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A CRITICAL APPRAISAL OF EAST AFRICAN COMMUNITY LAW GOVERNING ECONOMIC SUBSIDIES AND THEIR IMPACT ON COMPETITION

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Abstract

This article examines the effectiveness of the East African Community legal framework governing economic subsidies and their impact on competition in controlling the granting of such subsidies by Governments of the Partner States. It employs qualitative techniques involving documentary review of legal instruments, case law and scholarly writings, as well as interviews with selected officials in relevant portfolios in Kenya and Tanzania. The research concludes that the legal standards for the regulation of economic subsidies facilitate the effective limitation of the intervention in the market by Governments of the Partner States. The standards may, accordingly, be applied to limit their intervention in the market, using economic subsidies only to the extent strictly necessary to correct market failure. It also establishes, in contrast, that the regulatory institutions are unsuitable, with reference to their power, to limit the intervention in the market by the said Governments. Accordingly, it, recommends that the institutional framework of the Community be reviewed so as to safeguard the functional autonomy of the regulatory institutions and harmonise their mandates.

Key words: Competition, East African Community, Institutions, Legal Standards, Partner States, Subsidies

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1. Background

The Treaty for the Establishment of the East African Community (EAC Treaty) envisages a free market characterised by an export oriented economy and free movement of goods, persons, labour, services, capital, information and technology.[1] The free market paradigm presumes the existence of an effective competition law regime that controls government intervention in the market using economic subsidies only to the extent strictly necessary to correct market failure.[2] However, it is not certain whether such an effective law exists in the East African Community (EAC).

Since the East African Community Competition Act (EACCA)[3] was enacted in 2006, it has not been fully implemented, and the Competition Authority provided therein was only constituted in 2016. The Act is part of the legal framework for regulating economic subsidies and competition and, as such, the extent to which the free market paradigm has been effectively built into the legal framework requires to be established. Whereas section 16(1) of the EACCA prohibits Partner States from granting subsidies which distort or threaten to distort competition within the Community, the Act seems to provide no guidelines or criteria by which such distortion or threat of distortion may be established.

Therefore, the problem to be examined is the effectiveness of the EAC law governing economic subsidies and their impact on competition, in controlling the intervention in the market by Governments of the Partner States using economic subsidies. The intervention would be warranted in the interest of competition, and in accordance with the Treaty, only to the extent strictly necessary to correct market failure.

The objective of the analysis in this paper is to assess the extent to which the EAC legal standards for the regulation of economic subsidies are effective in limiting the intervention in the market by the Governments of the Partner States, to using economic subsidies only to the extent strictly necessary for

1 Treaty for the Establishment of the East African Community (EAC Treaty), 2144 UNTS 255, art 7(a) and (c).

2 L Rubini, *The Definition of Subsidy and State Aid. WTO and EC Law in Comparative Perspective* (Oxford University Press 2009) at 41-42; See for example C G Veljanovski *Economic Principles of Law* (Cambridge University Press 2007) at 38, who defines market failure as 'a departure from the efficient outcome of a perfectly competitive market'.

3 East African Community Competition Act (EACCA), No. 2 of 2006.

correcting market failure. In addition, it seeks to determine the suitability of the regulatory institutions responsible for controlling economic subsidies in the EAC with reference to their power to limit the intervention in the market by the Governments of the Partner States.

The paper uses qualitative data arising from the views and perceptions of respondents within the Ministries concerned with EAC affairs in Kenya and Tanzania, the competition authorities in the two countries and the EAC Competition Authority. The data were obtained through oral interviews, as well as documentary review, the latter being used to establish the nature of the law as well as evaluate the extent of its application in controlling the intervention in the market by Governments of the Partner States with a view to using economic subsidies only to correcting market failure.[4]

2. Normative Framework in the East African Community

In this section, the legal standards applicable to the regulation of economic subsidies and their impact on competition in the EAC are analysed to determine the applicable normative principles. This is necessary because in an integrated market, the impact of economic subsidies on competition is a fundamental concern due to its distortionary effects. Accordingly, the aspects relevant to economic subsidies and their impact on competition in the legal instruments of the Community are scrutinised to determine the nature of the normative values they infuse into the legal framework. These instruments are: the EAC Treaty, the Protocol on the Establishment of the East African Community Customs Union (EACCUP),[5] the Protocol on the Establishment of the East African Community Common Market (EACCMP)6 and the EACCA.

2.1 The Treaty for the Establishment of the East African Community

The operational principles of the EAC include people-centered and market-driven co-operation[7] as well as the establishment of an export oriented

[4] I Dobinson and F Johns 'Qualitative Legal Research', in M McConville and W H Chui (eds), *Research Methods for Law (Edinburgh University Press 2007) 16 at 17.*

[5] Protocol on the Establishment of the East African Community Customs Union (EACCUP) <www.eac.int/documents/category/protocols> accessed 23 October 2019.

[6] Protocol on the Establishment of the East African Community Common Market (EACCMP) <www.eac.int/documents/category/protocols> accessed 23 October 2019.

[7] EAC Treaty, art 7(a).

economy for the Partner States in which there is free movement of goods, persons, labour, services, capital, information and technology.[8] Pursuant to this, the framework for trade liberalisation is encompassed in Chapter 11 of the EAC Treaty.

The Treaty requires the Protocol on the Establishment of the Customs Union to address subsidies as well as competition, in addition to the elimination of tariff and non-tariff barriers, among other matters, in the Customs Union.[9] It also affirms the need to safeguard free movement of labour, goods, services, capital and the right of establishment in the Common Market, subject to a Protocol on the Common Market.[10]

The implications are that the Treaty envisages a single, liberalised, free EAC market without barriers to trade. A free market involves a continuum of behaviour, which range between government safeguarding public order, and the core area of market place competition which is normally the preserve of private business undertakings.[11] In the midranges of the continuum, governmental functions and private business blend into a range of government-business co-operation and even competition and regulatory interaction.[12]

It is in these midranges that government intervention may threaten competition in the market by favouring undertakings involved in business. Governments are obliged to provide education, healthcare, and infrastructure, support pure and theoretical research, and establish and maintain an environment broadly hospitable to commercial activity.[13] These are mostly provisions which the market by itself would not supply adequately or at all, generally, because of free-rider problems, although they produce substantial social and economic benefits, and once created, their use is costless.[14] In liberal economic theory, these provisions are generally conceived of as 'public goods', and it is the function of government to provide them.

The provision of public goods is, but part of a broader phenomenon, involving circumstances when governments properly remove resource allo-

8 EAC Treaty, art 7(b).
9 EAC Treaty, art 75(1)(b), (c), (g) and (i).
10 EAC Treaty, art 76(1) and (4).
11 Veljanovski *Economic Principles of Law (n 2) 4, 38-41.*
12 ibid.
13 ibid.
14 ibid.

cation from the free market, or modify the market outcome in those areas in which they determine that the market produces a socially undesirable or less than optimal result.[15] The other circumstances, where such intervention occurs include monopoly, when firms have unfettered economic power to raise prices or impose other onerous terms above the competitive level, such that the market is not competitive and does not generate an efficient allocation of resources.[16]

There is, also, externality, sometimes referred to as spill-over or third-party effect. This arises when one person, in the course of rendering some service to a second person for which payment is made, incidentally renders service or disservice to other persons, of such a sort that payment cannot be extracted from the benefited parties or compensation enforced on behalf of the injured party.[17]

In addition, there is information asymmetry, in which one party is better informed than another and is able to develop incentives for the revelation of this information to the other.[18] As a result, it becomes difficult for those investing in better and new information to capture the financial returns, with the result of underproduction of useful information, which leads consumers and others to make wrong choices and actions.[19]

The four circumstances in which governments modify, supplement or replace the action of the market because of the socially sub-optimal results, which the market alone would produce are commonly referred to as market failure.[20] Market failure generally provides an exception to competition since enforcing an open and freely competitive market would impede the provision of a socially required good or service. Accordingly, from a liberal economic perspective, government intervention in the market can only be justified on the basis of market failure.[21]

[15] ibid 40.
[16] ibid 38.
[17] ibid 39.
[18] ibid 40.
[19] ibid.
[20] ibid 38.
[21] ibid.

