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Implementing the East African Community Legislative Framework on Management of Environment and Natural Resources

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Abstract

The East African Community (EAC) is an intergovernmental regional economic community comprising six Partner States, namely the Republics of Burundi, Kenya, Rwanda, Uganda, South Sudan and United Republic of Tanzania. These States are endowed with diverse natural resources. They also share some resources such as water sources and wildlife. The EAC came into existence upon signing of the Treaty for the Establishment of the East African Community in 1999. This Treaty provides for cooperation of the Partner States in all walks of life including management and sustainable utilization of natural resources and the environment. The EAC has in place a Protocol on management of the environment and utilization of natural resources (the Protocol). The Protocol requires integration of the policy, legal and institutional frameworks at both regional and municipal levels. This is because the linkage between regional law and municipal laws on environmental management and sustainable utilization of resources is critical to the sustainable conservation of resources. Further to this directive, each Partner State has made some effort to tailor its policies, laws and institutions to comply with the objectives of the EAC. Literature on the extent to which EAC laws have been implemented in Partner States with regard to the utilization of natural resources and environmental management as directed by the Protocol is scanty and difficult to come by. This chapter analyses the adequacy of the legislative initiatives that the EAC Partner States have taken to implement the clarion call by the EAC Treaty to coordinate their joint efforts in ensuring sustainable management of environment and natural resources in the region. The analysis does not cover all the five EAC Partner States. It has purposely been confined to Kenya, Uganda and Tanzania. This bias has been necessitated by a number of factors, including the historical evolution of the EAC and limitation of time and resources. Data for the study was obtained from field work in the select Partner States where interviews were conducted with key informants in Kampala, Nairobi, Dar es Salaam, Arusha and Dodoma. Respondents were asked about a wide range of issues. These included the extent to which domestic legislative and institutional regimes accommodate the EAC Community law in environment and natural resources management, and initiatives that have been put in place at the regional level to ensure implementation of the Protocol. They were also asked about factors they considered could impact on sustainable management and utilization of the environment and natural resources in EAC Partner States. A review of the available literature on the subject, including a critical analysis of the relevant policy, institutional and legislative frameworks was undertaken before the field work. The overall findings suggest that concerted efforts have been made by the selected EAC Partner States in

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implementing the objectives of the Protocol. However, these initiatives have encountered diverse challenges which have been identified and discussed. Recommendations are put forward which have a bearing on opportunities for enhancing regional economic integration in general, and on how to overcome the challenges in the context of the EAC. It is hoped that the study will provide an impetus for more comprehensive studies covering the subject in all the five Partner States of the EAC.

Key words:

EAC, Regional Integration, Legislative Framework, Management of Environment, Natural Resources, Transboundary Resources, Sustainable Development

1 Introduction

The East African Community (EAC) is an intergovernmental organization comprising six Partner States – the Republics of Burundi, Kenya, Rwanda, South Sudan, Uganda and the United Republic of Tanzania. The EAC Partner States are endowed with diverse natural resources. Some of these transcend national territorial boundaries. Shared and transboundary resources, such as marine, flora and fauna resources, call for joint efforts in their management to ensure their sustainability. It is said that the African continent is home to about 25 percent of the global biodiversity and the Eastern Africa region has the highest number of endemic species of mammals, birds, reptiles and amphibians.[1] Issues relating to environmental and natural resources have ranked highly at both continental and national levels in terms of priorities in Africa. Natural resources form an important part of Africa's ecological and political history, because of its exceptional diversity of species and ecosystems and their social and economic benefits.[2] Governments in the EAC region have faced challenges in their attempts to ensure that the environment and natural resources are utilized without compromising the ability of future generations to enjoy them. These efforts have entailed the enactment of various pieces of legislation at the national level, and efforts to coordinate environmental and natural resources management initiatives at the international and regional levels. Despite these efforts, the challenges have still persisted.[3]

This chapter makes an analysis of the legislative initiatives that Partner States in the EAC have undertaken in an attempt to implement the clarion call by the EAC Treaty and to coordinate their joint efforts in ensuring sustainable management of environment and natural resources in the region. The analysis does not cover all the five EAC Partner States. It has purposely been confined to Kenya, Uganda and Tanzania. This bias in the focus has been necessitated by a number of factors. These include the fact that these three East African States are the founder members of the EAC and that at the inception of the Community they put in place deeply entrenched mechanisms to integrate a number

[1] Kameri-Mbote, P 'Sustainable Management of Wildlife Resources in East Africa: A Critical Analysis of the Legal, Policy and Institutional Frameworks' (2005) *IELRC Working Paper* 5/2005, 1 available at http://www. Ielrc.org/content/w0505.pdf.

[2] IUCN, *An Introduction to the African Convention on the Conservation of Nature and Natural Resources*, (IUCN-Gland 2004) 1.

[3] Kimani, N., 'Participatory Aspirations of Environmental Governance in East Africa' (2010) 6/2 *Environment and Development Journal* (LEAD) 200.

of issues, including environment and natural resources management. As a result of their colonial legacy, these States have a common approach to legislative enactments which is reflected, *inter alia*, in the training of their legal personnel with its attendant principles and shared values.[4] The earliest attempts to forge a common approach to legal frameworks in environmental and natural resources management can be traced to instruments initiated by these three Partner States. These have provided the foundation for other initiatives that have evolved within the EAC. The lack of adequate resources to conduct a holistic study covering all the EAC Partner States, given the time constraints and limitation in terms of human resources, also contributed to the bias in the focus of the study.

