

**PACIFIC SETTLEMENT OF DISPUTES: A CASE STUDY OF  
THE EAST AFRICAN COMMUNITY**

**BY**

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## DECLARATION

I, DERRICK KHAEMBA KUTO, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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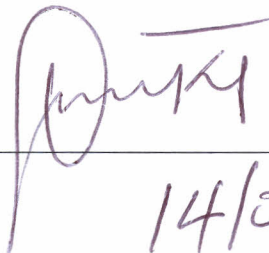


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## **DEDICATION**

I dedicate this work to the love of my life, Linet Wanjala Khaemba. Darling, you make my life have meaning.

## ACKNOWLEDGEMENTS

I wish to thank my supervisor, **Mr. Kipchumba Murkomen**, who, despite his busy schedule always found time to guide me in this research. Indeed, his guidance made me have focus in my work. I also wish to thank the members of my defence panel, **Prof Otieno Odek and Mr Jackson Bett**.

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Above all, I wish to thank God without whose grace I would not have lived to see this day. I give him glory and honour.

## **ABSTRACT**

The world has seen an emergence of many regional trade blocks created as a positive way of fostering international relations and gaining a competitive edge in the world market. However, conflicts between party states are not uncommon and there is always need to have in place efficient dispute resolution mechanisms that will ensure the peaceful and swift resolution of any such disagreements. It is important therefore that the drafters of international instruments creating the regional blocks bear this in mind as they draft the treaties or conventions.

This paper shall look at the pacific settlement of international disputes by discussing the various conventions and protocols that have been entered into since 1899, establishing different peaceful international dispute resolution mechanisms. The paper shall further look at the Treaty for East African Community and other instruments creating the East Africa Community, so as to establish the weaknesses in these instruments especially in providing for dispute resolution. The paper shall finally discuss the important lessons that can be learned from the pacific settlement of international disputes and make recommendation for the strengthening of the legal and institutional framework of the East African Community for its effective regional integration.

## TABLE OF CONTENTS

Declaration	ii
Dedication	iii
Acknowledgements	iv
Abstract	v
Table of contents	vi
Abbreviations	xi

## RESEARCH PROPOSAL

<b>CHAPTER 1</b>	<b>1</b>
1.1 Introduction	1
1.2 Revival of EAC	6
1.3 Statement of the Problem	8
1.4 Objectives of the Study	12
1.5 Hypotheses	13
1.6 Research questions	13
1.7 Justification of the Research	13
1.8 Conceptual framework	16

1.9 Literature Review	19
1.9.1 Introduction	19
1.9.2 Role of dispute settlement mechanisms in international and regional organizations	20
1.9.3 Pacific settlement of international disputes	20
1.9.4 Dispute resolution in the East African Community	23
1.10 Methodology	25
1.10.1 Introduction	25
1.10.2 Research strategy	25
1.11 Chapter breakdown	26
<b>1.12 Scope and limitations</b>	<b>27</b>
<b>CHAPTER II</b>	<b>28</b>
<b>THE DOCTRINE OF PACIFIC SETTLEMENT OF DISPUTES</b>	<b>28</b>
2.1 Introduction	28
2.2 The International Law Principle of peaceful settlement of International disputes	28
2.3 The Pacific Settlement of Dispute Mechanisms	30
2.3.1 Diplomatic/ Political Mechanisms	30
2.3.1.1 Good offices	30
2.3.1.2 Mediation	32
2.3.1.3 International Commissions of Inquiry	35
2.3.1.4 Conciliation	38

2.3.1.5 Negotiation	40
2.3.2 Judicial Mechanisms	42
2.3.2.1 International Commercial arbitration	42
2.3.3.2 Judicial settlement	45
<b>CHAPTER THREE</b>	<b>47</b>
<b>DISPUTE SETTLEMENT UNDER EAC</b>	<b>47</b>
3.1 Introduction	47
3.2 Treaty Establishing the EAC	49
3.2.1 Jurisdiction of the Court vis a vis integration	49
3.3 Protocol for the Establishment of the EA Customs Union	53
3.3.1 EAC dispute settlement regulations	54
3.3.1.1 Consultation	55
3.3.1.2 Good offices, Conciliation and Mediation	57
3.3.1.3 Arbitration	59
3.4 EACJ vs the Committee	62
3.5 The Common Market Protocol	64
<b>CHAPTER 4</b>	<b>69</b>



<b>PACIFIC SETTLEMENT OF DISPUTES IN OTHER REGIONAL ORGANISATIONS</b>	<b>69</b>
4.1 Introduction	69
4.2 Central European Trade Agreement	72
4.3 The European Union	78
4.3.1 Introduction	78
4.3.2 Ways of settling disputes under EU	78
4.3.2.1 The International Court of Justice	78
4.3.2.2 Conciliation	80
4.3.2.3 Mediation	84
4.3.2.4 Arbitration	88
4.4 The Caribbean Community	88
4.4.1 Introduction	88
4.4.2 Dispute Resolution Under CARICOM	90
4.4.2.1 Consultation	91
4.4.2.2 Conciliation	92
<b>CHAPTER FIVE</b>	<b>97</b>
<b>CONCLUSION AND RECOMMENDATIONS</b>	<b>97</b>

Introduction	97
5.3 Conclusions	100
5.3 Recommendations	101
5.3.1 Kinds of Disputes	101
5.3.2 Procedure for the mechanisms	102
5.3.3 Institutional framework	103
5.3.4 Institutional Rules	103
5.3.5 List of Conciliators and Mediators	104
5.3.6 Institutional and Financial strength	104
5.3.7 Protocol for the Extended Jurisdiction of EACJ	105
5.3.8 Convention for the Pacific Settlement of Disputes	105
<b>SELECT BIBLIOGRAPHY</b>	106

## LIST OF ABBREVIATIONS

EU	European Union
RTA	Regional Trade Agreements
UN	United Nations
EAC	East African Community
EACJ	East African Court of Justice
LVBC	Lake Victoria Basin Commission
ECJ	European Court of Justice
ADR	Alternative Dispute Resolution
ECOWAS	Economic Community of West African States
PLO	Palestine Liberation Organization
IGAD	Inter-Governmental Authority on Development
PTC	Permanent Tripartite Commission
NAFTA	North American Free Trade Agreement
WTO	World Trade Organization
GATT	General Agreement on Trade and Tariffs

ASEAN	Association of Southeast Asean Nations
KAM	Kenya Association of Manufacturers
CSME	Caricom Single Market and Economy
UNCITRAL	United Nations Commission on International Trade Law
CEFTA	Central European Free Trade Agreement
CARIFTA	Caribbean Free Trade Association
IGTF	Inter-Governmental Task Force
DRM	Dispute Resolution Mechanism

## CHAPTER ONE

### BACKGROUND OF THE STUDY

#### 1.1 INTRODUCTION

Regional integration is “a process through which a group of nation states voluntarily in various degrees have access to each others’ markets and establish mechanisms and techniques that minimize conflicts and maximize internal and external economic, political, social and cultural benefits of their interaction.<sup>1</sup> There has been an emergence of many international and regional organizations all over the world in the recent past. The motivation to join these regional groups ranges from trade, money and politics.<sup>2</sup>

Regional trade blocs are intergovernmental associations that manage and promote trade activities for specific regions of the world. Trade bloc activities however have political implications beyond economic implications. For example, the European Union, the world’s largest trading bloc, has “harbored political ambitions extending far beyond the free trading arrangements sought by other multistage regional economic organizations”.<sup>3</sup> In fact, the ideological foundations that gave birth to the EU were based on ensuring development and maintaining international stability, that is, the containment of communist expansion in post World War II Europe. The Maastricht Treaty which gave birth to the EU in 1992 included considerations for joint policies in regard to military defense and citizenship. Together, Regional trade agreements

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<sup>1</sup> Jens Haarlov, *Regional cooperation and integration within Industry and Trade in Southern Africa: general Approaches, SADCC and the World Bank* (Aldershot: Averbury, 1997) p15.

<sup>2</sup> Walter Mattli, *The Logic of Regional Integration: Europe and beyond*, (Cambridge University Press, 1999) 3.

<sup>3</sup>R Gibb and W. Michalak, *Continental trading blocs: the growth of regionalism in the world economy*. (Chichester, Wiley, 1994) P 50.

(RTAs) create a complex web of laws, regulations, and rules of origin and dispute settlement procedures known as the “spaghetti bowl phenomenon”.<sup>4</sup>

Many of the regional blocs are created as a way of coming up with a common market to be able to achieve a competitive edge in the world market. The creation of common currencies as the case of the Euro under the European Union has given such regional blocs a stronger bargaining power.

Conflicts between states have been resolved either by use of arms or by peaceful means. Such conflicts are an impediment to the success of regional organizations. Some have led even to wars because state leaders are unable to reach *ex ante* a mutually advantageous arrangement on conflict issues.<sup>5</sup> Taking Africa as an example, those regions with the most conflict have witnessed the slowest growth in regional integration.<sup>6</sup>

The essence of international law is not only to resolve disputes but to resolve them early enough and ensuring the maintenance of fairness and justice for all those involved.<sup>7</sup> It is the same spirit that found place in many international Conventions and Treaties such as the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes. The United Nations Charter, in its preamble, captures this quite well. It states in part:

...to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest...<sup>8</sup>

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<sup>4</sup> Jagdish Bhagwati, “U.S. Trade Policy: The infatuation with Free Trade Agreements”, in Jagdish Bhagwati and Anne O. Krueger (eds.), *The Dangerous Drift To Preferential Trade Agreements* (AEI Press, Washington, DC, 1995).

<sup>5</sup> M. O. Jackson, M. Massimo, “political bias and war,” (2007) *American Economic Review*, p9 4.

<sup>6</sup> UN Economic Commission for Africa, *Assessing Regional Integration in Africa* (2004).

<sup>7</sup> I. A. Shearer, *Starke's International Law*, 11<sup>th</sup> Edn (Butterworths, 1994) p 441.

<sup>8</sup> Chapter 1(para 1), Charter for the United Nations.

The preamble seeks to promote peaceful dispute settlement mechanisms as opposed to use of force. The Charter further emphasizes the need for peaceful means of the adjustment or settlement of international disputes. It thus says:

“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own mode.”<sup>9</sup>;

Further, in its declaration of the period between 1990 and 1999 as the United Nations Decade of International Law, the UN General Assembly emphasized the promotion of peaceful settlement of disputes as well as encouraging the resorting to and respect of the International Court of Justice.<sup>10</sup>

The League of Nations, and late the United Nations, were both created for the resolution of inter-state conflicts and promotion of peace between different states. The need for the strengthening of dispute resolution mechanism became even more important with the creation of regional trade blocs. The success of any international or regional organization depends upon strong dispute resolution mechanism to ensure any disputes are quickly dealt with and to foster harmony among state parties. Indeed, any international agreement which lacks specific means to resolve disputes is worthless.<sup>11</sup> At the centre of any agreement establishing an international organization therefore should be clear provisions establishing a peaceful international disputes settlements system. In

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<sup>9</sup> Ibid Art 33(1).

<sup>10</sup> N. L. Wallace-Bruce, *The Settlement of International Disputes: The contribution of Australia and Newzealand* (Martinus Nijhoff Publishers, 1998)p 30.

<sup>11</sup> Gabriel Villanueva and Luis Serna , “Energy law, free trade agreements and law reform in Latin America, Private parties in the Nafta dispute settlement mechanism: the Mexican experience”, 77 Tul.L. Rev. at 1017.

the horn of Africa, IGAD, one of the African Union's designated regional economic communities has a primary focus on rebuilding security in the region.<sup>12</sup> This ensures the maintenance of peace and security between member states.

Various regional blocks have also, in the instruments establishing them, made provisions for the establishment of strong dispute resolution mechanisms to deal with any disagreements between state parties. The European Union has a well established dispute resolution mechanism. The EU Directive on ADR adopted on Oct. 25, 2004, by the European Commission required 'Member States to develop mechanisms to ensure the quality of mediation services and encourage mediators to adhere to voluntary codes of conduct.'<sup>13</sup> Further, the European court of Justice has never been tired of pushing towards more integration, toward an even closer union of Europe.<sup>14</sup> It is a commonly held view that the ECJ has followed a vigorous policy of Legal Integration, particularly in the first decades of the community. The North American Free Trade Agreement of 1994 also provides for an elaborate dispute resolution mechanism that starts with consultations and moves to formal panels if need arises. It outlines, at chapter 20, a process that starts with a government-to-government discussions, then to consultations at ministerial level Free Trade Commission, and then ultimately the formation panel.<sup>15</sup>

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<sup>12</sup> James Thuo Gathii, "African Regional Trade Agreements as flexible legal regimes", available at <[http://works.bepress.com/james\\_gathii/20](http://works.bepress.com/james_gathii/20)> accessed on 19 May 2011.

<sup>13</sup> "EU Directive Requires New Mediation Policies". Dispute Resolution Journal. <FindArticles.com. [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200411/ai\\_n9469135/](http://findarticles.com/p/articles/mi_qa3923/is_200411/ai_n9469135/)> accessed on 4/4/2011.

<sup>14</sup> Ellen Vos, "Regional Integration through Dispute settlement: the European Union experience," found at [http://www.edac.org/brasil/noticias/paginas/2/22962/vos-Regional\\_Integration\\_through\\_Dispute\\_settlement](http://www.edac.org/brasil/noticias/paginas/2/22962/vos-Regional_Integration_through_Dispute_settlement)> accessed on 9/5/2011.

<sup>15</sup> John Kirton, "NAFTA Dispute Settlement Mechanisms: An Overview," a paper prepared for an experts workshop on "NAFTA and its Implications for ASEAN's Free Trade Area," Asian Institute, Munk Centre for International Studies, Toronto, May 27, 2004 available at <<http://www.envireform.utoronto.ca/publications/john-kirton/may27-2004.pdf>> accessed on 5/4/2011.



## The East African Community

It has been posited that the East African cooperation started way back in the colonial times, as early as 1917 when the British Colonies of Kenya and Uganda formed a customs union, to be joined 10 years later by Tanganyika.<sup>16</sup> It has actually been termed the oldest regional organization in the Sub-Saharan Africa with this union having culminated into the East African High Commission during the 1948 to 1961 period; the East African Common Services Organization for the period between 1961 and 1967; and what has commonly been referred to as the 'first EAC', the East African Community that started in 1967 and collapsed in 1977.<sup>17</sup> The community came into being through the treaty establishing the EAC concluded in 1967 by Kenya, Uganda and Tanzania. It was however faced with the big huddle of ideological differences pursued by the three member states. Kenya favoured an open and mixed economy; Nyerere led Tanzania, through the Arusha declaration proclaimed a socialist economy; while Milton Obote led Uganda to embrace a middle ground Common Man's Charter, as the driving engine for the country's econo-political development.<sup>18</sup> The other key issue that led to the crumble of the Community was Kenya's economic dominance that created suspicions and mistrust among the member states. The huge disparities in the export and economic power, and the resultant unequal gains Kenya was getting relative to Uganda and Tanzania has been said to have accentuated the conflicts among the three countries.<sup>19</sup> Personality differences between Tanzania's Mwalimu Julius Nyerere and Uganda's Idi Amin Dada, was yet another source of conflict. Idi Amin's autocratic rule and expansionist tendencies did not go down well with

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<sup>16</sup> S.A Akintan, *The Law of International Economic Institutions in Africa*, (Brill, 1977), p124.

<sup>17</sup> A. K. Vaidya, *Globalization: Encyclopedia of trade, labor, and politics* (ABC-CLIO, 2006) p533.

<sup>18</sup> Adar, Korwa G. "New Regionalism and Regional Reconstruction: The Case of the East African Community," (2005) 24 *Politeia*, pp28-48.

<sup>19</sup> *Supra*, note 12.

Nyerere and Kenyatta.<sup>20</sup> It has also been contended that there was a general lack of political will by the governments of the member states.<sup>21</sup> But another important problem that has been identified as having been a key contributor to the collapse, and which I consider to be the most crucial, was lack of mechanisms to address differences within the East African Community arrangements.<sup>22</sup> While it had established a number of key implementation institutions such as, the East African Authority, the Common Market Tribunal and the East African Legislative Assembly, the community lacked a clear dispute settlement mechanism to deal with the many disagreements arising among member states.<sup>23</sup> With a proper peaceful settlement of disputes mechanism, many of these differences would have been resolved amicably.

## 1.2 Revival of the EAC

These structural and systemic centrifugal and centripetal factors notwithstanding, change of leadership in the region in the 1980s and 1990s brought new style of governance and perceptions of regional integration with positive repercussions.<sup>24</sup> The Mediation Agreement signed in 1984 by the Partner States to apportion the assets of the EAC following its collapse in 1977, paved the way for a rapprochement between the countries, particularly the leaders.<sup>25</sup>

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<sup>20</sup> P.J. McGowan and P. Nel, Power, *Wealth and Global Equity*, An International Relations Textbook for Africa . (Juta and co. ltd 2007), p367.

<sup>21</sup> Phillip Apuuli Kasaija, "Regional Integration: A Political Federation of the East African Countries?" (2004) Vol. 7, Nos. 1&2, African Journal of International Affairs, pp. 21–34.

<sup>22</sup> Hon. Beatrice B. Kiraso, Deputy Secretary General, East African Community at the EAC Peace Security Conference – Kampala, Uganda, 5<sup>th</sup> October, 2009. accessed at [www.eac.int/news/index.php?option=com\\_docman](http://www.eac.int/news/index.php?option=com_docman) on 12<sup>th</sup> May 2011.

<sup>23</sup> Supra note 16.

<sup>24</sup> Supra note 18.

<sup>25</sup> M Rwekaza, 'Political Cooperation', in *Perspectives on Regional Integration and Cooperation in East Africa: Proceedings of the 1st Ministerial Seminar on East African Cooperation* Arusha, Tanzania, 25-26 March 1999, pp. 87-106.

The Commonwealth of Heads of States meeting in Harare, Zimbabwe enabled the then presidents of the three countries Daniel arap Moi (Kenya), Yoweri K. Museveni (Uganda), and Benjamin W. Mkapa (Tanzania) to work on an integration effort that bore fruits through the signing of the agreement for the Establishment of a Permanent Tripartite Commission (PTC) for East African Cooperation in 1993<sup>26</sup>. This formed the foundation for cooperation in the region, paving the way for the establishment of the structures and functions of the EAC. The EAC Secretariat, was established in 1996, followed with the signing of the Treaty in 1999<sup>27</sup>, which thereafter came into force after its ratification in 2000. The vision and mission of the revitalised EAC clearly capture the new spirit of cooperation between the Partner States. Whereas the vision of the EAC aims at establishing “a prosperous, competitive, secure and politically united East Africa”, its mission is to “widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa through increased competitiveness, value added production trade and investment”<sup>28</sup>. A number of gains have been made since the ratification, for example, the establishment and operationalisation of the Customs Union in 2005<sup>29</sup>; harmonisation and development of East African standards; removal of a number of non-tariff barriers; establishment of the Lake Victoria Basin Commission (LVBC); establishment of the East African Legislative assembly; the establishment of the East African

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<sup>26</sup> Supra, note 21, pg 27.

<sup>27</sup> The Treaty establishing the east African Community is available at [http://www.iss.co.za/fa/RegOrg/Unity\\_to\\_union/pdf/eac/EACTreaty.pdf](http://www.iss.co.za/fa/RegOrg/Unity_to_union/pdf/eac/EACTreaty.pdf) accessed on 4/4/2011.

<sup>28</sup> A Mushega, Nuwe, “East African Community ,”(2006), Handover Report to the New

Secretary General, ( Arusha: EAC Secretariat, April).

<sup>29</sup> See the customs union protocol on

[http://www.customs.eac.int/index.php?option=com\\_docman\\_view&task=doc\\_view&gid=col](http://www.customs.eac.int/index.php?option=com_docman_view&task=doc_view&gid=col) accessed on 6/6/2011.

Court of Justice; the admission of Burundi and Rwanda in 2006 as full members of the community; and the coming to force of the East African Community Customs Union in 2010.<sup>30</sup>

The treaty establishing the East African Community was signed on 28<sup>th</sup> June 2007. It establishes the East African Court of Justice under chapter 8, a judicial body charged with ensuring the adherence to law in the interpretation and application of and compliance with the Treaty. This has been followed by the East African Common Market Protocol and the East African customs union. To help in dispute resolution, the East African Community Customs Union (dispute settlement mechanism) Regulations were made under Article 41 of the East African Customs Union Protocol 'to ensure uniformity among Partner States in the implementation of the provisions on dispute settlement and to ensure to the extent possible, that the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol'<sup>31</sup>.

