

**IMPLEMENTATION OF LAKE VICTORIA TRANSPORT ACT AN EAST AFRICAN
COMMUNITY LAW IN KENYA**

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DECLARATION

I do solemnly declare that this piece of work, in its present form and content, is the result of my own initiative through research and that the same has not been presented to any institution of higher learning for academic or any other purpose.

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This work has been presented for examination with my approval as the university supervisor

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I acknowledge all whose material and monetary contributions that lead to the completion and actualization of this research paper. I particularly appreciate the support from my supervisor, Professor Situma, and my family.

DEDICATION

I dedicate this research paper to the men and women of the East African Community who have contributed towards the implementation of framework of the establishment of the East African Community. It is with your day to day efforts that the East African Community ceased being just a pipeline dream and become a reality. Certainly, even the implementation of operationalization laws such as this statute will be fully achieved with your commitment.

List of cases

Peter Anyang Nyong'o & 10 others vs. Attorney General & Another [2007] eKLR.

Sam Mukira Mochori v The Attorney General of the Republic of Uganda Case no 5 of 2011

EACJ

List of statutes

Lake Victoria Transport Act, 2007,

Constitution of Kenya 2010

Kenya Maritime Authority Act No 2 of 2006

Merchant Shipping Act No. 4 of 2009

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LIST OF ACRONYMS

KMA	Kenya Maritime Authority
LVTA	Lake Victoria Transport Act
LVBC	Lake Victoria Basin Commission
EAC	East African Community
IMDG	International Maritime Dangerous Goods
IMO	International Maritime Organization
SOLAS	Convention of Safety of Life At Sea
MARPOL	Convention for Protection of Marine Pollution from Vessels
EALA	East African Legislative assembly
ISM Code	International Safety Management Code

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Regional integration has developed with increased globalization and with the advent of the World Trade Organization (WTO), most countries are now members of one or more regional or sub-regional arrangement that seek to promote economic coordination, cooperation or integration among the Member States concerned. Some of the regional integration blocs in the developed world include The European Union (EU), North American Free Trade Area (NAFTA), Latin American Integration Association (LAIA), the Andean Common Market (ANCOM), Central American Common Market (CACM), Caribbean Community and Common Market (CARICOM), and Council of Arab Economic Unity (CAEU) in the Middle East.

The past decade has also seen a significant increase in developing countries pursuing regional economic integration. Many regional arrangements have been revitalized or expanded and new countries have come together. In Africa, some of the regional integration groupings include the Central African Economic and Monetary Community (CEMAC), the South African Development Community (SADC), Arab Maghreb Union (UMA) in North Africa, Economic Community of West African States (ECOWAS) and its Monetary Union (UEMOA) in West Africa, and the East African Community (EAC).¹

¹Murping M, 'Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination. (2005),' Available at <http://www.fondad.org/uploaded/Africa%20in%20the%20World%20Economy/Fondad-AfricaWorld-Chapter11.pdf>>(-accessed 19.2.2012)

The history of regional integration in Africa shows that the reasons or objectives for integrating have been evolving over time. There has been a shift from the initial focus on the political decolonization of Africa to the current emphasis on socio-economic integration in the post-independence era. This integration is primarily for a stronger bargaining base in global fora and for mutual benefit in the form of accelerated growth and development. Its main objectives are the pursuit of regional integration. This will be achieved by merging the economies as a derivative form a monetary union. This requires a harmonization of economic policies, to pave way for merger, hence convergence. Other derivatives of integration objectives are the enlargement and diversification of market size, the tapping of related opportunities and the promotion of intra-regional trade and free movement of the factors of production. This results in stronger Partner States' bargaining position in relation to other regional and international blocs, and the fostering of socio-economic progress, political stability, as well as peace and security.² Legislation plays a pivotal role in this regard as it ensures that there is a legal basis on which the regional blocs operate.

1.1.1 History of the EAC

The East African Community (EAC) is the regional intergovernmental organization of the Republics of Burundi, Kenya, Rwanda, Uganda and the United Republic of Tanzania. The headquarters of the EAC are located in Arusha, Tanzania. Together, the five East African states cover an area of 1.82 million square kilometers and have a population of more than 133.5 million people who share history, language, culture and infrastructure. These advantages provide the partner states with a unique framework for regional co-operation and integration. The combined

²Africa in the World Economy, 'The National, Regional and International Challenges Fondad, The Hague, December 2005,' available at <www.fondad.org> (accessed 15.2.2012)

Gross Domestic Product (GDP) of the five countries is US\$74.5 billion and an average GDP per capita of \$558.³

The three East African States (Kenya, Tanzania and Uganda) have had close commercial, industrial, historical and cultural ties. This began between the year 1897 to 1901 with the construction of the East African Railway, followed by the establishment of a customs collection centre in 1900, the East African Currency Board (1905), the Court of Appeal for Eastern Africa (1909), East African Governors' Conference (1926), the East African Income Tax Board (1940), and the Joint Economic Council in 1940. Between 1947 and 1961, there was an East African High Commission, (which was responsible for all cooperation activities), while between 1961 and 1966 there was the East African Common Services Organisation.⁴

In 1967, the three countries established the East African Community (EAC) for the first time through the treaty for East African Cooperation.⁵ This establishment lasted for ten years and later collapsed due to misunderstandings over the assets and liabilities. However, this was resolved through a Mediation Agreement arrived at in 1984. The Treaty for the Establishment of the East African Community was signed on 30th November 1999⁶ and entered into force on 7th July 2000, following its ratification by the three original Partner States, namely; Kenya, Uganda and Tanzania.⁷ Article 3(2) of the Treaty Establishing the East African Community provides that the Partner States may, upon such terms and in such manner as they may determine together,

³2010 figures, available at; <<http://www.eac.int/treaty/>> (accessed on 15.2.2012).

⁴Mugisa E et al, 'East African Community Report, An Evaluation of the Implementation and Impact of the EAC Customs Union, March 2009,' Available at <www.eac.int/customs/index.php> (accessed on 13.3.2012).

⁵Preamble to the Treaty establishing the EAC.

⁶The Treaty for the Establishment of the East African Community.

⁷The East African Community, 'History and background,' Available at <<http://www.africa-union.org/root/au/recs/EAC.htm>> [accessed (15.2.2012)].

negotiate with any foreign country the granting of membership to, or association of that country with, the Community or its participation in any of the activities of the Community. Pursuant to this provision the Republic of Burundi and the Republic of Rwanda acceded to this Treaty for the Establishment of the East African Community on 18th June 2007 and became full members of the Community with effect from 1st July 2007.⁸

Under Article 5 of the Treaty for the establishment of the East African Community, the objectives of the Community are to develop policies and programs aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields for their mutual benefit. The policies will also be developed in research, technology, defense, security, legal and judicial affairs.⁹

The thrust of the new Treaty assumes an entirely different orientation, largely reflecting the changing trends of political and economic reform in the past two decades. Governance issues have moved higher up on the agenda, with new emphases on democratization, broader participation and human rights observance. In the economic sphere, the role of the state has been reduced and changed in nature. The state is currently seen rather as a facilitator through the creation of an enabling environment conducive to economic growth, e.g., by harmonising policies and building infrastructure. The private sector, on the other hand, is given a greater role in production and distribution without undue interference by the state.

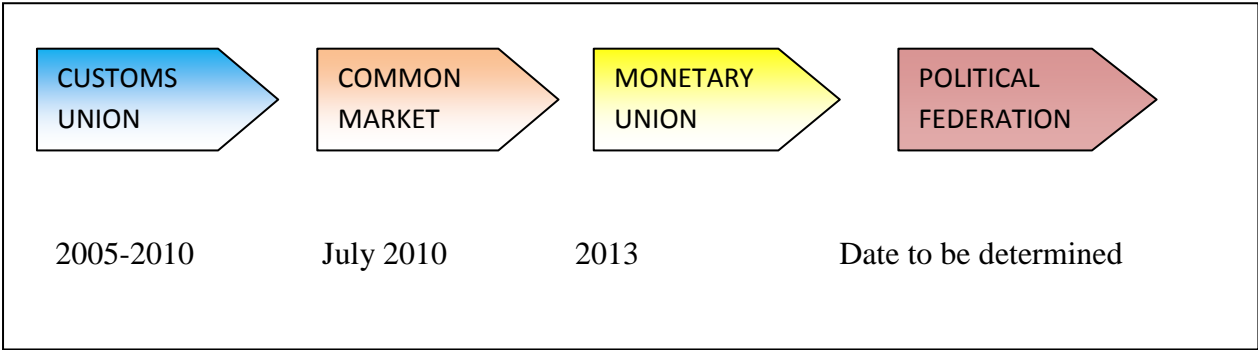
⁸Available at; <<http://www.eac.int/treaty/>> (accessed 15.2.2012).

⁹Treaty for the Establishment of the East African Community (*As amended on 14th December, 2006 and 20th August, 2007*)

The Treaty for the Establishment of the East African Community (EAC) was signed by the presidents of Kenya, Tanzania and Uganda on 30th November 1999, in Arusha, Tanzania. The Treaty entered into force on 7th July 2000 and it was formally launched on 15th January 2001. This was followed by the signing of the Protocol on the Establishment of the East African Customs Union on 2nd March 2004, which entered into force on 1st January 2005.

The EAC have in place a four step approach to integrating its economies, starting with a customs union, a common market, a monetary union and ultimately a political federation. The EAC is a potential precursor to the establishment of the East African Federation, a proposed federation of its five members into a single state. In 2010, the EAC launched its own common market for goods, labour and capital within the region, with the goal of a common currency by 2012 and full political federation in 2015.¹⁰

Figure 1.1 EAC Integration Stages and Timelines



Source: Author

¹⁰ East Africa: Common Market , 'Why EAC Dreams Are Not Coming True? Posted by [Accountancy Africa](http://accountancyafrica.com/news/east-africa-common-market-why-eac-dreams-are-not-coming-true) on Feb 06, 2012,' Available at <<http://accountancyafrica.com/news/east-africa-common-market-why-eac-dreams-are-not-coming-true>> (accessed 1.03.2012).

This flowchart above shows the milestones that have been achieved by the EAC towards integration. The most essential future milestone is that of a political federation. It is essential because, when attained, the laws of the community are likely to be implemented with ease because all systems will be in place.

1.1.2 Structure of the East African Community

Chapter Three of Treaty for the Establishment of the East African Community establishes the organs and institutions of the Community. These are the Summit, the Council, the Secretariat, the Co-ordination Committee, Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly, and other organs as may be established by the Summit.¹¹

Chapter 4 of the Treaty establishes the Summit which consists of the Heads of State or Government of the Partner States. The Summit gives general directions and impetus as to the development and achievement of the objectives of the Community. All rules and orders made by the Summit under the Treaty for the Establishment of the East African Community are published in the Gazette, and any such rules or orders shall come into force on the date of publication unless otherwise provided in the rule or order. The Summit is mandated with a key role of assenting to all Bills of the Community and such powers cannot be delegated to any other organ of the Community.

¹¹ Treaty for the establishment of the East African Community (*As amended on 14th December, 2006 and 20th August, 2007*)

The Council is established under Chapter 5 of the Treaty and consists of the Ministers responsible for regional cooperation of each Partner State and such other Ministers of the Partner States as each Partner State may determine. This is a policy organ on the Community that promotes monitors and keeps under constant review the implementation of the programmes of the Community in order to ensure the proper functioning and development of the Community in accordance with the Treaty for the Establishment of the East African Community. It is mandated to initiate and submit Bills to the Assembly and to establish the Sectoral Committees provided for under the Treaty, amongst other duties.

The Coordination Committee is established under Chapter 6 of the Treaty and consists of the Permanent Secretaries responsible for regional cooperation in each Partner State and such other Permanent Secretaries of the Partner States as each Partner State may determine. The Coordination Committee recommends to the Council the establishment, composition and functions of such Sectoral Committees as may be necessary for the achievement of the objectives of the Treaty for the Establishment of the East African Community.

The Sectoral Committees established under Chapter 7 of the Treaty are responsible for the preparation of a comprehensive implementation programme and the setting out of priorities with respect to the specific sectors under which they fall. They submit, from time to time, reports and recommendations to the Coordination Committee, either through its own initiative or upon request, concerning the implementation of the provisions of the Treaty for the Establishment of the East African Community that affect its sector. To ensure firm establishment and adherence to law in the interpretation and application of and compliance with the Treaty for the

Establishment of the East African Community, the East Africa Court of Justice was established under Chapter 9 of the Treaty for the Establishment of the East African Community.

1.1.3 Legal Personality of the EAC

The legal personality of the EAC can be ascertained from the provisions of the Articles of the EAC treaty. Article 2 which establishes the East African Community, states that; in furtherance of the provisions of the treaty that relate to the Contracting Parties establishing among them an East African Community, the Contracting Parties will establish an East African Customs Union and a Common Market as transitional stages and integral parts of the Community.

Article 4 makes provisions as to the legal capacity of the Community. It states in part that the Community shall have the capacity, within each of the Partner States, of a body corporate with perpetual succession, and shall have power to acquire, hold, manage and dispose of land and other property, and to sue and be sued in its own name.

Article 138(1), affirms the international legal personality of the Community. It that the Community shall enjoy international legal personality and each of the Partner States undertakes to accord to the Community and its officers the privileges and immunities accorded to similar international organizations in its territory.

One of the attributes of supranational personality is immunity from the jurisdiction of domestic courts.¹² However, according to Article 4, the EAC seems to cede this immunity by allowing the Community to be subjected to the jurisdiction of domestic courts based on the fact that the EAC can be sued and can sue in its name. However, when this Article is read with Article 138 which makes provisions in relation to immunities, then it becomes apparent that in matters relating to immunities, Article 138 overrides Article 4. This is so argued because, despite the fact that Article 4 may be used to sue the EAC in the domestic jurisdiction, Article 138 requires the partner states to accord the EAC the immunity accorded to other supranational institutions. This immunity is not to be subjected to the jurisdiction of these partner states' local jurisdiction.

Further, According to M. N. Shaw, another criterion of ascertaining whether an entity is a subject of international law is to examine whether that entity has power to enter into agreements, and whether it has privileges and immunities in the international sphere.¹³ With regard to this criterion, the EAC Treaty gives the Community the power to foster cooperative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community.¹⁴ As Article 73 of the EAC Treaty states that, persons employed by the Community enjoy diplomatic immunities. Hence, the international legal personality of the East African Community is also affirmed. According to Article 102 of the Charter of the United

¹² Best, E., Supranational Institutions And Regional Integration, paper presented at ECLAC-DFID-UK Embassy in Brazil Workshops on Experiences in Processes of Regional Integration and Impacts on Poverty Lima, 3-4 March 2005 < <http://www.eclac.cl/brasil/noticias/paginas/2/22962/Best%20-%20Supranational%20Institutions.pdf> > (accessed 23.9.2013)

¹³ Shaw M, 'International Law,' 6th edn, (Cambridge University Press, Cambridge 1997) 191.