The research was based on data from an extensive documentary review, and on empirical fieldwork at the East African Community Headquarters in Arusha, Nairobi, Kampala and Dodoma, to get first-hand information on the status of implementation of the EAC Community legislative frameworks on environment and natural resources management in the EAC founding Partner States. Interviews were conducted with key informants (officers) from the East African Legislative Assembly (EALA), the East African Community Secretariat, and the Attorney General's Chambers in these States. Key officials from the Ministries responsible for East African Community affairs, Non-Governmental Organizations and other key stakeholders were also interviewed.

2 Environment and Natural Resources Management in East Africa (Pre-1999)

The earliest attempts to forge a common approach to environment and natural resources management in East Africa took shape in the 1990s. This is evidenced in the initiatives undertaken by Kenya, Uganda and Tanzania to revive processes for cooperation among them within the framework of the Agreement for Division of Assets and Liabilities of the defunct East African Community (the East African Community Mediation Agreement) dated 14th May 1984.[5]

Another pertinent attempt was the adoption of the Memorandum of Understanding between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda for Cooperation in Environment Management on 22nd October 1998. The Memorandum reiterated the objective of undertaking joint programmes and activities, including harmonization of relevant environmental laws, to provide a basis for the Partner States to cooperate in environmental management and promote and implement principles of sustainable development, international treaties, instruments and strategies for environment and natural resources management.[6] It called for the adoption of a binding legal instrument through the negotiation, signing and ratification of a Protocol on environment and natural resources management.[7]

[4] See Mvungi, S.E.A (Ed), Forty Years of the Faculty of Law, University of Dar-es-Salaam, 1961-2001, (Faculty of Law, University of Dar-es-Salaam 2001).

[5] See Article 14.02 of the East African Community Mediation Agreement which enjoined the Partner States to explore areas of future cooperation between them. The Treaty can be accessed at: https://iea.uoregon.edu/treaty-text/1998-moucooperationenvironmentmanagemententxt (accessed on 11th July 2018).

[6] See Article 2 of the Memorandum of Understanding on Cooperation in Environmental Management, 1998.

[7] *Ibid*., Article 3.

This Memorandum caters for the establishment of interim institutional arrangement to oversee implementation in the areas of cooperation. The arrangement entails an Interim Sectoral Committee on Environment.[8] It also designates interim National Focal Points to ensure implementation of environment and natural resources management at the domestic levels of the Partner States to the Memorandum. These are the National Environment Secretariat in Kenya, the National Environment Management Authority (NEMA) for Uganda, and the Division of Environment in Tanzania.[9]

Furthermore, there was envisaged a need to harmonize environmental management and the development and enforcement of environmental legislation. There was a focus on harmonizing legislation related to shared and transboundary resources, such as the Lake Victoria ecosystem, natural rivers and wetlands, especially significant habitats of flora or fauna; the right to a clean, healthy and safe environment; the management of forests and shared mountain ecosystems; wildlife, including transboundary movements; the management of hazardous or toxic substances, including transboundary movements; and the management of marine resources.[10] The Partner States have made some effort to implement these directives through the adoption of various strategies at the international and national levels.

3 International Legislative Context for Natural Resources and Environmental Management

The EAC Partner States are signatories to various international legal instruments which cater for sustainable management of the environment and natural resources. These comprise global, regional and sub-regional legal instruments.

The Partner States are Parties to the Convention on Biological Diversity (CBD), 1992. The CBD caters for the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of utilization of genetic resources.[11] It also dedicates itself to general measures for conservation and sustainable use, *in situ* and *ex situ* conservation, and the sustainable use of the components of biological diversity.

The Partner States are also signatories to the Convention on Illegal Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973.[12] This Convention provides for the protection of various species of flora and fauna which are recognized as endangered and are on the verge of extinction if sustainable management is not applied. The wildlife species that migrate between the boundaries of the EAC Partner States seasonally are within the ambits of the Treaty.

Many other international legal instruments for the conservation of environment and natural resources also emphasize the need for joint cooperation between the State Parties in efforts to conserve marine, water, forest and fisheries resources, and the climate.[13] Being parties to most of the Multilateral Environmental Agreements (MEAs), the EAC

[8] *Ibid.,* Article 4.
[9] *Ibid.,* Article 5.
[10] *Ibid.,* See Articles 6-13.
[11] *Ibid.,* Article 3 .
[12] 993 UNTS 243 (1973, CITES).
[13] See UNEP 2015 Annual Report and UNEP, Role of Multilateral Environmental Agreements (MEAs) in Achieving Sustainable Development Goals (SDGs), United Nations Environment Programme, Nairobi, Kenya, (UNEP 2016) 1-43.

Partner States have responded to the demands of the MEAs in the legislative arrangements they have put in place to protect and conserve the region's environment and natural resources. The EAC Partner States are also signatories to a number of regional legal instruments on environmental and natural resources management and have shown their commitment to be bound by these.[14]

4 EAC Natural Resources and Environmental Management Legislative Framework

The EAC has a well-documented history of interest in sustainable environment and natural resources management. Its legislative enactments can be found in the constitutive documents of the Community and other documents. An analysis of these legislative enactments is crucial to understanding the extent to which the EAC legislative framework is adequate to cater for sustainable environment and natural resources management within the Community, and the extent of implementation at municipal level. At the EAC level, we can speak of primary and secondary sources of the legislative framework.

