Shared Competence: East African Community's Achilles' Heel

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Introduction

Regional integration is a process by which sovereign states establish common political, legal, economic, and social institutions for collective governance. This process is driven by economic, political or security considerations. For instance, it enables States to reduce or eliminate restrictions on the flow of goods, services, capital, people, and ideas. The economic gains of securing access to relatively larger markets in the absence of MFN-driven liberalization and the ease of doing so at a regional level further motivates States to deepen integration.

However, deeper regional integration inevitably requires delegation of some decision-making powers to shared institutions. The consequential loss of sovereignty in specific areas requires strong political will to make the (unpopular) decisions surrendering some independence in favour of common goals. The resulting legal framework governing the relationships and conduct of

the parties to integration is important as it constrains and shapes integration by making it easier or harder to attain joint objectives. It allocates power between the parties on the one hand, and the regional economic community on the other hand. For integration to be realized, the legal framework must balance power between these two.

Background

The East African Community (EAC) is one of the eight regional economic communities (RECs) in Africa recognized by the African Union. The EAC has been ranked among the fastest growing and integrated African regional economic blocs. However, recent trends in the Partner States' trade and economic policies have exposed the simmering tensions and diverging views. These concerning trends were evident when several Partner States failed to sign and ratify the jointly negotiated EU-EAC Economic Partnership Agreement. Moreover, one Partner State has resorted to unilaterally negotiating trade agreements with third countries, potentially undermining the effectiveness of the EAC Customs Union. Even further, there are numerous instances of acute intra-EAC red tape and rampant imposition of tariff and non-tariff barriers on goods (See here, here, here, here, here and here).

The above developments pose a serious threat to the EAC integration project. Key among them, the failure to negotiate as a bloc with third countries, could potentially unravel the integration milestones already achieved. This article examines the EAC's competencies in trade negotiations as a transnational institution in light of this concern. Specifically, it aims to establish whether (or not) EAC Partner States are legally obligated to jointly negotiate with third countries.

EAC trade negotiations: joint or unilateral?

The East African Community Treaty

The EAC was established with the objectives of developing policies and programmes to widen and deepen political, economic and social cooperation amongst the Partner States (Articles 2 and 5 of the EAC Treaty). To achieve these objectives, the Partner States undertook first to establish a Customs Union and thereafter a Common Market, a Monetary Union and ultimately a

Political Federation. The achievement of these objectives is centered on eight operational principles. Key among them are the principles of subsidiarity, variable geometry, complementarity, and equal distribution of benefits. (Article 7(1) of the EAC Treaty.) These principles envisage the EAC Partner States coordinating their economic policies through EAC institutions to the extent necessary. For instance, Article 8(1) of the EAC Treaty requires the Partner States to plan and direct their policies and resources to create suitable conditions for achieving the objectives. Further, Article 8(3) of the EAC Treaty establishes coordination mechanisms requiring Partner States to designate dedicated ministries for communication and information exchange through the EAC Secretary General.

Despite the ambitious objectives and explicit requirements in the EAC Treaty that the Partner States cooperate, the EAC's key legal weakness is the fact that its competence as an intergovernmental organization is not expressly stated in the EAC Treaty. (See also Elvis Mbembe Binda *here* pp. 103-118). The requirement in Article 8 of the EAC Treaty that the Partner States work in collaboration with the EAC institutions has been argued to create concurrent competence between the EAC and the Partner States (See Elvis). Effectively, the Partner States did not relinquish their competence in the areas also covered by the EAC Treaty and may still exercise their authority to the extent that the EAC has not acted.

The EAC's shared "subtle" competence can be contrasted with Articles 3 to 6 of the Treaty on the Functioning of the European Union (TFEU) that expressly outlines the exclusive competencies of the EU and the areas of shared competence. Article 1 of the TFEU grants the EU exclusive competence over the common commercial policy, the customs union, internal market competition rules, Eurozone monetary policy and the conservation of marine biological resources under the common fisheries policy. Article 26 of the TFEU further empowers the EU to establish an internal market, while Article 114 of the TFEU empowers it to adopt legislation to harmonize all national laws that may hinder the free movement of goods, services, capital, or people. The EU's exclusive competence over the common commercial policy ensures Member States act as a block externally through the EU institutions in commercial matters such as negotiating trade deals. In the areas of the EU's shared and supportive competence with the Member States (such as social policy, agriculture,

environment, transport, energy, trans-European networks - Article 4 of the Treaty of the European Union), once the EU legislates, the Member States lose their competence in the area and subject matter covered by the EU legislation.

The EAC and EU legal frameworks significantly contrast; the EAC does not have any exclusive competence. Moreover, in the areas where it has shared competence with the Partner States, the EAC Treaty implicitly confers such competence. Consequently. a Partner State may validly act unilaterally in an area of shared competence. Such an action inherently risks torpedoing the integration agenda. The explicit grant of exclusive competence over trade/commercial policy on the EAC by an amendment to the EAC Treaty could create legal clarity and predictability, eliminating potential unilateral external action.

