articles 23 and 27 of the EAC Treaty. It is instructive to note that the Court has, however, assumed jurisdiction to hear such other matters as human rights abuses even when the Court's jurisdiction to entertain such matters is not explicitly conferred in the Treaty. In *James Katabazi and 21 Others v Secretary General*

[32] Article 30(1) of the EAC Treaty provides that legal and natural persons can refer to the court the determination of the legality of acts, directives, regulations, or decision of a partner state or institution of the community.

[33] *Modern Holdings (EA) Ltd v Kenya Ports Authority* EACJ (2008), Reference No 1 of 2008.

of the East African Community and the Attorney General of the Republic of Uganda,[34] the Court conceded that Article 27 of the Treaty does not confer upon it the jurisdiction to hear human rights violations. However, the Court relied on Article 6(d), which provides for the adherence to the rule of law and the protection of peoples' rights and freedoms as articulated in the African Charter on Human and Peoples' Rights.[35] The Court also applied Article 7(2), which states that the Partner States should undertake to abide by the principles of good governance including the rule of law, adherence to democracy, maintaining the universally-accepted human rights principles, and also adhering to the principles of social justice.[36]

The finding of the Court in this regard affirms that it has jurisdiction over the interpretation and application of the Treaty in a manner that upholds the principles of the Treaty. Thus, there is nothing to show that the EACJ did not have the jurisdiction to hear and determine the commercial disputes discussed earlier in this paper. The explanation by the Court that the parties sued were neither EAC Partner States nor institutions of the Community was not satisfactory because both natural persons and corporate bodies are expected to engage in trade within the EAC and disputes are bound to arise. The same principles that provide for the commitment of the Partner States to adhere to the rule of law and the protection of human rights also provide for the commitment of Partner States to promote economic cooperation,[37] people-centred and market-driven cooperation,[38] and peaceful settlement of disputes.[39]

Apart from the Treaty, the jurisdiction of the Court has been extended by the Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice (the Protocol).[40] The Protocol was concluded by the EAC

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[34] *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda* EACJ (2007) Reference No 1 of 2007.

[35] EAC Treaty, Article 6(d).

[36] *James Katabazi and 21 others v Secretary General of the East African Community and the Attorney General of the Republic of Uganda.*

[37] EAC Treaty, Article 7(1)(c).

[38] EAC Treaty, Article 7(1)(a).

[39] EAC Treaty, Article 6(c).

[40] According to the information obtained from the EAC secretariat at Arusha, Tanzania, during the collection of data for this paper.

Summit on its fifteenth session on 30 November 2013 where it approved the resolution of the Council of Ministers to extend the jurisdiction of the EACJ to cover trade and investment matters as a result of the conclusion of the Customs Union Protocol and the Common Market Protocol.[41] It was envisioned that the extended jurisdiction of the Court would also cover disputes arising from the implementation of the Protocol on the Establishment of the East African Monetary Union (Monetary Union Protocol).[42]

The Extended Jurisdiction Protocol is made up of six articles. Its objective as articulated under Article 2 is to extend the jurisdiction of the EACJ to cover trade and investment disputes arising from the implementation of the Customs Union Protocol, the Common Market Protocol, and the Monetary Union Protocol. Article 3(1) restates this extended jurisdiction, while Article 3(2) provides that this extended jurisdiction 'shall not extend to the jurisdiction conferred by certain bodies that are established by the Treaty or which exist in the laws of the Partner States.' Though the Protocol sets out to extend the jurisdiction of the Court to matters of relevance to trade and investments, it avoids or does not address the jurisdictional overlap that might occur when the Court and these other bodies as established under the Customs Union and Common Market Protocols have the power to hear and determine similar disputes. Further, the Protocol does not establish any appellate jurisdiction of the Court over the dispute resolution bodies established under the other protocols of the Community or those that are established under the laws of Partner States.

5.0 Arbitral jurisdiction of the EACJ

The EACJ has jurisdiction to hear trade and investment matters through arbitration. However, certain conditions must be met before the Court assumes jurisdiction to hear matters arising from arbitration clauses. First, the matter must have arisen from an arbitration clause in a contract where the

[41] The EAC Customs Union Protocol was concluded on 2 March 2004 while the EAC Common Market Protocol was concluded on 20 November 2009. The Monetary Union Protocol was concluded on 30 November 2013.

[42] Protocol on the Establishment of the East African Monetary Union, preamble.

Community or any of its organs or institutions is a party and which confers the jurisdiction to arbitrate on the Court.[43] Secondly, the Court may arbitrate on a dispute between Partner States regarding the implementation of the Treaty if such Partner States submit the dispute to the Court under a special agreement.[44] Additionally, parties to a commercial agreement may state in their contract that the EACJ shall have the jurisdiction to hear any dispute arising from their engagement.

In light of this jurisdiction, the EACJ Rules of Arbitration were promulgated in 2012 to facilitate the arbitral jurisdiction of the EACJ.[45] Under the rules, the EACJ constitutes itself into an arbitral tribunal to exercise its jurisdiction under Article 32 of the Treaty.[46] Under Rule 3, a party intending to commence arbitration proceedings with the Court must notify the Respondent to the proceedings in writing and also notify the Registrar of the Court. The arbitral tribunal is constituted by the judges of the court.[47] Parties to the dispute choose the applicable law. However, where the parties have expressly allowed the tribunal to determine the applicable law, the tribunal does so under the dictates of justice and fairness, without being constrained by particular laws.

The tribunal also determines the dispute in terms of the contract and the laws applicable to such contracts.[48] If the parties do not state the place where the arbitration proceedings will take place, the tribunal chooses the place after consulting witnesses and parties to the dispute.[49] The tribunal shall also entertain expert opinion when it is necessary to do so.[50] The arbitral award that the tribunal delivers to the parties should be in writing and is binding on the parties. If the parties consent, the award may be made public and also reported in law reports.[51] The award shall be enforced according to the enforcement

[43] EAC Treaty, Article 32(a).

[44] EAC Treaty, Article 32(b).

[45] East African Court of Justice Rules of Arbitration, eacj.org, 8 March 2017.

[46] EACJ Rules of Arbitration, Rule 1 on citation, application, and definitions.

[47] EACJ Rules of Arbitration, Rule 8.