¹⁴ See EAC Treaty-1999, Article 130

Nations¹⁵ and Article 80 of the Vienna Convention on the Law of Treaties,¹⁶ a treaty is recognized in the international system through deposition and registration by the Secretariat of the United Nations Organisation. Only treaties that have been registered may be relied upon before the International Court of Justice. The Treaty for the Establishment of the East African Community was registered with the United Nations Secretariat under registration number 37437.¹⁷

1.1.4 Sources of Law in the EAC

Sources of law are the materials and procedures out of which law, whether substantive or procedural, is developed. In general terms, the sources of law of the East African Community may be categorized under internal law, municipal law of the Partner States, and international law.

The internal law of the East African Community consists of the EAC Treaty, the Acts of the East African Legislative Assembly, regulations, directives, decisions, and resolutions of such organs as the Summit or the Council, as well as judgments and rulings of the East African Court of Justice. It is generally accepted that the established practice of an organisation may also form

¹⁵ It reads: “1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter enters into force shall as soon as possible be registered with the Secretariat and published by it.

¹⁶ It reads: “1. Treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication.

¹⁷Article 80 of the *Vienna Convention on the Law of Treaties*, states; the designation of a depository shall constitute authorization for it to perform the acts specified in the preceding paragraph”. as cited in Kafeero E., *Customs Law of the East African Community in light of WTO Law and the Revised Kyoto Convention*, (inaugural dissertation Wilhelminian University, 2009)

part of the rules of an organisation.¹⁸ That means that some practices of the East African Community may also, in the long run, be considered part of its sources of law.

The existence of the East African Community does not necessarily render national legislation of the Partner States meaningless. This means that the municipal law of the Partner States is also a source of law of the East African Community. Article 33 of the EAC Treaty supports this view, for it makes clear that national courts of the Partner States are not necessarily excluded from the disputes to which the Community is a party.

According to the Statute of the International Court of Justice the main sources of international law include international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and teachings of the most highly qualified publicists of the various nations. These sources are also obviously relevant to the East African Community, for it is an international organisation. This is further substantiated by Article 39(1) (f) of the Protocol on the Establishment of the East African Customs Union, which states that relevant principles of international law are part of customs law of the East African Community.

1.1.5 Process of Legislation in EAC

The East African Legislative Assembly is established under Chapter 9 of the Treaty for the Establishment of the East African Community and is the legislative organ of the East African Community. According to Article 49(1), the Assembly has legislative functions as well as oversight of all East African Community matters. The mission of the East African Legislative

¹⁸See P. Sands, P. Klein (eds.), *Bowett's Law of International Institutions*, 6th edn, (Sweet& Maxwell, London, 2001) 51-53.

Assembly is to legislate, do oversight and represent the people of East Africa in a bid to foster economic, social, cultural and political integration.¹⁹ Article 49(2) sets its jurisdiction as that of liaising with national assemblies of partner states on matters relating to the Community and making recommendations to the Council as it deems necessary for the implementation of the EAC Treaty.

Under Article 62 of the Treaty for the Establishment of the East African Community, the enactment of legislation of the Community is effected by means of Bills passed by the East African Legislative Assembly and assented to by the Heads of State. When a Bill has been duly passed by the Assembly, the Speaker of the Assembly shall submit the Bill to the Heads of State for assent. The Heads of State may assent to or withhold assent to a Bill of the Assembly. A Bill that has not received assent within three months from the date on which it was passed by the Assembly shall be referred back to the Assembly, giving reasons, and with a request that the Bill or a particular provision thereof be reconsidered by the Assembly. If the Assembly discusses and approves the Bill, the Bill shall be resubmitted to the Heads of State for assent. Under Article 63(4), if a Head of State withholds assent to a re-submitted Bill, the Bill shall lapse. Under Article 12(3), the decisions of the Summit must be by consensus and, therefore, any Bill that does not receive the assent of all the Heads of State will not be adopted.

According to Article 8(2) (b), each Partner State shall confer upon the legislation, regulations and directives of the Community and its institutions as provided for in the Treaty for the Establishment of the East African Community, the force of law within its territory. Article 8(4)

¹⁹<http://www.eala.org/oldsite041111/component/content/article/26-overview/13-welcome-to-the-east-african-legislative-assembly.html>>(accessed 15.3.2012).

additionally provides that Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty.

Treaties and conventions between nations in the world are given the force of law by the Vienna convention on the Law of Treaties. Kenya, being a signatory to the Vienna Convention, is therefore, bound by it.²⁰ Article 2(5) and (6) of the Constitution of Kenya spells out the various sources of law that will form the laws of Kenya to include; general rules of international law and any treaty or convention ratified by Kenya.²¹ The treaty for the establishment of the EAC was signed on 30th November 1999, and entered into force on 7th July 2000, following its ratification and deposit of its instruments with the secretary general of the EAC.

1.1.6 Background to Lake Victoria Transport Act

In order to promote the achievement of the objectives of the Community, the Partner States were tasked to develop harmonized standards and regulations, laws, rules, procedures and practices with regard to the various modes of transport. Article 94 of the Treaty for the Establishment of the East African Community deals with inland waterways transport and states were required to harmonise their inland waterways transport policies and adopt and simplify rules, regulations and administrative procedures, governing waterways transport on their common navigable inland water ways. National policies on inland waterways transport were also to be harmonized to this end.

²⁰Article 2(6) of the Constitution of Kenya of 2010

²¹ Ibid

In this regard, the East African Community (EAC) Council of Ministers approved and adopted the Protocol for Sustainable Development of Lake Victoria Basin²² to guide the development and management in the Lake Victoria Basin. The signing of the Protocol for Sustainable Development of the Lake Victoria Basin on the 29th November 2003, and its ratification in December 2004, in effect cleared the way for the Lake Victoria Basin Commission (LVBC). The Protocol defines areas of cooperation and provides for the establishment of an institution, the Lake Victoria Basin Commission (LVBC) for coordination. The broad functions of the LVBC, as stipulated under Article 33 of the Protocol, are to promote, facilitate and coordinate activities of different actors towards sustainable development and poverty eradication within the Basin.²³

In November 2006, the Council approved the third EAC Development Strategy 2006-2010.²⁴ Under the Strategy, one of the major tasks of the LVBC was to enact the Lake Victoria Transport Bill and implementation of the resultant Act. The policy and decision making organ of the Commission is the Sectoral Council which is constituted by Ministers from the Partner States while the Committee comprises of all Permanent Secretaries from the three Partner States whose Ministries' mandates relate to the Lake Victoria Basin, particularly water, agriculture, transport, communication, energy, tourism and wildlife, fisheries, environment and economic development.²⁵

²²Protocol for Sustainable Development of Lake Victoria Basin signed on the 29th November 2003, ratified in December 2004.

²³Operational Strategy Lake Victoria Basin Commission (2007-2010), 2007, Lake Victoria Basin Commission Secretariat. Available at <<http://www.lvbcom.org/index.php/2013-03-07-10-24-03/operational-strategy>> (accessed 12. 3 2012).

²⁴EAC Development Strategy 2006 – 2010. Available at <http://www.eac.int/index.php?option=com_docman&task=doc_view&gid=649&Itemid=163> (accessed on 12. 3 2012).

²⁵Protocol Establishing Lake Victoria Basin Commission. Available at <<http://www.lvbcom.org/index.php/2013-03-07-10-24-03/protocol-establishing-lvbc>>[accessed 12. 3 2012]

Through concerted efforts by the LVBC and the Council of Ministers, the Lake Victoria Transport Act was enacted by the East African Legislative Assembly (EALA) in September 2007 as an Act of the Community which was to address marine transport safety and security on the lake. Section 247 of the Lake Victoria Transport Act 2007, provides that the Act shall take precedence over the relevant laws of the partner states. Subject to section 10 of the Act, the Council of Ministers shall be responsible for the administration of the Act. The Council, however, has the power to delegate the administration of the Act to the Lake Victoria Basin Commission who shall, consequently, coordinate the implementation of this Act.

The Council is required to make regulations for the working arrangements between the Commission and the partner states' maritime safety and administration security units which fall under the respective Partner States maritime authorities under section 10(2) of the Act. A maritime administration unit of a partner state shall then appoint officers who shall be responsible for the management and implementation of the Lake Victoria Transport Act as provided under section 11(3) of the Act. These provisions form the basis of the working relationship between the LVBC and the maritime authorities in each partner state.

The Council also has the mandate, under the Act, to make regulations generally for giving effect to the provisions of this Act, pursuant to section 246. In this regard, specific technical standards for full compliance and easy implementation of the Act have been provided.²⁶

²⁶ The Lake Victoria Transport (Maritime Safety) Regulations 2010. Legal Notice No.

1.2 Statement of the problem

The constitution of Kenya 2010 under Article 2(6) states that all treaties that Kenya ratifies form part of its law. Kenya ratified the treaty establishing the EAC and it consequently forms part of Kenyan law. The provisions of the Treaty should therefore be fully applicable within all EAC partner states.

The Treaty Making and Ratification Act 2012, was enacted to give effect to the provisions of Article 2(6) of the Constitution and to provide the procedure for the making and ratification of treaties. Article 3 (1) of the Act provides that the Act applies to treaties which are concluded by Kenya after the commencement of the Act²⁷. The EAC Treaty would therefore not fall within the auspices of the Act as it was not concluded after its commencement. The treaty for the establishment of the EAC was signed on 30th November 1999, and entered into force on 7th July 2000, following its ratification and deposit of its instruments with the secretary general of the EAC.

Under Article 5 of the EAC Treaty, the objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs, for their mutual benefit. For this purposes the Community shall ensure the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States²⁸.

²⁷ Treaty Making and Ratification No 45 of 2012

²⁸ Ibid

Article 8 provides for the General Undertaking as to Implementation of the treaty and the partner states undertake to plan and direct their policies and resources with a view to creating conditions favorable for the development and achievement of the objectives of the Community and the implementation of the provisions of the Treaty. They also undertake to co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty. The partner states shall confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.

Article 16 further provides that subject to the provisions of the Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States.

Despite having these provisions, there appears to be a gap in to the Act's passed by the EALA and their application within EAC states. On one hand Article 2(6) of the Constitution provides that all treaties that Kenya ratifies form part of its law. The EAC Treaty is consequently part of the Kenyan Laws and the provisions of the Treaty are binding. Article 8 of the EAC Treaty directs the Partners States to confer upon the regulations, legislations and directives of the Community and its institutions the force of law within its territories and that they shall take precedence over similar national ones on matters pertaining to the implementation of the Treaty. The EAC Treaty binds the partner states to the extent that they must ensure that the statutes of

the EALA are harmonized with the statutes of their respective Parliaments. This is aimed at averting conflicts between these laws thus making it easy to implement the statutes of the EALA.

On the other hand the sources of law in the partner states do not expressly provide for EAC law as a source of law. In Kenya the sources of Kenyan law are provided for under Section 3 of the Judicature Act which States that the jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with the Constitution all other written laws, including the Acts of Parliament of the United Kingdom the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date. The courts shall also be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it²⁹. The EALA law in States is therefore not expressly outlined as a Source of Law within the Kenyan Judicature Act.

The Lake Victoria Transport Act is an Act of the Community and based on the provisions of the Treaty as stated above, it takes precedence over similar national laws on matters pertaining to the implementation of the Treaty. The Act is in itself not self executing as and the Act provides that the Council shall be responsible for the administration of the Act. The council can however delegate its function to the Lake Basin Commission whose main function will be to coordinate the implementation of the Act as provided for under Section 10 of the Act. The Council is mandated, for the purposes of this Act, to make regulations for the working arrangements between the Commission and the Partner States' maritime safety and administration security

²⁹ Judicature Act, Chapter 8 of the Laws of Kenya, Revised Edition 2007 (2003)

units. Section 11 provides that for the purpose of implementing this Act, each Partner State shall in accordance with the Partner State's legislation, establish a maritime administration unit. The Commission therefore plays a coordinatory role, while the partner states respective maritime units ensure implementation of the Act within their territories.

In Kenya, the Kenya Maritime Authority is responsible for the implementation of the LVTA and is established under the Kenya Maritime Authority Act³⁰. The Merchants Shipping Act gives the enforcement powers of the Act to the Kenya Maritime Authority under Section 409. Section 3. 4 of the Merchants Shipping Act provides that the Act applies to the regulation of ships on inland waters and is thus applicable to Lake Victoria. Article 307 provides that the Minister may make regulations in respect of vessels operating in inland waters. In making the regulations the Minister shall take into consideration regional agreements that may have been concluded and adopted by Kenya in that respect. Since the LVTA is an Act out of a regional agreement, its provisions must be taken into consideration by the Kenya Maritime Authority.

At a policy level Article 132(5) of the Constitution provides that the president shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries. The EAC treaty as an international obligation will require that Kenya and other partner states set up the institutions, policies and procedures within their territories to fully implement and actualise all the EALA laws. The research will seek to establish the extent to which this has been achieved in regards to the Lake Victoria Transport Act 2007.

³⁰ Kenya Maritime Authority Act, No 5 of 2006

1.3 Hypothesis

Under Article 7 of the Treaty provides for operational principles of the Community. The principles shall govern the practical achievement of the objectives of the Community and include the provision by the Partner States of an adequate and appropriate enabling environment. This includes conducive policies and basic infrastructure. The principle of subsidiarity provides for multilevel participation and the involvement of a wide range of stake- holders in the process of integration.

One of the major strides that Kenya has made aimed at implementing the LVTA is the establishment of the Kenya Maritime Authority a national body that is stipulated under the LVTA to effectuate its enactment. The other fundamental initiative is the enactment of the Merchant Shipping Act.³¹

Under the Act the Authority has two functions namely; inspection of lake going vessels which is carried out by the chief inspector and maritime safety which is the preserve of the safety officer surveyors.

In relation to the enactment of the Merchant Shipping Act, Kenya has made further strides by enacting further regulations that are likely to ease its working. These include the Merchant Shipping (Maritime Service Providers) Regulations, 2011,³² The Merchant Shipping (Port State Control) regulations, 2011,³³ The Merchant Shipping (Fees) Regulations, 2011,³⁴ these

³¹ Act no. 4 of 2009.

³² Legal notice no.112 of 2011

³³ Legal notice no. 191 of 2011

regulations are sector specific in nature thus laying the required keen interest on each specific area of regulation envisaged in the Act.