2.2 *The Protocol on the Establishment of the East African Community Customs Union*

The EACCUP establishes the East African Community Customs Union.[22] Among the matters it covers are subsidies provided by third countries whose products are imported into the Community market[23] and subsidisation amongst Partner States.[24] It allows individual Partner States to take unilateral action in defined instances. In this respect, a Partner State may apply safeguard measures where there is a sudden surge of a product imported into its territory under conditions which cause or threaten to cause serious injury to domestic producers of like or directly competing products within the territory.[25]

From a multilateral trade perspective, the essence of safeguard measures is the recognition that free trade may expose domestic industries to sudden and unexpected increases in competition that may cause serious injury.[26] This may occur notwithstanding the absence of unfair trade practices, but also as a result of such practices, including subsidisation by the third state. Safeguard measures, accordingly, tend to be only temporary, and take the form of tariffs, quotas or tariff-related quotas but only to the extent necessary to prevent or remedy the serious injury and to facilitate adjustment.[27]

A safeguard measure, however, has a broader scope than other trade measures. This is because it is applied on a non-discriminatory basis to specified goods from all exporting World Trade Organization (WTO) member countries without regard to the level of importation.[28] A single safeguard measure may also apply to numerous products according to the classes or kinds of product at issue.[29] Since the Agreement on Safeguard Measures permits an affected exporting member to suspend in whole or in part, withdraw, or modify the concession made, a wide range of measures may, accordingly, be applied upon fulfilment of the requisite conditions.[30]

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22 EACCUP, art 2(1).
23 EACCUP, arts 18(1) and 20.
24 EACCUP, art 17.
25 EACCUP, art 19.
26 General Agreement on Tariffs and Trade 1994 (GATT 94), 1867 UNTS 190, 33 ILM 1153, art XIX:1(a).
27 WTO Agreement on Safeguard Measures, 1869 UNTS 154, art 5.
28 M R Nicely and D T Hardin 'Article 8 of the WTO Safeguards Agreement: Reforming the Right to Rebalance' (2008) 23(3) St John's Journal of Legal Commentary 699, 708.
29 ibid.
30 GATT 94, art XIX:1(a).

The EACCUP, thus, reserves unto the Partner States the prerogative to apply safeguard measures and, thereby, reflects a concern with subsidies, which cause injury to the domestic industry of the importing country. In addition, where there is a sudden surge in imports, or dumping, or export of subsidised goods by a foreign country into any of the Partner States that threatens or distorts competition within the Community, the Protocol provides that the affected Partner State may request the Partner State in whose territory there is a sudden surge in imports, or goods are dumped or subsidised goods are exported, to impose anti-dumping duties or countervailing duties or safeguard measures.[31] If the Partner State fails to do so within thirty days, the requesting Partner State may report to the appropriate Customs Union authority for action.[32]

The requirement that the product imported into a Partner State should threaten or distort competition within the Community, so as to warrant imposition of anti-dumping or countervailing duties or safeguard measures on such goods, seems to reflect an attitude that considers subsidies as pernicious and undeserving of accommodation.

Subsidisation by third parties is regulated by WTO rules, and a full account thereof is beyond the scope of this work. The Protocol, nonetheless, empowers Partner States to take collective action, as a Community, by levying countervailing duty on any product of a foreign country imported into the customs territory to offset the effects of any subsidy.[33]

2.2.1 Economic Subsidies by Partner States and Competition

In a customs union such as the EAC, the member states maintain a common external tariff and eliminate all tariff and non-tariff barriers to the exchange of goods amongst them, subject to rules as to the origin of the goods.[34] As a single market in which equality of conditions of trade is maintained, market forces, and the extent to which enterprises infuse efficiencies in production, should be the primary determinants of profit and commercial sustainability of enterprises in the EAC customs union.

[31] EACCUP, art 20(2).
[32] EACCUP, art 20.
[33] EACCUP, art 18.
[34] GATT 94, art XXIV:8(a).

In the circumstances, when a government grants a subsidy, which favours an enterprise or enterprises, it disrupts the market conditions, and thereby affects competition between enterprises in the single market. The Community Expert on Competition in the East African Community Competition Authority who, in an interview with the researcher in Arusha, Tanzania, on 27 March 2018, argued that since the EAC is a common market, subsidisation within a Partner State would affect competition in the entire common market supported this view.

The EACCUP addresses economic subsidies by Partner States and their impact on competition in articles 17 and 21 of the EACCUP. Article 17(1) of the EACCUP provides that:

> If a Partner State grants or maintains any subsidy, including any form of income or price support which operates directly or indirectly to distort competition by favouring certain undertakings or the production of certain goods in the Partner State, it shall notify the other Partner States in writing.

The notification required should contain the extent and nature of the subsidisation, the estimated effect of the subsidisation, the quantity of the affected product or products exported to the Partner States, and the circumstances making the subsidisation necessary.[35] The notification requirement also, seemingly, provides a standard for distortion of competition, in that the subsidy should directly or indirectly distort competition by 'favouring certain undertakings or the production of certain goods in the Partner State'.[36]

Generally, in economic terms, since an efficient firm will produce only until marginal cost, a subsidy will only distort competition if it reduces the marginal cost of the recipient or increases its marginal revenue. Beviglia-Zampetti explains the principle, thus:

> What would be important to prove is that the subsidy has indeed provided the recipient firm or firms with an artificial competitive advantage, affecting its cost and revenue structures, and that this action has distorted the normal competitive process, resulting in injury to the domestic industry.[37]

[35] EACCUP, art 17(2).
[36] EACCUP, art 17(2).
[37] B A Zampetti 'The Uruguay Round Agreement on Subsidies-A Forward Looking Assessment' [1996] Journal of World Trade 5, 24.

The above position is also applicable in the European Union. This was, for instance, the case in *Philip Morris v Commission,*[38] where the Dutch Government proposed to grant public support to an investment project by the Dutch subsidiary of Philip Morris. The investment was aimed at increasing the productive capacity of the subsidiary, and making possible the employment of a significant number of workers. It also followed the closure of one of the two factories Philip Morris had in the country. The European Commission had concluded that the intended public support was State aid, which could not be declared compatible.

The European Court of Justice, in which Philip Morris challenged the decision of the Commission, observed that the aid was granted to increase production capacity and to reduce the cost of converting the production facilities at the new factory.[39] The aid, therefore, gave Philip Morris a competitive advantage over other manufacturers who had completed or intended to complete at their own expense, a similar increase in the production capacity of their plant. In the circumstances, the aid threatened to distort competition between undertakings established in different Member States.[40]

The foregoing implies that in the EAC, specificity, that is, a subsidy favouring certain undertakings or the production of certain goods in a Partner State, constitutes the criterion for distortion of competition. In the WTO Agreement on Subsidies and Countervailing Measures (ASCM),[41] prohibited subsidies, actionable subsidies, and subsidies liable to the imposition of countervailing duties are deemed to be specific.[42] Accordingly, where such subsidies are granted or maintained by a Partner State in the EAC, they are deemed to distort competition.

In this respect, the criterion for specificity in the EAC, namely, 'favouring certain undertakings or the production of certain goods' in the Partner State has been held in the WTO context to signify a standard of specificity determinable at the enterprise or industry level.[43] Thus any subsidy, which favours certain undertakings or the production of certain goods in a Partner

[38] *Case 730/79 Philip Morris* [1980] ECR I-2671.
[39] ibid para 11.
[40] ibid para 12.
[41] Agreement on Subsidies and Countervailing Measures (ASCM), 1869 UNTS 14.
[42] ASCM, art 1.2.
[43] *United States-Preliminary Determinations with Respect to Certain Softwood Lumber from Canada (US-Softwood Lumber IV), WT/DS236/R, 1 November 2002 (Panel Report), para 7.121.*

State is deemed to reduce economic efficiency, and diminish the gains of exchange amongst the Partner States.[44]

It also seems that the purpose of the requirement that a Partner State which grants or maintains a subsidy should notify other Partner States of the subsidisation is to enable other Partner States to challenge the subsidisation. This logic is consistent with the further requirement that the Partner State should provide information in the notification as to the circumstances making the subsidisation necessary.[45] The implication is that the EAC Partner States may allow subsidisation by a Partner State only when it is necessary.

The foregoing perspective is entirely consistent with the postulated free market philosophy of the Treaty, which justifies intervention by Governments of Partner States through the use of economic subsidies only when there is market failure. The views of the Director of Trade, Investment and Productive Sectors in the Tanzania Ministry of Foreign Affairs and East African Co-operation, in an interview with the researcher at Dodoma, Tanzania on 12 April 2018 support this proposition. The Director explained that before any Partner State grants an economic subsidy, it is required to seek approval from the other Partner States, to specify the objective of the subsidy and the time frame within which it would be granted. If the Partner States approve the subsidy, the affected goods cannot be traded at the preferential tariff rates of the Community.

Article 21 of the EACCUP is a more generic provision, with a wider ambit as it seems to be aimed generally at practices, which adversely affect free trade. Article 21(1) thereof provides as follows:

> The Partner States shall prohibit any practice that adversely affects free trade including any agreement, undertaking or concerted practice, which has as its objective or effect the prevention, restriction or distortion of competition within the Community.