4.1 Legislative Framework for Environment and Natural Resources Management

Environment and natural resources management at the EAC level can be analysed in the light of the primary and secondary sources of the EAC legal framework. The nature, scope and sources of the law determine the level of protection accorded to environment and natural resources.

The primary sources are the negotiated, adopted, signed and ratified legal instruments which the Partner States are bound to observe and strictly comply with. These include Treaties, Agreements, Protocols, and other similar instruments. The stages of negotiation, signing and ratification indicate the willingness of the Partner States to be bound by the terms of the Treaty or Protocol.[15] Secondary sources, albeit critical, include precedents developed by the courts within the framework of the EAC, to wit the East African Court of Justice (EACJ).

4.1.1 The Treaty for the Establishment of the East African Community, 1999

The Treaty for the Establishment of the East African Community is the fundamental constitutive document for the EAC. It was signed on 30th October 1999 by the Presidents of the three EAC founding Partner States of Kenya, Uganda and Tanzania. The Treaty contains a number of provisions with regard to environment and natural resources management. The first and foremost provision sets out the objectives of the EAC as a Community. It provides for cooperation of the Partner States in all aspects of management and sustainable utilization of natural resources and the environment.[16] Environment and

[14] See Majamba, H.I, 'Environmental Protection within the Framework of the East African Community: Lessons for Constitutional Reform in Tanzania' in Doveling *et al.* (Eds), Constitutional Reform Processes and Integration in East Africa, Tanzania-German Center for Eastern African Legal Studies (TGCL), Series 3, (University of Dar es Salaam Press - UDP 2013).

[15] See Articles 26 and 27 of the Vienna Convention on Law of Treaties, 1969 which require State Parties to observe the '*pacta sunt servanda*' Principle and not to enact or use municipal law to avoid their obligations under international law.

[16] See Article 5 (3) (c) of the Treaty for the Establishment of the East African Community, 1999.

natural resources management is one of the areas of cooperation between and among EAC Partner States. There are general provisions on issues related to the management of transnational natural resources within the framework of the EAC. Among other directives, these provisions enjoin the EAC Partner States to cooperate in environmental management and protection and put in place mitigation measures to control natural and man-made disasters.[17]

Chapter Nineteen of the EAC Treaty is dedicated to environment and natural resources management. In particular, the Treaty articulates the negative impacts of development activities on the environment which might result in environmental degradation and depletion of natural resources. It further recognizes that a clean and healthy environment is a fundamental requirement for attaining sustainable development in the region.[18]

The Treaty calls on the Partner States to put in place common measures to foster cooperation for efficient management and sustainable utilization of natural resources, to cooperate and coordinate their policies and actions for protection and conservation of the natural resources and environment, and to develop common policies to control transboundary movement of toxic and hazardous waste. It calls upon the Parties to provide prior and timely notification of activities that may have a significant transboundary environmental impact, and to develop capacity-building programmes for sustainable management of natural resources.[19] Actions undertaken by the Community must be geared towards the preservation and protection of the environment, ensuring sustainable utilization of natural resources such as lakes, wetlands, forests and other aquatic and terrestrial ecosystems. The Parties are also urged to put in place mechanisms for jointly developing and adopting water resources conservation and management policies that ensure sustenance and preservation of ecosystems.[20]

Civil society organizations (CSOs) are enjoined by the Treaty to collaborate in socio-economic matters, including environmental sustainability and conservation.[21] CSOs which support environment and natural resources management initiatives and campaigns, including transboundary and shared natural resources, play a vital role in respect of EAC initiatives for sustainability in environmental management.

Further, the Treaty is detailed in important areas of cooperation regarding environment and natural resources management. It covers cooperation in management of the environment,[22] prevention of illegal trade and movement of toxic chemicals, substances and hazardous wastes,[23] management of forests, marine and water resources, management of mineral resources,[24] and cooperation in tourism and wildlife management.[25]

The Treaty lays the basis for partnership and cooperation between the EAC Partner States in sustainable management of the environment and natural resources within the region. This will facilitate future cooperation in the context of shared and transboundary resource management. Some efforts in this direction have been taken by the States.

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[17] See for instance, Article 3(c) and 8(1) (a) of the Treaty for the Establishment of the East African Community, 1999.
[18] Article 111 of the EAC Treaty.
[19] Article 111(1) (a) - (e), *ibid.*
[20] See Article 111(2), *ibid.*
[21] Section 5(3) (g) and 127(3) and (4) of the EAC Treaty.
[22] Article 112 of the EAC Treaty.
[23] Article 113 of the EAC Treaty.
[24] Article 114 of the EAC Treaty.
[25] Article 115&116 of the EAC Treaty.

4.1.2 The Protocol for the Sustainable Development of Lake Victoria Basin, 2003

Lake Victoria is one of the shared and transboundary resources within the EAC. It is shared by the Republics of Kenya and Uganda and the United Republic of Tanzania. In order to ensure sustainable management of the Lake, the EAC adopted the Protocol for Sustainable Development of Lake Victoria Basin, 2003. The EAC Partner States essentially agreed to cooperate in sustainable management and development of the Basin in the areas of water resources, fisheries, wetlands, agriculture, wildlife conservation, sustainable tourism development and land.[26]

Management of the Lake Victoria Basin is governed by international environmental law principles. These include precautionary measures to prevent environmental degradation, environmental impact assessment and audit, the polluter-pays principle, public participation, prevention, minimization and control of pollution of transboundary water courses to minimize adverse effects on fresh water resources and ecosystems integrity, the principle that water is a social and economic good and a finite resource, and the protection and preservation of the ecosystems of international water courses.[27]