Though these steps are all geared towards ensuring that the LVTA is fully enacted, there is still a lot that has not been done. There are inadequate regulatory services to oversee safety and security matters on Lake Victoria. Incidents of banditry and other illegal activities have been reported as the major security challenges.³⁵ Further, there are no maritime police units at the Lake Victoria.³⁶ Communication facilities in Lake Victoria waters are inadequate;³⁷ the development for maritime sub-sector experts such as seaworthiness surveyors, accident investigators, trainers, examiners, engineers and pilots among others is still hampered by high costs of training maritime personnel. The impact of this is that there is limited human resource in this area.³⁸ In addition the available manpower lacks a comprehensive maritime training. This has been due to the available limited funding for maritime training.³⁹ There is only one credible maritime training institution in Kenya which is the Bandari College in Mombasa that trains in some aspects of seafaring. However, its courses do not meet the requirements of the international conventions hence; the country has a shortage of senior cadres like captains, chief mates, officer in-charge of national watch radio operator, chief engineer, and officer in-charge of engine watch as well as ship surveyors, pilots, naval architects, marine engineers, hydrographers and cartographers among others.⁴⁰ The steps taken so far towards the implementation of the Act are

³⁴ Legal notice no.192 of 2011

³⁵ Ministry Of Transport, Integrated National Transport Policy: Moving a Working Nation. May 2009. Paragraph g pp. 93

³⁶ Ibid.

³⁷ *Supra*, note 31 Para (f).

³⁸ *Supra*, note 31 Para b pp. 94.

³⁹ *Supra*, note 31 Para c pp.94.

⁴⁰ *Supra*, note 31 Para d.

in this case not adequate based on what has been discussed above. Stakeholders as at 2011, 2 years after the above mentioned policy paper was set out, requested the government to speed up the implementation of the Act and still maintained that there were outstanding issues⁴¹. This clearly shows that the policy has not been implemented adequately.

Owing to what has been set out above, it is hypothesised that though the Kenyan government has put in place policies aimed at working towards the implementation of the LVTA, the Act has not been fully implemented.

1.3 Research Questions

The EALA Acts have been assented to by the Heads of State of the Partner States, but their implementation has not been satisfactory. In order to understand why this is the case, this study will address the following research questions, namely,

- (a) What is the legislative process and legal status of EAC legislation in Kenya?
- (b) What are the legal obligations of Kenya with regard to domestic implementation of EALA Acts?
- (c) Has the institutional framework established to oversee implementation of LVTA been effective?
- (d) What are the key challenges that Kenya is facing in the implementation of EAC legislation and how can these challenges be overcome?

⁴¹Report on the sensitization workshops in the partner states for the Lake Victoria Transport Act, 2007 and the Lake Victoria Transport (Maritime Safety) Code. 22nd September 2011.

1.5 Literature Review

There has not been much written concerning the implementation of this Act more so, specifically in relation to Kenya. The previous studies carried out on integration have considered mainly the economic integration and concentrate mainly on the common market and customs union. The literature includes studies by writers, such as Peter Holmes and Jim Rollo,⁴² who in their writing propose some lessons on integration that the EAC should learn from the EU. Of essence they write that the EAC should learn on how to sequence its integration processes from the EU. For example, they state that political integration should not precede economic integration. Instead, they should occur in a sequential manner. Thus, beginning with political integration and following it up with piecemeal introduction of different elements of the customs union, the common market and economic union while understandable, is a risky affair.

Those that have come close to writing about the issue of implementation of EAC laws in Partner states have given the topic a somewhat blanket approach. For example, Kitonsa E, while writing on the status of the EAC legal harmonization process In Uganda, states that the methodology adopted for the harmonization of laws at the regional level has been painstakingly slow, and the EAC Partner States need to adopt national comprehensive programmes to harmonize their laws.⁴³ Though these sentiments carry an integral point of argument that will be carried in this paper, there is lack of specificity. The writer does not go down to discussing whether Uganda has

⁴²Holmes P. And Rollo J, EAC Integration: Some Lessons from the EU Experience, (Institute Of Development Studies, 2012).

⁴³Kitonsa E, 'The Status of the EAC Legal Harmonisation Process in Uganda.' Report Presented At A Conference On Creating A Predictable And Facilitative Legal Environment For Business In The East African Community. Report Prepared For Uganda Law Reform Commission and presented In Arusha Tanzania on the 6th – 7th AUGUST 2012. Available at <https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Paper-on-Status-of-Legal-Harmonisation-Process-in-Uganda_Edward-Kitonsa.pdf> (accessed 15.3.2013)

tried to overcome this, whether there have been challenges and whether there has been an attempt at getting solutions for these issues. There thus remains a gap to the extent of the matters that have been raised.

There is literature that tends to point to the fact that there has not been full implementation of the Act. This is the report on the sensitization workshops in the partner states for the Lake Victoria Transport Act, 2007 and the Lake Victoria Transport (Maritime Safety) Code. It focuses on suggesting to the Kenyan government on what it needs to do to ensure full implementation of the Act. The suggestions include the recommendations that Government should put logos in the beaches to help the authority to effect the rules and regulations of Lake Victoria Transport Act 2007, That the KMA should carry out sensitization of Lake Victoria Transport Act 2007, that the Lake Victoria Transport (Maritime Safety) Regulations 2010 should be implemented within the beaches to help the implementation of the Act at the grassroots level, that rescue unit teams should be trained, as they are still not adequately trained to perform rescue activities, the government should set strategies to enable lake users to get safety and communication equipment, that the government should include safety of navigation on Lake Victoria as priority issue that needs urgent allocation of funds for implementation through the establishment of safety administration units on the lake, and that the government should facilitate safety awareness campaigns and mechanisms that would enable all lake users to understand what was required of them under the Lake Victoria Transport Act.

Though this research paper too aims at coming up with a raft of solutions for the government, it is thought that these solutions that have been suggested were not from a point of information as

the real underlying issues that are plaguing the implementation have not been set forth. This is another major informational gap.

There seems to be limited research on implementation of legislation enacted by the EALA and whether this has been successful in Partner States. A study specifically on the enforcement of Lake Victoria Transport Act has also not been carried out. This research will attempt to contribute to this area of research.

1.6 Theoretical Framework

The study will be based on the sociological theory of law legal theory which is based on the belief that the law is but one method of social control.⁴⁴ Thus, the view of law as a closed logical order is rejected. This is because new problems can emerge and the existing laws fail to provide solutions. For this reason, there arises a need for new laws to help keep up with the contemporary issues. For example, the dilapidation of the Lake Victoria basin and transport system did not arise because there were no laws in place. In fact, there were laws already in place, such as the EMCA in Kenya and others in the other partner states that could, indeed, curb the pollution. However, the problem could not be satisfactorily dealt with by any of the individual partners because the pollution had reached an alarming rate; there arose the need for concerted efforts to help curb the menace. The extensive nature of the dilapidation that would not have been successively stemmed by one member state supports the theory's claim that law, at times, is incapable of keeping up with emerging issues. For reasons such as these, the sociological jurists are skeptical of the rules presented in textbook and are concerned to see what

⁴⁴NiklasLuhmann, 1985: 1 as quoted in Aubert, Vilhelm, end, (1969) *Sociology of Law* (London, Penguin)

really happens, “the law in action”. They cherish a system where the law is dynamic and not static so that it can fit with the emerging issues in a society or can address new problems in a society.

However, because there are those who are opposed to this view, there comes a time when a jurisdiction finds itself in need of repealing the existent law. The new set of laws enables the jurisdiction to keep up with the changing society. Legislations are made with the view of curbing a certain kind of mischief that has arisen in society for which there was no prior deterrence in the nature legislation. This is what is known as the objective of legislation.⁴⁵ This may be as result of the law being static or the mischief being unforeseeable at the time the first set of laws were made. Upon enactment, the law will operate to deter the mischief from the point at which it becomes operational and into the future. This is what is called the prospective other than retrospective nature of the law. To be able to curb the mischief the laws must be given force; what is called the force of the law which subjects breakers of such a law to punishment so that future breaking of that law is deterred.

In this outlook, David Wigdor⁴⁶ was of the view that determinants of judicial creativity derive from outside law or legal doctrine as a variety of policy considerations, social pressures, political or economic imperatives and social interests are considered. Under this school of thought Law is viewed as a means to an end. The function of law is an instrument for serving the needs of human society. In this regards the Lake Victoria Transport Act should serve as the means to the

⁴⁵Lord Simon in *Maunsell v Olins* [1975] AC 373

⁴⁶David Wigdor as quoted in Stagner S., *The Recall of Judicial Decisions and the Due Process Debate*. The American Journal of Legal History, 3 (Temple University, 1980) 257-272

end of achieving good transport conditions on Lake Victoria. This can only be achieved through its full implementation.

1.7 Conceptual Framework

The definition of the word implement in the Webster Dictionary is to carry out, accomplish especially to give practical effect to and ensure of actual fulfillment by concrete measures⁴⁷. According to the online legal dictionary, the word means accomplish, achieve, actualize, bring about, bring off, bring to pass, carry into effect, carry into execution, carry out, carry through, complete, consummate, discharge, do, effect, effectuate, enact, enforce, fulfill, give force to, give validity to, make a reality, make active, make valid, perform, provide the means, put in force, put in practice, put into effect, realize, see through, set in motion, succeed, take action, work out⁴⁸.

In the context of this research, implementation will be viewed in terms of the practical effects and actual fulfillment of concrete measures. This will include the institutional implementation of the provisions of the Act within Kenyan and an assessment of the impact on the ground. It will consider implementation in the dimension of those to whom law applies those who enforce the law and those who are to implement the law.

⁴⁷ Available at <http://www.merriam-webster.com/dictionary/implement> accessed 24.10.13

⁴⁸ Available at <http://legal-dictionary.thefreedictionary.com/implement> accessed 24.10.13

1.8 Research Methodology

The research has followed the following research methodology.

1.8.1 Documentary Review

The research examined the relevant documentation, which included legislation, reports, and various policy documents, and many others documents with relevant information on the subject. The purpose of the documentary review is to collect data and information on the subject as a basis for further verification. This will include the EAC treaty and its ancillary protocols, the LVBC reports on progress of the implementation of the LVTA, etc.

1.8.2 Precedent

The research examined the various case precedents as have been set out in cases that have been handled by domestic courts in domestic jurisdictions and those that have been handled by the EACJ.

1.8.3 Books and Journal article

The research also relied on scholarly articles and books that have been published in relation to the topic of study.

1.8.4 Other sources

Other than the above mentioned sources the research relied on internet resources, newspaper articles and any other reference material that were suitable in the furtherance of the arguments advanced by the researcher in this research paper.

CHAPTER TWO

ROLE AND MANDATE OF EAST AFRICAN LEGISLATIVE ASSEMBLY

2.1 Overview of East African Legislative Assembly

East African Legislative Assembly (EALA) is the law making body of the East African Community. It was established in November 2001. EALA began with three Partner States Kenya, Tanzania and Uganda and had 9 elected members from each state. It then grew to five Partner States after Burundi and Rwanda joined the East Africa Community with 45 elected members, plus seven ex-officio members, namely, the Ministers responsible for EAC affairs from the Partner States, the Secretary General of the Community, and the Counsel to the Community. EALA has the mandate to make the laws for the Community, like the parliaments of the Partner states. EALA, as in the case of national legislative assemblies, is thus law-making organ of the EAC.⁴⁹

The EALA is responsible for, among other things, approving budgets of the EAC, debating audit reports, performing an oversight function and initiating Bills in the Assembly. Bills are normally introduced by any member or members of the Assembly. The Assembly may request the Council, as it has done over the years; to submit to it proposals on EAC related matters that may require its attention and scrutiny.⁵⁰

⁴⁹<<http://www.eala.org/oldsite041111/component/content/article/26-overview/13-welcome-to-the-east-african-legislative-assembly.html>> (accessed 7.7.13).

⁵⁰Article 19 of the Treaty for the establishment of the East African Community (*As amended on 14th December, 2006 and 20th August, 2007*).

The EALA holds its meetings once a year and such proceedings are presided over by the Speaker. The Speaker is elected from among the representatives for a five year term on a rotational basis. The EALA representatives hold office for five years and are eligible for re-election once for a further term of five years. Decisions of the Assembly are made by a majority vote of the representatives present and voting.

Currently, EALA has seven standing committees, namely, Accounts, Agriculture, Tourism and Natural Resources, General Purpose, House Business, Legal, Rules and Privileges, Regional Affairs and Conflict Resolution and, finally, Trade Communication and Investment. EALA may also appoint select committees as required. The composition and leadership of each of these committees is equally shared among the partner states.⁵¹

2.2 Legal Status of EAC Legislation

Every partner state has a duty to ensure that it commits to implementation of the Treaty by enacting a specific law.⁵² In the case of Kenya, this law is the Treaty for the Establishment of the East African Community Act of 2000.⁵³ It gives the force of law in Kenya to the treaty and provides for other connected or incidental matters.

The Treaty for the Establishment of the East African Community provides for general undertaking as to implementation. In particular, Article 8(4) provides that Community organs,

⁵¹EAC Rules of Procedure. ANNEX 5 as quoted in M. Mbangizi, EALA is it really worth the bother? May 2012, The Observer, Available at http://www.observer.ug/index.php?option=com_content&view=article&id=18835:eala-is-it-really-worth-the-bother (accessed 7/7/13).

⁵²Article 8 of the EAC Treaty.

⁵³Laws of Kenya, Act No 2 of 2000.

institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of the EAC treaty.

The phrase “matters pertaining to the implementation of the treaty” implies that the most central point is to ensure that the objectives of establishing the Community, namely, to develop policies and programmes aimed at widening and deepening cooperation among partner states in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs for mutual benefit,” as per Article 5(1) of the Treaty, are realized.

In essence, the laws enacted by the Community must widen and deepen cooperation in these areas for the mutual benefit of all partner states and, thus, all East African citizens. Under Article 8(2) of the Treaty, each partner state shall, within 12 months from the date of signing the treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to the treaty.⁵⁴

There is a distinction between the Treaty and Protocols, on one hand, and EALA legislation, on the other hand. The Treaty binds the Partner States and is the basis for cooperation and it specifies the areas of cooperation under Chapters 11 to 24. The Protocols are made under the Treaty and are an integral part of the Treaty. For each area of cooperation in the Treaty, the

⁵⁴ It states Each Partner State shall within 12 months from the date of signing of the treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty and in particular....(b) to confer the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.

partner states are to conclude a protocol which spells out the objectives and scope of cooperation and the institutional mechanisms to be put in place to ensure cooperation (Article 151). The protocols, therefore, give details of the cooperation in the Treaty. Therefore, by coming up with protocols that are ancillary to the treaty, the partner states are committing to cooperate in a more elaborate manner on areas that are already pinpointed in the treaty, albeit not extensively as in the protocols

Some protocols have annexes, in the form of regulations, which further detail how the cooperation will be implemented. The treaties and protocols are by the Summit and the Council of Ministers (the executive arm of EAC.) Protocols may be compared to policies at the Partner State level and they do not have force of law until ratified. Even after ratification, they need to be domesticated through domestic law.⁵⁵

The laws passed by EALA are the laws of the East African Community. Once a Bill has been enacted by the Assembly and assented to by the Heads of State or Government, it becomes an Act of the Community. Upon receipt of presidential assent by all the Heads of State, it becomes law in the Partner states with the same force as national law.⁵⁶ These Acts do not require any special implementation Procedure. However, because of the varying domestic legal jurisdictions, the specific legislation may require each domestic jurisdiction to establish authorities to enable smooth implementation. This is as is the case with the LVTA that required domestic jurisdictions to establish authorities that will enable the jurisdictions implement its provisions.