It seems, from the above provision, that the Protocol itself does not prohibit the identified practices., Instead, it requires the Partner States individually and/or collectively to identify the practices and prohibit them.[46]

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[44] G C Hufbauer and J S Erb, *Subsidies in International Trade (MIT Press 1984) 21.*
[45] EACCUP, art 17(2).
[46] EACCUP, art 21(1).

The Protocol specifies any agreement, undertaking or concerted practice whose objective or effect is to prevent, restrict or distort competition within the Community among the practices liable to be prohibited. Such practices involve joint action by parties for the purpose of negatively affecting competition. The provision does not, however, exclude governments of the Partner States from being parties to these specified practices.

The requirement that Partner States should prohibit any practice that adversely affects free trade is so broad as to encompass not just practices by enterprises, but also by governments.[47] Indeed, by definition, subsidies mostly involve concerted practices between a government or public body and an enterprise or enterprises. The recognition that it is not just the actions of enterprises, but also governments that distort competition in an integrated market is not an abnegation of the role of government.

It seems, therefore, that practices involving joint action undertaken by parties, including governments of Partner States, whose object or effect is to prevent, restrict or distort competition, ipso facto, adversely affects trade. Significantly, the Protocol provides that the implementation of the obligation to prohibit such practices by the Partner States should be in accordance with the East African Community competition law and policy.[48] This direction necessitates an examination of the EACCA, which is the principal legislation governing competition in the EAC, for the purpose of establishing its framework for the implementation of the obligation.

2.3 The East African Community Competition Act

The EACCA applies to all economic activities and sectors having cross-border effect.[49] As regards subsidies, it allows Partner States to grant a subsidy to any undertaking if it is of the opinion that it is in the public interest to do so.[50] However, prior to granting the subsidy, the Partner State must notify the East African Community Competition Authority which would then determine whether the subsidy distorts or threatens to distort competition in the Community.[51] In this regard, the EACCA does not give any guidance on, or

47 EACCUP, art 21(1).
48 EACCUP, art 21(3).
49 EACCA, sec 4(1).
50 EACCA, sec 14.
51 EACCA, sec 16(1).

otherwise expound the phrase 'any practice that adversely affects free trade' as used in article 21 of the EACCUP, nor the expression 'subsidy which distorts or threatens to distort competition in the Community' in section 16 thereof.

The delimitation in the Act that it applies to economic activities having cross-border effect, would seem to denote that it only applies to economic subsidies which affect trade in the Community.[52] This inference is consonant with the EACCUP, which enjoins Partner States to prohibit any practice that adversely affects trade.[53] It should also be noted that whilst a customs union is a single market and, therefore, all economic subsidies granted in theory affect the conditions in the market, in fact, not all such subsidies affect trade in the market.[54]

The Act, nonetheless, requires that, if the Authority determines that a subsidy distorts or threatens to distort competition in the Community, it should not be granted; and where it has been granted, it empowers the Authority to impose sanctions, even directing the Partner State to recover it from the recipient.[55] In this respect, a Partner State, which intends to grant a subsidy to an undertaking is required to notify the Authority of the intention, detailing reasons for granting the subsidy.[56]

The normative framework of the EACCA, therefore, appears to require the Competition Authority to conduct a three-stage test to determine compatibility of a subsidy. It has to determine, first, whether the subsidy is of such magnitude, or is of such a nature as to affect trade between Partner States. If it makes an affirmative determination of the first requirement, the Authority then has to determine whether the subsidy is granted in the public interest.

If the Authority determines that the subsidy is granted in the public interest, the Partner State is entitled to maintain it.[57] On the converse, if the subsidy is found not to be in the public interest, the Authority has to determine whether it distorts or threatens to distort competition. The Authority must, in any event,

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52 EACCA, sec 4(1).
53 EACCUP, art 21(1).
54 *Twenty Second Report on Competition Policy (Office for Official Publications of the European Communities 1993) para 120.*
55 EACCA, sec 42(1)(e).
56 East African Community Competition Regulations, reg 13.
57 EACCA, sec 14.

notify the Partner States of its decision within 45 days, and where it fails to do so, the Partner State may proceed and implement the subsidy.[58]

Where the Partner State is aggrieved by the decision of the Authority, it is entitled to appeal to the Court of Justice.[59] It may be noted that the requirement in the Act that the Authority may direct the Partner State to recover a subsidy from the recipient, seems to contradict the Regulations which provide that, where the Authority determines that a Partner State granted a subsidy in contravention of the Act, it may refer the matter to the Court of Justice.[60] If the Court determines that the subsidy is illegal, it is required to direct the Partner State to recover the subsidy from the recipient.[61]

The Act, nevertheless, provides that any subsidy for the promotion of exports or imports between the Partner States, or which is granted on the basis of nationality or residence of a person or country of origin of the goods or service, is prohibited per se.[62] Moreover, it provides a list of exempted subsidies, which are not subject to the determination of the Authority as to whether they distort or threaten to distort competition in the Community.[63]

The list encompasses subsidies granted to consumers of certain categories of products or services, to promote social services;[64] those granted for the development of small and medium sized enterprises;[65] or for the restructuring, rationalising and modernising of specific sectors of the economy.[66] It also includes subsidies for less developed regions;[67] for research and development;[68] for the financing of a public sector;[69] for the promotion and protection of food security;[70] and for the protection of the environment.[71] Subsidies for the education and training of personnel;[72] for the conservation of

58 Competition Regulations, reg 14(1).
59 Competition Regulations, reg 14(3).
60 Competition Regulations, reg 15(1).
61 Competition Regulations, reg 15(3).
62 EACCA, sec 16(2)(a) and (b).
63 EACCA, sec 17(1).
64 EACCA, sec 17(a).
65 EACCA, sec 17(b).
66 EACCA, sec 17(c).
67 EACCA, sec 17(d).
68 EACCA, sec 17(e).
69 EACCA, sec 17(f).
70 EACCA, sec 17(g).
71 EACCA, sec 17(h).
72 EACCA, sec 17(i).

the cultural heritage;[73] and for the compensation of damages caused by natural disasters or by macroeconomic disturbances are also exempted.[74]

The exempted subsidies appear to have the common characteristic that they involve the exercise of the regulatory authority of the state and serve a defined public interest function. As such, they involve the exercise of the sovereign authority of the state, and fit into the category of non-economic subsidies. Governments grant such subsidies in the course of the exercise of their public authority.[75]

The Act also empowers the Council of Ministers to exempt other categories of subsidies on the recommendation of the Competition Authority.[76] For this purpose, the Council is required to consider whether the subsidy is suitable for the achievement of the intended objectives, and whether it is compatible with the objectives of the Community as well as the establishment of a competitive environment in the Community.[77] This aspect will be revisited in the discussion of the institutional framework. The Council is, nonetheless, also bound to limit the duration of every exemption it grants.[78]

It may be concluded from the framework of the EACCA that economic subsidies, which are not granted in the public interest should not distort or threaten to distort competition in the Community. The requirement would seem to make the subsidy control framework in the Act consistent with the philosophy of the Treaty, which only justifies the granting of economic subsidies by Partner States on the basis of the need to correct market failure.

2.4 Protocol on the Establishment of the East African Community Common Market

The EACCMP enjoins the Partner States not to grant any subsidy through resources in any form, which distorts or threatens to distort effective competition by favouring an undertaking, so far as it affects trade between the Partner

[73] EACCA, sec 17(j).
[74] EACCA, sec 17(k).
[75] *Case C-214/12P Land Burgenland and Others v Commission [2013] nyp.*
[76] EACCA, sec 17(2).
[77] EACCA, sec 17(3).
[78] EACCA, sec 17(4).

States.[79] However, the prohibition does not apply to subsidies granted on the authority of the EAC Treaty, or Acts or policies of the Community or decisions of the Council.[80]

Several elements may be noted from the EACCMP. Firstly, the EACCMP identifies the source of the resource to be a Partner State. Accordingly, it does not prohibit subsidies in the form of payments on the export of agricultural product that are 'financed by virtue of government action' as described in the Agreement on Agriculture (AoA).[81] In this respect, in Canada-Measures Affecting the Importation of Dairy Products (Canada-Dairy),[82] the Appellate Body held that such subsidies do not involve any public resources.[83] It seems, nonetheless, that such subsidies are not recognised in the EAC. Secondly, the subsidies prohibited by the EACCMP may involve resources in any form. They could be direct payments, indirect outlay or other measures of equivalent effect.[84] What is critical is the source of such resource, not the nature thereof.

More importantly, the Protocol provides criteria for determining which subsidies are prohibited. It was noted that the EACCUP requires Partner States to notify the other Partner States when they grant any subsidy, which distorts competition.[85] It was also noted that the criterion provided in the EACCUP for distortion of competition is that the subsidy favours certain undertakings or the production of certain goods in the Partner State.[86] This is also the criterion of specificity. Accordingly, specific subsidies ipso facto distort competition.