The Protocol provides for equitable and rational utilization of water resources in the Lake Victoria Basin. It recognizes the need to utilize shared water resources sustainably due to scarcity of the resource. It calls for optimal and sustainable utilization of environmental and natural resources, and directs that benefits from the resources must guide the use and development of water resources by Partner States.[28]

Other critical areas covered by the Protocol relate to the development and management of fisheries, agriculture and land use practices, sustainable tourism, the polluter- and user-pays principle, environmental impact assessment and audit, and public participation.[29]

This Protocol essentially reiterates the need to ensure that the Lake Victoria Basin is managed properly with its entire ecosystems to ensure sustainability of shared and transboundary resources within the basin. It lays emphasis on the need for Partner States to cooperate in sustainable management of the Basin. As noted by Gastorn, 'the EAC has designated Lake Victoria and its Basin as an area of common economic interest and a regional economic growth zone to be developed jointly by all the Partner States.'[30]

4.2 Attempts to Consolidate Cooperation on Environment and Natural Resources Management

Different legislative initiatives have been taken in the EAC which have a bearing on environment and natural resources management. Some of these have resulted in the enactment of legislative instruments. However, they have faced challenges, as evidenced by the fact that these instruments have not yet come into force. Some of the important legislative initiatives are discussed below.

[26] Article 3 of the Protocol on the Development of Lake Victoria Basin, 2003.
[27] See Article 4 of the Protocol.
[28] *Ibid.,* Article 5.
[29] *Ibid.,* Articles 6 -22 .
[30] Gastorn, K., 'Regional Cooperation on Shared Watercourses: The Policy and Legal Framework on Transboundary Water Resources in Mainland Tanzania' in Gastorn, K (Ed), Essays in East African Community Law, Dar es Salaam, Public Law Department (University of Dar es Salaam 2016) 455.

4.2.1 Draft Protocol on Environment and Natural Resources Management, 2006

Attempts to crystallize cooperation between EAC Partner States have been undertaken in accordance with the provisions of the Treaty.[31] It is in this regard that on 3rd April 2006, the EAC Partner States managed to negotiate and sign a Protocol on Natural Resources and Environment Management. This Protocol contains detailed provisions in respect of transboundary environment and natural resources management. It also reflects sustainable principles of environmental management. The Protocol was not yet in force at the time of writing, since the United Republic of Tanzania was still in the process of holding consultations before making a decision on whether to ratify it.[32] The Republics of Uganda and Kenya ratified the Protocol in 2010 and 2011, respectively.[33]

4.2.2 East African Legislative Assembly

There have been a number of attempts by the East African Legislative Assembly (EALA) to legislate on environment and natural resources. These include the East African Transboundary Ecosystems Management Bill 2010, the East African Forests Management and Protection Bill 2015. Others are the East African Community Polythene Materials Control Bill 2017, the East African Community Mining Bill 2017 and the East African Community Disaster Risk Reduction and Management Bill 2012. These Bills have been duly passed by the EALA, but they cannot be operationalized because one or more of the Partner States has withheld assent or not returned their answer to the EAC Secretariat for further transmission to other EAC Partner States. One reason for not assenting to these Bills is the protection of national interests. Some Partner States have taken a precautionary approach, fearing loss of sovereignty as a result of sharing arrangements related to the management of environment and natural resources within the EAC.[34]

The apparent fear of loss of sovereignty has been associated with what some EALA legislators have referred to as lack of provision for EALA members to consult their governments prior to passing Bills. During an EALA meeting in 2015, there were calls by some EALA Members to be permitted to consult their governments instead of 'rushing' to pass the East African Community Forests Management and Protection Bill, 2015. One of the then Members of the EALA from Tanzania, Ms. Shy-Rose Bhanji, is on record as having stated:

> Okay, what I am trying to say-Okay my clarification is if we pass this Bill or we go to the next stages, who are the implementing stakeholders of the Bill? Obviously, all the five Partner States. I am not here to defend Tanzania, no. Even if it was any other Partner State, I would have still stood and said that it is wrong to go ahead and rush to pass the Bill. Already we have 22 Bills which have not yet been assented to and we want to continue to pass a Bill. What is the rush? This Bill is very important.[35]

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[31] Article 151 of the EAC Treaty.

[32] See Protocol on Environment and Natural Resources Management at https://www.eac.int/environment/natural-resources-management/protocol-on-environment-and-natural-resource-management as accessed on 16th April 2017.

[33] *Ibid.*

[34] Interview with EAC Principal Clerk Assistant at EAC Headquarters, Arusha on 10th March 2018.

[35] EALA-The Official Report of the Proceedings of the East African Legislative Assembly-116th Sitting Third Assembly: Third Meeting -Fourth Session (Kigali Rwanda), (Thursday 26th November 2015) 3.

