CHAPTER 9

The EAC Common Market

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9.1 Introduction

On the 1st July 2010 the East African Community Common Market became operational. The actual negotiations on the establishment of the Common Market started in April 2008 and ended in November 2009 when the East African Community (EAC) Heads of States signed the Protocol on the Establishment of the EAC Common Market. The ratification process was completed by each respective Partner State and, in July 2010, the Common Market came into force.

A common market is essentially an arrangement whereby member or partner countries of a regional economic community operate as a single market for goods, services, capital and labor, having common revenue and trade laws. Two main economic grounds in favor of a common market or absence of internal barriers are: firstly, that freedom of trade and movement tends to bring about that each kind of production undertaken in the area will be endeavored in the sectors that suit it best; and secondly, it tends to ensure that, where there is an advantage in large-scale production of a commodity, it will be produced on large scale in one or a few places, for the whole area, instead of being produced on an uneconomically small scale in a large number of places.

Article 5(2) of the Treaty for the Establishment of the East African Community (the EAC Treaty) enjoins Partner States to establish among themselves a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation. The Common Market is therefore the second stage of integration after the Customs Union which was achieved through the EAC Protocol on the Customs Union in 2004.

1 Gastorn, K. ‘The Legal Analysis of the Common Market of the East African Community as Market Freedoms in the Open Market Economy’, Law in Africa, 2011:1:143–154.
2 Newman, P., ‘The Economics of Integration in East Africa’, in Colin T. Leys and Peter Robson (eds), Federation in East Africa: Opportunities and Problems, Oxford University Press, London/New York (1965), 58.
3 Pursuant to Article 75 of the Treaty for the Establishment of the East African Community, 1999. The Protocol on the Establishment of the East African Community Customs Union was signed on 2nd March 2004, and launched in 2005 with the aim of removing tariff and
9.2 History of Common Market in the Region

The region has rich history of uncoordinated experiences of common markets. Cooperation among the Partner States of the EAC has a history dating back over a century. From 1884 to 1919, Burundi, Rwanda and Tanganyika were one territory (German East Africa) under German colonial rule. Uganda and Kenya existed as separate territories under British colonial rule. The defeat of the German power during the First World War changed the geographical frontiers of German East Africa. Two provinces were split from the territory and became autonomous territories and were renamed Burundi and Rwanda under Belgian colonial rule. The remaining part became Tanganyika (later Tanzania) under British rule, first as a mandate under the League of Nations and later as a trust territory under the rule of the United Nations. In short, the victorious powers divided the previous German territory among themselves under the Versailles Treaty of 1919 in which Germany was forced to surrender all its foreign occupations. By examining the historical development of the region, four stages of common market integration can be noted.

Generally, the pre-colonial African communities were not organized along countries, tribes or ethnic groups. Their identities and vernacular languages simply shaded into one another, and for them cooperation was more important than competition. All this changed when the Europeans came to Africa as colonialists. They invented colonies, drew frontiers across the map at will to exclusively suit their imperial interests and convenience at the whim of few cartographers in London, Berlin or Paris. They also classified peoples of Africa, sorting them out into what they called tribes, producing a whole new ethnic map to show the frontiers of each one. They simply wanted recognizable units they could easily control.

In 1895 the first phase of integration of the region began through the construction of the Uganda railway starting from Mombasa and linking the two countries of Kenya and Uganda. This provided a basis for the first creation of a common market in 1900 between Kenya and Uganda after the latter had made formal customs arrangements with Kenya for Mombasa to become the Customs Collection Centre. In 1905, the common currency (East African Shilling) was introduced in the two countries. Therefore, Kenya and Uganda
had by that year passed through the three main stages of integration, namely (a) customs union, (b) common market, and (c) monetary union. The cooperation between Uganda and Kenya was largely facilitated by the fact that both countries were under one colonial master, the British. However, at the time, Tanganyika (then German East Africa) was under German rule and therefore could not easily be brought into this cooperation.