[48] EACJ Rules of Arbitration, Rule 11.

[49] EACJ Rules of Arbitration, Rule 21.

[50] EACJ Rules of Arbitration, Rule 26.

[51] EACJ Rules of Arbitration, Rule 30.

procedures existing in the country in which enforcement is sought.[52] Thus, the court has the jurisdiction to hear commercial disputes through arbitral proceedings whenever parties specifically provide for that avenue in their contract.

The said arbitral jurisdiction appears to be unique to regional courts in Africa. This is so because the Court of Justice of the European Union (CJEU), the Court of Justice of the Andean Community and the Caribbean Court of Justice lack arbitral jurisdiction.[53] The Common Market for Eastern and Southern Africa (COMESA) and the Economic Community for West African States (ECOWAS)[54] have conferred arbitral jurisdiction on their regional courts as has the EAC on the EACJ. Although COMESA, ECOWAS and EAC have laws governing this arbitral jurisdiction, the jurisdiction has not yet been utilised at the time of writing this paper. The COMESA Court of Justice constituted itself as an arbitral tribunal in *Building Design Enterprise v Common Market for Eastern and Southern Africa.*[55] However, before that matter could proceed, the parties wrote to the Registrar of the Court withdrawing it.[56]

6.0 Parallel dispute resolution mechanisms for trade and investment disputes within the EAC

This section will examine the jurisdiction of good offices, conciliation, mediation and the East African Committee on Trade Remedies under the Customs Union Protocol. Further, the section will examine the jurisdiction of na-

[52] EACJ Rules of Arbitration, Rule 36.

[53] Richard Frimpong Oppong, *Legal aspects of economic integration in Africa,* Cambridge University Press, 2011.

[54] Although Article 16 of the Revised Treaty of Economic Community for West African Community, 1993 requires that an arbitral tribunal be established, the ECOWAS Community Court of Justice can sit as an arbitral tribunal pending the establishment of the said tribunal. Article 28 of the Treaty Establishing the Common Market for Eastern and Southern Africa, 1993 which came into force in 1994 confers arbitral jurisdiction to the COMESA Court of Justice.

[55] *Building Design Enterprise v Common Market for Eastern and Southern Africa*, [2002] Application for arbitration No 1. Application terminated on 18 October 2001 when the parties reached a mutual agreement to settle the dispute amicably outside court.

[56] Felix Manoera, 'Dispute settlement under COMESA', *TRALAC Working Paper No 7* (2011).

tional courts to hear commercial disputes arising from the Common Market Protocol. In addition to this, the jurisdiction of the East African Community Competition Authority under the East African Community Competition Act, the jurisdiction of other regional institutions in regional communities where Partner States of the EAC are also members, and arbitral jurisdiction of other arbitral tribunals will be examined. The existence of these multiple dispute resolution mechanisms limits access to justice by natural and legal persons at the EACJ but widens the range of institutions where these persons can file their commercial claims. As a result, the jurisdiction of the EACJ over trade and investment disputes is constrained.

6.1.0 Dispute resolution mechanisms under the Customs Union Protocol

6.1.1.0 Alternative dispute resolution mechanisms

The Customs Union Protocol establishes various mechanisms for settling trade and investment disputes. Under Article 41 of the Customs Union Protocol, regulations shall be promulgated to establish dispute resolution mechanisms giving it effect.[57] For this reason, the East African Community Customs Union (Dispute Settlement Mechanism) Regulations (the Regulations), Annex IX to the Customs Union Protocol, were promulgated. First, parties can pursue amicable dispute settlement processes such as mediation, conciliation and good offices.[58] These alternative dispute resolution mechanisms are determined by the parties and do not involve litigation. Good offices, essentially, provide for a conducive environment for the parties to amicably solve disputes without having to resort to litigation in courts.[59] In conciliation, an external third party actively participates in enabling the parties to reach an understanding while, in mediation, a neutral third party usually merely facilitates the reaching of the understanding but does not actively participate in the process. A distinction is drawn between mediation and good offices in that whereas

[57] Hence the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, Annex IX to the Protocol.

[58] East African Community Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 5 (1) and 6.

[59] World Trade Organisation Dispute Settlement Understanding (DSU), Article 5.1.

in mediation the mediator may sometimes play an active role in controlling the mediation process, good offices only initiate the negotiations and then the parties moderate the process by themselves.[60]

Thus, both the Customs Union Protocol and the Regulations recognise the need for ADR mechanisms to enable parties to resolve any disputes amicably without involving litigation. In *East African Law Society v Secretary General of the East African Community,*[61] the EACJ held that it is in the best interests of the parties to the dispute to choose a mechanism that enables them to solve their disputes promptly and amicably. Thus, the establishment of such offices is a pragmatic way of solving disputes arising from the Customs Union Protocol.

6.1.2 East African Committee on Trade Remedies

The Customs Union Protocol establishes an East African Committee on Trade Remedies (the Committee) with specific functions that are distinct from those of the EACJ.[62] According to the Customs Union Protocol, 'the Committee shall handle matters pertaining to EAC Rules of Origin, anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement, and any other matter that the Council of Ministers refers to it for resolution'.[63] The use of the word 'shall' means that the Committee has exclusive jurisdiction over these disputes. It is, however, not clear how the Committee shall be convened. This may explain why at the time of writing this paper, the Committee had neither convened nor determined any dispute falling under its jurisdiction.

Nine members, who are qualified in matters of trade, customs and law, shall compose the members of the Committee with each Partner State appointing three members.[64] While the Committee does not have investigative machin-

[60] Chief Justice Marshall in *Schooner Exchange v M'Faddon* [1812] 7 Cranch, 136-137. See also Sompong Sucharitkul 'Good offices as a peaceful means of settling regional differences', Faculty Scholarship at GGU Law Digital Commons (1967).

[61] EACJ Reference No 1 of 2011.

[62] Customs Union Protocol, Article 24(1).

[63] Customs Union Protocol, Article 24(1).