⁵⁵ Article 16 the EAC Treaty

⁵⁶ Article 63 as elaborated in; International Democracy Watch, East African Legislative Assembly, 2012, Available at <http://www.internationaldemocracywatch.org/index.php/east-african-legislative-assembly>, (accessed 24/6/2013).

2.3 Implementation of EALA Legislation

The EAC Treaty provides that the scope of co-operation in legal and judicial affairs encapsulates the harmonization of all the Partner states national laws appertaining to the Community.⁵⁷

Harmonization, a term often applied interchangeably to mean approximation of national laws, is a sine qua non for success in all integration processes. Applied in the context of this paper, in simple terms, implies bringing together in proximity, common areas of agreement for a state of peaceful co-existence; identifying and ironing out areas of divergences in the laws, all aimed at providing an environment that would support effective operation and smooth management and development of the Community.⁵⁸

The Sectoral Council on Legal and Judicial Affairs (herein referred to as the Council) as set out in the provisions of Article 14(3) (h) of the Treaty has a key role in ensuring that all laws enacted by the East African Legislative Assembly are in conformity with the Treaty commitments and obligations and that all national laws are, as far as practicable, proximate to those of other partner states.

The Council oversees the harmonization and approximation of laws exercise. Under the Council is a Subcommittee on Approximation of Laws, established with a mandate to study all the

⁵⁷Article 126(2) (b) of the Treaty.

⁵⁸Kitonsa E, 'The Status of the EAC Legal Harmonisation Process in Uganda.' Report Presented At A Conference On Creating A Predictable And Facilitative Legal Environment For Business In The East African Community. Report Prepared for Uganda Law Reform Commission and presented In Arusha Tanzania on the 6th – 7th AUGUST 2012. Available at <https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/business-regulation/upload/Paper-on-Status-of-Legal-Harmonisation-Process-in-Uganda_Edward-Kitonsa.pdf> (accessed 14.7.13)

national laws with a view to harmonizing them and advising the Council on the various aspects of the exercise.⁵⁹ The Subcommittee consists of Chairpersons of the Law Reform Commissions and, in the case of the Republics of Rwanda and Burundi, the bodies carrying out equivalent roles of law reform work. The Subcommittee reports to the Council. The Taskforce on the Approximation and Harmonization of Laws was established to facilitate the mandate of the Subcommittee. The Taskforce consists of high level officers, most of whom are lawyers from the Law Reform Commissions, Ministries of Justice or Attorney General's Chambers and Ministries responsible for EAC Affairs. The task force reports to the Subcommittee.

In cases where there is no conflict between the domestic legislation of partner states and EAC law, the implementation of the EAC law is carried out through the agencies established under the specific EAC legislation. For example, in the case of the Lake Victoria Transport Act, after its enactment by the East African Legislative Assembly (EALA) in September 2007 as an Act of the Community, the Act took precedence over the relevant laws of partner states.⁶⁰

Subject to section 10 of the Lake Victoria Transport Act, the Council of Ministers shall be responsible for its administration. The Council is required to make regulations for the working arrangements between the Commission and the partner states' maritime safety and administration security units which fall under the respective partner states maritime authorities under section 10(2) of the Act. The Council, however, has the power to delegate the

⁵⁹ Report of the 11th Summit 20th November, 2009, Available at <www.eac.int> (accessed 14.7.13)

⁶⁰Section 247 Lake Victoria Transport Act 2007.

administration of the Lake Victoria Transport Act to the Lake Victoria Basin Commission who shall consequently coordinate its implementation.

The Council also has the mandate under the Lake Victoria Transport Act to make regulations generally for giving effect its provisions pursuant to section 246. In this regard, the Lake Victoria Transport (Maritime Safety) Regulations 2010 which are subsidiary regulations to the LVTA provide specific technical standards for full compliance and easy implementation of the Lake Victoria Transport Act.

2.4 Challenges in the EAC Legislative Process

The challenge in the East African Community legislative process first and foremost arises from how the East African Legislative Assembly is constituted. The Legislative Assembly should serve as the custodian of regional democracy enlargement and consolidation. This has not been fully achieved because there are operational and structural challenges which have continued to negatively impact on the performance of its democratic legislative function. Each partner state is empowered by the Treaty to elect nine (9) representatives. The electoral procedures of the EALA representatives conducted by the National Assemblies of the partner states as prescribed in the treaty, puts into question the legitimacy of the representatives and, by extension, the Assembly itself. There is no Community-wide uniformity in the electoral process. Each partner state is empowered to employ its own electoral laws, rules and regulations when electing the representatives. This indirect electoral process undermines the principles of popular participation and individual sovereignty. This representation affects the perception of East African

Community partner state's citizens who may view the actions of EALA as not being representative of their aspirations.⁶¹

Another challenge in the EAC legislative process is the delayed consensus amongst the Heads of State of the EAC partner states. For any law to become an Act of the Community, there must be a consensus amongst all the Heads of State, and this process in some cases takes a lot of time.

There is also the challenge of slow implementation once the law has been enacted. The main contributor is the lack of goodwill amongst the technocrats in the partner states who implement the law. The presidents are simply overseers of the process and they rely on the technocrats in their countries to ensure that the laws are implemented; this leads to delayed implementation or lack of implementation in some cases.

The will of the partner states to cede some sovereign powers is also lacking, in some cases leading to the slow implementation of the EALA legislation. Despite having EAC legislation governing certain aspects, States still apply domestic legislation which is, in some cases, inconsistent to EAC legislation. A recent case, *Sam Mukira Mochori v The Attorney General*⁶² of Uganda, established the need by the partner states to cede some sovereign powers and allow for the full implementation of the Community legislation. In the case, the EACJ ruled that the denial of entry of the Applicant, a citizen of a Partner State without according him the due process of the law, is illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty. The actions were also illegal and in violation of his rights under Article 104 of the

⁶¹*Supra*, note 10.

⁶²Case no 5 of 2011.

Common Market Protocol.⁶³ The EACJ ruled that on matters pertaining to citizens of the partner states, any provisions of section 52 of Uganda Citizenship and Immigration Control Act⁶⁴ formally inconsistent with the Treaty and Protocol, were rendered inoperative and have no force of law, as of the respective dates of entry into force of the Treaty and Protocol as applicable in the Republic of Uganda.⁶⁵

In consideration of the fact that the Treaties and conventions now form part of the law of Kenya, the question rises as to how treaty law will be interpreted at a domestic level and by whom. Kenya's Constitution is the supreme law of the Republic while the general rules of international law form part of the law of Kenya and any treaty or convention ratified by Kenya forms part of the law of Kenya under the Constitution.⁶⁶ Kenyan courts addressed these issues in the case of *Peter Anyang Nyong'o & 10 others vs. Attorney General & Another*.⁶⁷ The High Court of Kenya found that it and other Kenyan Court had no jurisdiction to determine issues touching on the EAC Treaty or amendments thereof.⁶⁸

While before the EACJ in relation to the Nyong'o case, the first respondent the Attorney General of Kenya was of the view that he was the only person with locus standi to interpret the treaty in Kenya. The EACJ had no jurisdiction to interpret it on behalf of Kenya. The EACJ disagreed and continued to determine whether Kenya's elections laws governing election of members to the

⁶³The Protocol on the Establishment of the East African Community (EAC) Common Market (1 July 2010)

⁶⁴ Cap. 66 Laws of Uganda.

⁶⁵East Africa Court of Justice in its ruling in the case *Sam Mukira Mochori v The Attorney General*, 17th May 2013, Available at <<http://caselaw.ihlda.org/doc/05.2011/view/>> (viewed 24/06/2011).

⁶⁶ Constitution of Kenya 2010 available at <<http://www.parliament.go.ke>> (accessed 25/07/2013).

⁶⁷[2007] elk.

⁶⁸ *Peter Anyang Nyong'o & 10 others vs. Attorney General & Another* [2007] elk, Case number Petition 49 of 2007, delivered 19th March 2007, available at <www.kenyalaw.org> (accessed 25/07/2013).

East African Legislative Assembly were inconsistent with Article 50 of the EAC Treaty. The laws were found to be inconsistent with the EAC treaty.⁶⁹ These inconsistencies between the EAC laws and domestic legislation will continue to pose a challenge to the EAC legislation process.

2.5 Way Forward

The East African Legislative Assembly requires certain changes in order to enable it effectively exercise its mandate as the legislative arm of the East African Community. First, the election of the members of EALA needs to be by all registered voters within the EAC partner states as opposed to the current position where the election is through the legislatures of each Partner State. This will give the EALA ability to represent the citizens of the partner states of the East African Community and will have a positive impact on the acceptability of the legislation from the assembly as the members of EALA will be viewed as the democratic will of the EAC partner states citizens.

There is need to enhance EALA's legislative and oversight role on matters relating to the functions of the Community to ensure that the legislation of the Assembly is actually implemented within the partner states.

An improved relationship between EALA and national parliaments of the partner states is also critical for the Assembly to meet its objectives. The basis of this is that instead of the legislative

⁶⁹ EAC Judgment No. 1 of 2006, *Prof. Peter Anyang Nyong'o and Others vs. Attorney General of Kenya and others* [Nyong'o II], 30th March, 2007, <http://www.eacj.org/docs/judgements/EACJ_Reference_No_1_2006.pdf> (accessed 25/07/2013).

assemblies legislating on issues that have EALA Acts enacted and vice versa, a cordial relationship will enable these legislative bodies' harmonies such laws to avoid enacting of conflicting legislation which make it hard to implement the EAC laws. In this case, EALA laws suffer the most due to the lack of political goodwill in domestic jurisdictions of the partner states to implement laws from the EALA which may be viewed as foreign. Thus, the support of the National Assembly to enact and harmonize legislation within their respective jurisdictions will go a long way in enhancing the implementation of EALA legislation.

Public participation in the legislative process of the Assembly also needs to be enhanced to ensure that the aspirations of the EAC citizens are captured in the formulation of legislation. This will lead to more relevant legislation that will be easier to implement and administer. This can be done through caucuses and public participation forums modulated by the EALA members from each partner state in their own countries.

Though the cost effect of doing this public consultative meetings may be high considering the high populations and vast geographical areas covered by the partner sates, the benefits of the citizens support surpass the cost implications.

CHAPTER THREE

THE LAKE VICTORIA TRANSPORT ACT

3.1 Introduction

The preamble to the Act provides that the Act will mainly make provisions that will serve as a means through which the Community will regulate maritime safety and security. To achieve these two aspects, the provisions for the construction, survey, registration and licensing of all vessels used on the lake are made through the Act. Further provisions are made for the safety of passengers and cargo, provisions for the competency of vessel masters and their crew and for other related matters. Therefore, in a nutshell, the provisions that this chapter focuses on are those relating to maritime safety and maritime security. These will relate to the provisions in relation to security of vessel passengers, vessel crew and cargo being transported on board the vessels.

3.2 Classification of Water Zones

Section 7 of the Act classifies lake waters into sheltered and open water zones. This classification is based on the Council's designation. As it is, this is a form of geographical demarcation of the lake waters. This is vital in maintaining the safety of crew, passengers as well as cargo. Under section 21, it is a prerequisite that a vessel owner should apply to a Council's surveyor to have their vessel inspected. Among other reasons, the survey is aimed at determining the geographical limits or areas of the lake outside which the vessel may not be used, having regard to the construction, suitability for navigation and safe operation of the vessel.⁷⁰ It is based on these findings that a vessel will be permitted to ply only within those areas set out as A, B or

⁷⁰Lake Victoria Transport Act, Section 21(3)(d).

C within section 23(3). The basis of this classification is that the Act will be able to ensure that only vessels that have the capacity to withstand turbulence at a specific zone are given a leeway to ply that zone. This is important as it will ensure safety of vessel users. It is only through the geographical demarcation under section 7, and restrictions under section 23(3), that the surveyor will be able to limit a vessels area of navigation so that the safety of its users is not compromised.

3.3 Administration of the Act

Subject to section 10 of the Act, the Council of Ministers is responsible for the administration of the Act. The Council, however, has the power to delegate the administration of the Act to the Lake Victoria Basin Commission who shall consequently coordinate the implementation of this Act.

Lake Victoria Basin Commission is mandated to coordinate the implementation of this Act; set standards for accreditation and auditing of maritime training institutions; formulate policies and programmes on maritime safety and security and facilitate exchange of information between the Commission and maritime safety and administration security units of the Partner States.⁷¹ The LVBC is additionally to advise the Community on legislative and other matters relating to the management of maritime safety and the implementation of relevant international conventions, treaties and agreements, having a bearing on safety on the Lake and ensure that the maritime training standards together with the certification of members of crew employed on board vessels plying the lake meet the minimum national and international standards.⁷² The Council is required, under section 10(2) of the Act to make regulations for the working arrangements between the

⁷¹ Lake Victoria Transport Act Section 10

⁷² Ibid

Commission and the partner states' maritime safety and administration security units which fall under the respective partner states maritime authorities. A maritime administration unit of a partner state shall then appoint officers who shall be responsible for the management and implementation of the Lake Victoria Transport Act as provided under section 11(3) of the Act. These provisions form the basis of the working relationship between the LVBC and the maritime authorities in each partner state.

The mandate of the maritime administration units is to maintain and administer a registry of vessels registered or licensed in the partner state, enforce safety of navigation including compliance with construction regulations, safety standards and safety navigation regulations, conduct regular inspection of vessels to ensure maritime safety and prevention of pollution on the lake, implement maritime training and adhere to safety standards and set up and maintain of aids to navigation.⁷³

3.4 Mandatory Vessel Registration

The Act makes it mandatory that all vessels plying the lake waters be registered.⁷⁴ Use of a vessel on the lake's waters without registration is a crime under the Act and is to be followed by a penal sanction of either imprisonment or a fine.⁷⁵ This provision is capable of serving both as a safety and security measure. As a safety measure, the provision will regulate the condition of the vessels that are used on the lake's waters. This is such that mandatory registration will ensure that all the vessels are surveyed and only those that are seaworthy and, indeed, safe and secure

⁷³*Supra*, note 2 section 11.

⁷⁴*Supra*, note 2 section 18(4).

