Strengthening East African Community Economy through the Implementation of Division of Competences

By:

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November 13, 2022

The Treaty for the Establishment of the East African Community empowered the East African Community (EAC) to become a body corporate which could acquire, hold, manage and dispose of land and other properties, among other functions stipulated in the treaty. The treaty also provides for cooperative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community[1]. Additionally, the EAC Customs Protocol requires that all EAC partner states negotiate as a bloc on matters of trade with third parties[2].

Despite these provisions, there has been little effort by the EAC member states to negotiate as a bloc. This is despite the similarities of the products exported from the individual countries. While one may argue that there are products

specific to different states, the majority of the exports of the EAC partner states are shared among the majority of the member states, such as tea and coffee. Each member state has focused on improving its trade by seeking bilateral agreements with third countries despite the EAC discouraging such practices. Some agreements, like the UK-Kenya EPA, have clauses that allow for other EAC partner states to benefit; however, this clause is not compulsory. Little effort is being placed on pushing the EAC to be a negotiator for trade deals. Since its inception, the EAC has not reached any cooperative agreements with other economic blocs or countries.

For the EAC, each sovereign state is at liberty to trade any commodity with any state or economic bloc in the world. For example, the Republic of Kenya's relationship with the European Union[3]. The only restriction set out in the EAC customs protocol provides that the partner state intending to amend or conclude an agreement must send the proposed amendment to the Secretary-General of the EAC, who has to communicate the proposed agreement to the other partners for their consideration[4]. Their consideration, in this case, could be taken to mean identifying all issues that may arise from the new bilateral agreement. Some negotiated bilateral agreements may also have a clause allowing other EAC member states to benefit from the agreement, for example, the economic partnership agreement between the UK and Kenya[5]. Consideration, in this case, would involve allowing the states to consider whether or not they want to be part of the EPA. After the approval, the trade agreement enters into force. My main argument is that the EAC member states could delegate some of their sovereign power to manage some of the EAC's economic resources. This management could be exclusive or to some degree. The management would include formulating policies, providing support in implementing the policies and concluding trade deals on behalf of the region. This delegation would be beneficial because the EAC countries host a myriad of small industries. As a result, the commodities' production cost is usually very high.

Furthermore, given the financial situation of many of these countries, there is low purchasing power and poor infrastructure for those industries. As a result, the goods produced cannot compete with others on a global scale. This was evident in Kenya in the 1990s after the economic liberalisation programmes backed by the World Bank started taking hold of Kenya and other places around

the world. The Kenyan textile industry was undermined, causing the shutting down of up to 85% of textile industries. Allowing such sectors to be regulated from a supranational level would give the countries a chance to bring the sectors together and benefit from economies of scale. Potential economies of scale that the sector will likely benefit from include; increased purchasing power, increased infrastructural support, and better technical and financial support. In negotiation, the EAC will then benefit from collective bargaining power and unification of trade policies and tariffs, which was one of the goals of establishing the EAC Customs Union. Furthermore, by allowing for supranational decision-making, the countries will be closer to achieving the integration scheme, which is one of the goals of the EAC.

To correctly convey the concept I am suggesting, I will look into the European Union's concept of division of competencies and how it may be applied to the conclusion of trade agreements in the EAC. This concept was included in the Treaty of Functioning of the European Union. The European Union, similar to the EAC, is a regional organisation made up of sovereign states with the general objective of strengthening the unity of the economies of the member states and of reducing the differences existing between the various regions. Both regional economic blocs have made efforts to establish a common market within the borders of their member states. Both regional blocs have similar goals, some of which have been achieved by the European Union (EU), such as introducing a common currency (this has been achieved by the European Union but not the EAC). Therefore, the EAC would be a good contender for implementing the concept of division of competencies.

The Concept of Division of Competences

This concept can be traced back to the 1970s when the EU member states adopted a policy whereby they could delegate authority to negotiate their external relations to the European Commission[6]. This was commonly referred to as the Common Commercial Policy. The aim of the adoption of this policy was to increase trade among themselves and upping their bargaining power in relation to third countries. The treaty of Lisbon expanded the power of the Commission.

Division of competencies is an idea that was included in the functioning of the European Union by Articles 3, 4 and 6 of the Treaty on the Functioning of the European Union. This idea was backed by the Monnet method, which promoted a supranational decision-making method based on common institutions and majority rule[8]. The common institutions could decide on a common interest. Furthermore, common institutions can produce economies of scale by pooling resources and increasing countries' effectiveness in policy-making[9].