Having passed the East African Community Forests Management and Protection Bill 2015, the EALA was once again counselled by Ms. Shy-Rose Bhanji (EALA Member), after Tanzania withheld consent to the Bill, in the following words:

> …Mheshimiwa (Honorable) Speaker given the delays over lack of assent to the Bills, we cannot avoid giving the impression to public that we are not taking issues of East African Community very seriously… with these delays of the assent of these Bills, may be it is time for EALA to pause and reflect on the quality, exhaustiveness of the subject matter and give enough room to Partner States who show concerns and reservation when these Bills are brought to be read for the first and second time. My advice on the way forward for EALA is to take a step backward and re-examine our modus operandi on the way and manner in which we are passing these Bills in the House, one example and I am winding up, is on the Bill on Forest Management.[36]

5 Analysis of Findings

The findings of this study in the three Partner States reveal that environment and natural resources management in the EAC has had some key successes. There are various joint programmes and projects which are currently being undertaken in respect of sustainable environment and natural resources management. The principal laws in the Partner States are very similar, almost a replica of each other. They reflect the environmental framework legislation propounded by the United Nations Environment Program (UNEP) and were enacted after the governments became parties to the Environment Protocol under the auspices of the EAC.

5.1 Role of the Judiciary in Environment Management in EAC

Some encouraging jurisprudential approaches have been developed by judicial organs in Africa that have been vested with a mandate to enforce the provisions of Regional Treaties and Protocols that have a bearing on environment and natural resources management. Some of these judicial bodies have held governments of Partner States accountable for not adhering to the provisions of Regional Treaties with a bearing on environmental management to which they are signatories.[37]

The EACJ, established under the EAC Treaty, has not been left at the periphery in the quest to ensure that the Partner States are held accountable in matters of environmental and natural resources management covered by the EAC Treaty. The EACJ's efforts in this direction became evident in June, 2014. Following a complaint by an international NGO, African Network for Animal Welfare (ANAW), the First Instance Division of the EACJ held the Government of the United Republic of Tanzania accountable for a breach of the EAC Treaty, and consequently issued an injunction stopping it from constructing a bitumen road across the Serengeti National Park, a UNESCO World Heritage site. On appeal, the Appellate Division of the EACJ upheld that decision in July 2015. The thrust of the reasoning by the EACJ was that the government of the United Republic of Tanzania was in breach of the provisions of the EAC Treaty on environment

[36] EALA-The Official Report of the Proceedings of the East African Legislative Assembly-118th Sitting Third Assembly: Third Meeting -Third Session, (Wednesday 2nd December 2015) 7.

[37] See Gathii, J,T., 'Saving the Serengeti: Africa's New International Judicial Environmentalism' (2016) 16 *Chicago Journal of International Law* , Article 3.

and natural resources management, particularly Articles 5(3) (c), 8(1) (c), 111(2) and 114(1).

It is important to underscore here that the Government of Tanzania's appeal was premised on the argument that the Articles of the EAC Treaty under which the lower court had found it liable had not yet been negotiated, agreed, signed and ratified by all Partner States, due to the lack of an appropriate Protocol. It invited the Court to rule that the lack of such a Protocol exonerated it from any liabilities arising out of the Treaty.

In rejecting the Government of Tanzania's argument of lack of a Protocol, the Appellate Division of the EACJ in its Judgment dated 29th July 2014 stated:

> …There can be no bar or fetter whatsoever against the Court's carrying out its duty to interpret the provisions of the Treaty; apply them; and ensure that Partner States adhere to and live by the objectives, duties, undertakings and standards which they, as fully fledged Sovereign States, did directly, deliberately, freely and voluntarily assume under the provisions of their Treaty – a Treaty which, even Counsel for the Appellant readily admits, was negotiated, signed and duly ratified by all the Partner States.[38]

The EACJ decision in this case is critical, as it reiterates the international law principle which says that a State Party to an international legal instrument must respect its international obligations (including signing and ratification) within its territory to ensure that the spirit of international legal arrangements is upheld. This includes Multi-lateral Environmental Agreements (MEAS) to which the EAC States are Parties.

The above analysis clearly shows that the institutions charged with environment and natural resources management in the Partner States have made some efforts to align themselves with the EAC Protocol on the management of environment and natural resources. The three founding Partner States have very similar laws in their jurisdictions which were promulgated before the Protocol came into effect. These Partner States also have organs to coordinate the enforcement of laws relating to transboundary natural resources, and arrangements to address wildlife and forest management and mitigation of the impacts of climate change and tourism.

The effort made by the EALA to initiate Bills on environmental management issues is laudable, as well as the initiative taken by the Partner States that led to the establishment of the Protocol for Sustainable Management of Lake Victoria Basin of 2003. There have also been bilateral arrangements between Kenya and Tanzania that have resulted in collaborative management of environmental and natural resources. These agreements include the joint Memorandum of Understanding on the Management of the Mara River Basin, Lakes Chala and Jipe and River Umba in Taveta.[39] This was coupled with the establishment of the Transboundary Water for Biodiversity and Human Health in the Mara River Basin Programme. This programme seeks to promote a transboundary management framework for Mara River Basin, improve protection and management of Mau forest resources and Mara riverline forests, promote improved management of protected areas of Maasai Mara and Serengeti Ecosystems, improve water resources management in the Basin, and ensure institutional capacity-building in undertaking regional mandates

[38] Paragraph 23 of the judgment: Attorney General of the United Republic of Tanzania versus African Network for Animal Welfare (ANAW), Appeal No.3 of 2014, EACJ Appellate Division. (Reported as the Attorney General of the United Republic of Tanzania versus African Network for Animal Welfare [2012-2015] EACJLR (573-591) 578.