⁷⁵*Ibid*.

for all purposes, are the only ones that are registered. Further, upon registration, the proper tonnage of the vessel is verified. This in essence will help curb overloading, a factor that may compromise the vessel's safety. On security, the fact that all the vessels in operation on the lake are registered is likely to eliminate chances of criminal activities from taking place within the lake's waters. This is because if a vessel user puts his vessel into the discharge of such acts as this, their registration details will be used to trace them and bring them to book. This is made possible by the provisions of section 20 that provides for how a vessel should be marked upon registration. This section outlines the requirements of marking that should be followed upon registration. It forbids any kind of alteration on the markings.⁷⁶ Thus, the markings on the vessels are permanent, will be used for referencing the vessel and can only be altered in the manner provided under the Act.

3.3.1 Vessel Inspection

Upon application for registration, a vessel is to undergo inspection. As a requisite for subsequent registration, the inspection aims at achieving several goals. First, is to assess the seaworthiness of the vessel.⁷⁷ Secondly, it is to ascertain whether the vessel is equipped in accordance with the provisions of the Act.⁷⁸ Under section 76 of the Act, for purposes of a survey, a vessel should have the following equipment, namely, hull, boiler and other pressure systems, main and auxiliary machinery, electrical installations, radio installations, radio installations in motor life-boats, portable radio apparatus, survival craft, life-saving appliances, fire detecting and extinguishing appliances, pilot ladders and other equipment, including navigation aids. Further,

⁷⁶*Supra*, note 2 section 20(2).

⁷⁷*Supra*, note 2 section 21(3)(a).

⁷⁸*Supra*, note 2 section 21(3)(b).

the tonnage, dimensions, and method of propulsion are to be ascertained. Most importantly, the competencies attained by the vessel crew will have to be interrogated and ascertained at this point.⁷⁹ All these precautionary undertakings are aimed at ensuring the safety of the passengers and the cargo aboard the vessels. For example, the provisions on maximum tonnage, as well as that of maximum passenger capacity, are vital to avert instances of overloading which, in essence, are risky undertakings that may lead to the vessel in question presenting a real life threat to crew, passengers or cargo. The provision in relation to interrogation of the competencies attained by a vessel's crew is also a fundamental safety element. An incompetent traffic purser presents a threat to the safety of vessel users. Therefore, it is crucial to ascertain the competency level of any vessel crew as a safety measure.

3.3.2 Renewal of Certificate of Seaworthiness

It is essential that the condition of the vessel, upon inspection and subsequent registration, be maintained. This is because the circumstances of continued use may render the vessel unseaworthy over time. To avert any risks that may arise from there, the Act provides for annual renewal of certificate of seaworthiness which is issued initially at registration.⁸⁰ The Act gives the surveyor the power to deny renewal of the certificate of seaworthiness not only because of the lack of certificate, but also if he sufficiently believes that the vessel is being used to perpetrate criminal activities.⁸¹ This provision, therefore, acts as a double edged sword that works at ensuring passenger and cargo safety while, on the other hand, aiming at stamping out criminal activities, thus ensuring security for all lake water users.

⁷⁹*Supra*, note 2 section 21(3)(d)&(f).

⁸⁰*Supra*, note 2 section 22(3).

⁸¹*Supra*, note 2 section 25(c).

3.4 Licensing

The Act provides licensing as an alternative procedure for vessels not registered under Part III of the Act.⁸² Under section 57, the license application must state the construction and horsepower of the vessel, the total number of crew to be carried on the vessel, the number of passengers to be carried on the vessel and the type of cargo to be carried by the vessel.⁸³ This license, unless revoked, is valid for a year from the date it was issued.⁸⁴ This is an important provision because it will enable the surveyors to subject the vessels to annual survey so as to ensure continued seaworthiness before subsequent license renewal. The preconditions for issue of license include the requirement that the vessel must be maintained in a serviceable condition, and must comply with the limits of weight of cargo to be carried, as well as the number of passengers to be carried.⁸⁵ A vessel licensed under this section is to be used only for purposes for which it is licensed.⁸⁶ Just like registration, the option for the issue of license goes a long way towards ensuring the safety of vessel users. By requiring the vessels to operate only within the licensed limits, the provision may help achieve assured safety of the vessel users.

3.5 Surveys and Inspections

As per the provisions of section 67 of the Act, all vessels operating in the waters of the lake are subject to constant surveys and inspections. The surveys are in relation to the following, that is, the haul, boilers and machinery of a vessel, the equipment of a vessel, furnishings and appurtenances, the life-saving, fire fighting and other safety installations and appliances of a

⁸²*Supra*, note 2 section 56.

⁸³*Supra*, note 2 section 56(a)&(f).

⁸⁴*Supra*, note 2 section 59(1).

⁸⁵*Supra*, note 2 section 63(1)(a) and (b).

⁸⁶*Supra*, note 2 section63(4).

vessel, the navigation and communication equipment, storage and manner of loading of cargo and the storage of dangerous goods, the accommodation and facilities of the master and members of crew.⁸⁷ It is only after the surveyor has been satisfied that the vessel meets all the above stated conditions that an inspection certificate can be issued.⁸⁸ It is vide this certificate that the safe limits of operation of the vessel, based on the surveyor's opinion, will be set. To ensure compliance by vessels at all times of the set conditions, the Act empowers the surveyor to conduct a survey on any vessel at any time and to make requisite orders relating to the condition of the vessel in question.⁸⁹

Under section 72(1), a vessel with a gross registered tonnage of one hundred and twenty five tones or above has to comply with the International Safety Management Code (ISM) for the Safe Operation of Ships and for Pollution Prevention, adopted by the International Maritime Organization ISM Code.⁹⁰ Subject to this, no material change is to be made to the structure, machinery and equipment of the vessel without the approval of the Registrar of Vessels, except in instances where direct replacement is required.⁹¹ Under section 74 appointment of a surveyor will be done under the provisions of each Partner State's legislation. This is a clear indication that, among other things, the implementation of this Act is dependent to a great extent on the will of each partner state to legislate, at the domestic level, legislation that will operationalize crucial institutions stipulated under the Act, such as the institution of the vessel surveyor.

⁸⁷*Supra*, note 2 section 67(2)(a)&(f).

⁸⁸*Supra*, note 2 section 67(4).

⁸⁹*Supra*, note 2 section 68.

⁹⁰ISM Code and Guidelines on Implementation of the ISM Code 2010, available at <<http://www.imo.org/OurWork/HumanElement/SafetyManagement/Pages/ISMCode.aspx>> (accessed 29/08/13).

⁹¹Section 72 (2).

Under section 76, before a vessel is put into operation, it has to undergo an initial survey. An initial survey of a vessel shall be carried out before the vessel is put into service, and shall include a complete inspection of the hull, machinery and equipment of the vessel. These have to comply with the international conventions to which Partner States are parties. They also have to be in every respect satisfactory for the service for which the vessel is required. Besides the initial survey, the Act stipulates under section 77, that there should be a periodic survey whose aim will be to ensure continued compliance with the conditions ascertained during the initial survey, as set out in section 76. This is clear indicator that the Act intends to streamline the lake transport system and ensure unrivaled safety and security. The Act provides for a further inspection, referred to as an additional survey, under section 78.

This becomes necessary where the vessel has been involved in an accident. The survey has to yield total compliance before the vessel can resume service. Other instances include when a defect that affects the safety of the vessel or the efficiency or completeness of the life-saving appliances is discovered or when major alterations, repairs, modifications or renewals are made to the vessel.⁹² Its aim is to ensure that the necessary repairs, renewals or modifications, are effectively made, the material and workmanship of the repairs and renewals or modifications are in all respects satisfactory.⁹³ The stringent conditions that the Act sets out so far as survey in pursuit of establishment of seaworthiness of vessels is concerned, are quite fundamental to ensure that transport on the lake remains a safe and secure venture.

⁹²*Supra*, note 2 section 78(1)(a)&(b).

⁹³*Supra*, note 2 section 78 (2).

3.6 Vessel Manning and Safety of Navigation

Section 85 provides that a vessel on the lake shall be manned by a sufficient and efficient crew. The vessel is, therefore, required to have the recommended number of crew on board who are competent. This is aimed at ensuring safety of life while the vessel is sailing. Section 86 makes it an offence whose liability will be shouldered by the ship master if a vessel sails undermanned. Manning, unlike survey registration and licensing which guarantee safety prior to any eventuality, will facilitate safety subject to the occurrence of an eventuality that may compromise the safety of the vessel passengers. Thus, the Act operates in such a way that it provides both preventive and eventual risks and safety.

Under section 93 through to section 95, the Act provides for the navigation requirements for vessels bearing various dimensions. Section 93 provides that it is necessary that information on the vessel's tonnage should be availed on board the vessel to avoid overloading. The navigation requirements and the provision of vessel stability information as set out by the Act are crucial as a safety enhancing measure to avert accidents on the lake. Section 96 obligates a vessel master to convey information to an offshore station or a vessel in the vicinity on any navigation dangers that they have encountered. This will facilitate pursuit of a rescue operation if necessary. For this purpose, the Act forbids every vessel master from embarking on a voyage if the vessel is not equipped with the means of making a distress call.⁹⁴ Section 99 requires an owner or master of a vessel to carry adequate, proper, and up-to-date charts, sailing directions, lists of aids to navigation, notices to mariners, tide tables and any other nautical publications necessary for the

⁹⁴*Supra*, note 2 section 97.

intended voyage. This is aimed at reducing any chances of a vessel getting into a safety compromising position.

Section 103 forbids helm orders by the vessel master that are likely to endanger the safety of the vessel in question or the safety of another vessel by causing collision. Where, subject to the above orders, a collision occurs, section 104 provides that the master of any one of the vessels is to offer assistance to the crew and passengers of the other vessel. However, this is to be done only where the safety of the crew and passengers of the assisting vessel are not endangered in the process.

3.6.1 Conduct by Vessel Crew

Section 144 forbids members of the crew from willfully engaging in conduct that causes an imminent threat of loss or serious damage to the vessel or of the life of any other person in the vessel. Section 145 prescribes offences that members of the crew may be involved in, such as deserting the vessel, assaulting the master or any member of crew, or jointly with another member of crew, neglecting any duty which is required to be discharged, impeding the progress of a voyage or the navigation of the vessel, disobeying lawful commands which are required to be obeyed while the vessel is on the lake, or willfully damaging a vessel or misappropriating any of the stores or cargo of the vessel. As per the provisions of section 45, these acts of misconduct are to be met with stringent disciplinary action. This, together with the provisions of section 146 which set forth regulations for disciplinary offences and discipline of vessel crew, is to be maintained at a very high standard.

3.7 Carriage of Bulk Cargo and Dangerous Goods

Section 172 makes it a fundamental requirement that a vessel carrying bulk cargo as well as dangerous goods, must comply with the applicable requirements as prescribed by the Convention for the Safety of Life at Sea (1974) (SOLAS),⁹⁵ Annex III of the International Convention for the Prevention of Marine Pollution from Vessels (MARPOL 73/78)⁹⁶ and the International Maritime Dangerous Goods Code (IMDG)⁹⁷ of the International Maritime Organization.⁹⁸ This provision is vital because, as a result of it, the lake users are assured of a safe and secure lake.

The most fundamental precautions that the Act prescribes to be taken are prevention of shifting of the bulk cargo.⁹⁹ To this end, it provides that reasonable precautions shall be taken to prevent grain from shifting. Section 175, in relation to cargo, mandates the Council to make regulations relating to its safe carriage and stowage. In coming up with these regulations, the Act requires that the Council should have regard to the Code of Safe Practice for Bulk Cargoes issued by the International Maritime Organization,¹⁰⁰ as well as the safe carriage and stowage of grain in accordance with the safety convention¹⁰¹ issued by the International Maritime Organization.

Under section 176(2), the nature of dangerous goods should be marked on the outside of the package containing them. This should be preceded by a written notice of the nature of the goods and of the name and address of the sender to the owner or master of the vessel. However, it is

⁹⁵Convention for the Safety of life at Sea (1974). Treaties and international agreements Registered on 30 June 1980 No. 18961.

⁹⁶The International Convention for the Prevention of Marine Pollution from Vessels. Annex III, Convention No. 22484 of 1978

⁹⁷International Maritime Dangerous Goods Code adopted by resolution A.716(17)

⁹⁸Supra, note 27

⁹⁹Lake Victoria Transport Act, 2007, section 173.

¹⁰⁰ Available at <<http://www.imo.org/OurWork/Safety/Regulations/Pages/BulkCarriers.aspx>>(accessed 29/08/13).

¹⁰¹Supra, note 26

mandatory that a dangerous goods certificate is obtained by the vessel master before transportation is undertaken.¹⁰² This provision is vital as the certification prior to transportation will help curb the risks that may be occasioned by reckless transportation thereof.

Under section 177, a vessel master loading, discharging or transferring explosives is required to hoist the International Code flag “B” and to display an all round red light during the hours of darkness. To further safeguard against reckless handling and transportation of dangerous cargo, section 182 makes it an offence for a vessel master to transport dangerous goods without distinctly marking the nature of the goods on the outside of the package containing the goods. Under the section, carrying of dangerous goods under a false description constitutes an offence under the Act.

Under section 183, the Council reserves the right to make regulations prescribing the goods, articles and materials to be carried in a vessel as dangerous goods. This right is to be discharged in accordance with the Safety Convention Relating to the Carriage of Dangerous Goods.¹⁰³ This will also incorporate the International Maritime Dangerous Goods (IMDG)¹⁰⁴ and the Code of the International Maritime Organization.¹⁰⁵

¹⁰²Lake Victoria Transport Act, 2007, section 176(3).

¹⁰³Available at <http://www.icao.int/safety/DangerousGoods/Pages/technical-instructions.aspx>, (accessed 29/08/2013)

¹⁰⁴Ibid.

¹⁰⁵*Supra*, note 34

3.8 Vessel Seaworthiness

Besides the restrictions set to determine the seaworthiness of a vessel as a precondition for registration and or issue of license, the Act, under section 184, makes it the responsibility of the vessel master to ensure that he does not release an unseaworthy vessel that endangers the life of any person, property and the environment, into the lake. Such conditions will attract penal sanctions upon such vessel master. Thus, under section 185, the owner or master of a vessel registered or licensed under the Act is required to take all reasonable precautions to ensure that the vessel is seaworthy and is operated in a safe manner. A vessel that is operated in a contrary manner will, under section 186, be detained by the Registrar of Vessels until it is satisfactorily improved.

3.9 Prevention of Pollution from Vessels

Though the Act prohibits pollution by means of vessel discharge under section 214, and makes it an offence under section 212(2), it allows the discharge of waste occurring as a result of damage to a vessel, where discharge is necessary to secure the safety of the vessel or the health of persons on board the vessel or to save their lives.¹⁰⁶ The dumping of wastes or the discharge of sewage is also allowed where this is necessary to secure the safety of the vessel or the health of persons on board the vessel or to save their lives.¹⁰⁷ However, discharge of oil is disallowed. Under section 218, a vessel of a gross registered tonnage of fifty tones or more and an owner or operator of a loading or unloading facility on the lake, are required to have in place an oil pollution emergency plan with appropriately trained shore and vessel personnel capable of responding to and cleaning up oil spillages.