[64] Customs Union Protocol, Article 24(2).

ery, the investigative authorities of Partner States carry out their investigative functions. However, the Committee is to initiate such investigations.[65] The Committee works hand-in-hand with Partner States and also submits a report of its investigations, findings, provisional measures to prevent injury, advisory opinions and affirmative or negative determinations about the investigations.[66] The Committee determines its own procedure with regard to convening members, hearing disputes and making its decisions.[67] Except as provided for by other regulations promulgated under the Customs Union Protocol, the decisions of the Committee shall be final with regard to the settlement of disputes arising from the implementation of the Customs Union Protocol.[68]

The decisions of the Committee cannot be appealed to the EACJ except when a party seeks to challenge the illegality of the decision, lack of jurisdiction of the Committee with regard to the particular matter and fraud.[69] When this happens, an aggrieved party may approach the EACJ and seek an interpretation of the Committee's decision in line with Article 28(2) of the Treaty, which states that Partner States can refer matters to the court for determination. Regulation 6(7) restricts these appeals to the EACJ to Partner States as aggrieved parties. It does not anticipate a scenario whereby a natural or legal person aggrieved by the decision of the Committee could file an appeal with the Court. It appears that the Customs Union Protocol and the Regulations made thereunder governing the operations of the Committee do not provide for an avenue for natural and legal persons to refer matters to the Committee and the Court for determination. This in itself is a violation of the principle of a 'people-centred Community'.[70] By 'people-centredness', the people of East Africa should be given a chance to participate in the integration process which includes an opportunity to challenge injustices before the dispute resolution institutions created by the Treaty and the Protocols.

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[65] Customs Union Protocol, Article 24(4)(a).

[66] Customs Union Protocol, Article 24(4)(a).

[67] Customs Union Protocol, Article 24(5); See also, Dispute Settlement Mechanism Regulations, Regulation 6(7).

[68] EAC Treaty, Article 24(6).

[69] East African Community Customs Union (Dispute Settlement Mechanism) Regulations, Regulation 6(7).

[70] EAC Treaty, Article 5(3)(d).

In *East African Law Society v Secretary General of the East African Community,*[71] the Applicant sought a declaration by the Court that Article 24(1)(e) of the Customs Union Protocol was inconsistent with Articles 27(1) and 38(1) of the Treaty insofar as it purported to oust the jurisdiction of the EACJ over the interpretation and application of the Treaty. The Applicant also sought a declaration that the said Article 24 in the Customs Union Protocol contravened Articles 33(2) and 8(1)(a) and (c) of the Treaty as it gave the Committee precedence over the Court yet the Court has original jurisdiction over the interpretation and application of the Treaty. Article 75 of the Treaty empowers the Council to establish administrative institutions and authorise them to carry out functions of administering the Customs Union as the Council may deem necessary. It appears that the Committee is such an institution.

The EACJ has recognised the fact that whenever parties to a dispute submit their dispute to a resolution mechanism, they expect that the decision of the institution shall be final. Further, there is nothing in the Customs Union Protocol and the regulations to show that the jurisdiction of the Court with regard to trade and investment matters is fully ousted by the Committee. In the opinion of the Court, parties to a dispute can still apply to the Court for an interpretation of the provisions of the Customs Union Protocol and any other relevant law. Although the Court declined to rule that the establishment of the Committee ousts the jurisdiction of the EACJ in hearing disputes arising from the interpretation of the Customs Union Protocol, Article 24 of the Customs Union Protocol and the Regulations reveal the opposite. It would appear that the jurisdiction of the Court in matters appurtenant to the Customs Union Protocol is limited to the interpretation of the provisions because there is no room for an appeal of issues of law arising from the decision of the Committee. There is nothing in the Customs Union Protocol that shows that the Court can hear and determine disputes and award damages to parties to a dispute.[72]

[71] *East African Law Society v Secretary General of the East African Community.*

[72] *East Africa Law Society v Secretary General of the East African Community.*

6.2 Trade remedies available to Partner States

The Customs Union Protocol provides for three trade remedies for Partner States, namely: safeguards, anti-dumping measures and countervailing measures.[73]

6.2.1 Subsidies and countervailing measures

The Customs Union Protocol permits a Partner State to take countervailing measures where the subsidies used by another Partner State are harming its domestic industries.[74] The details of these countervailing measures are provided in Annex V of the Customs Union Protocol.[75] A subsidy occurs where a government or a public body makes a contribution towards the production of goods and services, the result of which affects the market of such a product.[76] Such a subsidy may take the form of direct funding by the government or public body, or grants and loans. Article 17 of the Customs Union Protocol provides that where a Partner State favours some undertakings by subsidising their production activities, it must notify the other Partner States about the details of the subsidy. Since one of the aims of economic integration is for the Partner States to harmonise their trade regimes by abolishing any barriers to trade, notifying the other Partner States ensures that this aim is promoted.

A Partner State is permitted to take a countervailing measure in the form of a countervailing duty to offset any injury that subsidised goods may cause to like goods in its domestic market.[77] A Partner State having reason to believe that another Partner State is maintaining subsidies is required to request that Partner State for consultations.[78] The Partner State should then inform the Committee on Trade Remedies about the subsidies being maintained and the

[73] James T Gathii, 'African regional trade agreements as flexible legal regimes', 35 *North Carolina Journal of International Law* (2009) 571.

[74] Customs Union Protocol, Article 17 and 18.

[75] East African Customs Union (Subsidies and Countervailing Measures) Regulations.

[76] Subsidies and Countervailing Measures Regulations, Regulation 7.

[77] Customs Union Protocol, Article 18.

[78] Subsidies and Countervailing Measures Regulations, Regulation 10.

consultations that have been made by the Partner States.[79] The two Partner States are required by the regulations to enter a mutual agreement within 30 days after the consultations, failure to which the Committee will take up the matter and submit a report within 90 days.[80] The report may recommend that a subsidy be withdrawn where it is a prohibited one under Regulation 9.

Discontented parties are required to object to the contents of the report within 30 days. In default, the Council of Ministers is required to adopt the report. Where a Partner State appeals to the Council of Ministers and the appeal is accepted, it will issue a directive on the suitable course of action. If the Council of Ministers does not accept the appeal by consensus, the aggrieved Partner State is permitted to refer the matter to the EACJ.[81] However, where the parties do not refer the matter to the EACJ within 20 days or where the parties do not implement the Council of Ministers directive within the specified period, the Council of Ministers shall be at liberty to authorise the complaining Partner State to impose the countervailing duties on the subsidised goods entering its local market.[82]

The EACJ has an opportunity in this remedy to determine a dispute arising from the maintenance of subsidies by a Partner State and the imposition of countervailing measures by an aggrieved Partner State. This provision is commendable, because the EACJ, as the apex neutral arbiter of disputes arising within the Community, should always have the ultimate opportunity to determine trade and investment disputes arising between the members of the Community.