Moreover, because according to the ASCM, prohibited subsidies, actionable subsidies and subsidies liable to countervailing measures are, by nature, specific, they distort competition in the EAC. The EACCUP, thus, requires Partner States to prohibit such subsidies.[87] The EACCMP, on its part, prohibits such subsidies in so far as they affect trade between Partner States.

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79 EACCMP, art 34(1).
80 EACCMP, art 34(2).
81 Agreement on Agriculture 1867 UNTS 410, art 9(1)(c).
82 *Canada-Dairy, WT/DS113/AB/R and Corr. WT/DS113/AB/R and Corr. 1, 27 October 1999 (Appellate Body Report).*
83 ibid para 87.
84 EACCUP, art 1.
85 EACCUP, art 17(1).
86 EACCUP, art 17(1).
87 EACCUP, art 21(1).

Accordingly, the distortion or threat of distortion of effective competition in the Community occurs when a subsidy favours an undertaking in such a way as to affect trade between the Partner States.[88] Since the Community constitutes a common market, when a subsidy favours a specific undertaking or the production of specific goods, it confers an advantage to the concerned enterprise in relation to its competitors who deal in like or substitutable products, and thereby distorts competition. However, for the subsidy to be prohibited per se in the common market on the basis that it distorts or threatens to distort competition, it must, in addition to such distortion of competition, also affect trade between Partner States.

The above criterion is, therefore, generally consistent with the normative standard in the EACCA. Moreover, the phrase 'effective competition' used in the EACCMP indicates a need to segregate economic subsidies, which affect trade between Partner States, and those, which have no such effect. The phrase, therefore, reinforces the contention that only subsidies, which affect trade between Partner States arouse the concern of the common market. It, thereby, also creates an opportunity for introducing criteria for distinguishing economic subsidies which are subject to control in the common market from those that are not, such as a *de minimis threshold.*

2.5 East African Community Customs Management Act

As far as concerns economic subsidies and their impact on competition, the application of the East African Community Customs Management Act (EACCMA)[89] is limited to regulating the process of collection of countervailing duties. Thus, the Act obliges the Commissioner of Customs of the Partner State to collect countervailing duty in case of goods which have benefited from subsidy and to take necessary measures in the case of any other matters regarding countervailing measures, where so advised by the Committee on Trade Remedies.[90] In addition, it provides that countervailing duty is chargeable in addition to any other duty chargeable on the respective goods.[91]

88 EACCUP, art 21(1).
89 East African Community Customs Management Act (EACCMA), No. 1 of 2005 [Rev. 2009].
90 EACCMA, sec 137(1).
91 EACCMA, sec 137(2).

A fundamental assumption made in the Act is that the Partner States would have the goodwill to institute the required mechanisms for management of subsidies and their impact on competition. As will be noted in the discussion of the institutional framework in the next section, the Committee on Trade Remedies has not been established.

3. East African Community Institutional Framework

This section examines the institutional architecture of the EAC concerned with the regulation of economic subsidies on account of their impact on competition. The institutional mandates range from norm setting to enforcement of the standards. The discussion commences with an overview of the legal personality of international institutions for the purpose of providing a general context to such institutions. The scrutiny of the relevant institutions in the EAC follows thereafter.

3.1 An Overview of Legal Personality of International Institutions

The normative standards for determining the impact of economic subsidies on competition are enforced by institutions. Regulatory institutions, whether regional or national, spearhead the determination, implementation and enforcement of policies. Accordingly, they are expected to act objectively and to enjoy varying degrees of autonomy depending on the underpinning philosophy of regulation.

At the same time, however, intergovernmental institutions generally elicit concerns about loss of sovereignty by the establishing states, and the need to balance between the autonomy of these institutions and control by the states. The position in international law is that the sovereignty of states does not mean freedom from law so that sovereign states cannot submit to constraints on their sovereignty, but freedom within the law.

In S.S. Wimbledon,[92] Germany had objected that to interpret the freedom of transit provisions in the Treaty of Versailles, so as to allow passage of armaments through the Kiel Canal would infringe its sovereignty: the armaments were destined for Poland in its war with Russia, a war in which Germany

[92] *S.S. Wimbledon, PCIJ [1923], Ser. A No. 1, 15.*

was neutral. The Permanent Court of International Justice declined to view in the conclusion of any Treaty by which a state undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty.[93] It observed that any convention creating an obligation of the kind places a restriction upon the exercise of the sovereign rights of the state, in the sense that it requires them to be exercised in a certain way, but the right of entering into international engagements is an attribute of sovereignty.[94]

In the law of international institutions, the criteria for determining whether institutions have been endowed with international personality was outlined in the Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations.[95] Thus, the member states of an international institution must be shown to have intended to cloth the institution with the competence required to enable it effectively discharge the functions entrusted to it, in certain respects, autonomously, in detachment from its members.[96] The institution must then, also, in actual fact, exercise and enjoy functions and rights which can only be explained on the basis of possession of a large measure of international personality, and the capacity to operate in the international sphere.[97]

The principles were essentially affirmed by a national court in the Italian case of *Cristiani v Instituto italo-latino-americano,*[98] where the Italian Court of Cassation postulated that international legal personality is based on the effective position of an entity in the international community: the institution should be detached from the member states and must, in addition, consist of organs that are distinct from the organs of each member state, and act as organs of the institution, and not as joint organs of those states.[99] The Court of Cassation also asserted that, as for institutions that do not satisfy the above conditions, it may be said that they act on behalf of all the member states, and are organs common to all those states, with the consequence that acts they perform may be legally attributed to all such states.[100]

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93 ibid 25.
94 ibid.
95 *Reparation for Injuries, ICJ Reports 1949, 174-189, 11 April 1949.*
96 ibid 179.
97 ibid.
98 *Cristiani, 69 RDI (1986), 23 November 1985.*
99 ibid 146-152.
100 ibid.

3.2 The Context of the East African Community

The EAC is a body corporate established by the Partner States for the purpose of developing policies and programmes aimed at widening and deepening co-operation among the Partners States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit.[101] In this regard, the Treaty provides that the institutions of the Community shall be such bodies, departments and services as may be established by the Summit, and the institutions, like the organs of the Community, are bound to perform the functions and act within the limits of the powers conferred upon them by or under the Treaty.[102]

In essence, the institutions of the Community only exist so far as the Summit allows. Moreover, it is the Summit that the Treaty mandates to give general directions and impetus as to the development and achievement of the objectives of the Community.[103] Nevertheless, the powers of the institutions in the EAC mandated to regulate economic subsidies and the extent to which they can operate independently of external interests, largely determine the effectiveness of the law in limiting the intervention in the market by Partner States using economic subsidies only to correct market failure.

The standard for effectiveness for regional competition institutions was underscored by Lowe, P., a former director-general of the Directorate General of the Commission for Competition Policy (hereinafter 'DG Competition') of the EU, who explained its implication, thus:

> From an institutional point of view, whatever the mode of co-operation, what is important is that the competition authorities should be in a position to be independent, to enforce effectively, to co-operate internationally, to influence regulatory initiatives, and of course to defer to their courts whose action is essential to achieve long term convergence.[104]

As is apparent, the above standard has been largely informed by the position in the European Union, where European Commissioners are chosen on the basis of general competence and their independence, and are expected to

[101] EAC Treaty, art 5(1).
[102] EAC Treaty, art 9(2) and (4).
[103] EAC Treaty, art 11(1).
[104] 'International antitrust: Recent Developments and Trends', Panel Discussion reported in B E Hawk (ed) *Annual Proceedings of the Fordham Competition Law Institute. International Antitrust Law and Policy (Juris Publishing 2010) 35, 45-46.*

be independent in the performance of their duties, so that they should not seek or take instructions from a government or any other body.[105] Thus, while the Commissioners come from member states, they do not represent their states, nor pursue or protect their interests. The institutions must also have the requisite powers for setting standards, or otherwise influencing the development of standards, and to enforce the standards; and, lastly, the institutional framework must also provide a mechanism that enables courts to be involved in normative prescription in the course of adjudication.

In the context of the EAC, a discussion of the institutional framework entails identifying the organs and institutions of the EAC responsible for subsidy control, defining their mandates and establishing whether the above standards find expression in their operations. In this respect, there are four main regulatory institutions in the EAC with mandate in matters of subsidy control which will be examined. These are; the East African Community Committee on Trade Remedies, the East African Competition Authority, the East African Court of Justice (EACJ) which consists of a Court of First Instance and an Appellate Division,[106] and the Council of Ministers. As shall also be seen, the Directorate of Customs has a very limited role in subsidy control.