In this paper, I shall be analyzing the dispute resolution mechanisms provided under the various conventions and protocols for the pacific settlement of international disputes as well as those under the East African Community with a view to identifying key lessons that the East African Community can learn from the former.

## **1.2 STATEMENT OF THE PROBLEM**

From issues touching on boundaries, to crime, to trade matters, states have disagreed. Without proper institutional mechanisms in place, such disagreements and disputes can easily result in total breakdown of relations between nations, disintegration of trade blocs or even war. Following the numerous rounds of negotiations under WTO and GATT, resulting in a more

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<sup>30</sup> Supra, note 17.

<sup>31</sup> Regulation 2 of the East African Customs Union (dispute settlement mechanism) Regulations available on [www.givengain.com/Tripatite\\_FTA\\_13\\_dispute\\_settlement\\_Revised\\_Dec\\_2010.pdf](http://www.givengain.com/Tripatite_FTA_13_dispute_settlement_Revised_Dec_2010.pdf) > accessed on 6/6/2011.

integrated world economy, more and more regions are also achieving a higher degree of integration. There are over 400 regional trade agreements (RTAs) in force, running approximately 50% of world trade, and over 250 trade agreements in force.<sup>32</sup> With the emergence of many international and regional blocs, conflict between any two member states may easily put the whole bloc at risk of disintegration. A weak system whether on the dispute resolving or the compliance phase would more likely undermine the legitimacy of an FTA and inhibit further progress.<sup>33</sup>

The East African Community is established by the Treaty establishing the East African Community and two protocols, The Protocol on the establishment of the East African Customs Union and The Protocol on the establishment of the East African Common Market. Under article 41 of the Protocol on the establishment of the East African Customs Union, are the East African Customs Union (dispute settlement mechanism) Regulations. The regulations provide for the different peaceful dispute resolution mechanisms, among them good offices, consultation, mediation, conciliation and arbitration.

The statement of the problem is as follows: Are the legal and institutional mechanisms outlined under the instruments establishing the East African Community adequate to guarantee peaceful dispute resolution and hence effective regional integration among member states?

I shall endeavor to establish this by analyzing in detail the dispute resolution mechanisms under the Conventions and Protocols establishing the Pacific Settlement of International Disputes. I

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<sup>32</sup> WTO, "Regional Trade Agreements", available at < [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) > Accessed on 5 April 2011. The WTO holds that the overall number of RTAs in force has been increasingly steadily, a trend likely to be strengthened by the many RTAs currently under negotiations. Of these RTAs, Free Trade Agreements (FTAs) and partial scope agreements account for 90%, while customs unions account for 10 %.

<sup>33</sup> David S. Huntington, "Settling disputes under the North American Free Trade Agreement," 34 Harvard international Law journal, 419.

shall also look at the institutional framework of the European Union, a model organization. These shall then be compared with the provisions under the Treaty and Protocols for the formation of the East African Community with a view to identifying weaknesses in the legal and institutional framework of the latter. Finally, the paper shall make recommendations.

This problem statement is informed by the fact that The East African Community started in 1967 and collapsed in 1977 for a number of reasons.<sup>34</sup> There were personality clashes between Idd Amin and Julius Nyerere with the latter refusing to sit with the former at a table<sup>35</sup>. But another important problem that contributed to the collapse, and which has been overlooked, was lack of mechanisms to address differences within the East African Community arrangements.<sup>36</sup> The community lacked a clear dispute settlement mechanism to deal with the many disagreements arising among member states. The expanded EAC in fact has more advanced conflict and governance issues bedeviling it yet the laws, rules and institutions to address them are not in place.

Most recently, the Migingo and Ugingo<sup>37</sup> issue, where the governments of Kenya and Uganda are claiming ownership of the two Islands, has strained relations between the two nations with both taking hardline positions over the matter. The president of Kenya, Mwai Kibaki, took the issue further when he declared during Madaraka day<sup>38</sup> celebrations that the two islands belong to Kenya and Kenyans have no cause for alarm. However, Uganda has its soldiers who are reported to harass Kenyans on the islands. Further, Kenya is also having border disputes with Sudan on

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<sup>34</sup> Supra, note 21.

<sup>35</sup> T.N. Kibua & Tostensen, "fast tracking East African integration: assessing the possibility of a political federation by 2010,"(2005) (Nairobi: Institute of policy analysis & research).

<sup>36</sup> Supra note 24.

<sup>37</sup> Migingo and Ugingo are islands on Lake Victoria.

<sup>38</sup> Madaraka day is celebrated yearly to commemorate the day when Kenya gained internal self rule.

its northern border, the more reason why a mechanism to solve disputes is needed. The Republic of South Sudan has expressed its willingness to join the East African Community.<sup>39</sup>

Article 9 of the treaty establishes the organs of the community. They include: the Summit, the council, the coordination committee, sectoral committees, the East African Court of Justice, the East African Legislative assembly and the Secretariat. The operation of these organs depends on the good will of partner states, a fact which has proved ineffective in solving disputes between member states hence delaying the integration process. Meeting the objectives of the Community under article 5 of the treaty becomes futile.<sup>40</sup>

Unless there are clear laws and institutions to guide amicable resolution of these disputes, it would be an impediment to regional integration. As at now the pacific settlement of disputes is operating in a vacuum. No forum for the utilization of these peaceful means of dispute settlement exists and hence jeopardizing interstate relations.

It has been said that the Institutional framework of the institution charged with spearheading the regional integration process is vital. The European Union, an Institution considered the most advanced in regional integration, has been aided by effective supranational institutions, notably, the European commission.<sup>41</sup> There is need to strengthen and empower the institutions that implement and monitor regional integration programmes both at regional and country levels.

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<sup>39</sup> This was said by the speaker of the National assembly on the promulgation of South Sudan as the world's newest state on 9/7/2011.

<sup>40</sup> The objectives of the East African Community as provided for under article 5 of the Treaty is to develop policies and programmes aimed at widening and deepening cooperation 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. The EAC hopes to ultimately establish a federation.

<sup>41</sup> O.A. Babarinde analysing the proposed African economic community: Lessons from the experience of the European union available at < <http://www.ecsanet.org/conferences/ecsaworld3/babarinde.htm> > accessed on 25/7/2011.

Any central authority overseeing convergence and integration should be independent of all National influence<sup>42</sup>

At the core of a successful RTA is a well drafted Treaty, with clear provisions for the rights and obligations of member states and clear dispute resolution mechanisms and institutions. The argument that regional trade agreements should incorporate effective methods of dispute resolution, has lately been gaining ground. The existence of a dispute settlement mechanism will ensure that all parties to such arrangements take their obligations seriously and that an effective method of redress exists should they violate or fail to live up to such obligations<sup>43</sup>. This guarantees to a large extent, the success of the integration process as it ensures strengthened relations among member states and smooth resolution of any disagreements that may arise.

### **1.3 OBJECTIVES OF THE STUDY**

- 1) To establish the effectiveness of the dispute resolution mechanisms in the instruments creating the East African Community.
- 2) To propose legal and institutional mechanisms for pacific settlement of disputes within the East African Community.
- 3) To establish the nexus between dispute settlement and regional integration.

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<sup>42</sup> Mothae Maruping, "Challenges for regional Integration in Sub Saharan Africa: Macro economic convergence and monetary coordination," pg 29.

<sup>43</sup> Gus Mandigora, "Dispute settlement mechanisms in bilateral and regional trade arrangements", available at < [http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause\\_dir\\_news\\_item&news\\_id=42876&cause\\_id=1694](http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&news_id=42876&cause_id=1694) > accessed on 4/20/2011.



## **1.4 HYPOTHESES**

Several assumptions guide this research. These primarily revolve around the applicability and effectiveness of dispute settlement mechanisms generally and in relation to the East African Community in particular.

1. The dispute settlement mechanisms under the EAC are not effective to guarantee certainty in dispute resolution.
2. Pacific settlement of disputes under the EAC has been hampered by inadequate legal and institutional mechanisms.
3. An effective dispute settlement mechanism promotes regional integration efforts.

## **1.6 RESEARCH QUESTIONS**

1. Are the dispute settlement mechanisms under the EAC effective to guarantee certainty in dispute resolution?
2. Has the Pacific settlement of disputes under the EAC been hampered by inadequate legal and institutional mechanisms?
3. Does an effective dispute settlement mechanism promote regional integration?

## **1.7 JUSTIFICATION OF THE RESEARCH**

The East African Community's collapse followed the culmination of various failures or inadequacies<sup>44</sup> Lessons from its collapse will assist in the integration efforts of the East African

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<sup>44</sup> A. Goldstein and N. Ndung'u, "Regional integration Experience in the Eastern African Region," (OECD Development centre, working paper No 71).

Community to avoid a repeat<sup>45</sup>. One of the reasons, but which has not been considered by many, was that there was no effective forum for the parties to refer their disputes to. It was basically left to the political will of the then three heads of states. This meant that personal differences among the leaders were enough to bring down the community. Despite that it is now one of the fastest growing regional trading organizations.<sup>46</sup> This work will be important to the success of the East African Community integration process<sup>47</sup>. This is especially because most of its institutions are still developing. The vision of the community is to ultimately have a political federation<sup>48</sup>. To achieve this goal, the interstate relations are bound to go up and this is a recipe for a number of issues namely: border, commercial, peace and governance issues.

As earlier said, the issue of the islands of Migingo and Ugingo has already strained relations between Kenya and Uganda. It is worth noting that the Republic of Southern Sudan has expressed its wish to join the EAC. Pacific settlement of disputes is paramount in this expanded Community. For effective integration, state parties must solve their disputes amicably. This is best captured by Mwai Kibaki as follows:

“We should always remember that Kenya is the biggest promoter of regional integration.

Let us always aspire to live harmoniously with our neighbours. A peaceful region holds

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<sup>45</sup> Abdallah Bujra , “A report on the workshop of deepening Integration in East African community, presented at the university of Daresallam , Department of political science and Public administration available at [http://www.dpmf.org/images/EAC\\_RegIntegWk.htm](http://www.dpmf.org/images/EAC_RegIntegWk.htm) accessed on 26/7/2011.

<sup>46</sup> It is worth to note that The Republic of Rwanda and Burundi, who were not members initially, have also joined the community.

<sup>47</sup> The world’s newest state, the Republic of Southern Sudan has expressed its willingness to be member of the East African community. It surprised many when Sudan also applied to join the East African Community.

<sup>48</sup> Supra note 27, Article 5.

much promise for our people who have great potential to do business and get jobs across our borders”<sup>49</sup>

The instruments establishing the EAC do not have an effective dispute settlement mechanism to guarantee smooth integration. There should be clear legal and institutional mechanisms to govern interstate dealings to avoid another collapse of the community. The community must not be left in the hands of individual leaders. In case the leaders disagree, the fallback position must always be the institutions established under the East African Community.

The Treaty and the two protocols have only made a mention of the various methods for the pacific settlement of disputes<sup>50</sup>. It is the position of this paper, however, that there is no provision for a forum to utilize the methods for pacific settlement of international disputes in any of the instruments establishing the East African Community. For this reason, there lies the risk in the implementation of the integration process of the East African Community once conflicts between member states arise. The integration process is likely to be slowed down due to such disagreements that may be protracted and unnecessarily allowed to blow out of proportion for the mere reason that there lacks a proper mechanism for dispute resolution.

I believe that the paper shall stimulate debate around the question of strong dispute resolution mechanisms. The study will assist those carrying the vision and strategic plans of the community.<sup>51</sup> I shall also provide insightful comparisons with other successful regional integration schemes like the European Union and NAFTA and to seek important lessons for the improvement of the provisions on dispute settlement systems in the instruments creating the East

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<sup>49</sup> This can be found at <http://kenya.rcbowen.com/talk/viewtopic.php?f=3&t=12604> Accessed on 20/7/2011.

<sup>50</sup> See article 41 of the Protocol on the establishment of the East African Customs Union.

<sup>51</sup> See the East African court of justice strategic plan on <http://www.eacj.org/docs/EDITED%20FINAL%20COPY%20.pdf> accessed on 9/4/2011.

African Community. And finally, it is believed that the paper shall make an important contribution on this critical issue of international law for purposes of academia (e.g. students and other legal scholars).

### **1.8 CONCEPTUAL FRAMEWORK**

This thesis is undertaken within the framework of the Charter of the United Nations. Under the charter, states have general obligation to solve their disputes in a way that international peace and security are maintained<sup>52</sup>

The most critical thing in regional integration and this paper shall seek to establish, is the affirmation of members that under no circumstances should they either use or threaten to use military force in the resolution of disputes among them.<sup>53</sup>

Sara McLaughlin Mitchell<sup>54</sup> explores the idea of Democratic norms becoming international norms as the proportion of democratic states in the international system increases. She focuses on the democratic norm of third party dispute resolution. Her argument is that several democracies played a prominent role in establishing a norm for third party dispute resolution, Particularly for United States and Great Britain.<sup>55</sup>

Simmons (1999) compares three theoretical perspectives on the role of supranational authority in resolving international disputes: a realist perspective, a functionalist perspective and a

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<sup>52</sup> Supra, note 7.

<sup>53</sup> Sunhyuk Kim and Philippe C. Schmitter, "The Experience of European Integration and Potential for Northeast Asian Integration, Asian Perspective" (2005), 39, No. 2, pp. 5-39.

<sup>54</sup> Mitchell, Sara McLaughlin and Brandon C. prins. "Beyond Territorial Contiguity: Issues at stake in Democratic Militarized Interstate Disputes." (1999) 43 International Studies Quarterly pp169-183.

<sup>55</sup> The article is also available at < <http://www.mailer.fsu.edu/phensel/garnet-phensel/Research/mitchell02.pdf>> accessed on 9/4/2011.

democratic legalist perspective.<sup>56</sup> The first two perspectives ignore the relationship between regime type and dispute settlement. Democratic realists however, assert that “regime type is crucial to understanding the role of law in interstate relations...because liberal democratic regimes share an affinity with prevalent international legal processes and institution; they tend to be more willing to depend on the rule of law for their external affairs. The argument depends on the notion that norms regarding limited government, respect for judicial processes and regard for constitutional constraints carry over into the realm of international politics.”<sup>57</sup>

Similar to this democratic legalist school of thought is Dixon’s argument about third party dispute resolution<sup>58</sup>. According to Dixon, when two democratic states disagree over some issue, they should be more likely to resolve the dispute peacefully because they realize that their opponent is operating under a norm of bounded competition, which favours the use of compromise and non violence. Such conciliatory democratic norms should increase chances of democracies adopting or agreeing to conflict management efforts, especially active participation by third parties.

Raymond (1994) also argues that democracies are more likely to turn to third parties to help resolve their disputes. He posits that democracies are more inclined to involve third parties in the resolution of disputes in ways that are binding (arbitration and adjudication) as opposed to non binding (good offices, mediation, inquiry or conciliation) because democratic institutions create

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<sup>56</sup> Simmons, Beth 1999. “See you in court? The appeal to Quasi Judicial Legal processes in the Settlement of Territorial Disputes.” In ed. Paul. Diehl, “A Road Map to War: Territorial Dimensions of international Conflict” (Nashville: Vanderbilt University press).

<sup>57</sup> Also available at <http://books.google.com/books?hl=en&lr=&jd=fIOK7GEfZrMC&oi=PA205&dq=theorie> accessed on 6/6/2011.

<sup>58</sup> J Dixon William, “ Democracy and the Pacific settlement of international Conflicts, “(1993) 88 American Political Science Review, pp14-32.

a norm of trust in legal procedures<sup>59</sup>. Raymond's analysis of dyadic disputes from 1820-1965 reveals that coherent democratic dyads were three times more likely to use binding third party arbitration than non democratic dyads.

Finnermore and Sikkink (1998) develop a persuasive theoretical framework for understanding the emergence and evolution of norms in the international system.<sup>60</sup> Three stages are identified: norm emergence, norm acceptance and internalization. In the first stage the norm emerges largely due to the effort of norm entrepreneurs. In the second stage, the norm begins to cascade to other members of international system, eventually reaching a tipping point where a critical mass of states adopts the norm. Finally, the norm becomes so widely accepted in international affairs that it becomes internalized by virtually all states.

On norm emergence, the importance of human agency is stressed. The first efforts to resolve disputes by processes such as adjudication, arbitration and mediation can be traced to democratic states like Great Britain and the United States. Although peaceful settlement of disputes dates back to the peace of Westphalia, monarchs did not accept the most binding forms of third party involvement. The development of arbitration in the modern era occurred shortly after the revolutionary war, when Great Britain and the United States signed the 1794 Jay treaty of Amity, Commerce and Navigation.<sup>61</sup> The United States and Great Britain also agreed to an arbitral settlement of disputes in 1871 arising from the actions of the British ship, Alabama, during the American civil war. This settlement drew great international attention to the usefulness of

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<sup>59</sup> Raymond, Gregory A, "Democracies, Disputes, and Thirty-Party intermediaries." (1994) 38 *Journal of conflict resolution*, pp24-42.

<sup>60</sup> Finnermore, Martha and Kathryn Sikkink "International Norm Dynamics and Political Change." (1998) 52 *International organization*, pp 887-917.

<sup>61</sup> They agreed to the creation of an arbitration commission to settle claims for damages by British and American Nations whose ships or property had been confiscated.

arbitration. Great Britain also played a prominent role in one of the early cases of inquiry in the 1904 Dogger Bank incident.<sup>62</sup>

On Norm acceptance, the writers post that for a new norm to be accepted, it must become institutionalized in international rules and organizations. A tipping point occurs when entrepreneurs have persuaded enough states to agree to new norms. The history of third party dispute resolution reveals evidence of this norm cascading from democratic states to non democratic states. For example, the Hague peace conferences of 1899 and 1907 created the permanent court of arbitration in the Hague. Several other regional treaties outlined methods for peaceful dispute settlement including The 1948 American treaty on Pacific settlement (Bogota act), the 1957 European convention for the Pacific Settlement of Disputes, the 1964 Protocol of the Commission of mediation and Arbitration of the Organisation of African Unity and the 1992 convention on conciliation and Arbitration Convention within the CSCE<sup>63</sup>

## **1.9 LITERATURE REVIEW**

### **1.9.1 Introduction**

This chapter will be discussing the findings of related research to this study. It will provide a discussion on the significance of this study to the existing literature. The author shall review literature in the following areas: the role of dispute settlement mechanisms in international and regional organizations; review of literature on pacific settlement of international disputes; and a review of literature on dispute resolution in the East African Community.

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<sup>62</sup> Supra note 32.

<sup>63</sup> Ibid.

## **1.9.2 Role of dispute settlement mechanisms in international and regional organizations**

The central role played by strong dispute settlement mechanisms cannot be overstated. Hartigan (2009) discusses how initially, the failure by General Agreements on Tariffs and Trade to provide for a well-designed system of trade dispute resolution militated against its ability to drive international trade liberalization.<sup>64</sup> It was only after the dispute resolution mechanisms in GATT were improved that gains envisaged under the agreements were realized. Shahin (2010), while acknowledging that the DSU as the core of WTO's dispute settlement system may not be above board in terms of failure to remain neutral, emphasizes the great gains that have been achieved in dispute settlement under this mechanism.<sup>65</sup> Wallace-Bruce (1998) posits that international law is mainly meant to serve the fundamental function of maintaining world peace, putting peaceful settlement of disputes at the core of it all.<sup>66</sup> The General Act of Arbitration (Pacific Settlement of International Disputes), adopted in 1928, further provides for the circumstances and procedure for presentation of a matter to the Permanent Court<sup>67</sup>

## **1.9.3 Pacific Settlement of International Disputes**

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<sup>64</sup>C.J. Hartigan , "Trade disputes and the dispute settlement understanding of the WTO: an interdisciplinary assessment"(2009), Vol 6 ,Emerald .