6.2.2 Safeguards

Partner States are permitted by the Customs Union Protocol to use protective measures in the form of safeguards to prevent their economies from suffering injury. Such safeguards can, for example, be applied when a sudden surge occurs in the imports of a Partner State in a manner that is likely to harm

[79] Subsidies and Countervailing Measures Regulations, Regulation 10.
[80] Subsidies and Countervailing Measures Regulations, Regulation 10.
[81] Subsidies and Countervailing Measures Regulations, Regulation 10.
[82] Subsidies and Countervailing Measures Regulations, Regulation 10.

directly-competing or domestic products in the local market.[83] Two conditions must, however, be fulfilled before a Partner State applies these safeguard measures. The first condition is that the measures must be applied indiscriminately and irrespective of the product source.[84] The second condition is that the Partner State must satisfy itself that the particular product is increasing in quantity in the country and that such an increase is threatening the existence of similar products in the country. An investigation by the state's Investigating Authority shall be carried out to confirm that the two conditions have been met.[85] After carrying out investigations, the Authority must establish a causal link between the increasing amounts of the import in the country and the serious injury that is alleged to have been caused by the product.[86]

The Partner State is required to consult and notify the EAC Committee on Trade Remedies on the investigations that it has carried out with regard to the threatening imports and the reasons for carrying out the investigations.[87] The Partner State must then provide all the relevant information that it has established after carrying out the investigations to the Committee. Although the Partner State is required by the regulations to notify the Committee about the investigations and to also provide evidence of a 'serious injury or threat of serious injury,' safeguard measures are a local mechanism for the Partner State to take to protect its domestic products. At no point is the Partner State required to file a reference to the EACJ for a determination as to the imports and their alleged injury or threat of injury to the country's products.[88] Since the EACJ is not given an opportunity to determine whether an injury to the country's domestic products exists as a result of the imports, this is evidence of diminished jurisdiction of the Court.

[83] Customs Union Protocol, Article 19; East African Community Customs Union (Safeguard Measures) Regulations.

[84] Subsidies and Countervailing Measures Regulations, Regulation 4.

[85] Subsidies and Countervailing Measures Regulations, Regulation 5.

[86] Subsidies and Countervailing Measures Regulations, Regulation 6.

[87] Subsidies and Countervailing Measures Regulations, Regulation 10.

[88] Subsidies and Countervailing Measures Regulations, Regulation 10.

6.2.3 Anti-dumping measures

A Partner State is permitted by the Customs Union Protocol to take action when goods whose export price is less than the normal price of similar goods in the country exporting the goods to the Partner State enter its territory.[89] However, the Partner State that takes any anti-dumping measure must also notify the WTO of the action.[90] Article 16 of the Customs Union Protocol lists the instances when a Partner State may undertake anti-dumping measures when dumping of goods occurs. These are: when such dumping occasions material injury to the country's established industries; when it frustrates the benefits that accrue when barriers to trade are removed between Partner States; and when it retards the country's domestic industry.[91]

Like in safeguard measures, the Investigating Authority of the Partner State must first carry out investigations to establish that dumping has in fact taken place and then recommend the anti-dumping measures that should be undertaken. The determination of dumping may take the form of mathematical approaches. Such approaches will determine the 'normal value' of the product, its export price, and the price of like products in the domestic market of the affected Partner State, among other concepts.[92] It is only then that the Investigating Authority can make a finding whether dumping of goods in the country has taken place or not and also whether or not such dumping has materially affected the domestic industries of the Partner State as per the Regulations.[93]

The Investigating Authority may recommend provisional measures to be taken to remedy the situation. The measures may take the form of duties, cash deposits or bonds. If the exporter revises the prices of the products or ceases to export the products into the country, these measures do not have to be taken.[94] It is, however, the EAC Trade Remedies Committee that will make

[89] Customs Union Protocol, Article 16; EAC Customs Union Protocol (Anti-Dumping Measures).

[90] Customs Union Protocol, Article 16; Anti-Dumping Measures Protocol.

[91] Customs Union Protocol, Article 16; Anti-Dumping Measures Protocol.

[92] Anti-Dumping Regulations, Regulation 7.

[93] Anti-Dumping Regulations, Regulation 8.

[94] Anti-Dumping Regulations, Regulation 13 (1). This act by the exporter is also called 'voluntary price undertaking'.

the ultimate decision to impose these anti-dumping measures after receiving recommendations from the Partner State's Investigating Authority.[95] Thus, as in the case with safeguard measures, the Investigating Authority of the Partner State must work in hand-in-hand with the Committee to effect the remedies.

Any disputes arising between Partner States with regard to the implementation of the Regulations shall be resolved by the Committee.[96] This trade remedy provides a dispute resolution mechanism that completely avoids the EACJ as the apex arbiter of disputes in the Community. This remedy is an administrative undertaking by the Partner State and the Committee and makes dispute resolution convenient for the Partner State. However, it takes away the adjudicative functions of the Court.

It is not uncommon for regional courts to determine disputes regarding subsidies and countervailing measures, anti-dumping measures, and safeguards. The Court of Justice of the European Union (CJEU) has consistently determined such disputes both at first instance and appellate level. For example, in *Council v Gull Ahmed Textile Mills,*[97] the Council of the European Union filed an appeal at the CJEU against the decision of the General Court[98] that had been delivered on 27 September 2011. In the 2011 decision, the General Court had annulled the decision of the Council regarding a definitive anti-dumping duty on imports of cotton-type bed linen that originated from Pakistan. The CJEU agreed with the Appellant by noting that since the regulation in question annulled all products of that type originating from Pakistan, all products of that nature constituted dumped products. The CJEU also affirmed that dumped imports cause economic injury to similar products produced in the domestic market.

[95] Anti-Dumping Regulations, Regulation 14.

[96] Anti-Dumping Regulations, Regulation 19.

[97] Case 638/11, *Council v Gull Ahmed Textile Mills* [2013] ECJ.