3.3 East African Community Committee on Trade Remedies

The East African Community Committee on Trade Remedies is a committee provided for in the EACCUP, and is to be composed of nine members, three of whom are nominated by each of the Partner States from persons who have expertise in matters of trade, customs and law.[107] It has a broad mandate to handle any matter pertaining to, among others, subsidies and countervailing measures, and dispute settlement.[108]

The Committee has, however, not been operationalised, as confirmed by the Principal Customs Officer, Tariffs and Valuation at the EAC Secretariat in an interview with the researcher in Arusha on 13 April 2018, as well as the Director of Trade, Investment and Productive Sectors in the Tanzania Ministry of Foreign Affairs and East African Co-operation who was also interviewed

[105] Treaty on European Union (TEU), [2010] OJ C83/13 at art 17(3).
[106] EAC Treaty, arts 9 and 23(2).
[107] EACCUP, art 24(2).
[108] EACCUP, art 24(1)(c).

in Dodoma on 12 April 2018. The Assistant Director in the Directorate of Economic Affairs in the Kenya Ministry of East African Community and Northern Corridor Development also confirmed this position in an interview with the researcher at Nairobi on 23 February 2018.

The Committee on Trade Remedies is responsible for administering and managing the customs union dispute settlement mechanism.[109] In relation to this, it may initiate and conduct investigations on trade disputes amongst the Partner States and between the Community and foreign countries through the investigating authorities of the Partner States. For this purpose, each Partner State is required to notify the Committee of the investigating authority within its territory designated to initiate and conduct investigations on behalf of the Committee.[110] The Principal Customs Officer for Tariffs and Valuation at the EAC informed the researcher that only Kenya has an investigating authority as required by the Protocol.

In general, whenever a Partner State has reason to believe that a prohibited subsidy is being granted or maintained by another Partner State or by a foreign state, the Partner State may make a request for consultations with that state.[111] The Committee should be notified of the request, which should include a statement of the available evidence on the existence and nature of the subsidy.[112] On receiving the request, the Partner State or foreign state believed to be granting the subsidy is required to enter into consultations expeditiously in a bid to arrive at a mutually agreeable solution.[113]

Where no resolution is reached within 30 days, any Partner State party to the consultations may refer the matter to the Committee for consideration, and the Committee is expected to review the evidence and submit a report to the Council of Ministers within 90 days.[114] It is noteworthy, that only Partner States can initiate the dispute resolution process before the Committee, in a procedure that excludes private actors who are major stakeholders in EAC trade.

[109] EACCUP, art 24(4)(j).
[110] EACCUP, art 24(3).
[111] East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, 2006 (Subsidies Regulations), reg 10(1).
[112] Subsidies Regulations, reg 10(1) and (2).
[113] Subsidies Regulations, reg 10(3).
[114] Subsidies Regulations, reg 10(4), (5) and (6).

The Committee may also recommend provisional measures to prevent injury to domestic industry where provisional affirmative determination has been made on any matter within its jurisdiction.[115] Where the Committee determines that there is a prohibited subsidy, it may recommend to the Council that the subsidy be withdrawn.[116] Thus, the Committee is required to make determinations on investigations initiated, and must report all determinations and decisions made to the Council of Ministers.[117]

The Committee's decisions in respect of settlement of disputes are generally final except where otherwise provided in the regulations made under the Protocol.[118] The Council, on its part, may adopt the Committee's report if no party disputes the report within 30 days, unless it otherwise decides not to adopt the report.[119] On the contrary, if a party to the consultations appeals against the report, the Council will decide the course of action to take, and where it makes a unanimous decision, it will issue a directive.[120]

Where the Council fails to make a decision, the aggrieved party may refer the matter to the East African Court of Justice.[121] In cases where no reference is made to the court within 20 days, or where the parties do not implement the directive of the Council within the period specified, the Council is empowered to authorise the complainant state to take appropriate counter measures.[122] The complainant state may only impose countervailing duties pursuant to an investigation initiated and conducted in accordance with the Regulations.[123]

Where the subsidy is actionable, and reasonable efforts have been made to complete consultations, but the subsidy has not been withdrawn, a Partner State may impose countervailing duties.[124] However, the method used by the investigating authority to calculate the benefit conferred on the recipient must be provided in the national legislation or implementation regulations of the

[115] EACCUP, art 24(4)(b) and (c).
[116] Subsidies Regulations, reg 10(7).
[117] EACCUP, art 24(4)(e).
[118] EACCUP, art 24(5).
[119] Subsidies Regulations, reg 10(8).
[120] Subsidies Regulations, reg 10(8).
[121] Subsidies Regulations, regs 10(9)(1), 9(2), and 9(3).
[122] Subsidies Regulations, reg 10(10).
[123] Subsidies Regulations, reg 16(2).
[124] Subsidies Regulations, reg 25(1).

Partner State concerned, and its application must be transparent, consistent and adequately explained.[125]

The decision whether or not to impose countervailing duties, and the amount of the countervailing duty which, in any event, cannot be in excess of the amount of the subsidy, is made by the Committee.[126] In this respect, the EACCMA provides that the Commissioner of Customs of a Partner State is obliged, on the advice of the Committee on Trade Remedies, to collect countervailing duty, which is chargeable in addition to any other duty chargeable on the respective goods.[127]

Partner States may also request consultations where non-actionable subsidies, although in compliance with Regulations, have resulted in serious adverse effects to the domestic industry of a Partner State, and are causing damage that will be difficult to repair.[128] Such subsidies include non-specific assistance for research activities conducted on contract basis with firms for the enlargement of general science and technical knowledge and not for industrial or commercial objectives,[129] assistance to disadvantaged regions given pursuant to a general framework of regional development,[130] as well as assistance to promote adaptation of existing facilities to new environmental requirements imposed by law which result in greater constraints and financial burdens on firms.[131] In the last case, the assistance must be given only once, and be limited to 20 per cent of the cost of the adaptation. It should also not cover the cost of replacing and operating the assisted investment and be available to all firms, which adopt the new equipment and production processes.[132]

The non-actionable subsidies provided in the Regulations are essentially similar to some of the non-economic subsidies listed in the EACCA and, on that account, would not be subject to challenge in the Competition Authority on the grounds of distorting or threatening to distort competition in the Community when granted by a Partner State.[133] They constitute a category of

[125] Subsidies Regulations, reg 20(a), (b) and (c).
[126] Subsidies Regulations, reg 20(2).
[127] EACCMA, sec 137.
[128] Subsidies Regulations, reg 15.
[129] Subsidies Regulations, reg 8.
[130] Subsidies Regulations, reg 14.
[131] Subsidies Regulations, reg 14(c).
[132] Subsidies Regulations, reg 14(c).
[133] EACCA, sec 17.

subsidies, which, seemingly, are applicable only amongst the Partner States. This is because, in the WTO context, non-actionable subsidies ceased to exist in 2000 when the Committee on Subsidies and Countervailing Measures failed to renew the applicable provisions of the ASCM.[134] However, where third states grant such subsidies, they constitute either prohibited or actionable subsidies, or subsidies liable to countervailing duties.

The institutional framework of the Committee shows that it is an inter-governmental agency of the Partner States, with the mandate to investigate complaints, and resolve disputes concerning trade in the EAC, rather than an independent institution with adjudicatory powers. Accordingly, it is not expected to enjoy autonomy from the Partner States, although it is expected to make objective findings and recommendations in its reports. The functional structure of the Committee explains why it has to rely on the investigating authorities of the Partner States to conduct investigations regarding trade related complaints, and its incapacity to enforce its own decisions.[135]

The Committee is, nonetheless, empowered to consult the Partner States and other countries on matters before it.[136] It can only apparently facilitate consultations by Partner States and parties to disputes to ensure that they fulfil all requirements, and provide advice as necessary; and may also recommend provisional measures ostensibly to the Council of Ministers.[137] It is the Council of Ministers to which the Committee reports that can make binding directives, which form part of the customs law of the Community.[138]

In this respect, the Council is mostly likely to make decisions largely influenced by political considerations. The danger in this is that political considerations in decisions that should otherwise be based on technical grounds are likely to reduce the effectiveness and predictability of subsidy control.[139] The large scope for political influence in the final outcome of the work of the Committee would seem to indicate that the Committee is limited

134 ASCM, art 31.
135 EACCUP, art 24(3).
136 EACCUP, art 24(4)(d).
137 EACCUP, art 24(4).
138 EACCUP, art 39(c).
139 H W Friederiszick, C Roller and V Verouden 'EC State Aid Control: An Economic Perspective', in M S Rydelski (ed) *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade (Cameron May 2006) 146, 179 state in reference to the EC: '[D]e-emphasising politics is helpful in terms of increasing the effectiveness and predictability of State aid control.'*

with reference to the actions it may take, in controlling the use of economic subsidies by the Partner States.