[39] See: The New Times (Rwanda), 16th February 2013, 'Kenya, Tanzania Sign Ecosystems MoU' at: https://www.newtimes.co.rw/section/read/90850 - accessed 3rd August 2018).

on conservation.[40] At the time of writing, there were also discussions on the development of a Climate Change Master Plan, Policy and Strategy under the auspices of the EAC.[41]

A further effort made within the framework of the Protocol is the Resolution passed by the Council of Ministers of the EAC at their meeting on 4th May 2012 in Kigali, Rwanda, to hold an annual event for raising awareness of sustainable environmental conservation. Accordingly, 15th September has since been marked as 'Mara Day', alternating between towns in the Mara Basin area in Kenya and Tanzania.[42] This initiative has also drawn the support of Civil Society Organizations and Non-Governmental Organizations involved in environment and natural resources management in the region. As noted above, some of these Organizations have been actively involved in espousing environmental law jurisprudence in the course of litigation at the EACJ.[43]

Also, there have been initiatives in Kenya and Uganda to revise their framework laws and regulations in respect of natural resources management to reflect the directives of the Protocol. Plans to amend the framework law in Tanzania are still underway.[44] The establishment of sector ministries specifically charged with EAC issues has also been applauded as an avenue to provide an impetus for the implementation of the Protocol, *inter alia*.

Our findings reveal that the efforts made by the three Partner States to implement the Protocol have encountered challenges. To these we now turn.

6 Challenges in Implementing the Protocol on Environment and Natural Resources

Our findings reveal that most of the environmental laws in the Partner States preceded the EAC Treaty and the Protocol. As a result, harmonization of these laws has been relatively slow.

The other shortcoming relates to the environmental and natural resources legislative frameworks put in place in the Partner States. According to officials, these do not provide for transboundary enforcement, although, as noted above, coordinating organs and mechanisms to enforce the legislation have been devised. Also, the promulgation of regulations under the framework laws has been slow due, *inter alia*, to a lack of human and financial resources. Judicial organs to be solely charged with adjudicating environment and natural resources cases have not been established in Tanzania. The judicial organs that have been established in Uganda and Kenya have had many problems relating to lack of financial resources.

[40] East African Community, Report of the 21st Meeting of Council of Ministers (EAC/CM21/2010) held between (22nd November to 1st December 2010, at AICC, Tanzania) 100-101.

[41] See: https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework (accessed 4th August 2018).

[42] (See: https://www.the-star.co.ke/news/2017/09/12/mara-day-set-for-friday-as-organisers-hail-achievements_c1634450 (accessed 3rd August 2018).

[43] See Gathii, J.T. (n.37).

[44] Information obtained from interviews with personnel from the Vice President's Office.

6.1 Need for Protocols on Environmental Management

As noted above, the EAC Treaty imposes a mandatory requirement for the EAC Partner States to conclude Protocols providing details of the objectives, scope, and institutional arrangements for cooperation.[45] This requirement covers all areas of cooperation among members of the Community. Our study reveals that, apart from the Convention on Lake Victoria Fisheries Organization and the Protocol for the Sustainable Development of the Lake Victoria Basin, there is no other binding Protocol which provides details of the objectives, scope and institutional arrangements for cooperation in the field of environmental management within the EAC. In the absence of such Protocols, any Bill passed by the EALA is bound to face resistance on the ground that there is nothing in place defining the scope of such Bills.

We have also established that there has been some resistance on the part of some Partner States with regard to adopting Protocols intended to enhance the management of the region's environmental and natural resources. This resistance is primarily premised on the processes for adoption of Protocols under the EAC system. There is no direct provision for engaging the main stakeholders in the EAC Partner States in the process of negotiation, adoption, signing and ratification prior to the coming into force of Protocols on environment and natural resources.[46] Consensus among the Parties is a necessary prerequisite for a harmonious environment in the rather charged and rigorous process of engagement. The consensus process among EAC Partner States cannot be short-circuited by EALA enactments. This is evidenced by the fate of the Cross-Sectional Property Bill, 2015. The Bill collapsed at the stage of collecting stakeholders' views. This Bill proposed regulations at the Community level that touched on the thorny issue of land tenure, even though it is clear that land issues are in the exclusive mandate of the EAC Partner States, as stipulated in the East African Community Common Market Protocol.[47]

It is our considered view that any attempt by the EALA to enact a Bill directly affecting land-based natural resources outside the Lake Victoria Basin is an infringement of the exclusive mandate of the EAC Partner States' policies and national laws. There must be a Protocol to categorically define the parameters upon which cooperation on environment and natural resources management can be pegged, to ensure that all stakeholders are involved, because in most instances environmental and natural resources management is related to land tenure. A good example is that of the proposed East African Cross-Sectional Property Bill, 2016 which collapsed after the stakeholders in some of the Partner States vehemently rejected the Bill for contravening the clear provisions of the East African Community Common Market Protocol that places all issues relating to land in the exclusive mandate of Partner States, save for the exercise of the right of establishment.[48]

6.2 Supremacy of EAC Laws over National Laws

A cross section of respondents were concerned about the issue of the supremacy of EAC laws over national laws generally and specifically on management of the environment and natural resources. Accordingly, the efforts made by Partner States to ensure their laws reflect the EAC Treaty on environment and natural resources may be defeated. This is a

[45] Article 151 (2) of the Treaty.
[46] Article 151 (3) of the Treaty.
[47] Article 15 of the East African Community Common Market Protocol, 2009.
[48] Interviews with Principal Clerks Assistant at EAC Headquarters, Arusha Tanzania dated 12th March 2018.

valid concern, as the EAC laws are considered supreme and have a direct effect on the national jurisdictions of the EAC Partner States. EAC laws and institutions take precedence over municipal laws and institutions.[49] Some respondents noted that it is perplexing to have Community laws enacted by the EALA without any Protocol to articulate the parameters under which these laws have superiority over the laws of the Partner States.