[98] The General Court is established by Title IV of the Statute of the Court of Justice of the European Union as a court of first instance comprising 47 judges as from 1 September 2016. The court determines disputes at first instance. Such disputes can then be appealed at the Court of Justice which functions as an appellate court.

6.3 Dispute resolution mechanisms under the Common Market Protocol

There exists a contradiction under the Common Market Protocol. Whereas Article 54(1) of the Common Market Protocol states that any dispute arising from the implementation of the Common Market Protocol shall be resolved in accordance with the provisions of the Treaty, Article 54(2) goes on to confer jurisdiction to solve such disputes on national courts of Partner States. Partner States guarantee under the Common Market Protocol that parties whose rights and liberties have been infringed upon shall have recourse to their national courts based on their constitutions, national laws and administrative procedures.[99] Thus, national courts and tribunals of Partner States shall have jurisdiction to hear disputes arising from the implementation of the Common Market Protocol, unless an issue arises with the interpretation of the provisions of the Common Market Protocol, in which case, the national court or tribunal of the Partner State shall refer the matter to the EACJ.[100]

The EACJ is not an appellate court like the defunct Court of Appeal of East Africa. The Court of Appeal of East Africa was established under Article 80 of the Treaty Establishing the East African Community, 1967. When the first EAC collapsed in 1977, this court also collapsed as it was an organ of the EAC of 1967-1977. This court, unlike the one established under the 1999 Treaty, could hear appeals from national courts of Partner States. This being the case, disputing parties that exhaust local remedies have no provisions in the Treaty or the protocols that allow them to appeal to the EACJ on matters of law. The situation is aggravated by the fact that a natural or legal person cannot institute legal proceedings against another natural person or legal person at the EACJ.[101]

The relationship between regional courts in an economic integration setting and national courts of Partner States is not unique to the EAC. The CJEU held in *Van Genden Loos v Nederlandse Administratie der Belastingen*[102] that, although Articles 169 and 170 of the European Economic Treaty empowered

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[99] Common Market Protocol, Article 54 (2)(a).

[100] EAC Treaty, Article 34.

[101] EAC Treaty, Article 30.

[102] Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

Partner States of the European Union (EU) and the European Commission to refer matters to the court regarding the failure of Partner States to fulfil their obligations under the Treaty, the provisions did not stop aggrieved individuals from pleading the same obligations before national courts, whenever the occasion demanded that they plead such obligations. The CJEU was also fortified in the interpretation of Article 12 of the Treaty that national courts of Partner States had an obligation to protect individual rights under the Treaty. The contentious issue that arises from this ruling is whether only the jurisprudence of the regional court has a direct effect on national courts of Partner States or aggrieved parties can appeal the decisions of such national courts at the regional court, so that the relationship between the regional court and the national courts is complementary.

In the previous section, this paper argued that the EACJ does not have an appellate jurisdiction over decisions of national courts of Partner States. In *Honourable Sitenda Sebalu v Secretary General of the East African Community and 3 Others,*[103] the EACJ held that Article 27 of the Treaty did not confer appellate jurisdiction over the Supreme Court of Uganda and that the only appellate jurisdiction that the EACJ possessed regarded appeals from the First Instance Division of the Court to its Appellate Division on points of law, procedural irregularity and grounds of lack of jurisdiction.[104] It appears, therefore, that the EACJ and national courts of Partner States regarding the adjudication of trade and investment disputes arising from the Common Market Protocol are loosely held together by Article 34 of the Treaty pertaining to preliminary rulings. Requests for preliminary rulings are discretionary on the part of the national court seeking interpretation by the EACJ.

Preliminary rulings ensure that national courts of Partner States facilitate Partner States' respect for Community law. Rule 76 of the EACJ Rules of Procedure[105] sets the procedure that preliminary rulings should follow. A request by a national court pertaining to Article 34 of the Treaty must be lodged in

[103] *Honourable Sitenda Sebalu v Secretary General of the East African Community and 3 others* [2010] EACJ Reference No 1 of 2010.

[104] EAC Treaty, Article 35A(1).

[105] East African Community Legal Notices Supplement No 1 to the East African Community Gazette No 7 (11 April 2013).

the Appellate Division of the Court in accordance with the procedure that the rules set out in the Sixth Schedule.[106] The request must specify the question raised and the issues that need to be determined by the court.[107] The EACJ shall then determine the issues and communicate its determination to the national court or tribunal as soon as it has reached the decision.[108]

The Sixth Schedule further clarifies the procedure to be followed when referring a matter to the EACJ for a preliminary ruling. It is the national court or tribunal that is supposed to notify the EACJ about the issues requiring a preliminary ruling.[109] The Registrar of the EACJ shall then notify the parties, the Secretary General of the Community and the organ or institution of the Community whose act precipitated the request for a preliminary ruling.[110] These parties, including the organ or institution of the Community where applicable and the Secretary General, shall file statements to the EACJ within two months of being notified.[111] The Court may also request clarification from the national court or tribunal that requested the preliminary ruling.[112] The Registrar shall notify all parties to the reference and also the national court or tribunal after the Court has issued its reasoned ruling on the question.[113]

Referring a matter for preliminary ruling to the EACJ enhances the cooperation of the EACJ with national courts and also ensures a uniform interpretation of Community law by all Partner States. Proceedings in the national court or tribunal must, then, be stayed, pending the determination of the regional court on the preliminary question raised. When this happens, the national court or tribunal may rule on protective measures to preserve the status quo of the case pending before it.[114]

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[106] EACJ Rules of Procedure, Rule 76(1).

[107] EACJ Rules of Procedure, Rule 76(2).

[108] EACJ Rules of Procedure, Rule 76(3).

[109] EACJ Rules of Procedure, Schedule 6, para 1.

[110] EACJ Rules of Procedure, Schedule 6, para 2.

[111] EACJ Rules of Procedure, Schedule 6, para 3.

[112] EACJ Rules of Procedure, Schedule 6, para 10.

[113] EACJ Rules of Procedure, Schedule 6, para 9.

[114] East African Court of Justice, Guidelines on a reference from national courts for a preliminary ruling, eacj.org, accessed 6 March 2017.