The Committee may also provide advisory opinions to Partner States in relation to the matters under its jurisdiction.[140] It also has the more general function of reviewing annually the implementation and operation of the matters under its jurisdiction.[141] Lastly, the Protocol provides that, in all the matters under its mandate, the Committee determines its own procedures and may issue public notices on the matters under its mandate.[142]

3.4 East African Community Competition Authority

The East African Community Competition Authority is an Authority established under the EACCA.[143] It is composed of three commissioners nominated by each of the Partner States, and appointed by the Council of Ministers of the EAC, for a renewable term of four years.[144] The commissioners of the Authority then appoint the chairman from amongst themselves for a period of one year on a rotating basis.[145] The Council may also remove a commissioner for prescribed reasons.[146] The Act provides that during a transitional period of five years after its constitution, the Authority will operate on an ad hoc basis.[147]

The researcher established in an interview with the Competition Expert of the Authority on 27 March 2018 in Arusha, that commissioners were appointed in 2016, 10 years after the Act was enacted, but that the Authority was still largely skeletal with few personnel so that, in effect, it had not become fully operational. As narrated below, the reasons advanced by different respondents in interviews conducted by the researcher as to the causes of the delay in operationalising the East African Competition Authority since the EACCA was enacted in 2006, are varied. Most of the respondents, however, attributed the delay to a lack of convergence on competition law and policy amongst the Partner States, which manifested in different forms.

140 EACCUP, art 24(4)(f).
141 EACCUP, art 24(4)(g).
142 EACCUP, arts 24(6) and 24(4)(h).
143 EACCA, sec 37.
144 EACCA, sec 38(3).
145 EACCA, sec 38.
146 EACCA, sec 39(2).
147 EACCA, sec 37(2).

In this regard, the Senior Analyst in the Competition Authority of Kenya, whom the researcher interviewed in Nairobi on 27 April 2018, gave as the reason for the delay, the fact that some Partner States initially did not have legal and institutional frameworks for competition. The official further explained that, since initially it was envisaged that the implementation of the regional competition law would be undertaken on the basis of consultation and co-ordination with national competition agencies, the delay by some Partner States to create their legal and institutional frameworks governing competition obstructed implementation of the regional competition framework.

Subsequently, the Senior Analyst added, the Partner States agreed to constitute the regional competition authority to address competition issues having cross-border dimensions, notwithstanding the fact that some Partner States had not enacted their competition laws and established agencies for regulating competition.

The fact that some Partner States did not have a legal and institutional framework for competition law and policy was also affirmed by the Director of Economic Affairs in the Kenya Ministry of East African Community and Northern Corridor Development in an interview with the researcher on 26 February 2018 at Nairobi. The Trade Officer in the Tanzania Ministry of Foreign Affairs and East African Co-operation,[148] as well as the Principal Customs Officer, Tariffs and Valuation in the East African Community Secretariat[149] and the Advocacy Officer in the Fair Competition Commission in Tanzania expressed similar views during interviews conducted by the researcher with them.[150]

Another explanation given for the lack of convergence among the Partner States was non-existence of similar laws amongst the Partner States. The Assistant Director in the Directorate of Economic Affairs in the Kenya Ministry confirmed, in an interview conducted by the researcher in Nairobi on 23 February 2018, that the delay was caused by the fact that Partner States had taken long to approximate their laws on competition to the regional laws. The Director of Trade, Investment and Productive Sectors in the Tanzania Ministry of Foreign Affairs and East African Co-operation also attributed the delay in

[148] Interview was conducted in Dodoma, Tanzania on 12 April 2018.
[149] Interview was conducted in Arusha, Tanzania on 13 April 2018.
[150] Interview was conducted in Dar es Salaam, Tanzania on 8 November 2017.

implementing the EACCA to non-existence of similar competition laws in some Partner States. The Director further explained that the Council of Ministers had issued a directive to those Partner States to proximate their competition laws.

Other reasons given by interviewees for the delay in implementing the EACCA were as follows: the Director, Kenya Competition Authority stated that the bureaucracy within the EAC prolonged the process of engaging personnel with the right skills, in addition to quota specifications which were a hindrance; the Trade Officer in the Tanzania Ministry also stated that there was a pending issue of reviewing the secretariat structure; while the Competition Expert in the East African Competition Authority attributed the delay to administrative reasons, such as lack of allocation and readiness by the Partner States.

The fact that the Council appoints the commissioners of the Authority on the recommendation of the Partner States, determines their remuneration, and may remove them, albeit for reasons specified in the Act, seems to point towards the overarching role of the Council which is an essentially political, as opposed to technical, organ.[151] In such circumstances, it seems that the commissioners are not satisfactorily insulated from the political pressures that are likely to come to bear when the individual interests of the Partner States are at stake.

The Authority has the general power to refer matters to the EACJ for determination.[152] Thus, where the Authority determines that a Partner State has granted a subsidy in contravention of the EACCA, it may refer the matter to the Court and, on determining that the subsidy granted was illegal, the Court may order the Partner State to recover the subsidy from the recipient.[153] The power to require a Partner State to recover an illegal subsidy is consistent with one approach to the interpretation of the relevant provision of the ASCM, which, however, many WTO member states do not agree with.[154]

The ASCM provides that where a panel finds a measure to be a prohibited subsidy, it is bound to recommend that the subsidising member withdraws the subsidy without delay, and specify in its recommendation the time frame for

[151] EACCA, secs 38(2) and (6), and 39(2).
[152] EACCA, sec 42(1)(f).
[153] Competition Regulations, reg 15(3).
[154] C Schoenbaum, *International Trade Law. Problems, Cases and Materials (2nd ed, Wolters Kluwer Law and Business 2013) 518.*

the withdrawal of the subsidy.[155] In Australia-Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse by the United States to Article 21.5 of the DSU ('Australia-Automotive Leather 21.5'),[156] the Panel ruled that, to comply with the provision of the ASCM, a prohibited subsidy must be withdrawn 'without delay' and the recipient must repay the subsidy.

The power of the Authority to enforce accountability from the Partner States regarding the granting of economic subsidies signifies that the Authority should be able to act objectively and independently, without specific regard to the interests of the Partner States. There are, nevertheless, serious doubts as to whether the institutional structure of the Authority conduces to these requirements. Nonetheless, the power of the Authority to refer a matter to the Court provides an appropriate linkage that would enable the Court to foster convergence in normative prescriptions related to economic subsidies and competition, by its decisions.

Similarly, the linkage between the Authority and law-making is expressed in the Authority's power to make recommendations to the Council of Ministers to make regulations.[157] The general powers of the Authority also sufficiently cover issues of enforcement, international co-operation and mechanisms for influencing regulatory initiatives.[158]

The affirmation in the Act that the determination of any violation of the EACCA is within the exclusive original jurisdiction of the Competition Authority also has important implications.[159] It signifies that the Authority has the exclusive jurisdiction to determine whether a subsidy granted by a Partner State ostensibly in the public interest, distorts or threatens to distort competition in the Community and is, therefore, unlawful.[160] It is, however, also likely to give rise to a conflict, even duplication of roles, between the Committee on Trade Remedies and the Authority.

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155 ASCM, art 4.7.

156 *Australia-Automotive Leather 21.5, WT/DS126/R/W, 11 February 2000 (Panel Report).*

157 EACCA, sec 42(1)(g).

158 EACCA, sec 42(1)(e) (impose sanctions and remedies); (l) (co-operate with regional and international organizations and with foreign competition authorities); (h) (develop appropriate procedures for public sensitization, consultation and participation); (i)(develop appropriate procedures for consultation and involvement of the East African Community's sectoral regulatory regimes for purposes of enhancing compatibility with the East African Community Competition Law); and (k) (collect data, undertake studies and publish reports).

159 EACCA, sec 44(1).

160 EACCA, sec 16.

Since the EAC constitutes a customs union, the application of the EACCA to economic activities having cross-border effect implies that it governs economic subsidies granted by Partner States, which affect trade between Partner States.[161] The jurisdiction of the Authority, therefore, does not cover economic subsidies whose effect is limited to the territories of individual Partner States.

Such subsidies, which have cross border effect also tend to give, rise to conflict between Partner States and, as such, may draw the intervention of the Committee on Trade Remedies, which has a very broad mandate under the EACCUP. In the circumstances, the institutional framework may entail duplication of functions between the Committee and the Competition Authority and, consequently, conflict of norms and uncertainty in the subsidy control framework.