The Protocol on the establishment of the East African Customs Union

The achievement of the objectives of the EAC Treaty is complemented and supplemented by the protocols that deepen integration. Article 2 of the Protocol on the establishment of the East African Customs Union establishes the East African Customs Union (EAC Customs Union) and the Common External Tariff (CET). The scope of trade cooperation in the EAC Customs Union is broad, including inter alia cooperation on liberalization, collection of customs duties and joint national institutional arrangements.

The EAC Customs Union is one mechanism through which the Partner States aim to ensure a joint external tariff regime for imports from third countries. Article 37(2) of the Customs Union Protocol requires the EAC to co-ordinate its trade relations with foreign countries to facilitate the implementation of a common external trade policy. The optimum functioning of the CET inherently requires coordination of customs procedures and harmonization of the tariff regimes amongst the Partner States. A Partner State that unilaterally concludes a trade agreement with a third party that results in its reduction or elimination of tariffs in respect of the third country significantly undermines the efficacy of the CET.

Although Article 37(4) of the Customs Union Protocol permits a Partner State to conclude or amend trade agreements with a third country, it requires that the terms of such agreement or amendment not conflict with the provisions of the

EAC Customs Union Protocol. The Partner State that so negotiates or amends a trade agreement is required to send the proposed text of the trade agreement or amendment to the Secretary General, who subsequently notifies other Partner States within 30 days for their consideration. Where other Partner States do not submit comments and proposals on the proposed trade agreement, the concerned Partner State may conclude or amend the trade agreement. However, a Partner State that intends to make comments and proposals on the proposed text is required to do so within 90 days of the Secretary General's notification and before the conclusion/amendment of the trade agreement. Upon receipt of the comments and proposals, the Secretary General is mandated to convene the EAC Council (Council) meeting within 60 days to consider the comments and proposals.

The Council takes decisions by consensus on specified matters (Article 15(4) of the EAC Treaty and Article 2(1) of the Protocol on Decision Making by the Council of the East African Community). However, the EAC Treaty and protocols are silent on whether the Council may adopt a negative decision in effect preventing the Partner States from signing the trade agreement. Nevertheless, it is worth noting that a member of the Council representing a Partner State may block a Council decision on a proposal by objecting, forcing such proposal to be referred to the apex organ (the Summit), which similarly takes decisions by consensus. It is prudent to conclude that a blocked Council decision that is subsequently escalated to the Summit requires high level political diplomacy to achieve consensus.

The East African Community Trade *Negotiations Act*

Section 2 of the East African Trade Negotiations Act No. 6 of 2008 ("the Trade Negotiations Act") sets out three important objectives concerning trade negotiations by the Partner States; (a) promotion of regional and international trade for the sustainable development of the Partner States, (b) establishment of a mechanism for joint negotiations in bilateral, regional and multilateral trade negotiations, and (c) development of an East African trade regime as per the EAC Treaty and the Customs Union Protocol. Section 3(2) of the Trade Negotiations Act requires that the Partner States shall negotiate as a bloc in all regional and multilateral trade negotiations. The Partner States may establish national negotiations committees to develop national positions on issues for

negotiations. The East African Trade Negotiation Commission is then required to develop the East African Common position from the national positions of the Partner States. The conduct of trade negotiations is to be undertaken by the East African Joint Trade Negotiation Commission (Article 12 of the Trade Negotiations Act).

The Partner States were required to integrate their delegations to regional and multilateral trade negotiations into a single East African Delegation within six months from 19 December 2008. There is no publicly available information that the East African Joint Trade Negotiation Commission has been established. Moreover, there is no formal indication that the Partner States have ever adopted the format specified in the East African Trade Negotiations Act in past negotiations.

Protocol on the Establishment of the East African Community Common Market

The Partner States established the EAC Common Market to widen and deepen cooperation amongst themselves in the economic and social fields. Specifically, the Partner States aim to strengthen, coordinate and regulate their economic and trade relations to promote accelerated, harmonious and balanced development. This includes implementation of a common trade policy and co-ordination of trade relations with third countries (Articles 5(2) (a) and 5(3) (e) of the East African Community Common Market Protocol. The Partner States are required to adopt common principles in relation to tariffs, the conclusion of tariff and trade agreements and uniformity in liberalization measures. The Council is mandated to establish a mechanism for the co-ordination of trade relations with third parties, including the adoption of common negotiating positions and promotion of joint representation in the negotiations (Article 37(3).

The Protocol on the Establishment of the EAC Common Market reflects the goals and aspirations already set out in the Customs Union Protocol and the Trade Negotiations Act. Likewise, it does not grant the EAC exclusive competence in the listed subject matter.

Conclusion

The EAC’s legal framework does not bestow exclusive competence on the EAC. The deep integration realized so far is a result of strong political goodwill.

However, recent developments draining the political goodwill have exposed the EAC’s main weakness - “subtle” shared competence. The shared competence renders the EAC unable to constrain Partner States’ unilateral actions. The fact that Partner States may still legally and validly negotiate trade engagements with third countries threatens to torpedo the viability of deeper integration. The review and amendment of the EAC Treaty and protocols to address these shortcomings are timely.

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