In *Attorney General of the Republic of Uganda v Tom Kyahurwenda,*[115] the High Court of Uganda referred two questions for a preliminary ruling by the EACJ. In the High Court case between Tom Kyahurwenda and the Attorney General of the Republic of Uganda, Tom Kyahurwenda, a former Member of Parliament in Buhanguzi County in the Republic of Uganda sued the government for malicious prosecution.[116] He sought compensation from the government on the basis that the prosecution had cost him his parliamentary seat in the elections. As a result, he asked the High Court to rule that the government of Uganda had violated Articles 6, 7, 8, and 123 of the EAC Treaty.[117] Thus, he sought reparation in form of damages for the loss and injury that he suffered in the hands of government operatives during the malicious arrest and prosecution.

The first question that the High Court of Uganda referred to the EACJ was whether or not Articles 6, 7, 8, and 123 as read together with Articles 27 and 33 of the Treaty could be determined by national courts.[118] The second question was whether or not Articles 6, 7, 8, and 123 as read together with Articles 27 and 33 of the Treaty were self-executing and conferred jurisdiction to national courts to determine matters of Treaty violations and also award damages to the applicants. The Court reformulated the questions as 'by what court(s) should the Treaty be interpreted?"[119] The EACJ held that national courts have the jurisdiction to apply the provisions of the Treaty as provided for under Articles 33 and 34 of the Treaty and that the preliminary ruling procedure in Article 34 should be based on the interpretation of the provisions of the Treaty and not their application. The regional court further held that the discretion conferred on national courts by Article 34 is narrow because it is restricted to deciding whether it is necessary to refer the question before the

[115] *Attorney General of the Republic of Uganda v Tom Kyahurwenda*, No 1 of 2014, referred by the High Court of the Republic of Uganda, arising from miscellaneous application No 558 of 2012 in civil suit No 298 of 2012 in the High Court of the Republic of Uganda at Kampala.

[116] *Tom Kyahurwenda v Attorney General of Uganda,* 298.

[117] Article 6 of the EAC treaty is about the fundamental principles of the community while Article 7 is about the operational principles of the community. Article 8 pertains to the general undertaking of partner states as to the implementation of the treaty, while Article 123 relates to cooperation of partner states of the EAC in political matters.

[118] *Attorney General of Uganda v Tom Kyahurwenda*, para 5.

[119] *Attorney General of Uganda v Tom Kyahurwenda*, para 34.

High Court for interpretation by the EACJ.[120] Once it determines that it is necessary, the national court or tribunal has no option but to refer the question to the EACJ for interpretation of the relevant Treaty provisions.

The EACJ in this case also determined that a preliminary ruling on a particular question of the Treaty is binding to the national court or tribunal that requested the ruling and also *erga omnes,* that is, to all national courts and tribunals of Partner States.[121] Further, the Court held that whereas national courts and tribunals of Partner States have jurisdiction to apply the Treaty and to award relevant damages, it is only the EACJ that has the exclusive jurisdiction to interpret the Treaty and invalidate Community acts.[122]

In *East African Law Society v Secretary General of the East African Community*,[123] the EACJ was asked to declare that Article 54(2) of the Common Market Protocol which conferred jurisdiction relating to disputes arising from the Common Market Protocol to national courts of Partner States ousted the jurisdiction of the EACJ in such matters and that even if it did not completely oust such jurisdiction from the Court, whether it created a parallel dispute resolution mechanism. The EACJ held that, although the article empowers national courts to deliver justice in terms of redress to individuals whose rights under the Common Market Protocol have been infringed upon, it does not oust the jurisdiction of the Court over the interpretation of the Common Market Protocol.[124]

Taken in its plain meaning, this ruling limits the jurisdiction of the EACJ to interpret the provisions of the Treaty and the Common Market Protocol when individuals seek such interpretation. Such a jurisdiction does not include awarding damages to the parties whose rights have been violated. In concluding this part, Article 54(2) of the Common Market Protocol confers jurisdiction to substantively determine disputes arising from the Common Market

[120] *Attorney General of Uganda v Tom Kyahurwenda*, para 56.

[121] *Attorney General of Uganda v Tom Kyahurwenda*, para 58.

[122] *Attorney General of Uganda v Tom Kyahurwenda*, para 77.

[123] *East African Law Society v Secretary General of the East African Community* [2011] EACJ Reference No 1 of 2011.

[124] *East African Law Society v Secretary General of the East African Community,* above, at paragraph 30 of concluding issue No 2.

Protocol to national courts of Partner States. It is only when parties to the dispute have differed on the interpretation of the provisions of the Common Market Protocol that they can seek an interpretation from the EACJ. Further, the national court hearing the matter has the discretion under Article 34 of the Treaty to seek the interpretation of such provisions from the EACJ. In a nutshell, the EACJ has only 'partial jurisdiction' to hear trade and investment disputes arising from the Common Market Protocol.

In the defunct East African Community, the relationship between national courts and the regional court was not any smoother. For instance, in *Republic v Okunda,*[125] the Respondents had been prosecuted under the East African Community's Official Secrets Act of 1968. Section 8(1) of the Act provided that the Secretary General of the Community had to be consulted before anyone was prosecuted under the Act. The Attorney General of the Republic of Kenya did not make such consultations because Section 26(8) of the repealed Kenyan Constitution stated that the Attorney General was not subject to any directions in the exercise of his duties. The Kenyan court held that the Attorney General did not break any law because the Community law was part of Kenyan laws and that the Constitution prevailed over any other law. An appeal at the Court of Appeal for East Africa was not successful. It was held that the Kenyan Constitution prevailed over any other law.[126] This case signifies the conflicts that are evident between Community law and national law.

The current treaty has remedied this conflict under Article 16 which states that the regulations, directives and decisions of the Council of Ministers taken or given in pursuance of the provisions of the Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the East African Legislative Assembly (EALA) within their jurisdictions. Decisions, directives and regulations of the Council, therefore, do not bind the Summit, the EACJ and the EALA. Article 8(4) of the Treaty also cures these discrepancies by providing that the laws, institutions and organs of the Treaty shall take precedence over similar ones in the Partner States regarding the implementation of the Treaty. Article 2(6) of the Constitution of Kenya provides that any treaty or convention ratified

[125] *Republic v Okunda* [1969] 91 ILM 556.