The second phase of the common market took place after the defeat of Germany in the First World War which culminated in the takeover of the territory by the British. The interests of the British could then be better served with Tanganyika joining its empire. Tanganyika was therefore brought within the already established arrangements of cooperation. In 1922, Tanganyika joined the customs union package. In 1933 it had already acceded to the free exchange of locally produced goods and the Postal Union, and finally the Common Market between Tanganyika, Kenya and Uganda was established.

The third phase of the common market was provided for in the Treaty for East African Cooperation adopted by Kenya, Tanzania and Uganda in 1967. The principal common market machineries included the Common Market Council and the Common Market Tribunal. The operation of this common market was very much influenced by historical accidents which ultimately made Kenya take a lead by gaining substantial benefits that accrued from the common market. Uganda also benefited, although not as much as Kenya, while Tanganyika gained the least. Such unequal benefits were among the reasons that led to the collapse of the common market in 1977 which was viewed as slowing down the economic development of some individual states.

After the independence of Tanganyika (1961), Uganda (1962) and Kenya (1963), there was a big interest, especially on the part of Tanganyika, to move towards a political federation, an idea imbued in Pan-Africanism. Tanganyika wanted to build on the already achieved stages of integration, namely customs union, common market and monetary union, and to have a political federation. Tanganyika was also prepared to delay its independence for a year to wait for

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1 (DENIVA), Public Dialogue on Fast Tracking East African Federation Dialogue, Hotel Equatoria Kampala, 24th November, 2006, 5; Ruhangisa, J.E., ‘The Institutions of the East African Community (EAC) with Emphasis on the East African Court of Justice’, A Course Material for TGCL Students, University of Dar es Salaam (2010), 2 (unpublished).
2 Part II of the Treaty for the Establishment of the East African Community.
3 Part III of the Treaty for the Establishment of the East African Community.
4 Ndewa, P., ‘The Common Market and Development in East Africa’, Eastern Africa Publishing House, Kampala (1965), 136.
Kenya and Uganda, so that an East African Federation would be established.\(^9\)

Thus in 1963, a Declaration for the establishment of a political federation was signed. From the point of view of Nyerere, then President of Tanganyika:

> A federation of at least Kenya, Uganda and Tanganyika should be comparatively easy to achieve. We already have a common market and run many services through the Common Services Organization which has its own Central Legislative Assembly and an Executive composed of the Prime Ministers of the three states. This is the nucleus from which a federation is the natural growth.\(^{10}\)

However, disagreements about the idea of a political federation prevented the establishment of the federation and instead the East African Cooperation was instituted. The main issues of disagreement include division of state and federal powers, citizenship, borrowing powers and conceptual structures. In any event, the Prime Minister of Uganda, Hon. Apollo Milton Obote, was instrumental in the failure of the idea of federation as he thought that Uganda might become extinct overnight.\(^{11}\) Moreover, it was still too soon to aim for a federation, both considering the complexities of federating and given the fact that all the preceding stages of integration were not people-centered and were not systematically and incrementally achieved.\(^{12}\)

The current Common Market set-up is the fourth phase, built on the ruins of the extinct East African Cooperation that collapsed in 1977. It should be noted that the 1967–1977 East African Common Market, and the Central American Common Market (CACM)\(^{13}\) were by then frequently cited as the two most economically integrated areas among the least developed countries. In particular, the East African Common Market was viewed as a more perfect customs union with somewhat more coordination of economic policies, while the CACM was more a free trade area.\(^{14}\)

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9 Apuuli, D.P., cited supra note 6, 5.
10 Apuuli, D.P., cited supra note 6, 4.
11 Ibid., 6–7.
12 Gastorn, K., cited supra note 1, 147.
13 The CACM was established in 1960 and is headquartered in Guatemala city, and includes Guatemala, Honduras, El Salvador, and Nicaragua, and Costa Rica.
14 Fred H. Lawson (ed), ‘Comparative Regionalism’, Ashgate (2009), 9.
9.3 Aims and Objectives