<sup>65</sup> In "WTO dispute settlement for a middle-income country: the case of Egypt" in a contribution to the book, Shaffer C. Gregory, Melendez-Ortiz Ricardo, *Dispute Settlement at the WTO: the developing country experience*, (Cambridge University Press, 2010). Shahin further contends that in only 10 years, the new WTO dispute settlement mechanism has shown to be an efficient way of solving disputes between WTO member states.

<sup>66</sup> Supra, note 4.

<sup>67</sup> See the Act .



Peaceful international dispute settlement is at the core to the operation of the United Nations system.<sup>68</sup> This principle “is well enshrined in a number of international conventions.”<sup>69</sup> Jasentuliyana (1995) posits that the Hague Conventions on the Pacific Settlement of Disputes of 1899 and 1907 have come to be recognized as core to international treaties of general application entered into by States for the purpose of peacefully resolving disputes among themselves.<sup>70</sup> The signatory powers aimed at, as much as possible, obviating the recourse by States to armed force in settlement of international disputes.<sup>71</sup> Under the conventions is established the Permanent Court of Arbitration, with clear procedures laid down on how a dispute may be referred for international arbitration.<sup>72</sup> The Convention does not however make it obligatory for member States to take all their disputes to arbitration before the Permanent Court of Arbitration, they are at liberty to engage their best efforts in ensuring pacific settlement of their disagreements.<sup>73</sup> The General Act of Arbitration (Pacific Settlement of International Disputes), adopted in 1928, further provides for the circumstances and procedure for presentation of a matter to the Permanent Court.<sup>74</sup> The dispute settlement mechanisms under the Pacific Settlement Conventions have been traditionally classified into two: adjudicational-legal, and diplomatic-

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<sup>68</sup> A. Peters, “International Dispute Settlement: A Network of Operational Duties,” at <http://ejil.oxfordjournals.org/content/14/1/1.full.pdf> accessed on 8 May 2011.

<sup>69</sup> ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua, Merits (Nicaragua v. USA), ICJ Reports (1986) 14, para. 290 at <http://www.ilsa.org/jessup/jessup08/basicmats/icjnicaragua.pdf> accessed on 7/4/2011.

<sup>70</sup> N. Jasentuliyana, *Perspectives of International Law*, (Martinus Nijhoff Publishers, 1995) p 255.

<sup>71</sup> See Article 1, 1899 Convention for the Pacific Settlement of International Disputes; also Article 1, 1907 Convention for the Pacific Settlement of International Disputes. The latter Convention uses the words ‘Contracting Powers’ rather than ‘Signatory Powers’.

<sup>72</sup> See Articles 20 – 29 of The Convention on Pacific Settlement of International Disputes for the establishment of the Court; and Articles 30 – et seq for the arbitral procedure.

<sup>73</sup> *Supra*, note 13.

<sup>74</sup> See Article 9, General Act of Arbitration (Pacific Settlement of International Disputes).

political means. Peters (2003) explains the former as including litigation and arbitration and the latter as including negotiation, mediation, inquiry and conciliation.<sup>75</sup>

International institutions are important in the employment of these mechanisms for dispute resolution. They provide neutral fora for the peaceful settlement of disputes.<sup>76</sup> A case in point is the Gabcikobo/Nagymaros case where the International Court noted the important role of bilateral negotiations by use of expertise from European communities as third parties.<sup>77</sup>

Malcolm N. Shaw discusses the methods for peaceful settlement of disputes by dividing them into diplomatic procedures and adjudication.<sup>78</sup> He discusses the principle within the 1970 declaration on principles of international Law concerning Friendly relations and cooperation among states, the UN Charter and regional instruments<sup>79</sup> He has discussed cases where the principle has been applied to solve disputes.

Starke (1989) points out that settlement of international disputes as early as possible and in the fairest manner possible is one of the key aims of international law. He further posits that while dispute resolution has been, in some instances a matter of custom or practice, it is also largely due to the law-making convention like the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.<sup>80</sup> It has widely been contended that one of the vital

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<sup>75</sup>Supra, note 59.

<sup>76</sup>Supra, note 33.

<sup>77</sup> [1997] I.C.J Rep. 7, 76.

<sup>78</sup> Malcolm N. Shaw, *International Law*, 4<sup>th</sup> edn, (Cambridge: Cambridge University Press), pg 717.

<sup>79</sup> Ibid at pg 720.

<sup>80</sup> J.G Starke QC, *Introduction to International Law* (Butterworths, 1989), p 463.

components for sustainability of regional integration processes is the legitimacy and effectiveness of the dispute settlement mechanisms.<sup>81</sup>

Yu (2005) emphasizes that Regional Trade Agreements, if well managed can enhance peace and common security. But then, in reference to the China-ASEAN trade relations, they argue that the mistrust existing between the initial members of ASEAN, who are small and weak, and China which is considered as a giant dragon, was only overcome through a commitment to peaceful settlement of disputes.<sup>82</sup> In 2003, China became the first country outside ASEAN to accede to the Treaty of Amity and Cooperation in Southeast Asia, a dispute settlement agreement that commits China to use peaceful means to resolve territorial disputes.<sup>83</sup> Many regional trade agreements expressly incorporate peaceful dispute settlement provisions in their integration instruments. This binds member states to resort to these peaceful means of dispute settlement such as arbitration, negotiation and mediation whenever a dispute arises.

#### **1.9.4 Dispute resolution in the East African Community**

Not much has been written about the dispute resolution mechanisms under the Treaty and various protocols on the establishment of the East African Community. Khan (2008) however contends that regional trade integration is not a well grounded concept generally in the Southern

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<sup>81</sup> This was well highlighted during the workshop on 'Specific Aspects of the Experiences of the European Union and the Andean Community', in Sao Paulo, October 2004, accessed on 16 May 16, 2011 at <http://integra.cepal.org.br/MAIN%20RESULTS%20FROM%20THE%20WORKSHOP.pdf>.

<sup>82</sup> Wang Jiang Yu, "Legal and Policy Consideration in China-ASEAN FTA," a contribution in S.C.Y Ku, G. Li Zhongshan da xue, "China and Southeast Asia: Global changes and regional challenges," (2005) Institute of Southeast Asian Studies) p 64.

<sup>83</sup> Ibid.

part of Africa.<sup>84</sup> Attempts by the fathers of the African Nations in the 60s to integrate Africa's political and economic structures mostly came to naught. Notable among them were the earlier attempts by Kenya, Uganda and Tanzania to form the East Africa Community. A number of scholars on this issue have pointed to economic imbalance that has led to deep inter-state suspicions as the main challenge to the successful integration of the region. It has been argued by Ogot (2003) that "the people who planted the seeds of disintegration, I felt, were cliques within the leadership, rather than the majority of East Africans on whose behalf they purported to be acting"<sup>85</sup> Anjaria, Eken & Laker (1982) point out disputes among the member states over distribution of costs and benefits as one of the causes for the break up of the East African Community in 1997.<sup>86</sup> The three member states of the Community only referred the matter to the experienced conciliator, Dr. Victor Umbricht, when they could not agree on how to divide the assets under the then defunct Community.<sup>87</sup> Perhaps had there been a stronger dispute resolution mechanism to help iron out the differences before it came to a point for them to go their separate ways, it would have been different. However, much emphasis seems to have been placed on other factors other than the fact that the instruments establishing the community had weak dispute resolution mechanisms to help the member states solve any disputes among them. That is the gap I purpose to fill.

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<sup>84</sup> S. R Khan, *Regional trade integration and Conflict resolution*, (Tailor & Francis, 2008), pg 42.

<sup>85</sup> B. A. Ogot, *My footprints on the sands of time: an autobiography*, (Trafford Publishing, 2003) pg 301. Ogot further explains a number of issues like the Entebbe airport attack and the complaint by the Kenyan government of the massacre of Kenyans in Uganda to the UN; the efforts by each of the partner states to seize as many assets as possible between 1976 and 1977 in anticipation of the possible disintegration; Kenya impounding railway cars and three ferry boats belonging to Tanzania over a dispute on maintenance costs and Tanzania's retaliatory acts of seizing Kenyan property in Tanzania; the economic cold war that became hot to the extend of repatriation of citizens of each partner state's citizens and refusal by each of the two countries to make contributions to the Community. All these ultimately culminated in the disintegration of the community in 1977.

<sup>86</sup> S. J Anjaria, S. Eken, J. F. Laker, *Payments arrangements and the expansion of trade in East and Southern Africa*, (IMF, 1982) 2.

<sup>87</sup> J. G Merrils, *International Dispute Settlement*, Second Edition, (Cambridge University Press, 2005) p 70.

## **1.10 METHODOLOGY**

### **1.10.1 Introduction**

In this part, the research philosophy, the research strategy and research methods have been provided. The choice of the methodology approaches that have been selected and followed have been well explained and justified. The purpose of the research was to establish the importance of Pacific Settlement of International Disputes in the East African Community integration process. Qualitative dissertation methodology was employed. In this method, I shall start by highlighting an understanding and describing, the key issues in the subject of the study; then draw comparisons and lessons from the available literature; and finish with conclusions and recommendations. To be able to do this, I shall examine the different literature available. This methodology shall be employed because it provides a systematic and organized series of steps that ensures maximum objectivity and consistency in researching a problem. It also provides a shared basis of analysis and helps to promote reliability and validity (accuracy and consistency).

### **1.10.2 Research strategy**

Research strategy refers to the general plan on how the research questions that have been set will be answered. In this research paper, normative research approach shall be adopted. The method is tenable as the research focused on the available information of the use of pacific settlement of international disputes. Qualitative research seeks to understand people's behaviors from their own frames of reference, using a variety of methods. It entails an interpretive approach to the subject matter, and in this case it is interpretation of available literature. Here data in the form of

the various literatures on the subject shall be collected first and later the theories and discussions drawn from the analysis of the available information.

### **1.11 Chapter breakdown**

The proposed chapter breakdown is as follows:

#### **Chapter 1: Background of the study:**

This chapter covers the research proposal. It shall introduce the topic of study; give a basic background of the research question; give the statement of the problem, objectives, hypotheses, research questions, and justification of the study; provide a literature review; and analyze the research methodology.

#### **Chapter 2: The doctrine of pacific settlement of international disputes:**

In this chapter, I shall give an analysis of the Doctrine of pacific settlement of international disputes; the mechanisms as provided under The Hague Conventions of 1899 and 1907, and the related protocols and Acts; the merits and demerits of the pacific settlement of international disputes.

#### **Chapter 3: Dispute settlement under the East Africa Community:**

This chapter shall provide a discussion of dispute resolution under the various instruments establishing the East African Community; analyze the various forms of dispute resolution under the EAC; and discuss the successes and failures of these mechanisms.

#### **Chapter 4: Pacific settlement of disputes under other Regional Organisations:**

This chapter shall seek to discuss the application of the doctrine of pacific settlement of disputes under other Regional Organizations. Specifically, it shall look at the EU, CEFTA and CARIBBEAN.

#### **Chapter 5: Conclusion and Recommendations.**

This chapter shall give the conclusions and recommendations. This will be based on the lessons to be learned by the East African Community from the study of other Regional Organisations aforementioned.

#### **1.12 SCOPE AND LIMITATIONS**

In this paper, I shall restrict myself only to the issue of dispute settlement mechanisms in international and regional organizations. The outcome of this study shall be limited only to the data gathered information from books, journals, pronouncements made by renowned international law scholars, and the relevant Conventions and Protocols. No interviews shall be carried out to clarify the issues. As this study is specific to the comparison between Pacific Settlement of International Disputes and the East African Community dispute resolution mechanisms, a further study of other regional blocs is suggested.

## CHAPTER TWO

### THE DOCTRINE OF PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

#### 2.1 Introduction

The international political climate has historically been fraught with interstate disputes. These will commonly emanate from mere political and economic rivalry, mistrust, suspicion as well as competition over territory. If left unresolved, these disputes have led to deterioration of interstate relations, disintegration of regional trade blocs and even armed conflict between States. This Chapter looks at the Doctrine of pacific settlement of international disputes by discussing the International law principle of peaceful settlement of disputes; the mechanisms as provided under The Hague Conventions of 1899 and 1907, and the related protocols and Acts; the merits and demerits of the pacific settlement of international disputes.

#### 2.2 THE INTERNATIONAL LAW PRINCIPLE OF PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

It is fair to say that international Law has always considered its fundamental purpose to be maintenance of peace.<sup>88</sup> The principle of peaceful settlement of international disputes forms one of the central pillars of the United Nations.<sup>89</sup> The mechanisms dealing with peaceful settlement of disputes require in the first instance the existence of a dispute. The Permanent Court in the *Mavrommatis Palestine Concessions (Jurisdiction)* case<sup>90</sup> defined a dispute as “a disagreement

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<sup>88</sup> Ibid.

<sup>89</sup> Supra, note 69.

<sup>90</sup> PCIJ, Series A, No. 2, 1924, p.11.



over a point of law or fact, a conflict of legal views or of interests between two persons.” A dispute has also been defined as a specific disagreement relating to a question of rights or interests in which parties proceed by way of claims, counterclaims or denials.<sup>91</sup>

The means for the pacific settlement of international disputes, including ‘diplomatic-political’ and ‘adjudicational-legal’ means, are laid down in international law - a law that basically regulates the relations among States and other entities having international legal personality<sup>92</sup>.

These forms of non-combative settlement of international disputes are however not new to international law. We have had these ‘diplomatic processes’ as an informal means of dispute resolution for a long time.<sup>93</sup> But pacific settlement of international disputes was formally incorporated into international law at the 1899 and 1907 Hague Conferences.<sup>94</sup> The 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes were a culmination of these conferences. These conventions set up third party processes of arbitration, mediation, good offices, inquiry and conciliation as means of dispute settlement. The processes have since found place in bilateral and multilateral treaties, notable among them, those that provided for the establishment of the Permanent Court of Arbitration<sup>95</sup>, the Permanent Conciliation Commissions, the fact-finding Commission of Inquiry and Mixed Arbitral Tribunals.<sup>96</sup> The United Nations, at Article 33 of its Charter, has also recognized the importance of these pacific means of dispute

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<sup>91</sup> Collier J and Lowe V, *The Settlement of Disputes in International Law*, (Oxford: Oxford University Press, 1999) p1.

<sup>92</sup> M. Bedjaoui, *International Law: Achievements and Prospects*, 502.

<sup>93</sup> Supra note 90.

<sup>94</sup> Gérardine Meishan Goh, “Dispute settlement in international space law: a multi-door courthouse for outer space,” (2007), Martinus Nijhoff Publishers.

<sup>95</sup> Articles 20-29, 1899 International Convention for the Pacific Settlement of Disputes.

<sup>96</sup> Articles 296 – 297, 304 – 305, Treaty of Versailles, 28 June 1919, 11 Martens (3rd) 323.

Good offices have also been referred to as ‘quiet diplomacy’ and are considered an important process which is usually entrusted to personalities with special qualifications on whom the parties to a dispute agree.<sup>99</sup> Good offices are provided for together with mediation in the 1899 and 1907 Conventions for the peaceful settlement of international disputes. Good offices, depending on the contest, may be similar or different from mediation. Article 2 of the 1899 Convention provides thus,

In case of serious disagreement or conflict, before an appeal to arms the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 2 of the 1907 Convention uses the same words, save for the use of “Contracting Powers” in the place of “Signatory Powers”. The Conventions also allow for any of the friendly powers, where circumstances allow, to take the initiative and offer good offices to the disputing parties. It is worth noting that article 33(1) of the UN Charter does not specifically mention good offices. However, according to Shaw, good offices are relevant where a third party tries to get the disputing parties to negotiate.<sup>100</sup>

It is important that the third party offering good offices, be it a single state or a group of states, individual or organ of universal or regional international organization, must be found acceptable to all the parties to the dispute.<sup>101</sup> Good offices have been used for many purposes and on many important international disputes. They have not only been used to adjust ordinary differences between disputing States, but they have also been employed to end war as well as avert

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<sup>99</sup> Academia De Derecho Internacional (La Haya), Recueil de cours.

<sup>100</sup> Supra note 79 p. 723.

<sup>101</sup> Supra, note 32, Article 101.

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In case of serious disagreement or conflict, before an appeal to arms the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Article 2 of the 1907 Convention uses the same words, save for the use of "Contracting Powers" in the place of "Signatory Powers". The Conventions also allow for any of the friendly powers, where circumstances allow, to take the initiative and offer good offices to the disputing parties. It is worth noting that article 33(1) of the UN Charter does not specifically mention good offices. However, according to Shaw, good offices are relevant where a third party tries to get the disputing parties to negotiate.<sup>100</sup>

It is important that the third party offering good offices, be it a single state or a group of states, individual or organ of universal or regional international organization, must be found acceptable to all the parties to the dispute.<sup>101</sup> Good offices have been used for many purposes and on many important international disputes. They have not only been used to adjust ordinary differences between disputing States, but they have also been employed to end war as well as avert

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<sup>99</sup> Academia De Derecho Internacional (La Haya), Recueil de cours.

<sup>100</sup> Supra note 79 p. 723.

<sup>101</sup> Supra, note 32, Article 101.

hostilities.<sup>102</sup> President Franklin Roosevelt, in 1905 offered good offices of the United States to help end the Russia-Japan war. Both parties accepted the offer, resulting in the September 5, 1905 Peace Treaty of Portsmouth (Maine)<sup>103</sup>. Another example was the dispute between France and Italy over the strengths of their navies in 1931. The British government offered good offices, which were accepted, although no final settlement was ultimately achieved through the process.<sup>104</sup>

The United Nations Secretary General has taken part in Disputes through his good offices.<sup>105</sup> He can also undertake the use of his good offices with officials of regional organizations. The use of his good offices or mediation can be required in different ways. One can be due to power inherent in his office or, a request can be made by the Security Council or the General Assembly. Sometimes, the parties have requested the mediation of the Secretary General themselves.

### **2.3.1.2. MEDIATION**

The term 'mediation' is defined as a confidential facilitated negotiation, substantially controlled by parties, procedurally controlled by neutral third parties but with no authority to impose an outcome.<sup>106</sup> It has also been defined as the participation of a third state or states, a disinterested individual or an organ of the United Nations with the disputing states, in an attempt to reconcile

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<sup>102</sup> E. Aloysius Walsh, S. Duggan, "The History and nature of international relations" (1992) Ayer Publishers p 161.

<sup>103</sup> See Treaty of Portsmouth, (Sept. 5 [Aug. 23, Old Style], 1905), peace settlement signed at Kittery, Maine, U.S., ending the Russo-Japanese War of 1904-05. According to the terms of the treaty, which was mediated by U.S. President Theodore Roosevelt, the defeated Russians recognized Japan as the dominant power in Korea and turned over their leases of Port Arthur and the Liaotung Peninsula, as well as the southern half of Sakhalin Island, to Japan. Both powers agreed to restore Manchuria to China: available at <http://www.onwar.com/aced/data/romeo/russojapanese1904.htm> accessed on 8/6/2011.

<sup>104</sup> R. B Mowat, *International Relations* (Ayer Publishers, 1977) p124.

<sup>105</sup> J.G. Merrills, *International Dispute Settlement*, 4th edn. ( New York, Cambridge University Press, 2005) Ch 2, p.35.

<sup>106</sup> Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2<sup>nd</sup> Edn. ( London, 1991), pp

the claims of the contending parties and to advance proposals aimed at a compromise solution<sup>107</sup>. Mediation is dealt with together with good offices under the Hague conventions.<sup>108</sup> The function of the mediator is to reconcile opposing claims and appease the feelings of resentment that may have arisen between States at variance.<sup>109</sup> The mediator's function will be considered to have come to an end if either party or the mediator himself declares that the resolution mechanisms proposed by him is not accepted.<sup>110</sup>

It has been variously conceded that there is a very thin line between mediation and conciliation, and even harder to say exactly when good offices end and mediation begins.<sup>111</sup> Just like good offices, mediation is not binding on the parties and this has been said to be an advantage in the sense that it allows the parties to retain control of the dispute. Mediation also comes in handy whenever there is need for compromise and the parties are willing to informally make some concessions.<sup>112</sup> Sensitive matters requiring absolute confidentiality in their resolution are also best dealt with through mediation as it is possible to keep off publicity.<sup>113</sup> Mediation as a dispute resolution mechanism was employed in international dispute settlement as early as the 1856 Declaration of Paris, where member States were encouraged to settle maritime disputes by mediation.<sup>114</sup> Currently, the UN Charter requires all members to submit their disputes to mediation on recommendation of the Security Council. Article 33 (1) of the UN Charter has named mediation as one of the preferred mechanisms for the settlement of international disputes.