[126] *East African Community v Republic of Kenya* [1970] 9 ILM 561.

by Kenya shall form part of the laws of Kenya under the Constitution. If such provisions had existed in the former treaty, maybe, such conflicts would not have occurred in the judiciaries of the Partner States and the Community at that time regarding the implementation of the treaty.

6.4 Parallel dispute resolution mechanisms between the EAC and COMESA

Some Partner States of the EAC are also members of other regional economic communities such as COMESA, IGAD, Economic Community of Central African States (ECCAS) and Southern African Development Community (SADC). Tanzania, for example, is a member of SADC, Kenya and Uganda are members of IGAD, while Burundi is a member of ECCAS. Kenya, Burundi, Uganda, and Rwanda are members of COMESA. These other RECs have dispute resolution mechanisms that their members subscribe to.

The COMESA Court of Justice has jurisdiction over interpretation and application of the COMESA Treaty.[127] However, matters that are referred to the Court can be submitted to any other dispute resolution mechanism other than the ones listed in the Treaty.[128] The similarity of the activities that members of COMESA and the EAC engage in and the overlapping membership that exists between the two RECs make it possible for members of the EAC who are also members of COMESA to seek justice in a more convenient forum within COMESA if the forum provided by the EAC is less favourable. When this happens, the EACJ is denied an opportunity to adjudicate upon trade and investment disputes arising from the relationships of such members. The COMESA Court of Justice even appeared to recognise the importance of seeking justice in other courts and dispute resolution institutions in *Eastern and Southern African Trade and Development Bank (PTA Bank) v Yvonne Nyagamukenga.*[129] It stated that the parties did not subvert the Treaty by submitting their dispute to an arbitral tribunal constituted by the Kenyan High

[127] Treaty Establishing the Common Market for Eastern and Southern Africa (30 September 1982); COMESA Treaty, Article 7(1)(c).

[128] COMESA Treaty, Article 34(1).

[129] *Eastern and Southern African Trade and Development Bank (PTA Bank) v Yvonne Nyagamukenga* [2006] COMESA Court of Justice, Reference No 3 of 2006.

Court and that the parties were within their rights to seek the most convenient forum for their dispute to be determined.

Although there are currently no known cases that are being heard concurrently at the EACJ and the COMESA Court of Justice, there have been instances where parties from the EAC region sought justice in the COMESA region. Recent practice at the COMESA Court of Justice has shown that parties are attracted by certain factors when deciding to file their disputes in courts that are located away from their regions. In *Intesolmac (Uganda) Limited v Rwanda Civil Aviation Authority,*[130] for example, the parties filed the case at the registry of the COMESA Court of Justice, which is located in Lusaka, Zambia, yet there was no party to the case who was domiciled near Zambia. The nearest court that was available to the parties was the EACJ and the parties could have filed their case there. However, since the countries from which the parties are citizens are also members of COMESA, they decided that the COMESA Court of Justice was a more convenient forum for them to find justice. This phenomenon denies the EACJ an opportunity to hear and determine such integration questions.

6.5 Parallel arbitral jurisdiction between the EACJ and other tribunals

The EACJ can constitute itself into an arbitral tribunal in which it can carry out arbitration.[131] Considering that the Partner States have their arbitration laws that provide for arbitral procedures, there may be conflict between the arbitration rules of the Court and the arbitration laws of the Partner States. Further conflict may arise between the arbitral jurisdiction of the court and that of other arbitral tribunals existing within the region. It follows that parties to arbitration are supposed to have control of the arbitral process by choosing the arbitral panel and also choosing the place of arbitration, among other things.[132] The arbitral jurisdiction of the Court has yet to be invoked. However, there are apparent conflicts that are expected to occur when the jurisdiction is finally invoked.

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[130] *Intesolmac (Uganda) Limited v Rwanda Civil Aviation Authority* [2009] COMESA Court of Justice Reference No 1 of 2009.

[131] EAC Treaty, Article 32; EACJ Arbitration Rules.

[132] Jacob Gakeri 'Placing Kenya on the global platform: An evaluation of the legal framework on arbitration and ADR', 1(6) *International Journal of Humanities and Social Science* (2011) 1.

Most countries that are members of the United Nations submit to the arbitral procedures prepared by the United Nations Commission on International Trade Law (UNCITRAL), which proposed the UNCITRAL Model Law on International Commercial Arbitration.[133] This Model Law guides Member States in carrying out arbitral proceedings. The Arbitration Acts of Member States may be prepared in line with the UNICTRAL Model Law as a way of domesticating the law. Article 5 of this Law, for example, limits the intervention of courts by stating that no court shall intervene in matters of the law except as provided for under the said law. Thus, courts are limited in engaging in arbitration except as provided for under the law. One of the interventions that a court can make is to grant interim protection to parties to arbitral proceedings when the parties ask the court to do so under Article 9 of the Law.[134] The other instance when a court can intervene is when a party who is not satisfied with the award applies to the court for setting aside as an exclusive recourse against the award.[135] Moreover, parties to arbitration can apply to courts for recognition and enforcement of arbitral awards.[136] The Arbitration Acts of Partner States of EAC have similar provisions regarding limitations on courts' intervention in arbitration proceedings.[137]

Under Article 10, parties to arbitral proceedings are free to determine the number of arbitrators, failing which the number of arbitrators shall be three. The Arbitral Rules of the EACJ are at variance with this provision because they provide that the appointing authority of the Court shall determine the composition of the Arbitral Tribunal of the Court.[138] Thus, it appears that the EACJ could impose arbitrators on parties as it is the judges of the court that make up the arbitral tribunal. The Arbitration Acts of Partner States of EAC also provide for parties to determine the composition of the arbitration tribunal.[139]

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[133] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration [1985], with amendments in 2006.

[134] Arbitration and Conciliation Act [Uganda], Section 34; Arbitration Act [Kenya], Section 35.

[135] UNCITRAL Model Law, Article 34.

[136] UNCITRAL Model Law, Article 34.

[137] Arbitration and Conciliation Act [Uganda], Section 9; Arbitration Act [Kenya], Section 10.

[138] EACJ Rules of Arbitration, Rule 8.

[139] Arbitration Act [Kenya], Section 11 and 12; Arbitration Act [Tanzania], Section 10.