The foundation of the current Common Market is derived from Articles 76 and 104 of the EAC Treaty. Article 76 of the Treaty provides that:

1. There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labor, goods, services, capital and the right of establishment.
2. The establishment of the Common Market shall be progressive and in accordance with schedules approved by the Council.
3. For purposes of this Article, the Council may establish and confer powers and authority upon such institutions as it may deem necessary to administer the Common Market.
4. For the purpose of this Article, the Partner States shall conclude a Protocol on a Common Market.

Furthermore, Article 46 of the Common Market Protocol requires the Council of Ministers to establish an authority or institution to manage the Common Market. This authority is not yet established.

The stated overall objective of the Common Market is to widen and deepen cooperation among the Partner States in economic and social fields for their benefit. The Common Market is the second out of the four envisaged stages for current EAC integration, namely the Customs Union, the Common Market, the Monetary Union, and the Political Federation. The achievement of the above stages is to be governed by the fundamental principles of cooperation for mutual benefit, mutual trust, political will and sovereign equality, good governance, equitable distribution of benefits, and peaceful co-existence and good neighborliness.

The EAC Common Market focuses mainly on four freedoms, namely free movement of goods, free movement of labor, free movement of services, and free movement of capital. It therefore involves the integration or amalgamation of the four markets; (a) the goods market, (b) the labor market, (c) the
services market, and (d) the capital market. On the account of Article 2(4) of the Common Market Protocol, the right of establishment, the right of residence, and the right of free movement of persons (other than labor) are an integral part of the Common Market. To this end, rights of establishment and residence may be added to as the fifth freedom under the Common Market.

Free movement of goods entails the removal of tariff and non-tariff barriers (barriers to trade), thus easing the movement of goods. Non-tariff barriers do not involve direct payments of money. They are quantitative restrictions and specific limitations that act as obstacles to trade, and which appear in the form of rules, regulations and laws that have a negative impact on trade.

Free movement of labor relates to the unhindered movement of workers within the territories. It entails the principle of non-discrimination in labor laws and policies on grounds of nationality. Article 10 of the Common Market Protocol provides for the free movement of workers and their accompanying spouse or children (family members).

Free movement of services is provided for under Part F of the Common Market Protocol and refers to the movement of services supplied by nationals of the Partner States within the Community. The current schedule of commitments on free movement of services identifies seven sectors to be liberalized, namely (a) business services, (b) communication services, (c) distribution services, (d) education services, (e) financial services, (f) tourism and other related services, and (g) transport services.

Free movement of capital is provided for under Part G of the Common Market Protocol and entails the removal of restrictions on the movement of capital supplied by nationals of Partner States, and the removal of discrimination based on nationality.

The right of establishment is provided for in Article 13 of the Common Market Protocol and entitles a national of a Partner State to undertake and pursue economic activities as a self-employed person, and set up and manage economic undertakings in the territory of another Partner State. It also entitles a self-employed person who is in the territory of another Partner State to join the social security scheme of that Partner State in accordance with its national

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18 Tax, S.L., (2010), ‘East African Community Integration: Marching towards a Common Market’, Paper Presented at the University of Dar es Salaam, East African Community Students’ Union, 26th June 2010, 6 (unpublished).
19 Part C of the EAC Common Market Protocol.
20 See on this point also the distinction in EU law between financial and non-financial restrictions to the free movement of goods discussed in EU Chapter 10.
21 Part D of the EAC Common Market Protocol.
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laws.22 The implementation of the right of establishment is done according to the specific regulations.23

The right of residence24 relates to persons from other Partner States who have been admitted to the country as workers25 or self-employed persons under the right of establishment as provided above.26 Under this right, citizens of the Partner States would be entitled to a residence permit in the host State provided that they have been employed or self-employed in accordance with the respective national policies and laws of that country. The implementation of the right of residence is also done in accordance with specific regulations.27