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<sup>107</sup> Ibid note 92 p.27.

<sup>108</sup> See Articles 2 – 8 of the 1907 Convention for Pacific Settlement of International Disputes.

<sup>109</sup> See the 1907 Convention Article 4.

<sup>110</sup> See the 1907 Convention Article 5.

<sup>111</sup> Supra note 106 pg 28.

<sup>112</sup> J. Bercovitch, *Theory and Practice of International Mediation*, 16.

<sup>113</sup> Supra note 41.

<sup>114</sup> See Declaration Respecting Maritime Law. Paris, 16 April 1856, available at

<http://www.yale.edu/lawweb/avalon/lawofwar/decparis.htm> .

There are different forms of mediation, determined by who can be able to act as a mediator. There can be an individual mediator who either engages disputing parties informally or formally. Informal mediation is when a mediator enters a conflict on its own volition and not seconded by any government.<sup>115</sup> The mediator relies communication strategies and social facilitation to solve the conflict, making the tone of the interaction free and flexible. Examples in history of informal mediation include the two Israel academics, Yair Hirshfeld and Ron Pundak, together with the Norwegian Johan Jorgen Holst who helped pave way for formal discussions between the Palestine Liberation Organization (PLO) and the Israel government. Formal mediation on the other hand involves a political incumbent, government appointee or high-level decision maker being mandated to formally mediate a conflict.<sup>116</sup> A good example is the role that was played by Colin Powell in the Middle East and that of Richard Holbrook in Bosnia.<sup>117</sup> Another form of mediation is where the state, through its representative(s) is engaged. Henry Kissinger, in his days as a secretary of state represented the US in many mediation efforts between nations. The United States (US) for example successfully mediated in the conflict between Bolivia and Chile. In 1966, the Soviet Union mediated the border clashes between India and China.<sup>118</sup> And yet another form of mediation is where institutions and organizations are used as mediators. This is more so where, in the modern complexities of the international environment, the states can no longer facilitate pursuit of all human interests, or satisfy the demands of an ever increasing range of services. International organizations formed among member states then come in handy to mediate in conflicts. Both regional and International organizations are playing the role of mediator in peaceful settlement of disputes. The UN is quickly turning into a centre for initiating

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<sup>115</sup> Supra note 113 at pg 25.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid at pg 40.

<sup>118</sup> L. A. Malone, *International Law*, P92.

concerted efforts to resolve deep rooted causes of conflict, resolve them apart from keeping peace. The UN served, though unsuccessfully, as a mediator in the dispute between Israel and Palestine in 1948. The UN Secretary-General has resolved some other international disputes, like for example the dispute between Netherlands and Indonesia over West Irian, through mediation. Regional organizations such as the Organization of African Unity (now called the African Union), the European Union, and the Arab League, all apply the principles of mediation and negotiation in resolving inter-state party conflicts.<sup>119</sup>

In conclusion, if the parties do not cooperate with the mediator, mediation or good offices will not resolve the dispute. The purpose of mediation is for a third party to convince the disputing parties to change their positions in a way they both find acceptable, so that they can resolve the dispute themselves. Mediation can produce a degree of trust and therefore improve cooperation between the parties, which can then lead to an agreement between them. Whether or not mediation is likely to succeed will depend partly on historic associations between the parties as well as between the mediator and the parties. In practice, successful mediation depends on its timing and the particular personality involved. There are no set terms to which the dispute should be resolved.

### **2.3.1.3 INTERNATIONAL COMMISSIONS OF INQUIRY**

The UN handbook on pacific settlement of disputes attempts a fair definition of inquiry as a dispute settlement process. It occurs where, in an international dispute involving a difference of opinion on points of fact, States agree to initiate an inquiry to investigate a disputed issue of fact,

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<sup>119</sup> Supra, note 113 at pg 45.

as well as other aspects of the dispute, to determine any violations of relevant treaties or other international commitments alleged by the parties and to suggest appropriate remedies and adjustments.<sup>120</sup> Parties may still resort to inquiry even after agreeing on another form of pacific settlement like conciliation or arbitration. This is when there arises a need for collecting all necessary information in order to ascertain or elucidate the facts giving rise to the dispute.<sup>121</sup>

This term formally found its way into international law in the first Hague Conference of 1899<sup>122</sup> although prior to this the process existed only in some rudimentary form. Article 9 of the 1907 Convention, sets out circumstances for the application of this dispute-settlement mechanism. It provides thus:

“In disputes of an international nature involving neither honour nor essential interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation.”

A number of bilateral and multilateral treaties have provided for inquiry as a dispute settlement mechanism, notable among them is the Charter of the United Nations and the constituent instruments of some specialized agencies and international organizations within the UN system. The 1988 Declaration on the Prevention and Removal of Disputes and Situations which may

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<sup>120</sup> See UN Handbook on pacific settlement of disputes para. 74.

<sup>121</sup> Michael Akehurst, *A Modern Introduction to international Law*, seventh edition, (New York: routledge) p227.

<sup>122</sup> J. H. Ralston, *International Arbitration from Athens to Locarno* (The Lawbook Exchange Ltd, 2004) .



threaten International Peace and Security and on the Role of the UN in this field, called for full use of the fact-finding capabilities of the Secretary General, the Security Council, and the General Assembly in strengthening further the role and effectiveness of the United Nations in maintaining international peace and security for all States. Some instruments establishing regional bodies have also co-opted inquiry as a means of dispute settlement.

One of the key advantages of inquiry is that an impartial inquiry usually has the effect of reducing tension and the area of disagreement between the parties.<sup>123</sup> The main object of inquiry is usually to produce an impartial finding of the disputed facts, narrowed down to the main points of contention, so as to pave way for a negotiated agreement.

Another advantage is that it permits a party to make a compensatory payment without formally accepting the fault and the matter need not be prolonged. One Case is *Letelier and Moffitt*, whereby the two named persons were assassinated in 1976, in Washington DC<sup>124</sup>. The US had alleged that this was carried out by Chilean intelligence. The inquiry then resolved the matter to both parties' satisfaction.

It is also possible to combine inquiry with legal evaluation and making recommendations for dispute settlement, thereby blurring the distinction between inquiry and mediation and conciliation. One such case was the *Dogger Bank Incident*<sup>125</sup> of 1904 which involved a Russian Baltic fleet which fired at British fishing vessels operating around the Dogger Bank in the North Sea. A commission of inquiry<sup>126</sup> composed of British, Russian, American, French and Austrian senior officers was tasked with not only establishing what exactly happened (the facts), but also

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<sup>123</sup> Supra, note 121 p. 227.

<sup>124</sup> Dispute concerning responsibility for the deaths of Lotelier and Moffitt.

[http://untreaty.un.org/cod/riaa/cases/vol\\_XXV/1-19.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XXV/1-19.pdf) accessed on 8/6/2011.

<sup>125</sup> Great Britain v. Russia (1908) 2 Am. J. Int'l L. 931-936 (I.C.I. Report of 26 Feb. 1905).

<sup>126</sup> The Commission was set up under the 1899 Hague Convention.

to establish responsibility and the degree of liability on both sides. This prevented the UK from entering the war against Russia. As a result of this process, the 1907 Hague Convention further elaborated the inquiry process articles from a total of 6 to 28.

#### **2.3.1.4 CONCILIATION**

Conciliation has been defined as:

A method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them or of affording the Parties, with a view to its settlement, such aid as they may have requested.<sup>127</sup>

The United Nations Handbook on the Peaceful Settlement of Disputes between States says of conciliation as a peaceful settlement procedure which combines the elements of both inquiry and mediation.<sup>128</sup> Considered as one of the best peaceful settlement mechanism, conciliation has been provided for in many bilateral and multilateral treaties. In 1922 the League of Nations adopted a resolution encouraging member States to submit their disputes to conciliation commissions. The earliest of the multilateral treaties that expressly established conciliation as among the third party dispute settlement mechanism under the treaty was the 1928 Geneva General Act for the Pacific Settlement of International Disputes. Article 33 paragraph 1 of the United Nations Charter provides conciliation as one of the peaceful dispute settlement mechanisms to which members

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<sup>127</sup> The quotation is from Article 1 of the Regulations on the Procedure of International Conciliation adopted by the Institute of International Law in 1961. See 49 (ii) *Annuaire* pp. 385-91.

<sup>128</sup> See Para 140. The paragraph states that Parties to an international dispute may agree to submit it to a peaceful settlement procedure which would, on the one hand, provide them with a better understanding of each other's case by undertaking objective investigation and evaluation of all aspects of the dispute and, on the other hand, provide them with an informal third-party machinery for the negotiation and non-judicial appraisal of each other's legal and other claims, including the opportunity for defining the terms for a solution susceptible of being accepted by them.

shall resort. The 1981 Manila Declaration on the Peaceful Settlement of International Disputes as well as the 1970 Declaration on Principles of international Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations refer to conciliation as among the procedures to be used by States in seeking an early and equitable settlement of any international disputes.

Conciliation has seen many potentially serious international disputes settled amicably between states. Many such disputes have been referred to conciliation commissions and successfully settled. In 1925 the treaty between France and Switzerland defined the functions of permanent conciliation commissions, setting a model to be adopted by later treaties.<sup>129</sup>

The duty of the Permanent Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all useful information by inquiry or otherwise, and to endeavour to bring the Parties to an agreement. It may, after examining the case, intimate to the Parties the terms of settlement which seem to it suitable, and lay down a time-limit within which they are to reach their decision.

At close of its proceedings the Commission shall draw up a report stating, as the case may be, either that the Parties have come to an agreement and, if need be, the terms of the agreement, or that it has proved impossible to effect a settlement.

The Commission's proceedings must, unless the Parties otherwise agree, be concluded within six months of the day on which the dispute was laid before the Commission.<sup>130</sup>

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<sup>129</sup> J.G Merrills, *International Dispute Settlement*, 4<sup>th</sup> edn, (New York, Cambridge University Press, 2005), p. 65.

<sup>130</sup> M. Habicht, *Post War Treaties for the Pacific Settlement of International Disputes*, (Cambridge, MA, 1931) P. 226.

The process of conciliation can be said to be some form of institutionalized negotiation, with the commission encouraging the Parties to dialogue, while providing whatever assistance as may be necessary to successfully settle the dispute. The Commission first does its investigation, before actively seeking to bring the parties together to dialogue. But of more importance is the confidentiality of the conciliation process, an essential component for its successful settlement of disputes. It is not uncommon for disputes to bring up delicate issues, and also governments are usually more comfortable giving concessions privately. This makes secrecy important and has become the general rule in conciliation.

In general, conciliation is well suited to disputes where the framework of rules and regulations is preferred by the parties. Therefore, it is appropriate to the intended terms of future interactions of the parties. A weak party can achieve a better settlement with the use of an official commission, than on its own. Therefore, if one party is economically or politically weak compared to the other parties, it may be more comfortable with conciliation. Conciliation is better suited where there is no immediate threat to regional security, and is therefore appropriate for instance in Regional trading agreements<sup>131</sup>.

### **2.3.1.5 NEGOTIATION**

Negotiation is the precursor to other settlement procedures as parties decide amongst themselves how best to resolve their differences<sup>132</sup>. In certain circumstances, there may exist a duty to enter negotiations arising out of particular bilateral or multilateral agreements.<sup>133</sup>

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<sup>131</sup> Turki Al Saud, "a Comparison between dispute settlement procedures in the International Court of Justice and the World Trade Organisation" at <http://bura.brunel.ac.uk/bitstream/2438/4477/1/TASCD.pdf> > accessed on 10/8/2011.

<sup>132</sup> Judge Nervo, *Fisheries jurisdiction case*, ICJ reports, 1973, pp. 3, 45.

<sup>133</sup> *Ibid.*

Negotiation, it has been argued by legal commentators, is the oldest and most fundamental method of amicable dispute resolution.<sup>134</sup> According to the Black's Law Dictionary:

Negotiation is a consensual bargaining process in which parties attempt to reach agreement on a disputed or potentially disputed matter, usually involving complete autonomy for the parties involved without the intervention of third parties.<sup>135</sup>

On his part, Judge Moore has defined negotiation as, "the legal and orderly administrative process by which governments, in the exercise of their unquestionable powers conduct their relations with another and discuss, adjust and settle their differences".<sup>136</sup>

Decisions of Tribunals may direct parties to engage in negotiations in good faith and may indicate factors to be taken into account in the course of negotiations between the parties.<sup>137</sup> Where there is an obligation to negotiate, this should imply also an obligation to pursue such negotiations as far as possible with a view to concluding agreements.<sup>138</sup> The Court held in the *North Sea Continental Shelf Cases* that:

The parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition...they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.

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<sup>134</sup> Q. Zhang, Consultation with WTO Dispute Settlement: A Chinese Perspective, 24.

<sup>135</sup> B.A. Garner, *Black's Law Dictionary*, 7th Edition, (St. Paul, Minn: West Group, 1999), p 1059.

<sup>136</sup> The Mavromatis Palestine Concessions Case (Judgement) PCIJ Series A. No. 2. 1924; 62-63.

<sup>137</sup> North Sea Continental shelf case, ICJ reports, 1969, pp 3,53-4;41ILR, pp.29, 83. See also the Fisheries Jurisdiction case, ICJ Reports, 1974, pp.3,32;55ILR, pp.238,267. Section 1, paragraph 10 of the Manila Declaration declares that when states resort to negotiations, they should 'negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties'.

<sup>138</sup> See the railway Traffic between Lithuania and Poland case, PCIJ, series A/B. No 42, p.116.

With negotiation, it has been argued that the responsibility of solving the dispute is placed on the parties themselves, who are best placed to come up with the most workable, sensible and acceptable settlement between themselves. Indeed, both parties need to be prepared to make concessions, but this can only be the case if they are of the opinion that the benefits of the agreement outweigh the losses<sup>139</sup>

Another advantage is that negotiation is the least risky mechanism to employ in solving a dispute as a State party has maximum control over the process and outcome, and always has the option of walking away from the negotiation table, should it feel pressured.<sup>140</sup> Yet another merit of negotiation is that there is a high likelihood of the settlement being accepted since it is arrived at by both members to the dispute, and not imposed on them by a third party like in other types of dispute settlement. And finally, it has also been argued that negotiation tends to favour accommodation and compromise between disputing parties, encouraging a 'give-and-take' as opposed to 'all-or-nothing' solution. This usually has the effect of preserving good relations and long-term co-operation between the disputing parties in future.<sup>141</sup>

### **2.3.2 JUDICIAL MECHANISMS**

Judicial mechanisms are divided into Arbitration and Judicial settlement.

#### **2.3.2.1 INTERNATIONAL ARBITRATION**

According to the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes, the main object of international arbitration is the settlement of disputes between States

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<sup>139</sup> Supra, note 129 at pg 8.

<sup>140</sup> Supra note 134 at pg 28.

<sup>141</sup> J. Pan, "Towards a new framework for Peaceful settlement of China's Territorial and Boundary Disputes" p6.

by judges appointed by the parties to the dispute themselves on the basis of respect of law.<sup>142</sup>

Arbitration gives rise to a binding award for which parties who, in good faith submit to the process are required to uphold. It is for the legal and binding effect of the awards from arbitration that this process has been acknowledged as the most effective and equitable means of settling disputes when diplomacy has failed.<sup>143</sup>

Different forms of tribunals as agreed upon by parties may be formed to arbitrate any dispute between the members. One such is the setting up of a commission consisting equal numbers of national arbitrators, appointed by member parties, and one neutral member (also called umpire) to whom the dispute may be referred to incase the national members fail to resolve. This is one of the earliest forms of arbitration tribunals which was used to resolve disputes arising from injury to aliens and it dates back to over 200 years ago.<sup>144</sup> The United States and Great Britain agreed, under the Treaty of Ghent of 1814, to refer any dispute between them to national commissioners with a further reference to a neutral third party in case the disagreement is not resolved. An even earlier and more famous Jay Treaty of 1794 only employed national commissioners and the commissions were not pure judicial tribunals as understood today. These commissions blended juridical and diplomatic considerations to produce a negotiated settlement to which both parties were supposed to be bound. This is unlike the modern mixed commissions in which greater emphasis is laid on the juridical element. A good example is the *Youmans*

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<sup>142</sup> See Articles 15 and 37 respectively of the 1899 and 1907 Hague Conventions. Also see para. 168 of the Handbook on Peaceful Settlement of Disputes.

<sup>143</sup> Article 38 of the 1907 Hague Convention on Peaceful Settlement of Disputes goes further to expressly state, "Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit."

<sup>144</sup> *Supra* note 130, pg 92.

*claim*<sup>145</sup> (1926) which was decided by the United States – Mexican General Claims Commission, and is regarded as one of the authoritative applications of international law.

Another type of arbitration is established from the long practice of referring disputes to a foreign head of State or Government for a decision. This also dates back to the medieval times when the Pope would come in handy to act in this capacity.<sup>146</sup> The advantage of using this form of arbitration is similar to that of mediation, where a powerful arbitrator comes in handy to apply some pressure or inducement to encourage stubborn party into accepting an unfavourable decision. Such arbitrator may also be helpful in case there are resources and experts required to implement a settlement through mapping and surveying. The disadvantage of this method however lay in the fact that the sovereign had no duty to give reasons for his decision and it therefore lacked the juridical considerations required in such decisions. In the most recent international disputes, the matters have been referred to panels of jurists rather than to a single arbitrator<sup>147</sup>. For instance in *Palena Case*<sup>148</sup> of 1966 the arbitral powers were delegated to a jurist called Lord McNair and two other geographical experts.

Yet another form of arbitration is what the 1899 Hague Convention refers to as ‘the Permanent Court of Arbitration’ where disputing parties may agree to refer the dispute to one of more qualified persons to settle. The 1899 Hague Convention went on to create fully equipped bureau with a library and staff which still exists even now and facilitates arbitration and other peaceful settlement mechanisms.<sup>149</sup> There were a number of cases that were successfully settled by

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<sup>145</sup> *Youmans Claim (United States v Mexico)* (1926), 4 RIAA p. 110. A further and more detailed discussion of the case and its significance can also be found in B.J Bederman, ‘The glorious past and uncertain future for international claims tribunals’, in M. W Janis (ed.), *International Courts for the Twenty-First Century*, Dordrecht, 1992, p. 161

<sup>146</sup> *Supra*, note 121 at pg 312.

<sup>147</sup> E. Luard, *The International Regulation of Frontier Disputes*, (London, 1970).

<sup>148</sup> *Argentine-Chile frontier Case*, (1966) 38 ILR p. 10, 16 RIAA - 109.

<sup>149</sup> W. E. Butler, ‘The Hague Permanent Court of Arbitration’, (Janis, *International Courts*) p. 43.



reference to a single qualified arbitrator. In the *Monetary Gold Arbitration* case<sup>150</sup>, M. George Sauser-Hall, a member of the Permanent Court was appointed in response to a request from the parties and he successfully settled the dispute as a single jurist. However the most common form of tribunal is the collegiate body consisting of an uneven number of members, three or five, with a decision being made through majority voting. The famous *Alabama Claims Case*<sup>151</sup> concerning the responsibilities of Britain as a neutral during the American civil war was heard by a five-member tribunal with only two of them being national members. It also strictly followed juridical procedure and gave a reasoned award, which has been considered as an important step towards development of arbitration.<sup>152</sup>

Many modern regional peace treaties expressly provide that disputes arising out of the relevant Treaty Interpretations or implementation are to be referred to arbitral commissions. Typically, these commissions consist of a national member from each of the disputing parties and a third member either appointed by agreement or failing which, by the United Nations Secretary General.

### **2.3.2.2 JUDICIAL SETTLEMENT**

Judicial Settlement of international disputes is set out in the *Charter of the United Nations* as one of the peaceful means of dispute settlement.<sup>153</sup> Under this mechanism, disputing States may submit the dispute to a pre-constituted international court or tribunal made up of independent

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<sup>150</sup> *Gold Looted by Germany from Rome in 1943* (United States, France, United Kingdom, Italy) (1953) 20 ILR 441.

<sup>151</sup> J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. 1, (1898) p. 635.

<sup>152</sup> *Supra* note 148.