An important feature of the Act is the provisions for deferral and referral, which are intended to safeguard the jurisdiction of Community institutions. Deferral refers to a situation where a legal dispute to be decided by a Partner State's competition authority or court is also pending before the Authority or the EACJ, in which event, the Partner State's competition authority or court is required to stay such proceedings until the Authority or Court has made a decision.[162] Referral, on the other hand, applies where a case or legal dispute within the scope of the application of the EACCA is not yet under consideration by the Authority, in which event, the Partner States' authorities or courts are required to refer the case or legal dispute to the Authority for determination.[163]

Finally, the resolutions and decisions of the Authority are legally binding on Partner States' authorities and Subordinate courts,[164] and the decisions made by the Authority are enforceable by the enforcement agencies of Partner States.[165] While Partner States are expected to fulfil their obligations in good

[161] EACCA, sec 4(1). See C D Ehlermann, 'State Aid Control in the European Union: Success or Failure', (1994)18(4) Fordham International Law Journal 1210, 1219, who states with respect to the European Community: 'Aid granted by a Member State is no longer controlled exclusively or principally in the interest of other Member States, but also, and perhaps even more so, in the interest of the competitors of the intended beneficiaries of the aid.'

[162] EACCA, sec 44(3).

[163] EACCA, sec 44(4).

[164] EACCA, sec 44(2).

[165] EACCA, sec 44(5).

faith, such reliance on Partner States' institutions without appropriate safeguards may lead to frustration of enforcement as a result of inaction by Partner States' authorities.

3.5 The Council of Ministers

The Council of Ministers is established under the EAC Treaty.[166] It is comprised of ministers responsible for regional co-operation of each Partner State, and such other ministers of the Partner States as each Partner State may determine.[167] It is the policy-making organ of the Community.[168] Among its principal functions are: making policy decisions;[169] giving directions to the Partner States and other organs and institutions of the Community except the Summit, the EACJ and the Legislative Assembly;[170] making regulations, issuing directives, taking decisions, making recommendations, and giving opinions in accordance with the Treaty.[171]

The Treaty provides that the regulations, directives and decisions of the Council made or given in pursuance of the Treaty are binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Legislative Assembly within their mandates.[172] As regards trade, the EACCUP provides that the regulations and directives made by the Council form part of the customs law of the Community.[173]

The EAC Treaty also provides that the decisions of the Council of Ministers, like the decisions of the Summit, should be made by consensus.[174] In Council of Ministers for the East African Community Advisory Opinion Request,[175] the lack of consensus among the Partner States on the details of the common market during negotiations for the protocol made the Council of Ministers to direct the EAC Secretariat to seek an advisory opinion from

[166] EAC Treaty, art 9(1)(b).
[167] EAC Treaty, art 13.
[168] EAC Treaty, art 14(1).
[169] EAC Treaty, art 14(3)(a).
[170] EAC Treaty, art 14(c).
[171] EAC Treaty, art 14(d).
[172] EAC Treaty, art 16.
[173] EACCUP, art 39(1)(c).
[174] EAC Treaty, arts 12(3) (Summit), 15(4)(Council).
[175] *Council of Ministers for the East African Community Advisory Opinion Request, Application No. 1 of 2008.*

the EACJ on the application of the principle of variable geometry. The EACJ explained that consensus as applied in the Treaty is purely and simply a decision-making mechanism in the Summit, Council and other executive organs of the Community and is distinguishable from variable geometry which is a strategy for implementation.[176]

As the policy-making organ of the Community, the Council fulfils an overarching role in the subsidy control regime of the EAC. In interviews this researcher conducted, this researcher found that the Council has been performing subsidy control functions in the absence of the East African Competition Authority. The Director of Trade, Investment and Productive Sectors in the Tanzania Ministry of Foreign Affairs and East African Co-operation, confirmed that any intended subsidisation by a Partner State should be reported to the Council of Ministers which would discuss the justification and consider the implications. The Director also stated that approval may only be given subject to a time frame. However, the official explained, goods, which have benefited from such subsidisation do not generally benefit from preferential tariff treatment in other Partner States.

In this respect, the Director gave as an example a request that had been made by Kenya to offload 20 per cent of goods manufactured in the Export Processing Zones into the EAC market. The Director informed the researcher that in order to maintain conditions of competition in the market, the other Partner States levied tariffs on all affected textiles and other leather products at the maximum tariff rate. The Principal Customs Officer, Tariffs and Valuation at the EAC Secretariat also confirmed the subsidy control activities of the Council. The officer gave, as an example, confectionaries from Kenya which had been manufactured using industrial sugar imported into Kenya under a ten percent duty remission scheme. The other Partner States had, consequently, imposed import duty on the confectionaries at the maximum tariff rate of 25 percent so as to maintain fair conditions of competition for other manufacturers of confectionaries.[177]

The Council of Ministers is also empowered, on the recommendation of the Competition Authority, to exempt, for specified periods, other categories

[176] ibid para 83.

[177] See also G Omondi, 'Tanzania, Uganda Bar Kenya Sweets' *Business Daily (Nairobi 23 April 2018) 1-2.*

of subsidies which may otherwise distort or threaten to distort competition.[178] In doing so, however, it must have regard to the materiality of the subsidy for the achievement of its objective, the compatibility of the subsidy with the objectives of the Community, including the opening of Partner States' markets and the establishment of a competitive environment in the Community.[179]

It is undoubted that the Council of Ministers is also a political organ and, whereas the EACCA requires it to take into account the specified technical considerations when it decides whether to grant exemptions to other categories of subsidies, it is more likely to respond to the political pressures surrounding the demands by a Partner State, for exemptions, whether exclusively or in addition to the technical specifications. Such an eventuality is likely to result in a stalemate, especially since members of the Council represent national political interests and its decisions are required to be made by consensus.

It is, therefore, not altogether a satisfactory arrangement to vest the power of exemption on the Council. A better arrangement would have been to vest such exemption power in the Competition Authority, as the technical institution expected to exercise expertise in carrying out its mandate, subject to certain fundamental reforms in its legal and institutional framework.

The Council of Ministers is also expected to receive reports from the Committee on Trade Remedies on all determinations on the matters submitted to it, and decisions made by it, and may assign to the Committee any other function.[180] As has been noted, it also appoints the commissioners to the Competition Authority on the recommendations of the Partner States, and may also remove any commissioner at any time for specified reasons.[181]

3.6 The East African Court of Justice

With reference to subsidies, a Partner State, which is dissatisfied with the decision of the Competition Authority as to whether a subsidy distorts or threatens to distort competition, or is otherwise an exempted subsidy, may challenge the decision in the Court.[182] It was also noted with reference to the

[178] EACCA, sec 17(2) and (3).
[179] EACCA, sec 17(2) and (3).
[180] EACCUP, art 24(4)(e) and (i).
[181] EACCA, secs 38(3) and 39(2).
[182] EACCA, sec 15(3).

Committee on Trade Remedies, that where the Council of Ministers fails to reach a decision by consensus in relation to the Committee's report, an aggrieved party may refer the matter to the Court.[183]

The jurisdiction of the Court in this context may be seen as an extension of the jurisdiction conferred by the Treaty, which entitles a Partner State to refer to the Court for determination the legality of, inter alia, any decision on the ground that it is unlawful or an abuse or misuse of power.[184] Where the Court determines that the subsidy is unlawful, the Partner State is required to recover it from the recipient.[185] As has been noted, this power is similar to the interpretation made of the relevant provision of the ASCM by the WTO Panel in Australia-Automotive Leather 21.5.[186]

The Court also has jurisdiction to determine any dispute between the Competition Authority and Partner States' authorities or courts, which has been referred to it.[187] Moreover, the Court is also empowered to exercise jurisdiction whenever any question with respect to any action of the Authority, or anything done with respect to the Authority under the Act arises.[188] More generally, the Court interprets its jurisdiction liberally, and is likely to affirm jurisdiction when a person resident in a Partner State challenges the granting of a subsidy by a Partner State in contravention of the Treaty.[189]

Thus, in *Prof. Peter Anyang Nyong'o & Others v Attorney General and Others,*[190] the petitioners challenged the swearing in of Kenya's representatives to the East African Legislative Assembly on the ground that Kenya had violated the EAC Treaty when selecting the representatives and the election was, therefore, void. The Treaty provides that, 'the elected members shall, as much as feasible, be representative of specified groups', and sets out the qualification for election.[191]

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183 Subsidies Regulations, regs 10(9)(1), (9)(2) and (9)(3).
184 EAC Treaty, art 28(2).
185 EACCA, sec 15(4).
186 *Australia-Automotive Leather 21.5 (n 156).*
187 EACCA, sec 45(6).
188 EACCA, sec 46.
189 EAC Treaty, art 30.
190 *Prof. Peter Anyang Nyong'o & Others v Attorney General and Others, Ref No. 1 of 2006 (30 March 2007).*
191 EAC Treaty, art 50.