This concept is only practised by the EU, but some scholars argue that the division of competencies was borrowed from federalism[10] which is practised in some nations like the United States of America, Australia and Switzerland. The federal government used the rule that the decision-making mandate should be placed on the best, most efficient, most rational level of governance for an appropriate subject matter[11]. For this reason, some decisions are made by the federal government, while there are decisions that are made by the states.

The European Union is the only regional economic bloc that has this concept within its legal framework. It originated from the European Union's Common Commercial policy, where EU Partner states were required to delegate authority to the European Commission. The European Commission was in charge of negotiating external trade relations to increase trade among the partner states and increase Europe's bargaining power when negotiating with the rest of the world. Its application is not limited to trade but to the wholesome prosperity of the region. The EU has come up with policies on agriculture[12], competition[13] and business[14]. Through a division of competencies, the EU has been able to direct development and economic policies that have helped elevate the state of European nations. The EU only has competencies conferred to it through the treaties as a body. This is often referred to as the principle of conferral. Under this principle, the EU is bound within the limits of the competencies conferred to it by the EU member states in the treaties to achieve certain outlined objectives[15]. Whichever competencies are not outlined by the treaties remain with the member states.

In its application, the concept applies to more than just economic policies. It applies to social policies[16] but only for aspects specifically defined in the treaty, environmental protection, consumer protection, energy[17], and conservation of marine biological resources[18].

The treaty of Lisbon places competencies in 3 categories; exclusive competencies, shared competencies and supporting competencies[19]. Exclusive competencies include areas where the EU alone is allowed to legislate and adopt binding acts. The only time EU member states are allowed to legislate on those areas is when the EU empowers them to do that. Shared competence includes areas where the EU and EU member states can legislate and adopt legally binding acts. EU member states exercise their competence where the EU does not exercise or has chosen not to exercise its competence. Supporting competence involves areas where EU intervention is for support, coordination and complementing the action of EU members. With the appropriate treaty legislation, the concept of division of competencies will be very applicable within the context of the EAC.

Application of division of competencies in the EAC

The EAC has been working towards a customs union, a common market and a common currency. This has been seen through the member states ratifying the EAC Customs Union Protocol[20], EAC Common Market protocol[21] and EAC Monetary Union Protocol[22]. The most recent step has been the coming into effect of the EAC Monetary institute, which happened on 1st July 2021[23]. All these have been steps taken to unify the region's economy. Furthermore, active steps have been taken by the EAC Countries to implement these treaties. The next step in the EAC journey to regional economic integration is applying the concept of division of competence, specifically for international trade agreements and policy.

Application of the division of competencies within the EAC context would involve EAC countries identifying common trade areas that are likely to benefit from economies of scale and reserving the competence to legislate on policy matters and conclude international trade agreements with the EAC. The guiding rule should be that the EAC should allocate the best, most efficient, most rational level of governance for an appropriate subject matter. Using the earlier example of tea, the EAC countries could delegate the EAC with the exclusive competence to develop policies to govern the growing, processing and exportation of tea produced within its territory. Individual countries would not have the competence to legislate on tea growing, processing and exportation.

The EAC could implement shared competence in areas where the nations agree that there is a need for every nation's express consent to be given. In such cases, the consent of both the EAC and the EAC member states must be expressly given for there to be an agreement. Shared competence may also require internal legislation to share out the obligations between the EAC partner states and the EAC. The EAC should also get the competence to support, coordinate or supplement the actions of the member states. To improve on the errors of the EU, the EAC should come up with guidelines for the EAC to ensure that they do not either do too much or too little.

It is, therefore, my recommendation that the EAC comes up with a protocol for the division of competencies. This protocol would empower the EAC with exclusive competence in some issues. In the spirit of abiding with treaties, nations would be barred from legislating or entering into agreements regarding those sectors whose exclusive competence has been conferred to the EAC. The protocol should also set up guidelines on shared competence and supporting competence areas.

Conclusion

The author hopes that the EAC will consider implementing the concept of division of competencies. The EAC can look to improve this concept such that it is better applicable while using the existing African social structures philosophies such as *ubuntu* and *ujamaa*. In my view, the application of this concept is likely to take the EAC to the next level of integration and help achieve its collective prosperity goals'.

References

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