<sup>153</sup> See Article 33 of the Charter of the United Nations.

judges. The judges are supposed to settle the dispute on the basis of international law and their decision is binding on the parties involved.<sup>154</sup> A number of permanent international courts have been established under different international instruments for the purpose of settlement of disputes among member parties.

## CONCLUSION

In this chapter, I have been discussing the doctrine of pacific settlement of international disputes and the various mechanisms for the same. I have traced the doctrine to the 1899 and 1907 Conventions for the pacific settlement of international disputes and how the same has been applied by various protocols, bilateral and multilateral treaties.

Peaceful settlement of disputes is key to good interstate relations and helps to avert wars between states. The mechanisms are divided into diplomatic and legal. This study will centre on the diplomatic methods. States should only resort to the judicial methods if the diplomatic methods have failed.

I have established that the diplomatic methods do not work in isolation. It is also difficult to get the distinguishing feature among the various methods. Negotiation is the precursor to other methods. Good offices and mediation are often discussed together but the distinct feature is that a third party takes a very active role in the latter. Conciliation combines the elements of inquiry and mediation.

These diplomatic methods will be vital to the integration efforts of the East African Community if proper forums for their utilization are provided for. Such forums, as I have noted, are lacking within the East African Community.

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<sup>154</sup> See Para, 196 of the UN Handbook on Peaceful Settlement of Disputes.

## CHAPTER THREE

### DISPUTE RESOLUTION UNDER THE EAST AFRICAN COMMUNITY

#### 3.1 INTRODUCTION

For the EAC to enjoy increased trade and enhance its economic development, it is crucial to have a functional and trusted dispute resolution organ with dispute resolution mechanisms in place in order to build investor confidence and assure East African citizens that there is an organ that is capable of guiding the integration process according to law, thereby leading to enjoyment of fruits of integration by all<sup>155</sup>.

The East African Community is established under the Treaty and a number of protocols and Acts, among them the East African Community Customs Union Protocol and the Common Market Protocol. The Treaty only provides for the East African Court of Justice as the body charged with dispute resolution among member states. It is the East African Customs Union (Dispute Settlement Mechanism) Regulations that provide for a variety of dispute settlement mechanisms for the member states to the Union.

Among the reasons why the former East African Community collapsed were the governance challenges, including lack of mechanisms to address corruption, non respect for the rule of law, impunity and governments' high handedness; as well as foreign influence for economic reasons.<sup>156</sup>

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<sup>155</sup> See the pre amble of the strategic plan to the East African Court of Justice.

<sup>156</sup> Hon. Beatrice B. Kiraso, Deputy Secretary General, East African Community at the EAC Peace Security Conference – Kampala, Uganda, 5<sup>th</sup> October, 2009. accessed at [www.eac.int/news/index.php?option=com\\_docman](http://www.eac.int/news/index.php?option=com_docman) on 12<sup>th</sup> May 2011.

However it can be seen that all the above challenges could have been surmountable had there been a strong pacific settlement of disputes mechanism established in the instruments that created the community.<sup>157</sup> It is important to note that it was only for purposes of determining and dividing the EAC assets and liabilities among the Partner States after its collapse that mediation was employed after the Partners signed the Mediation Agreement in 1984. This Chapter explores how effectively the instruments provide for peaceful dispute settlement mechanisms in the Community.

The ultimate goal of the community is to attain political integration through stages, beginning with Customs Union, Common Market, then monetary union and ultimately political union.<sup>158</sup> East Africans appear to share the same ideals and their leaders and perhaps more so. Indeed, from their findings from their workshop with stakeholders, the committee on fast tracking the federation found that it clearly emerged that the people of East Africa are united in their quest for the federation<sup>159</sup> In the implementation of such a great scheme, disputes are bound to arise. The more East Africa gets integrated, the more disputes of trans boundary nature are likely to happen. The existence of the East African Court of Justice constitutes another forum within the Community for advancing EAC integration agenda. Visionary founders of EAC foresaw this situation and decided to create it as one of the organs to address such situations.

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<sup>157</sup> Ibid.

<sup>158</sup> Supra note 27 at the pre amble.

<sup>159</sup> See the Report of the Committee of three persons appointed to examine how to fast track the ultimate goal of Political Federation contained in the Report of the Sixth Summit of the East African Community Heads of State, November 26, 2004 Para 4.1 p.48-Ref: EAC/SHS/06/2004.

### **3.2 TREATY ESTABLISHING THE EAST AFRICAN COMMUNITY**

Under the Treaty, the main dispute settlement organ is the East African Court of Justice<sup>160</sup> as the judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.<sup>161</sup> Article 28 of the Treaty provides for a Partner State which considers that another Partner State or an organ or institution of the Community has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty, may refer the matter to the Court for adjudication. The Court also has power to consider the legality of any regulation, Act or action by a Partner state and find it ultra vires to the provisions of the Treaty or if it amounts to abuse or misuse of power. Before submission of the matter to the Court, an aggrieved Partner State has the option of first presenting it to the Secretary General of the Community, who can further refer it to the Council of Ministers under the Treaty. The Council will consider whether to resolve the matter itself or refer it to the Court.<sup>162</sup> The right to refer any acts of illegality, unlawfulness or infringements of the provisions of the Treaty by a Partner State to the Court is also extended to Legal and Natural Persons.<sup>163</sup>

#### **3.2.1 JURISDICTION OF THE COURT VIS A VIS INTEGRATION**

Article 27 of the Treaty limits the Court's jurisdiction to the interpretation and application of the treaty. Provision is made for the extension of this jurisdiction to include either original, appellate or human rights matters by way of an additional Protocol<sup>164</sup> but that is yet to be done.<sup>165</sup> There is

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<sup>160</sup> Supra, note 27, Chapter 8.

<sup>161</sup> Ibid, Article 23.

<sup>162</sup> Ibid, Article 29.

<sup>163</sup> Article 30 of the Treaty empowers a legal or private person who is a citizen of a Partner State to refer the matter to the Court, subject to the provisions of Article 27.

<sup>164</sup> Ibid, Art. 27(2).

only a draft to that effect<sup>166</sup> The EACJ has held that the delay to extend its jurisdiction contravenes the principle of good governance as stipulated in the treaty.<sup>167</sup>

The limitation of the court's jurisdiction only to the interpretation of the Treaty provisions was clearly designed to keep the level of scrutiny over the actions of the individual executives of each country to a minimum, and to limit the extent to which questions could be raised over the extent to which human and peoples were being observed in individual member states. It is of no surprise that since its establishment, the EACJ has yet to determine a substantive case.<sup>168</sup>

The provisions reflect that there was a concern right from the start that the court should not be allowed too much freedom of action to significantly affect the political and legal institutions of Partner States, such as the Heads of state in Summit. By deciding on whom to nominate and then appoint as judges, the Summit members exercise an extension of their national powers.<sup>169</sup>

This limited jurisdiction has crippled the Court to an extent that it has in some cases exceeded its jurisdiction to hear some cases some of which attempts have been thwarted by the executive. The EACJ has for example decided cases relating to human rights even though there is no explicit treaty basis for the court to assume jurisdiction over human rights cases that challenge the conduct of member state governments. For taking such bold steps, the leaders of the EAC

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<sup>165</sup> J Oloka Onyango, who owns the East African Community, presentation at Denvia public dialogue on the East African Community, held at hotel Equatoria, November 23<sup>rd</sup>, 2005 available at [http://docs.google.com/viewer?a=v&q=cache:4Nif\\_MvNSWYJ:www.deniva.or.ug/files/articles\\_who-owns.doc+east+african+court+of+justice&hl=en&gl=ke&pid=bl&srcid=ADGEESgyxFmZ28DoXQhL-tqGaagTQHX5F0ESDjntmjH-6j6EZj6F3Ege8Zq4JgwnPgp9\\_HZQFPw8KqW7M6j7Pvfl0UwE4WUMB0Jj36gUCsORRkYWZk24h8cmKFs-DQ2P4kX5pKnXWoLb&sig=AHIEtbS2LbTG8\\_MnjcwfnZe0RjvP6iyFtg](http://docs.google.com/viewer?a=v&q=cache:4Nif_MvNSWYJ:www.deniva.or.ug/files/articles_who-owns.doc+east+african+court+of+justice&hl=en&gl=ke&pid=bl&srcid=ADGEESgyxFmZ28DoXQhL-tqGaagTQHX5F0ESDjntmjH-6j6EZj6F3Ege8Zq4JgwnPgp9_HZQFPw8KqW7M6j7Pvfl0UwE4WUMB0Jj36gUCsORRkYWZk24h8cmKFs-DQ2P4kX5pKnXWoLb&sig=AHIEtbS2LbTG8_MnjcwfnZe0RjvP6iyFtg) accessed on 1/9/2011.

<sup>166</sup> See the draft at [http://www.ealawsociety.org/Joomla/UserFiles/File/draft\\_protocol\\_eacj.pdf](http://www.ealawsociety.org/Joomla/UserFiles/File/draft_protocol_eacj.pdf) accessed on 17/9/2011.

<sup>167</sup> See the judgement of the court, following an application for reference by a Ugandan MP, available at <http://www.jamiiforums.com/jukwaa-la-sheria-the-law-forum/157245-eac-told-to-establish-court-of-appeal.html> accessed on 1/9/2011.

<sup>168</sup> *Supra*, note 165.

<sup>169</sup> *Ibid*.

amended the Treaty Establishing the EAC as a statement of disapproval of EACJ's decision in the NYONG'O case<sup>170</sup>

The EAC council criticized this exercise of jurisdiction and recommended to the Summit that certain amendments be passed to curtail the court's power, ultimately resulting in the EAC Treaty's amendment in December 14, 2006. These amendments included: restructuring the Court into 2 divisions, a first instance division and an appellate division (2) adding additional grounds for removing a judge from office "to limit the court's jurisdiction so as not to apply 'to jurisdiction conferred by the Treaty on organs of Partner States'"; (3) Adding in a two month limit for cases brought by natural and legal persons; and (4) providing grounds of appeal to the appellate division of the EACJ.

The procedure for removal, which can only be effected upon the recommendation of an adhoc tribunal likewise vests with the Summit<sup>171</sup>. While the creation of this tribunal is based on a complaint over misconduct or inability to perform the functions of the respective office, it is not clear who is to initiate the process leading to the appointment of the tribunal or even how the process is to be set off. The lack of clarity coupled with the fact that it is generally the summit to initiate the process means that the East African heads enjoy wide control over powers of the removal of judges as well. It seems therefore that other persons are not in a position to seek redress in case of a complaint against a member of the bench.

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<sup>170</sup> James Thuo Gathii, "The under appreciated Jurisprudence of Africa's Regional Trade Judiciaries," Vlm 12 (Oregon Review of International Law,) pg 245.

<sup>171</sup> Art. 26 of the treaty.

Unless the jurisdiction of EACJ is broadened to include adjudication in commercial disputes and or human rights cases, it runs the risk of becoming totally moribund.<sup>172</sup>

The above discussion shows how the East African Court of Justice can potentially play its role of ensuring adherence to rule of law but it is not given sufficient jurisdiction in this regard and in some instances the little jurisdiction it has is barely taken away. EACJ has been systematically reduced to a toothless dog that cannot bite. The court of justice of the European Community, which since its inception, has been playing a crucial role in the European integration process, from January 2000-Nov 2009, determined more than 400 cases related to customs union and common market. This is what a fully fledged EACJ has potential of doing the same. All it needs is support from EAC policy organs.<sup>173</sup>

The establishment of the Court was in line with the realization that one of the key reasons for the collapse of the first East African Community in 1977 was the lack of mechanisms to address the differences in the arrangements.<sup>174</sup> The Court is established as the sole institution charged with the resolution of disputes of all kinds arising under the Treaty and any other annexes and protocols thereto.<sup>175</sup> It has however, not served this purpose. As the premier dispute settlement mechanism, it cannot guarantee and promote regional integration in its present form.<sup>176</sup>

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<sup>172</sup>Supra, note 170.

<sup>173</sup> Ibid.

<sup>174</sup> Kiraso B, "EAC integration and the Enabling Peace and Security Architecture," Paper presented at Peace and Security Conference, Kampala, Uganda on 5<sup>th</sup> October 2009. Hon. Kiraso, then Deputy Secretary General of the East African Community argued that the Vision of the Community to have a prosperous, competitive, secure and politically united East Africa can only be attained within the context of a structured security arrangement that can create the right environment for integration initiatives, capable of protecting gains attained.

<sup>175</sup> Supra note 25, article 1.

<sup>176</sup> *The strategic plan for the East African Community has summarized the weaknesses of the Court as follows:* Adhoc nature of the court, Undetermined terms of service and conditions of the judges, lack of security of tenure for judges, president and principal judge not resident in Arusha judges serving both EACJ and Partner States' judiciaries, Limited jurisdiction, Erosion of the jurisdiction, Lack of awareness by national courts of their relationship with EACJ, Difficulties in executing EACJ judgments and rulings, understaffed, inadequate organizational structure of the court, Undetermined seat of the court, weaknesses in staff appraisal process,



The Court also has jurisdiction to hear and determine matters arising from arbitration clauses contained in agreements which confer to it jurisdiction or special agreements between Partner States.<sup>177</sup> It is instructive to note that there is no other article that specifically enables the court to employ arbitration or any other peaceful settlement mechanism in settling disputes in the Community. Yet it has been argued that in the process of regional integration on which the EAC has embarked, the Court ought to play an instrumental role through peaceful settlement of disputes and contributing to the harmonization of laws of the laws of Partner States through the development of jurisprudence in the region.<sup>178</sup>

### **3.3 PROTOCOL FOR THE ESTABLISHMENT OF THE EAST AFRICAN CUSTOMS UNION**

The Protocol seeks to implement article 75 of the East African Community Treaty. The Customs Union was established for, among other reasons, the promotion of efficiency in production within the Community; liberalization of intra-regional trade in goods on the basis of mutually beneficial trade arrangements among the Partner States; enhance domestic, cross border and foreign investment in the Community and the promotion of economic development and diversification in industrialization in the Community.<sup>179</sup> The success of all these objectives depends so much on a strong dispute resolution mechanism within the Community.

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Budgetary constraints, Inadequate publicity of the court, Lack of awareness of the arbitration jurisdiction and absence of sub registries in Partner states.

<sup>177</sup> Supra note 25, Article 3.

<sup>178</sup> Ruhangisa J. E, "The Role of the East African Court of Justice in the Realization of Customs Union and Common Market," A paper for presentation during the Inter-Parliamentary Relations Seminar (Nanyuki – V - ) to be held at Burundi National Assembly, Bujumbura, Burundi, 27<sup>th</sup> – 31<sup>st</sup> January, 2010.

<sup>179</sup> See Protocol for the establishment of the East African Community Article 3.

Article 41 of the Protocol provides for dispute settlement. It states thus;

Each Partner State affirms her adherence to the principles for the administration and management of disputes and shall in particular:

- (a) accord due consideration to the other Partner States' presentation or complaints;
- (b) accord adequate opportunity for consultation on representations made by other Partner States; and
- (c) implement in good faith any decisions made pursuant to the Community's dispute settlement mechanisms.

The same Article goes further to provide that the implementation of the Article shall be in line with the East African Community Customs Union (Dispute Settlement Mechanism) Regulations as specified in Annex IX to the protocol. It is important for this paper to discuss the Regulations, which provide a wide range of dispute settlement mechanisms.

### **3.3.1 EAST AFRICAN COMMUNITY CUSTOMS UNION (DISPUTE SETTLEMENT MECHANISM) REGULATIONS**

The purpose of the Regulations is to implement the provisions of Article 41 of the Protocol and to ensure uniformity among Partner States in the implementation of the provisions on dispute settlement and to ensure to the extent possible, that the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol<sup>180</sup>. The regulations apply to dispute

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<sup>180</sup> Regulation 2 of the East African Community Customs Union (Dispute Settlement Mechanism) Regulations.

settlement in respect of anti-dumping measures; subsidies and countervailing duties; safeguard measures; rules of origin; and any other matter under the Protocol.

Regulation 5 establishes a dispute Settlement Mechanism. It provides that where a dispute arises between or among Partner States, recourse shall in the first instance be had to consultations with a view to finding an amicable resolution to the dispute including, but not limited to, the use of good offices, conciliation and mediation. It further provides that when an amicable resolution is not achieved, any party to the dispute shall after notifying the other parties, refer the matter to the Committee, through the Secretary General, requesting for the establishment of a dispute settlement panel for purposes of settling the dispute.

The regulations provide for a number of peaceful dispute settlement mechanisms:

### **3.3.1.1 CONSULTATION**

Regulation 6 of the Customs Union Regulations provides for consultation as a dispute settlement mechanism. It however only states that “Requests for consultations shall be notified to the Committee through the Secretary General in writing, giving the reasons for the request, including identification of the issues and an indication of the legal basis for the complaint”.<sup>181</sup> It does not exhaustively explain the procedure for consultations.

Where a request for consultations is made pursuant to these regulations, the Partner State to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten days after the date of its receipt and shall enter into consultations in good faith within a period

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<sup>181</sup> Ibid Regulation 6(1).

not exceeding thirty days after the date of receipt of the request, with a view of reaching a mutually satisfactory solution<sup>182</sup>.

Where a Partner State does not respond within ten days after the date of receipt of the request, or does not enter into consultation within a period of thirty days, or a period otherwise mutually agreed, after the date of receipt of the request, the Partner State that requested the consultations may refer the matter to the committee.<sup>183</sup>

Where parties fail to settle a dispute through consultations within sixty days after the date of the receipt of the request for consultations, the complaining party may refer the matter to the committee. A complaining party may also refer the matter to the Committee during the sixty day period where the consulting parties jointly determine that they have failed to settle the dispute through consultations<sup>184</sup>.

In cases of urgency, for example cases involving perishable goods, the Partner States take a much shorter time to enter consultations after a request has been made.

Consultation has been listed as a way of having disputes solved amicably. Consultations give the parties an opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation.<sup>185</sup> A majority of disputes so far in the WTO have not proceeded beyond consultations, either because a satisfactory settlement was found or the complainant decided for other reasons

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<sup>182</sup> Ibid Regulation 6(2).

<sup>183</sup> Ibid Regulation 6 (3).

<sup>184</sup> Ibid Regulation 6(6).

<sup>185</sup> See Article 4.5 of the DSU.

22 See a handbook of the WTO dispute settlement system by World Trade Organization, Legal affairs Division found at

[http://books.google.co.ke/books?id=6UU794RIDt4C&pg=PA43&lpg=PA43&dq=consultations+as+a+means+of+dispute+settlement&source=bl&ots=-TxD6oPqf&sig=q-ljK5Jt5z0Vae1w4saA05AMUv0&hl=en&ei=iLpYTtzIA4qBORzo-acM&sa=X&oi=book\\_result&ct=result&resnum=8&sqi=2&ved=0CFEQ6AEwBw#v=onepage&q=consultations%20as%20a%20means%20of%20dispute%20settlement&f=false](http://books.google.co.ke/books?id=6UU794RIDt4C&pg=PA43&lpg=PA43&dq=consultations+as+a+means+of+dispute+settlement&source=bl&ots=-TxD6oPqf&sig=q-ljK5Jt5z0Vae1w4saA05AMUv0&hl=en&ei=iLpYTtzIA4qBORzo-acM&sa=X&oi=book_result&ct=result&resnum=8&sqi=2&ved=0CFEQ6AEwBw#v=onepage&q=consultations%20as%20a%20means%20of%20dispute%20settlement&f=false). Accessed on 27/8/2011.

not to pursue the matter further. This shows that consultations are often an effective means of dispute resolution in the WTO and that the instruments of adjudication and enforcement in the dispute settlement system are by no means always necessary.<sup>186</sup> It gives parties an ample opportunity to sort out their issues before the panel stage. Consultations should be in good faith and without prejudice to the rights of the parties in further proceedings. In urgent cases, especially cases of perishable goods, consultations ought to be done quickly.

### **3.3.1.2 GOOD OFFICES, CONCILIATION AND MEDIATION**

Good offices, conciliation and mediation may be undertaken voluntarily where the parties to the dispute agree<sup>187</sup>. Such proceedings shall be confidential and without prejudice to the rights of either party in any further proceedings<sup>188</sup>.