¹⁰⁶*Supra*, note 2 section 213(1)(c).

¹⁰⁷*Supra*, note 2 section 213(1)(d).

3.10 Compulsory Insurance or Security

Section 222 makes it a compulsory requirement that every sea going vessel should have an insurance contract or security to insure persons on the vessel from any eventuality that may arise during their voyage on the lake waters. Though this is a sound provision, the flipside is that the kind of safeguard envisaged herein is not that of protection of life, but that of protection of limb. Thus, if one is injured in the event of an accident, then the insurance will be able to caution him against damages incurred during the accident.

3.11 Lake Victoria Transport (Maritime Safety) Regulations 2010

These regulations form part of the LVTA.¹⁰⁸ They are made by the EAC Council of Ministers, pursuant to the powers conferred to it by section 246 of the Act. The Regulations make provisions in the following areas.

3.11.1 Certification and Surveys

This involves the issue of a certificate of seaworthiness. Regulation 6(1) makes it mandatory for an owner or master of a vessel who wishes to send a vessel on the lake to apply to the vessel surveyor for a Certificate of Seaworthiness. Each vessel operating on the lake is under the regulations at required to all time carry the Certificate of Seaworthiness issued under the Act.¹⁰⁹ Regulation 7 sets the mandate of issuance of this certificate on the surveyor of the partner state in which the vessel is registered. The Regulation provides that the survey for certification is carried out, in respect of a new vessel, after a survey is carried out, before the vessel is put into service, to confirm that the vessel complies with the technical requirements set out in the Act and these

¹⁰⁸ Lake Victoria Transport Act(Lake Victoria Transport (Maritime Safety) Regulations 2010,)

¹⁰⁹Lake Victoria Transport (Maritime Safety) Regulations 2010, regulation 6(5)

Regulations, ¹¹⁰in respect of an existing vessel, after a survey is carried out, to confirm that the vessel complies with the technical requirements set out in the Act and in the Regulations.¹¹¹ Perhaps in ensuring continued compliance with the certification requirements Regulation 7(9) provides that the surveyor may at any time inspect a vessel to confirm that it has a valid Certificate of Seaworthiness and that it satisfies the conditions set out in the Certificate.

Under Regulation 8(5) where major alterations or repairs that modify the structural soundness or characteristics of a vessel are undertaken after a survey, the owner or master of the vessel is required to present it for another survey, prior to any further voyage. This is most likely aimed at ensuring that such repairs or modifications do not compromise the safety of the lake users.

3.11.2 Construction and Equipment

Regulation 10 makes provisions relating to construction of vessels. It states that a vessel's hull of a vessel is required to be sufficiently strong to withstand all stresses to which it is subjected in service under normal conditions.¹¹² In this regard, under sub-regulation (3) an owner or a master of a vessel is required to submit to the surveyor approval plans showing the construction materials and scantlings of the hull.

Under sub-regulation (4) new structures are fitted to existing vessels or there are major conversions of existing vessels which affect the strength of the vessel, adequate strength shall be demonstrated by the presentation of proof in the form of design calculations.

¹¹⁰Ibid regulation 7(a)

¹¹¹ Ibid (b)

¹¹²*Supra*, note 40 regulation 10(2)

Sub-regulation (6) makes it mandatory for the installation of watertight bulkheads extending to the deck or, in the absence of a deck, to the upper edge of the hull planking or plating. Under sub-regulation (7), the accommodation and engine room, and any working spaces forming part of the engine room, should be separated from each other and from the holds by means of watertight bulkheads, to the top of the engine room or the hold. The sub regulation goes on to give the specifications of the material to be used in paragraphs (a) and (b).

Regulation 11 makes provisions in relation to Anchors, chains and anchor cables

Under sub-regulation (4) the anchor mass required by this regulation is:

$$P = k \cdot B \cdot T \text{ (kg)}$$

Where:

B is the breadth of the vessel;

T is the depth of the vessel; and

k is a coefficient given by $45 \times (L/8B)^{0.5}$

L = length of the vessel.

However, under sub regulation (6) a mandate to allow reduction of the standards set out above is placed upon the surveyor. Sub-regulation (7) prohibits the fitting of a vessel with a cast iron anchor. Sub-regulation (9) requires a windlass capable of being operated by hand to be fitted where a vessel carries a single anchor with a mass of 50 kilograms or more. The regulation goes on to provide for the required chain length to be fitted on an anchor under sub-regulation (10) sub-regulation (11) sets the minimum tensile strength of the anchor chains and sets the formulae for their calculations, which is interpreted under sub-regulation (12) sub-regulation (14) gives a

leeway for the use of cables instead of chains provided that the cables have the same tensile strength as that required for chains and are 20% longer than the required chain.

3.11.3 Freeboard and Stability

Under this, regulation 17 stipulates the regulations to be followed in relation to minimum freeboard it states that the minimum freeboard is the freeboard at which a vessel is in the maximum condition of loading meet the stability requirements as determined by a stability proof test, carried out in accordance with regulation 22. In essence, this part seeks to prevent the sinking or capsizing of ships within the lake for both loaded vessels and vessels without any cargo onboard.

3.11.4 Machinery and Bilge Pumping Arrangements

Regulation 31 requires that all machinery and associated installations be designed, constructed and installed in accordance with good engineering practice. Of interest in this part is the vessel engine,¹¹³ power plant, ancillary, boiler and pressure vessel, together with their accessories,¹¹⁴ the engine exhaust system,¹¹⁵ the engine and boiler rooms,¹¹⁶ propulsion machinery,¹¹⁷ fuel tanks, pipes and accessories,¹¹⁸ steering gear,¹¹⁹ steering gear control system,¹²⁰ power source for steering system,¹²¹ bilge pumping systems,¹²² and bilge piping,¹²³

¹¹³Supra note 40, regulation 31.

¹¹⁴Ibid sub regulation (4).

¹¹⁵Supra, note 40, regulation 32.

¹¹⁶Supra, note 40, regulation 33.

¹¹⁷Supra, note 40, regulation 34.

¹¹⁸Supra, note 40, regulation 35.

¹¹⁹Supra, note 40, regulation 37.

¹²⁰Supra, note 40, regulation 38.

¹²¹Supra, note 40, regulation 39.

¹²²Supra, note 40, regulation 42.

3.11.4 Electrical Installations

Regulation 45 stipulates on the electrical installations that may be carried on board a vessel based on its length.¹²⁴ Regulation 46 sets the maximum permissible voltages. Of the electrical installations aboard a vessel regulation 47 provides that for shore connections, only flexible cable insulated by oil-resistant and flame-retardant sheathing shall be used for shore connections.

Other installations considered under the part include generators and motors, regulation 48, batteries under regulation 49, switches, protective devices and circuits under regulation 51, measuring and monitoring devices under regulation 52, lighting under regulation 53, signal lights under regulation 54, earthing under regulation 55, and emergency source of power under regulation 56.

3.11.5 Fire Protection

Under regulation 57 it is mandatory for every vessel to be fitted with the fire extinguishing systems as required under the regulation. Under regulation 59, power-driven vessels are required to carry fire extinguishing materials as set under the regulation as well as portable fire extinguishers.

Other fire extinguishing gears provided for in the regulations include; Fire extinguishing systems under regulation 60, fixed foam fire extinguishing system under regulation 61, fire pumps under regulation 63 and hydrants and hoses under regulation 64.

¹²³*Supra*, note 40, regulation 43.

¹²⁴*Supra* note 40, regulation 45(1)

3.11.6 Other general Provisions

Provisions set under this head are those that the Act already provided for. Thus, under the regulations they are set forth in elaborate terms for administrative and implementation purposes. Under regulation 67 to regulation 80, the regulations make provisions aimed at giving directions in relation to life-saving arrangements and appliances. These are aimed at aiding those in distress at the lake.

Under regulation 81 to regulation 84 provisions are made in relation to communications equipment. This equipment is useful in the communication as between the vessel crew and the control tower. The part gives the specifications of the equipment that should be used. Conclusively, the regulations are made in a way that they make it possible for the implementation of the Act as they state its provisions in more clearer and elaborate terms

3.12 Conclusion

Despite having the law in place, there is still a concern that vessels have not been registered or issued with licenses as per the provisions of the Act and the regulations.¹²⁵ There is need to ensure that operators register their vessels in order to get seaworthiness certificate for vessels with capacity of over 12 passengers and ensure they are in good condition to curb accidents.

The regulations stipulate that vessels must have life-jackets, radar reflectors and firefighting equipment, among other requirements, before being registered. These provisions are currently not being implemented as there are still instances where there have been accidents and fatalities

¹²⁵ KAM seeks to improve safety on Lake Victoria, Available at <<http://www.the-star.co.ke/news/article-20849/kma-seeks-boost-safety-l-victoria>> (accessed 28/08/2013).

due to the failure to have life jackets on board. There is clearly a gap between the legal provisions and actual implementation.

The administration of the Act is carried out by two separate bodies, the Lake Victoria Basin Commission and maritime administration Units within the partner states. The implementation of the Act is linked to the establishment of the maritime administration units by Partner States. However, the period for the establishment of the units is not provided. The delay in the implementation of the Act has been attributed to the member states' failure to set up the maritime administration units.¹²⁶ This is clearly a gap in the Act as a time period for creation of the units should have been stipulated, with an interim measure for cases where there was delayed implementation by Partner States.

¹²⁶ Lake Victoria Transport Law becomes operational, Available at <<http://in2eastfrica.net/lake-victoria-transport-law-becomes-operational/>> (accessed 29/08/13).

CHAPTER FOUR

STATUS OF THE IMPLEMENTATION OF THE LAKE VICTORIA TRANSPORT ACT IN KENYA

4.1 Introduction

The Lake Victoria Transport Act was enacted in 2007 and the Council directed that the coming into full effect would be dependent upon the approval of the Lake Victoria Transport Maritime Safety Regulations¹²⁷ and the Lake Victoria Transport (Fees) Regulations.¹²⁸ Both the Lake Victoria Transport Maritime Safety Regulations, which were approved in November 2010 and the Lake Victoria Transport (Fees) Regulations of 2010, were approved by the Sectoral Council of Ministers for Lake Victoria Basin to commence operation in 1st July, 2011.¹²⁹

This was the first step that gave life to the implementation process of the Act. The period following the approval has seen efforts towards sensitization carried out by the Council's Secretariat through seminars. These seminars have helped bring together officials from maritime administration authorities of the Partner States, ship owners, fishermen, skippers and surveyors and other stakeholders. The seminars have taken the centre stage as some of the initial undertakings by the Council's Secretariat aimed at preparing the ground for the implementation of the Act. So far, there are a number of requirements under the Act that have been implemented by Kenya as one of the partner states of the EAC.¹³⁰

¹²⁷ Available at http://www.lvbcom.org/index.php/2013-03-07-10-27-25/vacancies/doc_details/46-lake-victoria-maritime-safety-regulations-2010?tmpl=component (accessed 23. 9.2013).

¹²⁸ Available at http://www.eac.int/legal/index.php?option=com_docman&task=doc_details&gid=149&Itemid=227 (accessed 23.9.2013).

¹²⁹ Sensitization workshops in the partner states for the Lake Victoria Transport Act, 2007 and the Lake Victoria Transport (Maritime Safety) Regulations 2010. Workshops Report pp 2 REF: EAC/LVBC/SC10/DOC BP 4.2A/2012.

¹³⁰ Ibid.

4.2 Passing of the Merchant Shipping Act

As a matter of law, the Lake Victoria Transport Act overrides the domestic legislation of any one of the partner states of the EAC.¹³¹ This means that where there is a conflict between the laws of any one Partner States and the laws of the EAC, then the EAC's laws prevail. However, the Act in itself is not self-executing. There are provisions within the Act that require that partner states come up with maritime authorities to help implement the Act in the domestic jurisdictions. Consequently, one of the major ways through which the partner states may pursue implementation of the Act is by passing legislation that will bring into existence the maritime authorities that are tasked with the implementation of the provisions of the Act. For example, section 74 the Act provides that appointment of a vessel surveyor is to be done under the provisions of each Partner State's legislation. Considering the importance of the institution of the vessel surveyor, especially pertaining to registration and licensing, a failure on the part of a Partner State is likely to undermine the Act's aims and objects. The passing of the Merchant Shipping Act¹³² was, therefore, a bold step towards the implementation of the Lake Victoria Transport Act by Kenya as a partner state. However, for Kenya, the buck does not stop at the passing of the Act; the country must follow through and ensure that the Act is implemented. The full implementation of the Merchants Shipping Act will contribute to the operationalisation of the LVTA. This is opined based on the fact that it is an enabling statute of the LVTA.

To gauge its implementation, it is prudent to first of all look at what its most fundamental provisions in relation to the LVTA are. Generally, the Merchant Shipping Act provides for the registration and licensing of Kenyan ships. The Merchant Shipping Act's provisions aim at

¹³¹ Lake Victoria Transport Act Section 247

¹³² Merchant Shipping Act No. 4 of 2009

effectuating the registration requirements that are set out in Part III of the Lake Victoria Transport Act on Kenya's part as a partner state. The provisions also will serve to actualize the provisions of Part V of the Lake Victoria Transport Act which provides for the issue of licenses for vessels plying the lake as a condition for registration, if implemented.

The Merchant Shipping Act handles registration of vessels and vessel licensing on separate provisions.¹³³ Lake Victoria Transport Act requires state partners to effect its implementation in their domestic jurisdictions, by giving registration and licensing special considerations. The manner in which this Act has been drafted shows a clear move towards implementing the LVTA as it has given each, special consideration. Under registration, one of the fundamental requirements is set out by section 18(a). Under this, the minister is required to make regulations prescribing the manner and conditions under which persons or classes of persons who are not Kenyan citizens may own Kenyan ships. This policy has not been pursued yet by any of the incumbent ministers for transport.¹³⁴ However, according to Kenya Maritime Authority (KMA) Director General Nancy Karigithu,¹³⁵ there is much lobbying being done in the sidelines to ensure that this is done so as to welcome the input of any foreigners who may be interested in investing in the shipping sector in Kenya.

In relation to licensing of Kenyan ships, the Act stipulates that the Minister may make regulations regarding licensing of ships. The regulations will cover, the manning and life-saving,

¹³³The merchant shipping Act Part IV

¹³⁴Patrick Beja, Ship owners urge leaders to revamp maritime laws, standard digital September 25, 2013. http://www.standardmedia.co.ke/?articleID=2000067597&story_title=ship-owners-urge-leaders-to-revamp-maritime-laws (accessed 23.9.2013)

¹³⁵ As quoted in *ibid*

safety and fire-fighting equipment to be carried on such ships, the examination and certification of officers, skippers, mechanics and deckhands, surveys and inspections, the appointment of surveyors, the keeping of records, fees, discipline, operating permits, exemption of ships from licensing. As at 2012, there was no policy in this direction by the minister in charge of transport. However, the KMA had stated that by August 2013, a law will be put in place to apply to the licensing of ships operating in Kenya's waters unless registered in another country.¹³⁶ Unfortunately, this has not taken place.