Under Article 22 of the law, parties are at liberty to agree on the language to be used during the proceedings, failure to which the tribunal shall decide the language. However, the EACJ Arbitration Rules provide that the language of the proceedings shall be English,[140] and that any document that is drawn in any other language shall be accompanied by a certified copy of translation into the English language. The question that remains is whether parties who submit to the arbitral jurisdiction of the court shall agree to be bound by this provision, especially when they are not comfortable with the language. The Kenyan Act, for example, provides that parties to arbitration shall be free to choose the language to be used in the conduct of the proceedings, failing which the tribunal shall determine the most applicable language.[141]

One of the contentious issues expected to arise during the exercise of the court's arbitral jurisdiction relates to the recognition and enforcement of the arbitral award. The Treaty provides that the execution of judgments of the court shall follow the civil procedure rules of the Partner State in which the execution of the judgement is to take place. However, this provision only relates to judgments involving a pecuniary interest.[142] The Arbitral Rules of the Court, similarly, provide that the enforcement of an arbitral award of the Court shall be in accordance with the enforcement rules existing in the Partner State where the enforcement is to take place.[143]

In essence, this arrangement on execution seems to subject the court to the jurisdiction of national courts and tribunals of Partner States. Section 35 (2) of the Kenyan Arbitration Act provides for instances where an arbitral award may be set aside by the High Court. Under paragraph (ii), an arbitration award may be set aside where the arbitration agreement was not made in accordance with the laws of Kenya or those of the country to which the parties subjected the agreement. Further, the Kenyan High Court may set aside an award where it establishes that the subject-matter of the dispute is not capable of settlement under the laws of Kenya or the award is in conflict with public

[140] EACJ Arbitration Rules, Rule 22.

[141] Arbitration Act [Kenya], Section 23. The Arbitration Act [Uganda] provides under Section 23 that the language shall be English.

[142] EAC Treaty, Article 44.

[143] EACJ Arbitration Rules, Rule 36.

policy. There is currently no law in Kenya that allows arbitral awards made by the EACJ to be recognised by Kenyan courts.

Article 3 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which EAC Partner States are party to, states that States Parties shall recognise and enforce arbitral awards in accordance with the rules of the territory where the award is relied upon and also in accordance with the conditions set out in the convention. This option may be taken if the parties to the arbitration proceedings take the EACJ Arbitral Tribunal, as a tribunal like any other, whose proceedings can be subject to the New York Convention. It is a reliable option because it enhances uniformity and consistency of arbitral proceedings with those of other arbitral tribunals all over the world.

The other option open for parties to arbitration under the EACJ Tribunal and the national courts of Partner States to take is to subject the recognition and enforcement proceedings to the provisions of the International Centre for Settlement of Investment Disputes (ICSID) Convention.[144] Article 53 (1) of the ICSID Convention provides that the arbitral award arising from the arbitral proceedings carried out in accordance with the provisions of the Convention shall be binding on the parties and shall not be subjected to any other appeal or remedy except as provided under the Convention. Article 54 on the other hand, requires Partner States to recognise an award rendered pursuant to the Convention as binding and also to enforce the pecuniary obligations that the award provides as if the national courts or tribunals of that Partner State had issued such an award.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) provides another option. The ICSID Convention may be the only way to save the legacy and identity of the EACJ as a transnational court. For the arbitral proceedings of the court to be subjected to the procedures stated in the Convention, the Arbitral Rules of the EACJ need to state explicitly that the EACJ Tribunal would follow the ICSID Convention when exercising its arbitral jurisdiction.[145]

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[144] Under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS, Washington DC (18 March 1965) 159.

[145] Convention on the Settlement of Investment Disputes between States and Nationals of

7. Conclusion

The existence of several dispute resolution mechanisms within the EAC, multiple membership of EAC Partner States in other regional economic communities, and the failure of the EAC Treaty to clearly state the EACJ's jurisdiction in commercial matters has not just fundamentally constrained the Court's jurisdiction in these matters but has also denied the region an opportunity to develop its jurisprudence in matters of relevance to trade and investment. The Treaty promises the Court this jurisdiction through future treaty enactments, rendering it redundant in commercial matters. Further, the Treaty denies the Court a clear appellate jurisdiction to determine commercial matters from national courts of Partner States and also from dispute resolution institutions existing within the Community. When other instruments confer such appellate jurisdiction on the Court, as it is with the Customs Union Protocol, the jurisdiction is limited to only a few points of law.

In addition to this, the Court's arbitral jurisdiction is questionable as it is not clear which law guides its Arbitral Tribunal. Whereas the court's Arbitral Tribunal affords natural and legal persons an opportunity to arbitrate their commercial disputes without having to incur additional costs in paying commercial arbitrators, there are clear conflicts with global arbitral model law and also with Arbitration legislations of Partner States.

As the final word, this paper recommends that the EACJ should be granted original and exclusive jurisdiction to hear and determine matters of relevance to trade and investment affecting Partner States, Community organs, natural and legal persons in the Community. This can only be done through an amendment to the EAC Treaty or by way of an additional protocol.

Other States (International Centre for Settlement of Investment Disputes, ICSID]), Article 8(4).

THE ENFORCEMENT OF THE RIGHT OF ESTABLISHMENT BEFORE THE ECOWAS COURT: JURISDICTIONAL HURDLES FOR INDIVIDUALS

Julius Edobor *

Abstract

The Economic Community of West African States Court of Justice (ECCJ) was established in 1991 by the Protocol on the ECCJ. This article examines the jurisdictional challenges faced by individuals in approaching the ECCJ with regard to the violation of the right of establishment within the sub-region. Fundamentally, the inability of the ECOWAS citizens to access the ECCJ to litigate ECOWAS Protocols is given prominent emphasis with reference to the case of *Pinheiro v. Republic of Ghana*. Although, the ECCJ can now assume jurisdiction over cases of human rights violations through its expanded mandate, its jurisdiction is still very limited, given the inability of individuals to use the jurisdiction of the Court for the interpretation and application of ECOWAS Protocols. The study, therefore, argues for an amendment to the ECOWAS instruments to accommodate the protection of individual rights. It also argues for the Court's courageous approach in interpreting ECOWAS Protocols in line with the object of ECOWAS, to accommodate suits by individuals seeking to enforce their Community rights.

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