A party to a dispute may request for good offices, conciliation or mediation at any time and the proceedings may begin and be terminated at any time. If the proceedings are terminated, the complaining party may request for a panel.<sup>189</sup>

The parties to a dispute may request the Chairperson of the Council, the Secretary General or any other person the parties to dispute deem fit to offer good offices, or to conciliate or mediate between or among them with a view to achieving an amicable settlement of the dispute.<sup>190</sup>

Under Regulation 8, where an amicable resolution is not achieved through consultations, the complaining party shall, in writing refer the matter to the committee requesting for the

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<sup>186</sup> handbook of the WTO dispute settlement system by World Trade Organization, Legal affairs Division

<sup>187</sup> See Regulation 7(1) of the East African Community Customs Union (Dispute Settlement Mechanism) Regulations.

<sup>188</sup> Ibid regulation 7(2).

<sup>189</sup> Ibid regulation 7(3).

<sup>190</sup> Ibid regulation 7(6).

establishment of a panel. The complaining party may in any case request the establishment of a panel at any time where it is of the view that the consultations are not productive.

Good offices, Conciliation and Mediation are useful if a right forum is provided. It is worth noting that these diplomatic procedures are provided for under Article 5 of the Rules and procedures governing the settlement of disputes under the dispute settlement understanding.<sup>191</sup>

Indeed, the drafters of the East African Community Customs Union Regulations borrowed heavily from these rules. This is in the spirit of the Hague Convention for the Pacific Settlement of International Disputes which encourages parties to a dispute to give priority to these peaceful methods of dispute settlement.

As earlier noted, mere listing of these methods is not enough. Active steps must be taken to give them legal and Institutional teeth to enable them operate. Regulation 7(6) of the East African Community Customs Union regulations, mandates the Chairperson of the Council, the Secretary General or any other person the parties to a dispute deem fit to offer good offices, to conciliate or to mediate between or among them. This is not enough.

It is noteworthy that the East African Community is not as developed as other regional integration schemes like the European Union. As such, offices like that of the Chairperson of the Council and the Secretary General are still pegged on their individual partner members. They may not therefore be good candidates to offer good offices, conciliation and mediation. So, the

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<sup>191</sup> See annex 2 of the Rules and procedures governing the settlement of disputes under the Dispute settlement understanding found at [http://docs.google.com/viewer?a=v&q=cache:0vecOLdGojUJ:www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf+dispute+settlement+understanding+pdf&hl=en&gl=ke&pid=bl&srcid=ADGEEShQ85oFRxKWcbfegSNL GkQXdUAg0WxiPyG0XoEITPifRnH\\_KpSXTMsIsEUAIpDpq6-jq9wz9vetEaokhIng8eUfTRx4oJEc0JBERnG3K4sPW2UOJUel5tlMRMPriGAo3WfXtqFO&sig=AHIEtbRopp4v29zJh1kws2cgCUoSsN2LvA](http://docs.google.com/viewer?a=v&q=cache:0vecOLdGojUJ:www.wto.org/english/docs_e/legal_e/28-dsu.pdf+dispute+settlement+understanding+pdf&hl=en&gl=ke&pid=bl&srcid=ADGEEShQ85oFRxKWcbfegSNL GkQXdUAg0WxiPyG0XoEITPifRnH_KpSXTMsIsEUAIpDpq6-jq9wz9vetEaokhIng8eUfTRx4oJEc0JBERnG3K4sPW2UOJUel5tlMRMPriGAo3WfXtqFO&sig=AHIEtbRopp4v29zJh1kws2cgCUoSsN2LvA) accessed on 30/8/2011.

utilization of these methods will only happen if clear procedures, rules and mechanisms are established.

Good offices, Mediation and Conciliation have merely been listed. They are inadequate in their present form because the procedure for their utilization has not been given. There are no proper rules to guide their operation. The institutions to give effect to these methods have also not been provided for. I intend to fill these gaps in this study.

### **3.3.1.3 ARBITRATION**

Parties to a dispute shall resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings. Agreement to resort to arbitration shall be notified to the committee.<sup>192</sup>

Interested parties may be enjoined to an arbitration proceeding only upon the agreement of the parties to the arbitration proceeding.<sup>193</sup>The parties are also called upon to abide by an arbitration award.<sup>194</sup>Under regulation 20(4), parties to the proceedings may opt to be governed by the rules of the arbitration court.

It is obvious that the regulations leave it to parties to adopt the procedure. No procedures are provided. Without clear arbitration procedures being set out, there is the risk of uncertainty as to how the arbitration should be undertaken. By allowing the parties the freedom to agree on the

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<sup>192</sup> Regulation 20(1) of the East African Community Customs Union (Dispute Settlement Mechanism) Regulations.

<sup>193</sup> Ibid, Regulation 20(2).

<sup>194</sup> Ibid, Regulation 20(3).

procedures, the proceedings may be inordinately long since it might take the parties time before agreeing on the procedure to be adopted.

Parties are also given the option of being governed by the rules of the arbitration court. In as much as this would be a good idea, we have established that the court, as an institution, cannot be fully relied upon for the various weaknesses addressed herein before. One can say that the court is not fully operational. The East African region does not also have any known arbitration institution to arbitrate over their matters. The parties within the region are therefore left at the mercy of other arbitration institutions away. Some of these arbitration institutions have their rules and procedures which may not necessarily be palatable to the members of the East African Community. Furthermore, some of the institutions may not be cost effective given that they may have their seats far away from the East African region.

The mechanism under the Regulations also consists of a possibility for an amicable settlement before the East African Committee on Trade Remedies established under Article 24 of the Protocol (Committee). The Committee shall be composed of nine members, qualified and competent in matters of trade, customs and law.<sup>195</sup> The Committee shall handle all matters pertaining to:

- a) rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules, specified in Annex III to the Protocol;
- b) anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to this Protocol;

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<sup>195</sup> Article 24(2)(a) of the Customs Union Protocol.



- c) subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to this Protocol;
- d) safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to this Protocol;
- e) dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to this Protocol;
- f) Any other matter referred to the Committee by the Council.<sup>196</sup>

**The functions of the Committee shall be:**

1. Initiate, through the investigating authorities of the Partner States, investigating on disputes under the Regulations in paragraph 1 of this Article;
2. Make affirmative or negative determinations on investigation arising from sub-paragraph (a) of this paragraph;
3. Recommend provisional measures to prevent injury to domestic industry where preliminary affirmative determination has been made under any matter in paragraph 1 of this Article;
4. Undertake consultations with Partner States and other countries on matters before it;
5. Report to the council on all determinations in relations to matters that are submitted to it and decisions made by it;
6. Provide advisory opinions to the Partner States in relation to matters under paragraph 1 of this Article;

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<sup>196</sup> Ibid, Article 24 (1).

7. Review annually the implementation and operation of the matters in paragraph 1 of this Article;
8. Issue public notices under the matters in paragraph 1 of this Article;
9. Facilitate consultations by Partner States and parties to the dispute before it, to ensure timely fulfillment of all requirements by parties to the dispute and provide advice as may be appropriate;
10. Administer and manage the dispute settlement mechanism; and
11. Undertake any function that may be assigned to it by any regulation under this Protocol or by the Council<sup>197</sup>

### **3.3 EACJ VS THE COMMITTEE**

While this can be said to be an effective amicable dispute settlement mechanism, many have argued that its efficiency is hampered by the provision in the Protocol that the decision of the Committee on these matters shall be final.<sup>198</sup> This effectively ousts the jurisdiction of the East African Court of Justice over the process under the Customs Union Protocol except if any party challenges the decision of the Committee on grounds of fraud, lack of jurisdiction or other illegality,<sup>199</sup> in which case such party may refer the matter to Court for review in accordance with Article 28(2) of the Treaty and any other enabling provision of the Treaty. Furthermore, the review provided for under this provision can only be requested by Partner States as Article 28 of

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<sup>197</sup> Ibid Article 24 (4).

<sup>198</sup> Ibid Article 24 (5).

<sup>199</sup> Emphasis added.

the Treaty referred to provides, only for references by Partner States and not by any other person.<sup>200</sup>

This ouster of jurisdiction hampers its ability to play the role. The question that has been asked is that if the Court's core mandate is to ensure the adherence to law within the Community, would one conclude that the Customs Union Protocol is not part of the EAC law? For all intents and purposes the EAC Customs Union is part of the Community law whose application, interpretation and compliance therewith would have naturally come to the Court. The establishment of the above mentioned Committee with exclusive jurisdiction on matters arising out of Customs Union and the ousting of the jurisdiction of the East African Court of Justice is therefore bound to create a conflict that would hamper the efficiency of this dispute settlement mechanism.

It is therefore not surprising that over five years since the Customs Union Protocol became operational, this dispute settlement mechanism is yet to be tested and the EACJ is yet to receive a single application under the Protocol. An attempt by one person to file a reference in the East African Court of Justice failed flat as the Court dismissed it on the preliminary objection ground which was raised by the Respondent that the Court had no jurisdiction.<sup>201</sup> This apparent institutional conflict that led to the dismissal of this case is a blow especially to the Business Community.

The other challenge to the efficiency of this mechanism is the establishment of some of the mentioned bodies. The East African Committee on Trade Remedies that is contemplated under Article 24 of the Protocol is yet to be established. This has meant that many of the disputes

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<sup>200</sup> Supra note 165.

<sup>201</sup> See *Mordern Holdings v. Kenya Ports Authority*, Reference No 1 of 2008.

among business people in the Community are yet to get a forum for their resolution, rendering the peaceful dispute settlement mechanism established under the Protocol useless. The business people in East Africa are left with nowhere to present their disputes that arise out of Customs Union. Consequently the chances of EACJ receiving appeals under its limited jurisdiction are also not there unless the Committees are formed to generate work for the Court.<sup>202</sup>

### **3.4 COMMON MARKET PROTOCOL**

The provisions of the Protocol, namely the free movement of goods; the free movement of persons, the free movement of labour, the free movement of persons, the free movement of capital and the right of establishment and residence are all aimed at increasing trade and enhancing economic growth and development for the mutual benefit of all East Africans.

Article 46 states that

In accordance with paragraph 3 of Article 76 of the treaty, the Council may establish and confer powers and authority upon such institutions as it may deem necessary to administer the common market.

Article 54(1) states that any dispute between the partner states arising from the interpretation or application of this protocol shall be settled in accordance with the provisions of the treaty.

The first point to note is that the Common Market Protocol neither establishes a new dispute resolution body nor does it give to the EACJ the powers to determine disputes arising under it. Jurisdiction to entertain Common Market related disputes has mainly been given to national courts as it flows from Article 54 (2):

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<sup>202</sup> Supra note 165.

“In accordance with their Constitutions, national laws and administrative procedures and with the provisions of this Protocol, Partner States guarantee that:

a) any person whose rights and liberties as recognized by this Protocol have been infringed upon, shall enjoy the right of recourse, even where this infringement has been committed by persons exercising their official duties; and

b) the competent judicial, administrative or legislative authority or any other competent authority, shall rule on the rights of the person who is making the appeal”.

This provision effectively means that an individual, whose rights accruing from the Common Market Protocol may be violated, shall take the matter to his/her national courts for resolution. There is no immediate recourse to the EACJ or any other body established under the East African Community.

The granting of jurisdiction over disputes under the Common Market Protocol to national courts and not the EACJ has been viewed as weakening of the regional Court. Given that the Protocol does not make provision for a clear amicable dispute settlement mechanism, this leaves disputants to the mercy of the different national jurisdiction. Unless a national court seized with a Community law related matter feels a need for interpretation and refers it to the EACJ in accordance with Article 34 of the Treaty, the EACJ shall never entertain a Common Market-related matter.

Although article 54 (1) of the Common Market Protocol refers any dispute amongst Partner States arising from the Protocol to “the procedure for settlement of disputes stipulated in the

treaty,” the likelihood of Partner States taking each other to court is little if at all. The individuals and body corporate would have been the ones to make the East African Court of Justice play a significant role in realization of Common Market. It should always be understood that the court was established for sole and exclusive use of Partner States and EAC institutions. The main reason why it was put in place was indeed to assist the community achieve its objectives through respect of principles of Rule of law, democracy, good governance and human rights which are well enshrined in the treaty.<sup>203</sup>

## **CONCLUSION**

Meaningful integration will result only if the community and its peoples enjoy equal rights in an economically vibrant federation when states, individuals, NGOs, regions and international organizations have capacity to challenge actions that not only contravene the treaty but also internationally recognized fundamental values and norms in human rights.<sup>204</sup>

The East African Community has made reference to peaceful dispute settlement under WTO as well as providing for specific pacific settlement of dispute mechanisms under the Customs Union Protocol. But as mentioned earlier, the efficiency of these mechanisms is challenged by a number of factors.

The mechanism under the Customs Union Protocol are not clear on the types of disputes to be dealt with under the different mechanism, the procedure of applying the mechanisms, and clear institutional framework.

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<sup>203</sup>Supra, note 166.

<sup>204</sup><http://docs.google.com/viewer?a=v&q=cashe:VDVsJ403TEJ:www.kituoachakatiba.org/index2.php%3Fotion%3> accessed on 15/9/2011.

The other challenge to dispute settlement in the East African community is the existence of parallel dispute resolution mechanisms. While the EACJ was meant to be the sole dispute settlement body, different Protocols under the EAC Treaty have granted jurisdiction to other bodies and even gone further to oust the jurisdiction of EACJ in certain dispute settlement mechanisms. This is a challenge to the successful integration of the Community.

There is likely to be different interpretations of the Community Law that will create a vicious circle of endless litigation. This will in turn discourage affected parties from bringing their disputes to the Community for resolution. Secondly the process of dispute resolution will take too long thereby defeating the purpose for which the system was set and in turn delaying the whole integration process. This has been cited severally as the reason why many traders in the Community do not take their matters before any of the EAC bodies. The Kenya Association of Manufacturers (KAM) CEO Betty Maina said this of the Common Market Protocol, “Although we have a formal dispute resolution system under the treaty, business has been reluctant to use them because of the fact that it is perceived to be slow and unreliable. This calls for an efficient and reliable dispute resolution system,”<sup>205</sup>

Third is that the co-existence of the EACJ and the Committee is not cost effective at all. The Committee is to be comprised of three (3) members per Partner State,<sup>206</sup> making a total of fifteen members. It will also need a secretariat just as the Court needs to have Registry staff. Lastly the procedure before the Committee will be extremely costly to the parties as they shall bear the remuneration and travel expenses of the members of the Panel and those of experts,<sup>207</sup> on the rate

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<sup>205</sup> Quoted in Coastweek, Issue No. 3432 (12-18 August 2011), accessed on 17<sup>th</sup> August 2011 at [http://www.coastweek.com/3430\\_10.htm](http://www.coastweek.com/3430_10.htm) .

<sup>206</sup> Supra, note 194, Regulation 19 (2).

<sup>207</sup> Ibid, Regulation 19 (1).

fixed by the Council of Ministers from time to time.<sup>208</sup> The number of Panel members is fixed by the Committee.

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<sup>208</sup> Ibid, Regulation 8(5).



## CHAPTER FOUR

### COMPARATIVE STUDY BETWEEN THE EAC AND

#### OTHER REGIONAL ORGANISATIONS

#### 4.1 INTRODUCTION

As the world economy becomes more integrated following numerous rounds of trade negotiations under GATT and the WTO, various regions are also achieving a higher degree of integration<sup>209</sup>. With over 300 Regional Trade Agreements in place, both Free Trade Agreements and Customs Unions coming up, they have created a complex web of laws, regulations and rules of origin and dispute settlement procedures known as the “spaghetti bowl phenomenon”<sup>210</sup>.

The type(s) of dispute resolution regime(s) chosen by the parties to an international treaty are usually seen as reflective of a number of factors such as the depth of integration that the treaty intends<sup>211</sup> and the economic and political goals that underpin the integration (including the level of internal or domestic support for the agreement in each participating state). Other factors include the relationship between the parties to the RTA, and the parties’ attitudes towards the role of international institutions and towards the institutions’ Dispute Resolution Mechanisms.<sup>212</sup>

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<sup>209</sup> Jo-Ann Crawford and Roberto V. Fiorentino, “The Changing Landscape of Regional Trade Agreements”, (2005) 8 *WTO Discussion Paper* p3.

<sup>210</sup> *Supra*, note 4.

<sup>211</sup> James McCall Smith, “The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts”, (2000), 54(1) *International Organization*, 137-180, at 169. “No mere free trade agreements or customs unions have embraced the concept of binding rulings by a standing tribunal of justices. Only where the level of proposed integration is high, in the form of a common market or economic union, have highly legalistic mechanisms been endorsed.”

<sup>212</sup> Cherie O’Neal Taylor, “Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR”, (1996) 17(23), *Northwest Journal of International Law and Business* pp 850-899, at 851.

It is often said that states that are more powerful economically and politically choose to resolve their trade disputes by negotiation, which allows them to benefit from their bargaining power and thus attain resolutions advantageous to them. A corresponding assumption is that a rule-based or juridicalized Dispute Resolution Mechanism relying on the adjudication of disputes by an independent, impartial and unbiased third party in a transparent procedure supplemented by an enforcement mechanism is beneficial to a developing country that lacks international economic, political and legal influence.<sup>213</sup>

In some cases, the complexity of the relationship between member states and the scope and objectives of their economic integration have led to the development of new forms of Dispute Resolution Mechanisms. If the treaty between those states is more comprehensive and is intended to lead to a deeper integration of the parties, then the optimal Dispute Resolution Mechanism is likely to be the one that is more supranational, centralized and capable of producing enforceable decisions.<sup>214</sup> Economic considerations—such as the goals and functions of economic integration and the scope of economic exchange within the RTA—play a role. Political issues—such as each state’s concerns regarding sovereignty, any opposition to the RTA that might exist within a state, and perceptions in the various states of the role of international institutions and international law, and the independence of tribunals and courts—are also a factor. Social and legal factors—including the legal culture of the society, in general, and its

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<sup>213</sup> W. Michael Reisman and Mark Wiedman, “Contextual Imperatives of Dispute Resolution Mechanisms; Some Hypotheses and Their Application in the Uruguay Round and NAFTA”, (1995), 29-33 *Journal of World Trade*, 5-38, p 9.

<sup>214</sup> Ljiljana Biukovic, “The New Face of CEFTA and its Dispute Resolution Mechanisms” (2008) 33 *Review of Central and East European Law* pp257-294.

legal profession, in particular, and the people's commitment to the rule of law and to liberalism and democracy—can also influence the effectiveness of Dispute Resolution Mechanisms.<sup>215</sup>

An analysis of the above factors, provides the starting point for determining the effectiveness of a model of supranational adjudication and for finding out how it might be possible, if at all, to transplant a Dispute Resolution Mechanism that has worked well in one setting or within the framework of an RTA concluded by a group of countries in a particular geographical region, into an RTA concluded by a different group of countries in a different geographical region.<sup>216</sup> In addition to those factors, it is often emphasized that an effective Dispute Resolution Mechanism capable of bringing some certainty and predictability to dispute settlement should have certain desired qualities. For instance, it must be a transparent and accessible procedure that is not too costly and time-consuming to administer. Its rules must be based on a widely accepted set of international norms and standards. Its tribunals must consist of arbitrators who are independent, impartial, neutral and knowledgeable, and the decision-making process must end in a final and binding award that is well reasoned and contributes to the development of uniform jurisprudence.<sup>217</sup>

To be able to better understand the importance of establishing a strong dispute settlement mechanism for the East African Community, I shall look at other Regional Trade Blocks that are successfully integrated. It shall especially look at their dispute resolution mechanisms and compare them with the one established under the East African Community. The chapter will

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<sup>215</sup> Ibid

<sup>216</sup> Laurence R. Helfer and Anne-Marie Slaughter, "Towards a Theory of Effective Supranational Adjudication", (1997) 107(2) *Yale Law Journal*, pp 273-391.

<sup>217</sup> Christian Leathley, "The Mercosur Dispute Resolution System", *Working Paper for The Royal Institute of International Affairs Mercosur Study Group* (2002), available at <<http://www.chathamhouse.org.uk/publications/papers/view/-/id/169/>>. Accessed on 5/8/2011.

analyze the Dispute Resolution Mechanisms used by the EU and CEFTA and the Caribbean Community.