The Attorney-General of Kenya contended that article 52(1) of the Treaty reserved any question that may arise, whether any person is an elected member of the Assembly, to the institution of the Partner State that determines questions of the election of members of the National Assembly. Accordingly, the Attorney-General urged that the EACJ had no jurisdiction which, instead, vested in the High Court of Kenya.

The Court, however, held that since the dispute raised questions regarding the infringement of the Treaty, the Court had jurisdiction. Moreover, the Court also held that the National Assembly of Kenya had not conducted an election in accordance with the requirements of the Treaty.

In this respect, the EACJ has been willing to rely on the objectives and purposes clauses of the Treaty to expound on the obligations arising from the Treaty. Thus in *James Katabazi and 21 Others v Secretary General of the East African Community and Another,*[192] the Court held that, while the human rights jurisdiction of the Court had not been activated, nevertheless, it could determine issues of human rights which are incidental to, or arise in the course of exercising its jurisdiction as conferred by the Treaty to ensure adherence to law.[193]

It should also be noted that an appeal lies from a judgment or order of the First Instance Division to the Appellate Division on a point of law, or lack of jurisdiction, or procedural irregularity.[194] In any event, the independence of the Court is secured mainly through two mechanisms. Firstly, by the requirement that judges be appointed from among persons of proven integrity, impartiality and independence who fulfil the conditions required for the holding of high judicial office, or who are jurists of recognised competence.[195]

Secondly, the tenure of office of judges is fixed at seven years, unless they resign, or attain the age of seventy years, or die, or are removed by the Summit.[196] In this respect, the Summit may remove a judge of the Court on the recommendation of an ad hoc tribunal constituted by the Summit to determine misconduct or inability to perform the functions of office on their part,

[192] *James Katabazi and 21 Others v Secretary General of the East African Community and Another, Reference No. 1 of 2007 (1 November 2007).*
[193] ibid paras 15-23.
[194] EAC Treaty, art 35A.
[195] EAC Treaty, art 24(1).
[196] EAC Treaty, art 25.

or because they have been removed or have resigned from judicial or public office in their country on account of misconduct or inability to perform the functions of their office.[197] The Summit may also remove a judge who has been adjudged bankrupt or convicted of an offence involving dishonesty, fraud or moral turpitude under any law in a Partner State.[198]

The Treaty, accordingly, constitutes the Court into one of only two organs of the Community, which have functional independence from the executives of the Partner States in the Community.

3.7 The Directorate of Customs

The Directorate of Customs is established by the Council of Ministers in accordance with the EAC Treaty.[199] It is responsible for the initiation of policies of customs and related trade matters in the Community, and the co-ordination of such policies in the Partner States.[200] More specifically, in relation to management and administration of customs, it co-ordinates and monitors the enforcement of the customs law of the Community.[201]

The Directorate is subject to the general direction of the Council of Ministers.[202] It consults with and, where necessary, delegates any of its functions to any commissioner.[203] The commissioners are responsible for the management and control of customs in each of the Partner States and are appointed in accordance with Partner States legislation.[204] They, thus, head the Customs Department of each Partner State, which is responsible for customs management and control and has such other staff as may be necessary for the administration and efficient working of the Customs.[205]

The role of Customs with reference to economic subsidies and their impact on competition is, however, limited to collecting countervailing duties. Thus the Commissioner of Customs is responsible for collecting countervail-

197 EAC Treaty, art 26(1)(a) and (b).
198 EAC Treaty, art 26(1)(c) and (d).
199 EACCMA, sec 3.
200 EACCMA, sec 3.
201 EACCMA, sec 4(1)(b).
202 EACCMA, sec 4(2).
203 EACCMA, sec 4(2).
204 EACCMA, sec 5(1).
205 EACCMA, sec 5(1).

ing duty on goods in respect of which subsidies have been granted, where advice to that effect has been given by the Committee on Trade Remedies.[206] The Commissioner may also take necessary measures in the case of any other matter in respect of countervailing measures.[207] As has been noted, however, the Committee on Trade Remedies has not been established and, thus, the Council of Ministers undertakes residual functions relating to subsidy control.

3.8 *A Synopsis of the East African Community Institutional Framework*

The examination of the institutional framework governing economic subsidies and their impact on competition in the EAC in the context of the EAC Treaty underscores the dominance of the executive branch of the Partner States, in the form of the Summit of Heads of States and the Council of Ministers, in the institutional framework of the Community.

The ideology underpinning this institutional framework is inter-governmentalism, in which regional integration arrangements are conceived as mere appendages of Partner States, formed to do their collective bidding.[208] In this context, the *raison d'etre* for the dominant executive in the Community has its crucible in the Partner States, where the executive branches of Government exercise near absolute control over the bureaucracy of state institutions and executive agencies, except so far as Constitutions prescribe independence for specific institutions safeguarded by forms of security of tenure.

The dominant executive branches in the Partner States have, therefore, essentially been accommodated by being transposed into the EAC, which is largely driven by the Partner States at their behest, thereby relegating other Community organs to a minimalist role, whilst leaving no formal space for nongovernmental actors. Thus, in replicating the philosophy of the dominant executive in the EAC, the EAC Treaty subjugates the bureaucracy and institutions of the Community to the executives of the Partner States in the Community. The pervasive power of the executive branches of the Partner States in the

[206] EACCMA, sec 137(1).

[207] EACCMA, sec 137(1).

[208] TP Milej 'Legal Harmonisation in Regional Economic Communities-The Case of the European Union' in D Johannes et al (eds) *Harmonisation of Laws in the East African Community. The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities* (LawAfrica Publishing 2018) 139, 140.

Community is limited only in so far as concerns the EACJ and the East African Legislative Assembly within their mandate. At the same time, the requirement of consensus in executive decision making by the Summit and the Council of Ministers ensures that executive decision-making involves compromise and convergence in the pursuit of the interests of the Partner States.

As the bureaucracy and institutions of the EAC are largely conceived of as agencies of the Partner States acting collectively, and are subject to the unwieldy control of the executives of the Partner States in the Community, the exercise of functions by the regulatory institutions of the Community is subject to the control of the executives of the Partner States in the Community, which is largely inimical to functional independence for the institutions.

4. Conclusion

This research paper has critically examined the effectiveness of the EAC law governing economic subsidies and their impact on competition, in limiting the intervention in the market by the Governments of the Partner States. Such intervention, using economic subsidies, would be warranted in the interest of competition only to the extent considered to be strictly necessary for correcting market failure. In this connection, it has revealed, with respect to the legal standards for the regulation of economic subsidies and their impact on competition, that there are clear and express legal standards for the regulation of economic subsidies and their impact on competition in the EAC.

The legal standards require the Partner States to prohibit any subsidies, which distort or threaten to distort competition by favouring certain undertakings or the production of certain goods in the Partner States. They also enjoin the Partner States not to grant any subsidy through resources in any form, which distorts or threatens to distort effective competition by favouring an undertaking so as to affect trade between the Partner States.

In view of the foregoing, the first conclusion made is that the legal standards constitute an effective basis for limiting the intervention in the market by Governments of Partner States, to using economic subsidies only to the extent strictly necessary for correcting market failure. This is because the standards are consistent with the free market philosophy of the EAC Treaty that allows interventions by Partner States in the market using economic subsidies only for purposes of correcting market failure.

Moreover, in relation to the regulatory institutions for controlling economic subsidies in the EAC, it has established that the East African Committee on Trade Remedies has not been established, while the East African Competition Authority has not been fully operationalised. Furthermore, the composition and operations of these regulatory institutions are largely subject to dominant control by the executives of the Partner States in the Community, thereby compromising their functional independence.

The circumstances render the institutions largely incapable of exercising independence for purposes of making decisions that are likely to conflict with the interests of the Governments of the Partner States. Accordingly, the second conclusion made is that the regulatory institutions responsible for controlling subsidies in the EAC are unsuitable for the purpose of limiting the intervention in the market by Governments of the Partner States using economic subsidies only to correct market failure.

In view of the foregoing, it is recommended that the institutional framework of the East African Competition Authority should be reviewed so as to safeguard its functional autonomy to regulate, among other matters, economic subsidies and their impact of competition. It is also recommended that the functions of the East African Community Committee on Trade Remedies and East African Competition Authority be reviewed with a view to harmonisation as their mandates as provided in the EACCUP and the EACCA respectively may give rise to a duplication of functions when the two institutions are operationalised. In this context, all matters relating to economic subsidies and their impact on competition amongst the Partner States may be vested in the Competition Authority. Non-Partner States may still retain the Committee as the institution with the mandate over matters relating to subsidisation.

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