Secondly, the Act also addresses the issue of certification of members of crew employed on board vessels.¹³⁷ This is in pursuit of fulfilling the requirements under Section 21 of the Lake Victoria Transport Act, which makes provisions in relation to survey and inspection of a vessel. In this, the LVTA provides that one of the considerations while inspecting a vessel is the standard of competency that has been attained by the vessel's crew. However, there is a gaping absence of legally established manning agencies for seafarers in Kenya; there is no proper replacement and recruitment of seafarers in the country.¹³⁸ Therefore, the recommended solution is to harness the unique power of the office of the Merchant Shipping Superintendent, Ship Owners and Seafarers Union of Kenya to ensure competency based recruitment to actualise the implementation of the LVTA.¹³⁹

¹³⁶Rawlings Otini, Kenyan ships to be licensed by end of August, says KMA, Business Daily Wednesday September 25, 2013

<<http://www.businessdailyafrica.com/Corporate+News/Kenyan+ships+to+be+licensed+by+end+of+August++says+KMA++/-/539550/1456576/-/kycipmz/-/index.html>> (accessed 23.9.2013)

¹³⁷Supra note 9 section 176

¹³⁸Kenya Seafarers - ECOP-marine<<http://www.ecop.info/english/e-sap-net-2.htm>> (accessed 23.9.2013)

¹³⁹ Ibid

In the quest to implement the provisions of the Lake Victoria Transport Act the Merchant Shipping Act provides for stringent rules relating to competencies gained by crew. It provides that the crew of vessels plying the lake have to meet the minimum national and international standards of competency.¹⁴⁰ This is in tandem with the provisions of section 10 of the Lake Victoria Transport Act. In the operationalisation of these competencies, the curriculum used by maritime training institutions will have to be within the standards for accreditation and auditing of maritime training institutions that are set by the Lake Victoria Basin Commission.¹⁴¹ This is aimed at ensuring that the maritime training standards, together with the certification of members of crew employed on board vessels plying the lake, meet the minimum national and international standards.

Further, the offering of such training under the Maritime Shipping Act will enable crew members fulfill the required standards for award of certificates of competency under Part VII of the Lake Victoria Transport Act which deals with the issue of certificates of competency and manning. Being, as it is, that the Lake Victoria Transport Act takes precedence over any national legislation as regards any matter to which the Act relates as provided for under Section 247, any provisions of the Merchant Shipping Act that will be in contravention of the Lake Victoria Transport Act will be considered null.

¹⁴⁰ *Supra*, note 7 section 170.

¹⁴¹ *Supra*, note 7 section 10(1) (b).

4.3 Establishment of Implementation Authorities

4.3.1 The Kenya Maritime Authority

The Kenya Maritime Authority is established under the Kenya Maritime Authority Act.¹⁴² The LVTA has having stated earlier, under section 74, obligated the partner states to constitute maritime authorities that will aid the implementation of its provisions within the domestic jurisdictions. The fact that Kenya as a country did its part in establishing the authority and its enabling statute, is clear evidence that the LVTA' implementation is being pursued.

The key functions of this Authority include the regulation of activities with regard to shipping in the inland waterways. In the discharge of this regulation mandate, the authority may levy its focus on navigation safety.¹⁴³ The Lake Victoria Transport Act in its Part VIII makes various provisions in relation to this aspect of navigation safety.¹⁴⁴

These provisions relating to navigation safety set out what the position of Lake Victoria Transport Act is, and what the Kenya Maritime Authority need to implement. However, Kenya Maritime Authority, through its constitutive statute, the Kenya Maritime Authority Act, provides a complementary legal framework in relation to navigation safety. Though the Kenya Maritime Authority Act came into operation earlier, as compared to the Lake Victoria Transport Act, its complementary task is comparably relevant in the pursuit of implementation of the Lake Victoria Transport Act unless any of its provisions are overridden by those of the Lake Victoria Transport Act as prescribed under its section 247.

¹⁴² Act no 2 Of 2006

¹⁴³ Ibid, section 19

¹⁴⁴ *Supra*, note 3 section 93

By 2008, the Director General of KMA disclosed that KMA had put up an office on the lake side City of Kisumu.¹⁴⁵ This was followed by the establishment of maritime administration units to aid the implementation of the Lake Victoria Transport Act. The units were considered to be vital to the enforcement of safety navigation rules in Lake Victoria waters.¹⁴⁶ The main purpose of the units is to ensure that safety standards and compliance with construction and regulations governing the lake transport are strictly observed, not only by Kenya, but also by the other Partner States. Besides the maritime administration units, the KMA stated in its report that it was engaging beach management units in order to help inspect vessels and inform boat owners of the new requirements as provided in the Lake Victoria Transport Act. The units would be used to provide maritime training for all lake users, maintain and administer a registration of all vessels using the lake in all EAC countries, conduct regular inspection of vessels to ensure the lake was not polluted, and ensure navigation aids, such as life jackets, were set up and maintained to prevent fatal accidents.¹⁴⁷

In the recent past, KMA has come out as a committed authority in ensuring safety in the waters of Lake Victoria. In 2012 it issued a notice that vessels plying the Lake Victoria waters have until June 1, 2012 to comply with the Kenya Maritime Authority safety regulations or be deregistered.¹⁴⁸ Its major boost has been the operationalisation of the Kenya Maritime Authority safety regulations. Regulations require operators to register their vessels and ensure they are in

¹⁴⁵Omolo L; East African States to have joint safety precautions in Lake Victoria waters. *African Press International* October 3, 2008. <<http://africanpress.me/2008/10/page/21/>> (accessed 23.09.2013)

¹⁴⁶ Ibid.

¹⁴⁷ *Supra*, note 13

¹⁴⁸ <<http://www.kma.co.ke>> (accessed 30.09.2013).

good condition to curb accidents.¹⁴⁹ Under the regulations vessels with a capacity of more than 12 passengers are required to register with KMA in order to get seaworthiness certificate. Those with a capacity of less than 12 passengers will need a license before being allowed to operate. Further, the regulations stipulate that vessels must have life-jackets, radar reflectors and firefighting equipment among other requirements before being registered.¹⁵⁰

According to the KMA General Director Nancy Karigithu the Authority has embarked on awareness to sensitize its stakeholders on safety of life at sea, search and rescue activities on the lake. On pollution she confirmed measures are being put in place to control discharge of effluents from factories and industries into the Lake.¹⁵¹

There are a number of commitments that have been made under the auspices of the KMA. However, most of the commitments by its management have not been fully implemented. For example by September 2013, the de-registration notice for vessels that have not received the seaworthiness certificate by June 1 2012 is yet to be effected. As a result vessels that are not seaworthy continue plying the waters of the lake.¹⁵² This goes against the provisions and the spirit of the LVTA.

¹⁴⁹Wilfred Kagimbi KMA ship surveyor speaking during a sensitisation and enforcement workshop at Tom Mboya Labour College in Kisumu. As quoted in Ibid.

¹⁵⁰ Regulation 23.

¹⁵¹KMA General Director Nancy Karigithu as quoted in Justus Ochieng, KMA seeks to boost safety on L. Victoria, The Star; Thursday, April 26, 2012 <<http://www.the-star.co.ke/news/article-20849/kma-seeks-boost-safety-l-victoria#sthash.GrEns9V8.dpuf>> (accessed 23.9.2013).

¹⁵² *Supra*, note 20.

4.3.2 The Lake Basin Development Authority

The Lake Basin Development Authority is established under the Lake Basin Development Authority Act.¹⁵³ Though it is not one of the authorities set out under the LVTA to help in its implementation, its functions are to a great extent related to what the LVTA aims at achieving in the Lake Victoria transport system. Its functions include the monitoring of operations and providing technical reports of any agreement or arrangements between Kenya and other states relating to the use of the waters of Lake Victoria. In relation to the implementation of the Lake Victoria Transport Act and its provisions, the Lake Basin Development Authority is likely to play a pivotal role through acting as a monitor from the Kenyan side. This is crucial, because from the Community level, there is no mechanism that has been set to monitor the implementation of Community laws in the partner states. This will hasten the implementation process issuing reports on how far the implementation process has gone.

4.3.4 Lake Victoria Basin Commission

Lake Victoria Basin Commission (LVBC) is a specialized institution of the EAC that is responsible for coordinating the sustainable development agenda of the Lake Victoria Basin.¹⁵⁴ Though the LVBC is not a Kenyan body, its operations affect the implementation of the LVTA on Kenya's part. Lake Victoria is a shared resource therefore whatever each partner state does in terms of implementation, affects the way the other partner states go about their part in implementing the Act. Therefore, though not a Kenyan body, Kenya has through it made an input in the implementation of the LVTA.

¹⁵³ Cap 445 laws of Kenya

¹⁵⁴ Article 114 Treaty for Establishment of the East African Community (1999)

The establishment of the Commission has, however, been sequential and basing itself on study outputs and step-wise building of the institution. First the Partner States, in the second EAC Development Strategy (1997-2000), designated the Lake Victoria and its basin as an economic growth zone to be exploited in a coordinated manner. In order to realize this, a study to determine the legal and institutional arrangements for managing the basin was commissioned by the EAC Secretariat.

The broad mandate of the Commission is provided for under Article 33(2) of the Protocol for Sustainable Development of Lake Victoria Basin, namely, to promote equitable economic growth; promote measures aimed at eradicating poverty; promote sustainable utilization and management of natural resources; promote the protection of environment of the Lake Victoria Basin; and promote compliance on safety of navigation. The general scope of cooperation is detailed in Article 3 of the Protocol. The LVBC addresses these issues through the Maritime Transport, Security and Safety Programme, and one of the key roles of the Commission is operationalize the implementation of the Lake Victoria Transport Act.¹⁵⁵

Besides offering rescue services, the LVBC intends to use the stations as training centers where people can learn about maritime safety. Special target towards this end are the fishermen many of whom have fallen easy prey to the dangers of the lake waters in the past. In a quest to implement the provisions of the Lake Victoria Transport Act in relation to rescue and salvage of passengers' cargo and crew, the commission has embarked on the process of putting in place a maritime telecommunication network. The network is set to cover the lake surface as well as the

¹⁵⁵ Operation Strategy Lake Victoria Basin Commission, 2007, LVBC

entire shoreline.¹⁵⁶ Towards this end an emergency toll free number 110, which can be used for search and rescue services in Lake Victoria by anyone in distress has also been adopted for use by the national regulatory authorities of each of the EAC states. Along with the telecommunication network, the LVBC has launched a pilot emergency response control and positioning center. The pilot emergency response control and positioning centre had by December 2012 already undergone testing in Kampala Uganda. The pilot emergency response and positioning centre's network is expected to cover over 80 per cent of the fishing areas of the lake.¹⁵⁷ The extent of the implementation of the said phase one of the project that seeks to ensure safety on the lake is said to have started three years ago at a cost of 20 million US dollars while its second phase may require additional an 10 million US dollars to complete.¹⁵⁸ This far, it is evident that the implementation process is still on course.

The Lake Victoria Transport Act currently, is not only concerned with the streamlining of transportation on the lake waters. It also seeks to curb inland pollution of the lake by discharge of pollutants into the lake waters by vessels as well as offshore pollution from on the lake basin. To achieve offshore regulation, the Lake Victoria Transport Act acts through the national regulatory authorities. It is for this reason that the LVBC is facilitating and promoting the implementation of a number of key community driven projects executed by various state actors in each Partner State. Amongst these projects is water supply and sanitation projects, protection of water catchment areas, income generating activities which in the end should aid it in its vision of

¹⁵⁶ *Supra* note 30

¹⁵⁷ *Supra*, note 30

¹⁵⁸ *Supra*, note 30

having a prosperous population living in a healthy and a sustainably managed environment.¹⁵⁹

These initiatives are key tool towards identifying major gaps that may exist and the overall impact of their implementation to the community, through the initiatives LVBC is able to identify priority areas that would need quick intervention by the Partner state, the initiative act as tool to institutional development that will go a long way in implementation of the legislation.

¹⁵⁹ *Supra*, note 30

CHAPTER FIVE
CHALLENGES TO THE IMPLEMENTATION OF THE LAKE VICTORIA
TRANSPORT ACT IN KENYA

5.1 Introduction

The LVTA was to be fully implemented by July 2011 as set by the council of ministers of the EAC. Though this date elapsed, the implementation process is yet to be fully concluded. This is a clear indication that the implementation process has been rife with challenges and that have contributed to the delay in the full implementation of the Act. Some of the challenges are discussed here below.

5.2 Financial Constraints

The implementation of the Lake Victoria Act requires financial investment by the Partner States as there are various undertakings within the Act that are cost intensive. Financing is required to set up the systems and processes towards the operationalisation of the provisions of the Act. Kenya has however continued to face financial constraints that have lead to its failure to fully implement of the Lake Victoria Transport Act.¹⁶⁰ For example, as at the time the LVTA was coming into force in the year 2007, the economy of the country was growing at a rate of 5%. Soon thereafter, the growth rate plunged to a low of 2%.¹⁶¹ A survey on the Gross Domestic Product (GDP) in Kenya starting 2007 to 2013 show that the Kenya's GDP Growth Rate averaged 1.2 Percent reaching an all time high of 3.5 Percent in March of 2010 and a record low

¹⁶⁰ Republic Of Kenya Ministry Of Transport Integrated National Transport Policy: Moving A Working Nation May 2009 <marsgroupkenya.org/pdfs/2011/01/Ministry_PDFS/Ministry_of_Transport/intp.pdf> (accessed 23.09.2013)

¹⁶¹ Kenya National Bureau of Statistics, statistics for the year 2007 to 2013.

of -2.4 Percent in March of 2008.¹⁶² Based on this statistics, it is evident that Kenya has grappled with financial constrains over the years and the financing to actualise the Act may not be available.

The Ministry of Transport and Infrastructure, which is the parent ministry for the KMA, has not availed the necessary funds for implementation of the provisions of the Act. In the budgetary allocation for the financial year 2013/2014, the ministry was allocated Ksh125.72 billion which is comparatively lower than Ksh 268 billion in the 2012/2013 financial year budget. Consequently the amount allocated in year 2013/2014 for transport management and safety in the transport sector is Kshs 4.27 billion. This amount may not be adequate to pursue the safety issues regarding transport on the Lake Victoria and other related implementation purposes. There are also financial challenges within the East African Community. The LVBC for example, had a budget of USD 2,858,519 in the financial year 2007-2008 to be financed by contributions from partner states. The partner states however only managed to raise USD 1,664,019.¹⁶³

5.3 Lack of manpower

The implementation of the Act is labour intensive and requires the partners States investment in manpower. For example, under Part III dealing with registration of vessels, the Act requires that a detailed survey has to be done on all the vessels before they are registered to operate on the lake. Therefore, from the basic minimum, there is need for qualified surveyors to ensure that the very basic requirement of the Act is implemented. The governments of the Partner States must

¹⁶² Available at <<http://www.tradingeconomics.com/kenya/gdp-growth> > (accessed 23.9.2013).