It was also pointed out that such an arrangement infringes the sovereignty of the Partner States which must be shared willingly through a negotiated process by adopting a Protocol to that effect. In the absence of a Protocol defining the mandate and scope of cooperation between EAC Partner States, an Act of the EALA cannot be legally sufficient to deal with management of the natural resources and environment. In terms of being bound, though both the Treaty and its Protocols are binding as it is for Acts of the Community which have been assented, the Treaty and Protocol enjoy an upper recognition than the Acts.

6.3 Assent to EALA Bills on Environment and Natural Resources Management

It has been observed that assent by the Heads of State to EALA Bills has been difficult to come by, particularly for Bills relating to management of the environment and natural resources. Natural resources are in the exclusive mandate of individual EAC Partner States, so that any EAC Partner State must consent to sharing its sovereign mandate with another Partner State. At the time of writing, there were more than twenty Bills of the Community which had not come into force for lack of assent.

Lack of assent to Bills proposed by the EAC is attributed to several factors. The first relates to the protection of State sovereignty. This is due to the fact that some States such as Tanzania are taking a precautionary approach towards sharing their sovereign powers over natural resources and the environment. Secondly, there seems to be a feeling among key personnel in the Partner States that the decision-making process in the EALA does not always accommodate the national interests of individual Partner States. This could be due to the fact that decisions are not reached by majority vote but by consensus. In this regard, some Partner States feel that they are being bulldozed by other EAC Partner States EALA members. A good example is the observation by the EALA Member from Tanzania, Shy-Rose Bhanji, who in 2015, in a debate on the East African Community Forest Protection and Management Bill, stated the position of Tanzania, which had requested that the debate on the Bill be shelved temporarily to allow more consultations within Tanzania due to democratic change of the State's leadership.[50] The EALA ultimately gave in to the request by Tanzania, after a heated debate. However, Tanzania later notified the EALA Speaker that it was withholding its assent.[51]

It is due to such factors, among others, that at the time of writing there was not a single EALA Bill on natural resources and environment that had been assented to. All of them had been left to die a natural death on expiration of the time allowed for the Bill to be assented to prior to coming into force. The Bills that have been affected include the

[49] Article 8 (2) (b), (4) and (5) and 16 of the Treaty for the Establishment of the East African Community, 1999.

[50] East African Legislative Assembly (EALA), The Official Report of the Proceedings of the East African Legislative Assembly-116th Sitting Third Assembly: Third Meeting -Fourth Session, Kigali Rwanda, (Thursday 26th November 2015) 3.

[51] See:http://www.thecitizen.co.tz/News/Eala-bills-hang-in-the-balance-after-rejection-by-Tanzania/1840340-3901352-vyj6y9z/index.html (Accessed 4th August 2018).

East African Transboundary Ecosystems Management Bill 2010, the East African Forests Management and Protection Bill 2015, the East African Community Polythene Materials Control Bill 2017, the East African Community Mining Bill 2017 and the East African Community Disaster Risk Reduction and Management Bill 2012.[52]

6.4 Lack of Priority for Harmonization of Laws on Environment and Natural Resources Management

Harmonization of laws in different sectors is one of the ways through which the EAC legislative framework can be implemented in the EAC Partner States. Chapters Nineteen and Twenty of the EAC Treaty recognize the need to harmonize the laws and policies of the EAC Partner States in order to have common policies and laws.

Harmonization entails changes in national laws to make sure they reflect and abide by the EAC legislative framework. Identification of areas of priority for harmonization remains the mandate of the Partner States.[53] The institutions established by national laws have been faced with challenges, ranging from lack of independence in providing professional advice to the government, inadequate financial resources, and lack of direct provisions in the enabling laws granting them jurisdiction to address cross-border enforcement in the management of environment and natural resources. Membership of other regional blocs where obligations regarding environment and natural resources management are to be considered also poses a serious challenge to the national institutions charged with overseeing the conservation of environment and natural resources. Priorities in respect of diverse regional obligations, and divergence approaches to environment and natural resource management, sometimes overlap and create potential for conflict.

As pointed out above, some Partner States see the issue of sovereignty over natural resources as critical for attaining economic development, in some cases without taking into account the EAC approach envisaged in the East African Community Mining Bill 2017. This Bill sought to implement the EAC Vision 2050 and specifically to operationalize Article 114(2) (c) (iv) of the EAC Treaty, which calls for harmonization of mining regulations to ensure environmentally friendly and sound mining practices. The Bill also provided for transparent and accountable mechanisms for reporting mining and mineral-related activities in the region. Its primary objectives were to reduce differences in the operating environment in this the sector, to ensure macro-economic stability, higher savings and investment rates, and to put the region in the upper middle income category.[54] As noted above, this Bill has since been shelved.

It appears that Tanzania had different plans in store while the EAC Mining Bill was on the drawing board at EALA. This is evidenced by the fact that in the same year, it enacted a sweeping law that effectively put the final nail in the coffin for the envisaged collective effort to reduce differences and harmonize mining laws in the EAC. The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017[55] exemplifies the priorities of the government of Tanzania, which are in all respects contrary to the intention of harmonizing the region's mining sector contained in the now obsolete EAC Mining Bill. The overall effect of the Act is ring fencing of the country's natural resources, with the

[52] Interview with Principal Clerk's Assistant at EAC Headquarters, Arusha on 12th March 2018.
[53] Interview with Senior Legal Officer at EAC Headquarters, Arusha on 14th March 2018.
[54] See: http://www.azaniapost.com/economy/the-eac-mining-bill-to-provide-legal-framework-for-mining-sector-h4258.html (Accessed 5th August 2018).
[55] Act No. 5 of 2017, Laws of Tanzania.

consequence of excluding other EAC Partner States from making decisions over them through the EAC framework.