#### **4.2 CENTRAL EUROPEAN FREE TRADE AGREEMENT (CEFTA)**

The Central European Free Trade Agreement (CEFTA) is a trade agreement between non-EU countries in Central and South-East Europe. Original CEFTA agreement was signed by Visegrád Group countries, that is by Poland, Hungary and Czech and Slovak republics on 21 December 1992 in Kraków, Poland. It entered into force since July 1994. Through CEFTA, participating countries hoped to mobilize efforts to integrate Western European institutions and through this, to join European political, economic, security and legal systems, thereby consolidating democracy and free-market economics. The agreement was amended by the agreements signed on 11 September 1995 in Brno and on 4 July 2003 in Bled. Slovenia joined CEFTA in 1996, Romania in 1997, Bulgaria in 1999, Croatia in 2003 and Macedonia in 2006. With the opening of CEFTA to the Balkan states in 2006 several substantive amendments were made to the Agreement in December 2006.<sup>218</sup>

Article 1 of the CEFTA Treaty stated that its main objectives were to gradually establish a free trade area among its member states and to:

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<sup>218</sup> “Annex 1 to the Agreement on Amendment of and Accession to the Central European Free Trade Agreement, Consolidated Version of the Central European Free Trade Agreement”, adopted 19 December 2006, entered into force 26 July 2007, available at <<http://www.stabilitypact.org/trade/ANN1CEFTA%202006%20Final%20Text.pdf>> accessed on 8/6/2011.

“(a) foster [...] the advance of economic activity, the improvement of living and employment conditions, and increased productivity and financial stability.

(b) provide fair conditions of competition for trade [...] (c) contribute [...] by [the] removal of barriers to trade, to the harmonious development and expansion of trade.”<sup>219</sup>

CEFTA 1992 did not have sufficient provision for dispute settlement, with Article 31 containing CEFTA 1992’s only provisions on dispute settlement, and with no record that they have ever been used. These provisions were based on the political model of DRM—that is, direct bilateral consultations between the parties to a dispute and, where necessary, subsequent consultations between the parties within the Joint Committee. It has been argued that highly juridicalized DRMs occur in cases where there is low asymmetry and a high level of integration is proposed.<sup>220</sup> And further that “where asymmetry is high, legalism is unlikely to be high even in cases where the proposed integration is deep”.<sup>221</sup> When some of the CEFTA members left to join the EU and the remaining members sought a deeper level of integration, it was felt that a more adjudicative DRM, similar to the ECJ in the EU, was preferable. CEFTA 1992, at Article 31, did not make any reference to the GATT dispute settlement mechanism, but Article 26 of CEFTA gives its members the opportunity to pursue anti-dumping measures against each other in accordance with Article VI of GATT and agreements related to that Article.

Since the WTO DSU has been established, several CEFTA members have submitted their disputes to its panels/tribunals for settlement, but there have been no concurrent proceedings

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<sup>219</sup> Art.1(2), CEFTA 1992.

<sup>220</sup> James McCall Smith, “The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts”, (2000) 54(1) *International Organization*, pp137-180, at 169.

<sup>221</sup> *Supra* note 211.

under CEFTA and the WTO dispute settlement mechanisms.<sup>222</sup> However, not all of the disputes that could have arisen between CEFTA members could have been resolved through the WTO DSU. Disputes among CEFTA members arising, for example, out of the application or infringement of competition rules concerning undertakings (Art.22, CEFTA 1992) would have had to be resolved in accordance with the procedure set out in Article 31, CEFTA 1992—through consultation between the parties. It is noteworthy that the majority of CEFTA disputes submitted to the WTO DSU involved agricultural products. That was one of the most sensitive areas that was not sufficiently regulated by CEFTA 1992 and for which the DRM based on consultations and conciliation before the Joint Commission proved to be insufficient. The complete lack of any agreement among the parties as to their common agricultural policy was apparent.

CEFTA 2006 was meant to usher in a much deeper level of economic integration among its members, including competition, services, investment and IP. It therefore significantly amended the 1992 Treaty by modifying the rules related to consultation, by establishing a quasi-judicative DRM, by providing detailed rules of procedure for the new arbitral tribunal, and by addressing the issue of concurrent jurisdiction between CEFTA tribunals and the WTO DSU.<sup>223</sup>

At present, any dispute between CEFTA members arising out of their trade in industrial and agricultural products, services or competition issues, and any dispute in which only one of the parties is also a WTO member, has to be resolved under the CEFTA Dispute Resolution Mechanism. As already mentioned, in the event of a dispute, the parties are first required to

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<sup>222</sup> WTO, “Dispute Settlement: Dispute by Country”, available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) accessed on 5/8/2011.

<sup>223</sup> Ibid

cooperate trying to resolve it through direct consultations or consultations within the Joint Committee.<sup>224</sup>

Under CEFTA 2006 parties are able to hold direct consultations in the presence of a mediator,<sup>225</sup> who would submit a final report to the Joint Committee. Annex 8 of CEFTA 2006 goes on to set out rules for the appointment of the mediator. It is noteworthy that Annex 8 provides that the United Nations Commission on International Trade Law (UNCITRAL) rules on conciliation will apply to the mediation proceedings. If the parties fail to reach agreement regarding the dispute through bilateral consultations and mediation or through the Joint Committee, then they have the right to submit the dispute to an arbitral tribunal<sup>226</sup> for final and binding resolution.

Article 43(3) determines that the award of the arbitral tribunal shall be final and binding upon the parties; but CEFTA 2006, like the original treaty, does not specify any special enforcement provisions outside of the general obligation of the parties to take necessary measures required to fulfill their obligations under the agreement.

Annex 9 of CEFTA 2006 sets out how its arbitral panels are to be constituted and how they will function. It provides that, if the parties fail to agree on the appointment of the third arbitrator, that arbitrator is to be nominated by the President of the Permanent Court of Arbitration at The Hague. This resolution is important as it prevents the parties from obstructing the proceedings by failing to agree on a panel. It is also noteworthy that Annex 9 specifies that the procedural

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<sup>224</sup> Art.42(1)(2), CEFTA 2006.

<sup>225</sup> Art.42(3), CEFTA 2006: "These consultations may take place, should the Parties concerned so agree, in the presence of a mediator. If The Parties concerned do not agree on a mediator, the Chairman of the Joint Committee or, if he is a national or resident of one of the Parties concerned, then the first of his predecessors who is not, shall appoint the mediator within 20 calendar days of receipt of the initial written request for mediation in accordance with the rules set out in Annex 8."

<sup>226</sup> Article 43(1), CEFTA 2006.

arbitration rules applicable are the Optional Rules for Arbitrating Disputes between Two States of the Permanent Court of Arbitration at The Hague.

Article 43(4) of CEFTA 2006 addresses the issue of concurrent jurisdiction between the CEFTA tribunal and the WTO DSU. That article states that:

“A dispute under consultation and arbitration under this Agreement shall not be submitted to the WTO for dispute settlement [n]or shall an issue already before the WTO DSU be submitted for arbitration under this article.”

Another important provision under CEFTA 2006 is the substantive law that CEFTA arbitrators have to apply in dispute resolution. If no WTO rules and disciplines apply to the provisions of the FTA that are in dispute (usually because the area in dispute happens not to be regulated by the WTO) or where the FTA explicitly refers to the WTO or even to GATT, the CEFTA tribunal will apply CEFTA rules.

Another interesting inclusion in CEFTA 2006 is the clause on the admissibility of *amicus curiae* briefs during arbitration proceedings.<sup>227</sup> That allows opinions of third parties to be presented before the tribunal and potentially contribute to a better understanding of the issues in dispute, thereby influencing the tribunal's decision.

In addition to conciliation, mediation and arbitration as provided for by CEFTA 2006, its members are permitted to take various special trade measures on the basis of the WTO agreements. For example, Article 23 of CEFTA 2003 slightly modifies the provisions of CEFTA

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<sup>227</sup> Art.43(2), CEFTA 2006.



1992 Article 27 on General Safeguards, permitting the parties to take safeguard measures under Article XIX of GATT and under the WTO Agreement on Safeguard Measures. Article 21(6) of CEFTA 2006 allows CEFTA members to take countervailing measures under the relevant articles of GATT and the WTO Agreement on Subsidies and Countervailing Measures or under related internal regulations.<sup>228</sup> Next, based on Article 22 of CEFTA 2006, CEFTA members could take anti-dumping measures against another CEFTA member on the basis of GATT and WTO regulations without previous notification to the Joint Committee. CEFTA 2006 opts to make use of WTO rules and disciplines, where it can, rather than to create its own independent rules.

### **COMPARISON WITH THE EAST AFRICAN COMMUNITY**

Under CEFTA 2006, parties hold direct consultations in the presence of a mediator. No such provisions exist under EAC as regards consultations.

Annex 8 of CEFTA 2006 sets out rules for the appointment of a mediator and explicitly imports UNICITRAL rules on conciliation to guide mediation proceedings. EAC has not provided clear rules to guide mediation proceedings. It is the Chairperson of the Council or the Secretary General that are relied upon to act as mediators. No clear procedures for the appointment of mediators are in place.

CEFTA 2006 is also clear on how an Arbitral Tribunal is to be established in case parties fail to solve their dispute through consultations or mediation. It also clearly provides for the applicable

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<sup>228</sup> James McCall Smith, "The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts", (2000) ,54(1) *International Organization* , pp 137-180.

rules and procedures. The EAC has not given clear procedures of how the arbitral tribunal is to be set up. There also no clear rules on the appointment of potential arbitrators.

CEPTA members are free to take special trade measures on the basis of WTO agreements. No such provisions or their equivalent exist under the EAC. Indeed, they would be useful for the EAC if provided for.

### **4.3 THE EUROPEAN UNION**

#### **4.3.1 INTRODUCTION**

Pacific settlement of disputes in Europe is largely drawn from the European Convention for the Peaceful Settlement of Disputes that was opened for signature by the members of the Council of Europe, in Strasbourg on 29 April 1957 and entered into force on 30 April 1958. The convention first provides for judicial means of dispute settlement through the European Court of Justice (ECJ). But it also goes further to provide for alternative, 'soft' means of dispute settlement as well as mechanisms for prevention of disputes.

#### **4.3.2 WAYS OF SETTLING DISPUTES UNDER THE EU.**

##### **4.3.2.1 THE INTERNATIONAL COURT OF JUSTICE**

Parties agree to submit to the judgment of the International Court of Justice all international legal disputes which may arise between them and concern the interpretation of a treaty, any question of international law, the existence of any fact constituting a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation.<sup>229</sup> Indeed, within the European Union context, the European Court of Justice (ECJ) in particular has never tired of pushing towards more integration, toward an 'ever closer union

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<sup>229</sup> Article 1 European Convention for the Peaceful Settlement of Disputes, (1957), 320 UNTS 243, ETS 23.

between the peoples of Europe'. In view of its pro-active attitude in addressing disputes, the ECJ is therefore generally considered to be of pivotal importance for the European integration process. As one author commented:

'European legal integration, provoked by the European Court of Justice ... and sustained by private litigants and national judges, has gradually but inexorably 'transformed' ... the European Community.'<sup>230</sup>

The Court has been quite active in expanding Community competences and enhancing the effectiveness of Community law, while also actively promoting the integration of Community law into national legal systems.<sup>231</sup> Moreover the ECJ is viewed as a 'forum for inter-institutional debate', where it has jurisdiction to review Community acts or inaction of the Community institutions, brought either by Member States and Community institutions<sup>232</sup>, and as a 'regulatory complaint board' where it can hear cases brought by individuals against Community acts or inaction of the institutions<sup>233</sup>. The ECJ acts as a constitutional court where it needs to guard the objectives and rules of law laid down in the Treaties and plays an essential role in preserving the balance between the Community and the Member States.<sup>234</sup> The ECJ thus decides on the legality of Community secondary legislation, the preservation of the institutional balance, the

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<sup>230</sup> A. Stone Sweet, *The Judicial Construction of Europe* (OUP, Oxford 2004) pg 1.

<sup>231</sup> See for recent reviews e.g. G. de Búrca, 'The European Court of Justice and the Evolution of EU law', in: T. Börzel and R. Cichowski (eds.), *The State of the European Union, Law, Politics and Society* (OUP, Oxford 2003), 48-75; M. Dougan, *National Remedies before the Court of Justice*, (Hart Publishing, Oxford 2004).

<sup>232</sup> *Supra*, note 230, Articles 230 and 232.

<sup>233</sup> *Ibid.*

<sup>234</sup> See F. Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in: D. Curtin and D. O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law* (Butterworths, Dublin 1992), 32 and J. Komárek, 'Federal Elements in the Community Judicial System: Building Coherence in The Community Legal Order', (2005) 42 *CML Rev.*, 9-34.

demarcation of Community and national competences, as well as the protection of fundamental rights. At the same time, the ECJ sits at the apex of the Community court system and as such needs to ensure the uniform application of Community law, within the framework of preliminary questions referred to it by national courts, or upon appeal against a judgment of the Court of First Instance (CFI).

### **COMPARISON WITH THE EACJ**

While the ECJ has wide-ranging powers and jurisdiction over the integration of the community, the latter's powers are greatly curtailed and limited to merely interpreting the Treaty. EACJ has also not been so pro active as compared to ECJ. There is need to give greater Constitutional and Human Rights powers to the East African Regional court than it has now, if the region is to emulate the integration success of the EU.

The ECJ operates on a fulltime basis while the EACJ operates on an ad hoc basis. The ECJ has appellate jurisdiction. This has contributed to uniformity in the application of community law. The EACJ lacks appellate jurisdiction.

#### **4.3.2.2 CONCILIATION**

For the settlement of other disputes or when Parties have agreed to submit them to conciliation prior to recourse to judicial resolution, Parties agree to submit a dispute to a Permanent Conciliation Commission or to a special Conciliation Commission.<sup>235</sup> The latter Commission shall be set up within a period of three months from the date of request by one of the parties to the other.

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<sup>235</sup> Supra, note 231, chapter 11.

The European Convention for the Peaceful Settlement of Disputes lays down the procedure for conciliation. Article 6 of the Convention provides for the constitution of the Special Commission thus:

The Commission shall be composed of five members. The parties shall each nominate one Commissioner, who may be chosen from among their respective nationals. The three other Commissioners, including the President, shall be chosen by agreement from among the nationals of third States. These three Commissioners shall be of different nationalities and shall not be habitually resident in the territory nor be in the service of the parties.

If the nomination of the Commissioners to be designated jointly is not made within the period provided for in Article 5, the task of making the necessary nominations shall be entrusted to the government of a third State, chosen by agreement between the parties, or, failing such agreement being reached within three months, to the President of the International Court of Justice. Should the latter be a national of one of the parties to the dispute, this task shall be entrusted to the Vice-President of the Court or to the next senior judge of the Court who is not a national of the parties.<sup>236</sup>

Article 9 goes on to specifically provide for the steps to be taken in bringing the dispute before the Special Conciliation Commission. It is done by means of an application addressed to the President by the two parties acting in agreement or, in default thereof, by one or other of the parties. The application, after giving a summary account of the subject of the dispute, shall contain the invitation to the Commission to take all necessary measures with a view to arriving at

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<sup>236</sup> Ibid Article 7.

an amicable solution. If the application emanates from only one of the parties, the other party shall, without delay, be notified of it by that party.

The proceedings of the Special Conciliation Commission are at all times done in confidence unless both parties consent to the same being done publicly.<sup>237</sup> On the conduct of the proceedings by the Special Commission, unless otherwise agreed by the parties, the Commission sets its own procedural rules. However as relates to enquiries, it makes reference to the provisions of Part III of The Hague Convention for the Pacific Settlement of International Disputes of 18th October 1907. The parties are represented before the Conciliation Commission by agents whose duty is to act as intermediaries between them and the Commission; they may be assisted by counsels and experts appointed by them for that purpose and may request that all persons whose evidence appears to them desirable shall be heard.<sup>238</sup>

At article 15, the Convention clearly outlines the task of the Commission thus;

“The task of the Special Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it and lay down the period within which they are to make their decision.

At the close of its proceedings, the Commission shall draw up a *procès-verbal* stating, as the case may be, either that the parties have come to an agreement and,

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<sup>237</sup> Ibid Article 11.

<sup>238</sup> Ibid Article 12.

if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the *procès-verbal* of whether the Commission's decisions were taken unanimously or by a majority vote.

The proceedings of the Commission shall, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.”

In the case of a mixed dispute involving both questions for which conciliation is appropriate and other questions for which judicial settlement is appropriate, any party to the dispute shall have the right to insist that the judicial settlement of the legal questions shall precede conciliation.<sup>239</sup>

For all disputes which may arise between the Parties other than those mentioned in Article 1 and which have not been settled by conciliation, either because the Parties have agreed not to have prior recourse to it or because conciliation has failed, Parties agree to apply the procedure of arbitration<sup>240</sup>.

## **COMPARISON WITH EAC**

An institution named Conciliation Commission or Special Conciliation Commission is established under the EU to deal with resolution of disputes by conciliation. There are clear procedures of how it is established and how matters are to be brought before it. The EAC neither establishes such a Commission or a different one to utilize Conciliation as a mechanism. Regulation 7(3) only says that proceedings may begin and be terminated at any time. No

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<sup>239</sup> Ibid Article 18.

<sup>240</sup> Supra, note 235.

procedures to govern these proceedings are provided for as is the case under EU. How do you begin the proceedings? How do you end them?

While Regulation 7(6) of the East African Community Customs Union regulations merely mandates the Chairperson of the Council, the Secretary General or any other person the parties to a dispute deem fit to offer good offices, to conciliate or to mediate between or among them, its counterpart, under the European Convention on Peaceful Dispute Settlement, Article 6, gives power to the disputing member states to constitute the conciliation committee. This has the advantage of guaranteeing credibility, fairness and trust in the conciliation process. As it has been noted in the previous chapter, offices like that of the Chairperson of the Council and the Secretary General under the EAC Treaty are still pegged on their individual partner members, a fact that greatly hinders their impartiality.

Be that as it may, no procedures have been given on how to approach these personalities to offer conciliation. The parties to the dispute have also not been given a fallback position just in case they are dissatisfied with any of those personalities.

#### **4.3.2.3 MEDIATION**

New EU Directive on Mediation, Directive 2008/52/EC adopted on 21 may 2008, makes arrangements for the promotion and use of mediation in certain civil and commercial matters.<sup>241</sup>

The Directive applies to processes where two or more parties to a cross-border dispute of a civil or commercial nature attempt by themselves, on a voluntary basis, to reach an amicable

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<sup>241</sup> Association for International Arbitration, The New EU Directive on Mediation: First Insights, Association for International Arbitration, 50.



settlement to their dispute with the assistance of a mediator. The Directive only applies to cross-border disputes, although it does not prevent Member States from applying the provisions of the Directive to internal mediation processes.<sup>242</sup> Given the broad definition of “cross-border disputes”, the Directive's provisions on confidentiality and on limitation and prescription periods also apply in situations which are purely internal at the time of mediation but become international at the judicial proceedings stage, e. g. if one party moves abroad after mediation fails.

The Directive makes four important provisions in relation to mediation: facilitate and promote access to the settlement of the disputes by mediation; support of enforceability of mediation agreements in transactions; encourage confidentiality of the mediation process; and makes provision to prevent expiry of limitation periods during the mediation process.

The Directive obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conducts and other effective quality control mechanisms concerning the provision of mediation services.<sup>243</sup> These mechanisms may include market-based solutions provided that they aim to preserve the flexibility of the mediation process and the autonomy of the parties and to ensure that mediation is conducted in an effective, impartial and competent way. Member states, under Articles 9 and 10 are required to provide information on how to contact mediators and organizations providing mediation services as well as those courts which will be available to make mediation settlements agreement enforceable through a court order, decision or judgment. The Directive gives every judge in the Community, at any stage of the procedure, the right to invite the parties to have recourse to mediation if he

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<sup>242</sup> See Article 3 of the Directive.

<sup>243</sup> Ibid articles 4 and 5.

considers it appropriate in the case in question. The judge can also suggest that the parties attend an information meeting on mediation.