¹⁶³ East African Community Lake Victoria Basin Commission, Operational Strategy Lake Victoria Basin Commission (2007-2010), 2007 at pp.14.

invest in the recruitment and training of the human capital in order to ensure that they are equipped with the right competencies.

The implementing institution, the LVBC, is mandated to publicize the Act to all stakeholders and lake users. This requires pool of human resources and financing considering the large numbers of people that will be targeted for this kind of publicity. The publicizing of the Act has not been well discharged,¹⁶⁴ which is an indication that there must be staffing constraints. For instance, in a stakeholders' sensitization program that was carried out in the year 2011, almost four years from the time the Act came into force, the stakeholders made recommendations that were indicative that sensitization was yet to start. Some of the recommendations included one that the EAC, Lake Victoria Basin Commission and the Kenya Maritime Authority, should carry out sensitization of Lake Victoria Transport Act 2007, for the implementation of Lake Victoria Transport Maritime Safety Regulations 2010 within the beaches, to help the implementation of the Act at the grassroots level.¹⁶⁵ The issue of manpower deficiency, therefore, remains to be one of challenges facing the implementation of the Act in Kenya.

5. 4 Lack of a follow up mechanism

There is need to ensure that there is continuous monitoring and evaluation of the Act's implementation in order to meet all the milestones under the LVTA. This has not been the case so far an example has been cited earlier on in the research where the KMA, subject to Maritime Safety Regulations, made a declaration that by June 1st 2012 all ships plying the Lake Victoria

¹⁶⁴Report on the sensitization workshops in the partner states for the Lake Victoria Transport Act, 2007 and the Lake Victoria Transport (Maritime Safety) Code. Held at Tom Mboya on 19th - 22nd September 2011.

¹⁶⁵ Ibid

Waters must be registered was not followed up. As a result, unseaworthy vessels continue to ply the lake thus compromising safety in the lake which is one of the fundamental issues that the LVTA seeks to rid the lake.

5.5 Lack of collaboration between partner states

Lake Victoria is a shared resource and the LVTA clearly required all members' states to set up maritime unit. Kenya has established the Kenya Maritime Authority, Tanzania the Surface and Marine Transport Regulatory Authority (SUMTRA). Uganda is however yet to establish a maritime unit¹⁶⁶. The lack of collaboration between the maritime units of the partners' states will impact on the implementation of the Act within Kenya as the vessels of the other partner states plying the waters will not meet the same requirements and this will impact negatively on the overall safety on the lake.

5.6 Kenya Maritime Authority implementation role

The Kenya Maritime Authority's mandate has been to oversee the high seas and implementation of legislation on the same. The Kenya Merchants and Shipping Act 2009 however expanded their mandate to inland waters. Under the LVTA, KMA are also the maritime unit responsible for overseeing the implementation of the Act. This is a challenge as the mindset of KMA has been primarily related to the high seas. The capacity for enforcement of legislation in inland waters is however limited.

¹⁶⁶ Uganda Election Supply for Kenyan Traders available at <http://allafrica.com/stories/201302110439.html?viewall=1> accessed on 1.10.13

5.8 Two separate legislations governing Lake Victoria

The Lake Victoria Transport Act is the Act of the Community that governs the Lake Victoria as a shared resource in East Africa. The Act is not self executing as stated within the research and provides for implementation through maritime administrative units of partner states. In Kenya, the Merchants Shipping Act 2009 applies to the regulation of ships within the inland waters and gives KMA the enforcement and implementation authority. The provisions of the Merchants Shipping Act are however wider than those of the LVTA as the Act was mainly drafted to be applicable to the High Seas. In carrying out of its mandate the KMA will be required to consider both Acts.

5.6 Kenya's efforts towards countering these challenges

Under section 11 of the Lake Victoria Transport Act, the respective governments of partner states should seek to implement it through state authorities. There is documentary evidence that within less than a year of the coming into force of the Lake Victoria Transport Act, the state authority tasked with its implementation in Kenya, the KMA was already in site at Kisumu, setting up maritime administration units to help in the implementation of the Lake Victoria Transport Act. The units were to ensure safety standards and compliance with construction and regulations governing the lake transport were strictly observed. They were meant to achieve this by way of sensitization of the lake users as well ensuring proper tools, equipment were in place¹⁶⁷. Besides these units, KMA was at the time engaging beach management units in order to help in inspection of vessels and inform boat owners of the new requirements as provided in the Lake Victoria Transport Act which was yet to be operational.

¹⁶⁷ Supra (n 1)

The government has also set aside funds for the transport management and safety in the transport sector and allocated Kshs 4.27 billion in year 2013/2014. The funds may not be adequate but are a step in the right direction as they indicate the commitment and goodwill of the government to support the implementation of the Act.¹⁶⁸ As the economy continues to grow, the exchequer may be able to assign additional funds that may make it possible for the KMA to be able to fully execute its mandate to implement the LVTA.

¹⁶⁸ *Supra*, note 1

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

The Lake Victoria Transport Act is a legislation of the East African Legislative Assembly. Under Article 8(4) of the Treaty establishing the EAC the Act takes precedence over similar national Acts on matters incidental to the implementation of the EAC treaty. Though not expressly provided for as a source of law in Kenya as an Act of the EALA under the Constitution or the Judicature Act,¹⁶⁹ the LVTA becomes a source of law in Kenya through the EAC Treaty which was ratified by Kenya. Article 2(6) the treaty therefore forms part of the sources of law in Kenya. The phrase “matters pertaining to the implementation of the treaty” implies that the most central point is to ensure that the objectives of establishing the Community, namely, to develop policies and programmes aimed at widening and deepening cooperation among partner states in political, economic, social and cultural fields, research and technology, defense, security and legal and judicial affairs for mutual benefit,” as per Article 5(1) of the Treaty, are realized.

Upon receipt of presidential assent by all the Heads of State, the LVTA become law in the Partner states with the same force as national law.¹⁷⁰ It thus does not require any additional enactment or transposition procedures. After receiving presidential assent, by the virtue of the Treaty, the EALA legislations form part of the partner states domestic laws. Article 7 of the Treaty for the Establishment of the EAC provides for operational principles of the Community.

¹⁶⁹ Cap 80 Laws of Kenya

¹⁷⁰ Article 63 as elaborated in; International Democracy Watch, East African Legislative Assembly, 2012, Available at <http://www.internationaldemocracywatch.org/index.php/east-african-legislative-assembly>,(accessed 24/6/2013).

The principles shall govern the practical achievement of the objectives of the Community and include the provision by the Partner States of an adequate and appropriate enabling environment. This includes development of relevant policies and basic infrastructure. The partner states therefore need to establish authorities within their jurisdictions to enable smooth implementation. This is the case with the LVTA where the partner states are required under its section 74 to establish Authorities that will enable the jurisdictions implement its provisions. Kenya is under a legal obligation to ensure that the Act receives full implementation.

The research has determined that the LVTA creates a very vibrant legal framework through which the East African Community can regulate marine transport on Lake Victoria to maximize on its economic benefits. This is clear from the analysis of the Acts provisions under chapter two of the research paper. The fact that set timelines set have lapsed with little achievements of the milestones, is evidence that the Act has not been well executed in Kenya and this has negated these prospective gains.

As at 2009 a policy paper by the ministry of transport showed that there are inadequate regulatory services to oversee safety and security matters on Lake Victoria,¹⁷¹ there were no maritime police units at the Lake Victoria.¹⁷² Communication facilities in Lake Victoria waters were inadequate;¹⁷³ the development for maritime sub-sector experts such as seaworthiness surveyors, accident investigators, trainers, examiners, engineers and pilots among others was still

¹⁷¹ Ministry Of Transport, Integrated National Transport Policy: Moving A Working Nation. May 2009<marsgroupkenya.org/pdfs/2011/01/Ministry_PDFS/Ministry_of_Transport/intp.pdf> (accessed 23.09.2013). Paragraph g pp. 93

¹⁷² Ibid.

¹⁷³ *Supra*, note 3 Para (f).

hampered by high costs of training maritime personnel the impact of which there is limited human resource in this area.¹⁷⁴ There is only one maritime training institution in Kenya which is the Bandari College in Mombasa which is the only credible institution in the country that teaches some aspects of seafaring. However, its courses do not meet the requirements of the international conventions hence; the country has a shortage of senior cadres like captains, chief mates, officer in-charge of national watch radio operator, chief engineer, and officer in-charge of engine watch as well as ship surveyors, pilots, naval architects, marine engineers, hydrographers and cartographers among others.¹⁷⁵ As at 2011, four years after the Act come into force, a sectoral sensitization forum was held in each of the Partner States. Sector players from Kenya, still felt that there was a lot that had not been done as most of the issues that had been identified in the policy paper still remained undone.

Partner States were additionally expected to ensure implementation was prioritized through domestication of laws that would enhance a smooth sail. Though this has been done, it has been noted that the implementation process is affected by lack of harmonization within the partner states. The greatest problem seems to be the lack of structural means of implementation as well as a mechanism for reporting progress. Perhaps this explains why, the policy paper has not been effected years after it was set forth.

Kenya has, to an extent, tried to implement the Lake Victoria Transport Act. This is characterized by the state's quest towards setting up the legislative mechanisms that are required to meet the requirements for the implementation of the Act. Some of these, include the

¹⁷⁴ *Supra*, note 3 Para b pp. 94.

¹⁷⁵ *Supra*, note 3 Para d.

enactment of the Merchant Shipping Act which has enabled Kenya to satisfy section 74 of the LVTA that requires that partner states make laws in various areas incidental to its provisions of the Act to give effect to the institutions that are stipulated in the Act.

Based on the enactment of the Merchant Shipping Act, Kenya is able to discharge mandates such as appointment of vessel surveyors as provided for under section 74 of the LVTA. Secondly, the LVTA requires that partner states set up Maritime authorities that will foresee its implementation in the domestic jurisdictions. In this respect, Kenya has made bold steps by the establishment of the Kenya Maritime Authority. This is a fundamental action geared towards ensuring that the LVTA's provisions are implemented as these institutions, main purpose is supporting the Acts implementation process.¹⁷⁶

In relation to the enactment of the Merchant Shipping Act, Kenya has made further strides by enacting regulations that are aimed to at implementing the Act. These include the Merchant Shipping (Maritime Service Providers) Regulations, 2011,¹⁷⁷ The Merchant Shipping (Port State Control) regulations, 2011,¹⁷⁸ The Merchant Shipping (Fees) Regulations, 2011,¹⁷⁹ these regulations are sector specific in nature thus laying the required keen interest on each specific are of regulation envisaged in the Act.

¹⁷⁶ Operational Strategy Lake Victoria Basin Commission (2007-2010), 2007, Lake Victoria Basin Commission Secretariat

¹⁷⁷ Legal notice no.112 of 2011

¹⁷⁸ Legal notice no. 191 of 2011

¹⁷⁹ Legal notice no.192 of 2011

Despite having the steps geared towards enactment of the LVTA, there is still a lot that has not been done based on the stakeholders concerns over lack of the most basic structures required as a matter of implementation of the LVTA at the Lake as at 2011.¹⁸⁰ These in essence, pointed out to existing gaps in the implementation of the Act.

The recommendations and the findings from the chapter dealing with the interrogation of Kenya's implementation of the LVTA indicate that though the systems aimed at actualizing the Act's implementation are in place, implementation has not been fully actualized. The challenges include Insufficient Governmental Support, this has been seen to mostly impact negatively on the government institutions that are required to be in place and play an instrumental role in the Acts implementation such as the KMA. Lack of manpower is another challenge.

It's a big challenge because the Act's implementation needs quite a number of specialized officers such as surveyors, rescue personnel and crew member trainers. The lack of these personnel makes it impossible for implementation to continue smoothly. Financial constraints have also plagued implementation. This is characterized by low budgetary allocations to the ministry of transport occasioning deficits. Lack of follow-up mechanisms has also been a contributing factor in the lax in implementation as there are no clear monitoring and evaluation mechanisms. This may be apparent from constantly shifting timelines. As indicated, there are solutions to these challenges that are in the offing. It only remains to be seen how far they will go towards combating these challenges.

¹⁸⁰ Report on the sensitization workshops in the partner states for the Lake Victoria Transport Act, 2007 and the Lake Victoria Transport (maritime safety) Code .Held at Tom Mboya on 19th - 22nd September 2011

6.2 Recommendations

- (i) The government should endeavor to find ways to raise money towards the implementation of the LVTA. One of the most viable ways is for the government to seek individuals with financial capacity to enter into public private partnership with it that may enable it raise enough money to continue with the implementation process. The option is viable because the revenue that is likely to be collected out of a vibrant Lake Victoria transport system when and if this Act is fully implemented is much more from what will be invested. Therefore if due diligence is done by the government and prospective financial gains put out to the public, investors are likely to come on board. This may ease financial constrains experienced by the country.
- (ii) Secondly, the government should lobby parliament to accord the implementation of this Act maximum support. By doing so, parliament should be able to enact legislation that will put in place the required institution, streamline the already existent legislations that may have areas of conflict with the LVTA. Further parliament may form a house committee to foresee the implementation of the Act. This will go a long way in creating need for accountability for all tasked with the Acts implementation.
- (iii) There should be widespread publication of the Act by relevant state authorities such as the KMA so that all lake users are made aware of the provisions thereof. Capacity building and sensitization of the stakeholders will be a major step towards the full implementation of the Act. This will be made possible by increased compliance by those concerned and general support based on the understanding of the good that is likely to come out of the Act if fully implemented.

- (iv) In order to stem the challenge of manpower, more so those that will deal with specialized tasks, the government should look for ways to enable it come up with institutions to train these personnel. This is a cheaper option compared to if; for example, the government was to outsource the personnel. To achieve this, the government may want to set up these institutions or again seek private public partnerships with the private sector. This may be done by way of introduction of tax incentives to individuals who may be interested in setting up these institutions. This way the manpower problem will have been fully dealt with.
- (v) In order to ensure that the Act is fully implemented within Kenya, there needs to be institutional collaboration within the EAC. The LVBC needs to be strengthened to play a leading role in bringing together the maritime institutions within the EAC as the Lake Victoria is shared resource.
- (vi) Capacity building of the Kenya Maritime Authority staff will be required for the effective implementation of the Act. Collaboration with the other partner states in the same will be critical for the seamless implementation of the Act.
- (vii) Kenya could alternatively establish and mandate a separate body to deal with the implementation of the LVTA. The Kenya maritime Authority was ideally set up to deal with the high seas and its resources are probably allocated mainly to this area. A body specific for implementation of LVTA created to specifically under see the implementation of the Act would be more effective than KMA.

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