Another challenge that we detected in the course of the study was the absence of a policy to guide EALA members in the course of deliberations in the EALA on Bills generally, and specifically those with a bearing on environment and natural resources management. This poses a challenge especially to new members, who are sometimes considered to have 'betrayed' their countries when they take positions that are not in line with their government's priorities but are favourable to the coherence of the EALA members and represent the collective resolve of the group.[56]

The challenges alluded to above notwithstanding, there are important lessons that can be drawn from the implementation of the EAC Protocol on Environment and Natural Resources in the Partner States studied.

7 Opportunities for Facilitating Regional Economic Integration

The findings of this study strongly suggest that opportunities for facilitating regional economic integration are inherent in the efforts to forge alliances in managing the region's environmental and natural resources, despite the challenges alluded to above. One of the opportunities that emerge is the existence of common institutions under the framework legislation for environment and natural resources management in the Partner States. Another opportunity is the step-by-step efforts being made by the Partner States to harmonize their environment and natural resources legislative and policy frameworks. The implementation of common policies and programmes relating to environment and natural resources management by the Partner States at the regional level is another useful avenue for economic integration in the region.

Another opportunity for facilitating regional economic integration can be seen in the efforts made by NGOs and CSOs to seek intervention by the EACJ in an attempt to enforce EAC regulations that have a bearing on environment and natural resources. The EACJ's effort to clarify and define its mandate and jurisdiction to address issues relating to environmental and natural resources management is notable. The manner in which this Court has articulated its understanding of the principles of international law and the way it has linked these with the evolving jurisprudence on environmental and natural resources management is commendable. This initiative is critical and certainly provides room for improving regional economic integration. A vibrant regional economic bloc requires certainty in the dispute resolution mechanisms that have been put in place. The combined efforts by NGOs, CSO and the EACJ set a good foundation for checking the actions of governments in the EAC where there is a likelihood of not complying with their obligations and commitments under the EAC Treaty in general and the Protocol on environment and natural resources in particular.

The above opportunities clearly indicate a potential for positive change. This has implications for revenue generation which can boost the livelihoods of citizens in the EAC, with trickle-down effects on the economies of the Partner States. There are also opportunities for enhancing political cohesion and laying a good foundation for the political integration envisaged in the EAC Treaty.

[56] Information from an interview with a Member of EALA from Tanzania who prefers to remain anonymous.

8 Recommendations

The study reveals that a substantial number of Protocols on environment and natural resources have not been concluded, signed or ratified in good faith as required by international law. The Partner States should desist from taking individual positions, contrary to the on-going deliberations within the EAC framework. Negotiations should be carried on to ensure consensus in the concluding, signing and ratification of Protocols.

Putting in place mechanisms to ensure thorough consultations with a wide range of stakeholders prior to implementing environment and natural resources management laws at the EAC level will go a long way to ensuring a vibrant regional economic integration. Local communities whose environmental and natural resources spread across borders between Partner States, NGOs, the private sector, and CSOs whose activities have a bearing on these resources, need to be involved from the initial stages, from planning to implementation of strategies, policies and legislative frameworks. Mechanisms to ensure the involvement of these groups need to be developed. The EAC should also forge alliances with these stakeholders to reach out, sensitize and raise awareness of citizens, especially at the grassroots level in the EAC Partner States, on the benefits of conservation and management of the region's vast, rare and diverse environmental and natural resources.

The controversial issue of the supremacy of EAC laws over national laws has had some negative effects on the implementation of the EAC Protocol on Environment and Natural Resources Management by the Partner States. One way of addressing this matter would be for the EAC Partner States to include explicit provisions in their Constitutions and national laws in respect of implementing the EAC legal regime in general, and that relating to the conservation, management and protection of the region's environmental and natural resources in particular. The rather vague and general existing provisions that do not make explicit mention of the EAC should be amended.[57] This should go hand in hand with the restructuring of national environmental agencies and institutions in order to enable them to deal effectively with shared resources. The creation of a joint policing structure in line with this recommendation would be ideal.

The innovative effort of the EACJ in advocating compliance with international law principles in the matter of implementing commitments made by Partner States under the EAC Treaty should be supported by providing more funds to improve this judicial organ's infrastructural and related facilities. The Partner States should devise more effective mechanisms to ensure implementation, monitoring and evaluation of directives issued by the EACJ relating, *inter alia*, to management of the environment and natural resources.

The lack of guidance for EALA members regarding the Partner States' positions on critical issues relating to Bills should be addressed by putting in place a known policy to avoid uncertainly among representatives when discussing Bills in the EALA. Tanzania needs to provide a policy directive in the short term while it works on a long-term definite policy.

Insufficiency of funds to run operations smoothly and on a sustainable basis is a challenge that has plagued many regional economic blocs, including the EAC. This has had a significant impact on the efforts made by the Partner States to implement commitments related to managing transboundary natural resources under the Treaty. The Partner States

[57] See Majamba, H.I. (n.14).

should concentrate their efforts on preparing joint donor proposals in a combined attempt to address the shortage of funds for conservation and management initiatives in the region.