The abovementioned freedoms are the subject of the following chapters in which they will be discussed in more detail. Suffice it to say at this stage that the Common Market has created opportunities within the region as it seeks to remove all obstacles to intra-community trade and to merge the national markets into one unified market, and thereby make a place where the individual freedom of economic activity would be exercised regardless of borders between Partner States. The unified EAC Common Market encompasses more than 143.5 million people and a combined Gross Domestic Product of $110.3 billion (2014).28 Opportunities include (a) a deeper understanding and integration of the East Africans which in return would strengthen peace and stability in the region, (b) an expanded market for goods, services, capital, and labor likely to boost and expedite economic and social development in the region, (c) the creation of a strong basis on which common fiscal policies including currency may be established.

9.4 Levels of Economic Integration

In terms of levels of economic integration, a common market is normally the third level, after a free trade area (an area within which customs duties and other trade restrictions between member states are prohibited) and a customs union (a free trade area, together with a system whereby a common duty is charged on goods entering the free trade area from a non-member state).29

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22 Article 13(3) of the EAC Common Market Protocol.
23 Article 13(12) of the EAC Common Market Protocol.
24 Article 14 of the EAC Common Market Protocol.
25 Article 10 of the EAC Common Market Protocol.
26 Article 13 of the EAC Common Market Protocol.
27 Article 14(8) of the EAC Common Market Protocol.
28 EAC Facts & Figures Report 2014.
29 Cf, also EU Chapter 9 on the internal market in the EU.
It is a stage in which there is free flow of factors of production, a common external tariff and no tariffs or quotas. However, the EAC common market today is a label more widely applied than practiced. Also the concept of levels tends to employ stages, the sequence of which is often confusing in practice. For instance, the European Common Market achieved partial free flow of factors of production before it became a full free trade area and customs union in July 1968.30

9.5 The Relationship between the EAC Treaty and the Protocols

The EAC Treaty is the basic rule constituting the integration process. In the scheme of constitutional principles within a state, the EAC Treaty is similar to a national constitution or grundnorm of the legal orders.31 The EAC Treaty defines “Treaty” as including its annexes and protocols. Article 1 of the EAC Treaty defines a “protocol” as an agreement that supplements, amends or qualifies the Treaty. Protocols therefore derive their legitimacy and legality from the Treaty and thereby become an integral part of the EAC Treaty.32

In principle, protocols are negotiated and concluded “for purposes of spelling out the objectives and scope of, and institutional mechanisms for, cooperation and integration”.33 The protocol is therefore a tool that is used to open up a sector of cooperation between the Partner States.

In the EAC, a protocol may be concluded on any matter specifically provided for in the Treaty. For example, Article 27(2) specifically requires Partner States to conclude a protocol to operationalize the extended jurisdiction of the East African Court of Justice on matters like appellate and human rights jurisdiction. Furthermore, a protocol may be concluded on any matter necessary to achieve the agreed objectives in each area of cooperation. However, each protocol must be approved by the Summit of the Heads of State on a recommendation from the Council of Ministers, and is also subject to signature and ratification by the Partner States.34

30 Fred H. Lawson, cited supra note 15, 8.
31 Mchome, S.E. ‘The Treaty of the East African Community: Is it the Equivalent of a National Constitution?’, in in Kennedy Gastorn et al. (eds.), ‘Processes of Legal Integration in the East African Community’, Dar Es Salaam University Press, Dar es Salaam, 83–102.
32 Article 151(4) of the Treaty for the Establishment of the East African Community.
33 Mwapachu, J.V. ‘Ten Years of the EAC—Achievements, Challenges and Prospects’, in Kennedy Gastorn et al. (eds.), ‘Processes of Legal Integration in the East African Community’, Dar Es Salaam University Press, Dar es Salaam, 62.
34 Article 151 of the Treaty for the Establishment of the East African Community.