The Directive obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request.<sup>244</sup> This can be achieved, for example, by way of approval by a court or certification by a public notary. The choice of mechanism is left to the Member States. This provision will enable parties to give an agreement resulting from mediation a status similar to that of a judgment without having to commence judicial proceedings. This possibility, which currently does not exist in all Member States, can provide an incentive for parties to resort to mediation rather than go to court. Although parties will in most cases voluntarily comply with the terms of an agreement reached in mediation, the possibility of obtaining an enforceable title can be desirable for obligations, such as child maintenance, which require regular payments over a fairly long period, in the course of which the willingness of the debtor to fulfill his obligations voluntarily may deteriorate.<sup>245</sup>

The Directive also ensures that mediation takes place in an atmosphere of confidentiality and that information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails.<sup>246</sup> This provision is essential to give parties confidence in, and to encourage them to make use of, mediation. Both the EU Code of Conduct for mediators and the Directive acknowledge the need for parties in mediation as well as the mediator, to operate in an atmosphere without fear that, in seeking to arrive at an amicable solution to the dispute, their openness and honesty with each other might lead to

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<sup>244</sup> Ibid article 6.

<sup>245</sup> See the Official Journal of the European Union, L 136/3, 24.5.2008.

<sup>246</sup> Goldsmith JC, Ingen-Housz A and Pointon G.H., "Adr In Business. Practice and Issues Across Countries and Cultures" (1998) pg184.

irrevocable prejudice on their part in subsequent litigation. To this end, the Directive provides that the mediator and all those involved in the administration of the mediation process cannot be compelled to give evidence about what took place during mediation in subsequent judicial proceedings between the parties.<sup>247</sup>

Finally, the Directive contains a rule on limitation and prescription periods which ensures that, when the parties engage in mediation, any such period will be suspended or interrupted in order to guarantee that they will not be prevented from going to court as a result of the time spent on mediation.<sup>248</sup> Like the rule on confidentiality, this provision also indirectly promotes the use of mediation by ensuring that parties' access to justice is preserved should mediation not succeed.

The EU directive on mediation is part of an effort to promote mediation throughout the Union, aimed at facilitating the resolution of disputes, especially those arising between residents of different member states. The EU describes the benefits of mediation thus:

Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between parties. These benefits become even more pronounced in situations displaying cross-border elements.<sup>249</sup>

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<sup>247</sup> Supra note 239, Article 7.

<sup>248</sup> Ibid article 8.

<sup>249</sup> Recital 6 to the EU Directive on Mediation. Also see a further discussion in Lodder A.R and Zeleznikow J, "Enhanced Dispute Resolution Through the Use of Information Technology,"(2010) Cambridge University Press,p. 29

## **COMPARISON WITH EAC**

In contrast to the mediation procedure of the EU, that under the EAC treaty appears to give mediation powers to the Chairman of the Council or the Secretary General. It is worth noting that the Council Chairman and Secretary General are in most cases politically appointed, based on members state interest. They therefore may not possess the necessary mediation skills to play the role of mediators. The procedure for mediation is also not given within EAC.

The EAC is yet to establish a pool of mediation experts exclusively charged with mediating any disputes arising under the community as is the case under EU. There are also no clear provisions touching on the confidentiality of mediation process and the binding effect of the process.

### **4.3.2.4 ARBITRATION**

Article 19 of the European Convention for the Peaceful Settlement of Disputes provides that the signatory states are to submit to arbitration all disputes which may arise between them and which have not been settled by conciliation or otherwise.<sup>250</sup> By appointing a court of arbitration, the states agree in advance to comply with the award. This makes arbitration an important and appropriate tool to cure the missing obligation of the authorities to reach an agreement.<sup>251</sup>

In as much as the EU has clear rules and procedures to guide mediation, the same is not the case with the EAC.

## **4.4 THE CARIBBEAN COMMUNITY**

### **4.4.1 INTRODUCTION**

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<sup>250</sup> Supra, note 229.

<sup>251</sup> Supra note 234 p18.

In 1972, Commonwealth Caribbean leaders at the Seventh Heads of Government Conference decided to transform the Caribbean Free Trade Association (CARIFTA) into a Common Market and establish the Caribbean Community, of which the Common Market would be an integral part.<sup>252</sup>

The signing of the Treaty establishing the Caribbean Community, Chaguaramas, 4th July 1973, was a defining moment in the history of the Commonwealth Caribbean. Although a free-trade area had been established, CARIFTA did not provide for the free movement of labour and capital, or the coordination of agricultural, industrial and foreign policies.<sup>253</sup>

The objectives of the Community, identified in Article 6 of the Revised Treaty, are: to improve standards of living and work; the full employment of labour and other factors of production; accelerated, coordinated and sustained economic development and convergence; expansion of trade and economic relations with third States; enhanced levels of international competitiveness; organisation for increased production and productivity; achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with third States, groups of States and entities of any description and the enhanced co-ordination of Member States' foreign and foreign economic policies and enhanced functional co-operation.<sup>254</sup>

In 1989, when the Heads of Government made the decision to transform the Common Market into a single market and economy in which factors move freely as a basis for internationally competitive production of goods and provision of services, it was also decided that for the transformation to take place, the Treaty would have to be revised.

In 1992, following the adoption of the report of the West Indian Commission, an Inter-

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<sup>252</sup> Payne A., *The Political History of CARICOM*, 57.

<sup>253</sup> D. Alissa Trotz, *CARICOM: an example of regional cooperation*, 34.

<sup>254</sup> Pollard D. E., *The CARICOM System: basic instruments*, 469.

governmental Task Force was established, to work on the revision of the Treaty. Between 1993 and 2000, the Inter-Governmental Task Force (IGTF) which was composed of representatives of all Member States, produced nine Protocols, for the purpose of amending the Treaty.<sup>255</sup> These nine Protocols were later combined to create a new version of the Treaty, called formally, The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy.

Allowances have been made for the subsequent inclusion in the Revised Treaty, by way of additional Protocols, new issues such as e-commerce, government procurement, trade in goods from free zones, free circulation of goods, and the rights contingent on the free movement of persons.

#### **4.4.2 DISPUTE RESOLUTION UNDER CARICOM**

The revised CARICOM Treaty devotes Chapter 9 to the issues of Disputes Settlement. Article 188 recognizes international experience and identifies six modes of settlement as legitimate that is, good offices, mediation, consultations, conciliation, arbitration and adjudication. It further provides that parties may have recourse to good offices, mediation or conciliation in order to arrive at an interim arrangement pending settlement by arbitration or adjudication.<sup>256</sup>

In 2000, the CARICOM member states signed the Protocol IX on Dispute Settlement. The Protocol sought to amend the provisions of Chapters One and Two of the Caribbean Common Market Annex to the Treaty. The protocol outlines the kind of disputes touching on the interpretation of the Treaty that shall be resolved by means of peaceful settlement mechanisms

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<sup>255</sup> Supra, note 252, p127.

<sup>256</sup> Hall K., "UWI-CARICOM Project, Chuck-A-Sang M., University of the West Indies, Caricom single market and economy: challenges, benefits and prospects,"pg 124.

under the protocol.<sup>257</sup> The disputes include; allegations that an actual or proposed measure of another Member State is, or would be, inconsistent with the objectives of the Community; allegations of injury, serious prejudice suffered or likely to be suffered, nullification or impairment of benefits expected from the establishment and operation of the CARICOM Single Market and Economy (CSME); allegations that an organ or body of the Community has acted *ultra vires*; or allegations that the purpose or object of the Treaty is being frustrated or prejudiced. The protocol suggests the following as modes for the settlement of disputes, namely, good offices, mediation, consultations, conciliation, arbitration and adjudication.<sup>258</sup> For purposes of this paper, we shall look at two peaceful dispute settlement mechanisms that have been well provided for under the Protocol – Consultation and Conciliation.

#### **4.4.2.1 CONSULTATION**

Article 193 (6) of the Revised Treaty establishing the Caribbean Community, as amended by Protocol IX makes provision for disputing member states to submit their dispute to consultation. Consultation is entered into upon request by one of the disputing member states to another. The request to Consultation must be writing. There is a duty to always inform the Secretary General of the Community of any request for consultation. However, much as the Secretary-General is to be notified, the consultations themselves are confidential and without prejudice to the rights of the member states in any further proceedings.<sup>259</sup> The Treaty requires member states involved in consultations to employ their best endeavours to settle the dispute.<sup>260</sup> It requires that the member states that take on consultation should endeavour to “arrive at a mutually satisfactory settlement

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<sup>257</sup> Article IV of the Protocol.

<sup>258</sup> Ibid, Article V.

<sup>259</sup> Supra note 217 at pg 138.

<sup>260</sup> See Article 193(6) of the revised Treaty.

of the dispute”.<sup>261</sup> This includes that the member states shall provide sufficient information to enable a full examination of how the action complained of constitutes a breach of obligations arising from or under the provisions of the Revised Treaty. And any third party states that are not originally party to the dispute and request consultation may notify the consulting member states and the CARICOM Secretary-General of their interest to join in the consultations, if they have a legitimate interest in consultations being held. This request must be made within 10 days of the circulation of the request for consultation.<sup>262</sup> It is upon the member requested by the third party to determine whether their (third party’s) interest is legitimate and well-founded on similar facts and circumstances, before the third party can be joined to the consultations.<sup>263</sup>

#### **4.4.2.2 CONCILIATION**

Under Article 196 of the Revised Treaty, the Secretary-General of CARICOM is required to maintain a list of potential conciliators. When two member states agree to submit their dispute to conciliation, each shall be entitled to nominate two conciliators, each of whom shall be a person enjoying the highest reputation for fairness, competence and integrity.<sup>264</sup>

The conciliation process is conducted by a conciliation commission comprising of three conciliators. In a similar manner as the mode of constituting an arbitral tribunal, the party instituting the proceedings shall appoint one conciliator from the list mentioned in Article 196 of the Revised Treaty. That conciliator (and the conciliator appointed by the other party to the

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<sup>261</sup> See Article 194 of the Revised Treaty.

<sup>262</sup> See Article 193(9) of the Revised Treaty.

<sup>263</sup> E Laurent, “Understanding International Trade: a CARICOM perspective,” 129.

<sup>264</sup> See Article 196 of the Revised Treaty for the full details of how the List is to be maintained by the nominations by the representative member states. The term of a conciliator shall be five years and may be renewed.



dispute) may be a national of the party making the appointment. Once the first conciliator is appointed, the other party to the dispute has ten days in which to make their corresponding appointment<sup>265</sup> failure to which the conciliation proceedings may be terminated or request is made to the CARICOM Secretary-General to make the necessary appointment from the list. Within ten days of both party-appointed conciliators being appointed, the two conciliators shall between them appoint a third conciliator who shall be the chairman of the conciliation commission.<sup>266</sup> Where two or more member states are parties to the dispute, they shall agree if they have the same interest, to appoint one conciliator together.

The role of the conciliation commission is to hear the parties' dispute, examine their claims and objections and make proposal to the parties with a view to reaching an amicable settlement. Indeed, the conciliation commission may draw measures to the parties' attention that would facilitate an amicable settlement.<sup>267</sup> The commission has power to determine its own procedure and may call the parties to any dispute to submit their views orally or in writing. The parties however, also have power to modify any procedures of conciliation to suit their desire.<sup>268</sup>

The commission, upon finalizing the hearing of both sides, shall come up with a report containing their recommendations. Just like any other procedural decisions, the report requires a consensus and majority vote among the members of the commission.

### **COMPARISON WITH EAC**

The procedure for consultations under CARICOM is exhaustive as opposed to consultations under the EAC. Of importance to note under consultation is emphasis on the confidential nature

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<sup>265</sup> See Article 197(c) and (d) of the revised Treaty.

<sup>266</sup> See Article 197 (d) of the Revised Treaty.

<sup>267</sup> Supra, note 261, pg 139.

<sup>268</sup> See Article 200(2) of the Revised Treaty.

of the process and the express statement that the process is without prejudice to the parties' right to seek other dispute resolution alternatives. The parties are also called upon to use all means to have the matter settled through consultations. Such provisions are lacking under the EAC Treaty.

On Conciliation, Article 196 of the revised CARICOM Treaty mandates the Secretary General to maintain a pool of potential conciliators. The treaty goes further to elaborately provide for the process of appointing conciliators by disputing member states. All these are lacking under the EAC, and it is no wonder that we are yet to see any dispute referred to conciliation or consultation. The role of a conciliation commission, which lacks under EAC, is expressly explained.

## **CONCLUSION**

This chapter has been exploring dispute settlement mechanisms of various regional integration schemes to get lessons for the East African regional integration. This is because the East African Community lacks an effective dispute settlement scheme yet other regions are at various advanced degrees of integration. We have learned that if the treaty intends deeper integration, the dispute resolution mechanism is likely to be more supranational. For this reason, different regions have different forms of dispute settlement. A good mechanism ought to be certain and predictable.

Under the European Union, the pacific settlement of disputes is largely governed by the European Convention for the peaceful settlement of disputes which provides for the European Court of Justice (ECJ) to which members agree to submit their legal disputes. It has been established that the ECJ has been very active in pushing for integration as opposed to its counterpart of the East African Community. Other soft law mechanisms under the European

Union include conciliation under which parties agree to submit their disputes to a permanent Conciliation Commission or to a special conciliation commission. The latter Commission has an elaborate procedure to be employed and the kinds of disputes to be settled. Mediation is also provided for under the EU Directive On Mediation. For those matters not settled by conciliation and mediation arbitration is also provided for under an elaborate arbitral Tribunal.

This chapter also reviewed the procedures under the Central European Free Trade Agreement (CEFTA) under which parties may utilize consultations. There is also a quasi adjudicative Dispute resolution mechanism with detailed rules of procedure for the new arbitral tribunal. It expressly provides for UNCITRAL rules on conciliation for mediation proceedings. There is also a special provision for amicus curiae proceedings.

The chapter also looked at dispute settlement under the Caribbean Community. The Protocol amending the Treaty establishing the Caribbean Community gives a mechanism for pacific settlement of disputes. It expressly names arbitration, good offices, mediation or conciliation as modes of dispute settlement. It gives an in depth analysis of good offices, mediation and consultations. It establishes a procedure for conciliation and also a body referred to as a conciliation commission. It also establishes an arbitration tribunal with elaborate rules. Its judicial settlement mechanism has well laid down procedure for operation.

It is noteworthy that there has been an attempt to provide for the pacific settlement of dispute mechanisms under the East African Community. The weakness is that the methods have only been listed without giving any procedure for their utilization. Neither rules nor institutions have been provided for and this makes their being utilized next to impossible. The three regional integration schemes that have been discussed under this chapter will offer vital lessons for the

East African Community. This is especially in relation to the laws, procedures, mechanisms and institutions governing dispute settlement. The various conciliation commissions discussed hereinabove plus their rules and procedures do not exist under the East African community dispute settlement mechanism. The next chapter will deal with conclusion and recommendations based on what I have discussed in this chapter.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

In this paper, I sought to analyze the peaceful dispute settlement mechanisms established under the East African Community instruments, with a view to understanding how effective they are in dealing with amicable resolution of disputes. Coming from the background of previous attempts to have the community, which attempts failed largely because of poor dispute settlement mechanism, it was the position of this paper that it is imperative for any regional body to have a strong peaceful settlement mechanism as a prerequisite to its success. While, like many other regional bodies, the East African Community has established the East African Court of Justice, this court is more concerned with judicial methods of dispute settlement. The regional courts have in many instances played a crucial role towards the development of regional blocs, providing avenues for dispute resolution, both economic/trade disputes and political differences. The courts have also come in handy when it comes to interpretation and enforcement of the regional agreements and protocols. We noted that the European Court of Justice has been instrumental in this.

The East African Court of justice was established as the main dispute settlement organ of the East African Community. Its main purpose is to ensure adherence to law in the interpretation and application of the Treaty. This has really limited the operation of the Court. We have also noted that the Court operates at the mercy of the Partner States. There is a protocol to extend its jurisdiction but the same has not been effected. This has therefore made the court not to be trusted when it comes to dispute settlement.

Be that as it may, it is my argument in this paper that some disputes, as has been well illustrated in the earlier chapters, cannot be effectively resolved using the judicial methods in the regional courts. This is because, just like in many other instances of judicial dispute settlement, the decisions may easily strain the relationship between the disputing parties. This, especially at supra national level, may have serious implications to the success of regional integration. It is for this reason that I argue that peaceful dispute settlement mechanisms would come in handy in ensuring amicable solution of disputes which ensures the disputing parties maintain good diplomatic relations even after resolution of the dispute and thereby promoting stronger regional integration.

In this paper, I have analyzed the Pacific Settlement of Dispute Settlement Mechanisms that has been established by the Hague Conventions of 1899 and 1907. I have discussed the different peaceful dispute settlement mechanisms under the treaty and how different regional blocks have successfully utilized them in dispute resolution over the years.

I have also discussed the East African Community integration efforts. I looked at the earlier efforts to integration of the region between 1967 and 1977 and what caused the disintegration of the first East African Community in 1977. It is my conclusion of that underlying all the other causes for the disintegration of the Community is the clear lack of proper dispute settlement mechanism. This is what led to the escalation of the other problems ailing the community, creating friction between the three member states culminating in the ultimate collapse. I noted as a justification of the study that the community is still bedeviled with many disputes that can still make it disintegrate unless a clear pacific settlement of disputes forum is provided. The dispute surrounding the islands of Migingo and Ugingo has not been solved to date. The paper also appreciated the fact that the governments of Sudan and Southern Sudan have expressed their

wish to join the East African Community which expression anticipates an expanded community that culminates into more disputes that require settlement.

I then turned to the discussion of the latest efforts by the more expanded East African Community to integrate the five member states into a single regional bloc. In discussing the integration, the paper concentrated on dispute settlement mechanisms. It is the conclusion of this paper that while the new East African Court of Justice is meant to play a critical role in the economic and political integration of the region, its judicial settlement of disputes is not sufficient to deal with the many intricate differences that are bound to arise between the different member states. The consideration of peaceful settlement mechanisms is therefore imperative.

In Chapter two, I noted that the Pacific settlement of dispute mechanisms are divided into diplomatic and adjudicatory. The former includes good offices, mediation, conciliation and negotiation while the latter includes judicial settlement and arbitration. The diplomatic methods are useful when seeking amicable resolution of disputes.

In chapter three, I analyzed the peaceful dispute settlement mechanisms as provided under the different East African Community instruments. I then discussed the East African Community Customs Union (Dispute Settlement Mechanism). These regulations are established as Annex IX to the Protocol for the establishment of the East African Customs Union. The various mechanisms have only been listed and hence I concluded that coming up with procedures for their operation would be useful. I also looked at peaceful dispute settlement mechanisms provided under the Protocol for the establishment of the East African Common Market where I noted no dispute settlement mechanism is expressly provided for.

Chapter four discussed the dispute settlement mechanisms under the EU, CEFTA and Caribbean regions. I noted that as opposed to the East African Community, these regions have established institutions with rules and procedures which the East African Community can borrow from. Indeed, in coming up with recommendations, I have borrowed heavily from these institutions.

## **5.2. CONCLUSIONS**

From this analysis, a number of conclusions can be drawn and they include:

1. The mechanisms under the Customs Union Protocol are not clear on the types of disputes to be dealt with under the different mechanisms, the procedure of applying the mechanisms, and clear institutional framework. There has only been listing of the mechanisms.
2. The existence of parallel dispute resolution mechanisms without properly established working relations between the different bodies is likely to hamper the success of these bodies in resolving disputes. While the EACJ was meant to be the sole dispute settlement body, different Protocols under the EAC Treaty have granted jurisdiction to other bodies and even gone further to oust the jurisdiction of EACJ in certain dispute settlement mechanisms. This is a challenge to the successful integration of the Community as there is likely to be different interpretations of the Community Law that will create a vicious circle of endless litigation. This will in turn discourage affected parties from bringing their disputes to the Community for resolution. Secondly the process of dispute resolution



will take too long thereby defeating the purpose for which the system was set and in turn delaying the whole integration process.

3. The procedure before the Committee is considered by many as being extremely costly to the parties as they shall bear the remuneration and travel expenses of the members of the Panel and those of experts, on the rate fixed by the Council of Ministers from time to time. The number of Panel members is fixed by the Committee. This lack of flexibility is bound to make many members shy off from the process.
4. The dispute settlement mechanisms do not clearly provide for the rules, procedures and institutions to be followed in pursuing the different peaceful dispute settlement mechanisms.

A discussion of the other regional blocs around the world was meant to draw comparisons in terms of the peaceful settlement mechanisms available under them as well as getting some important lessons to be learned from them.

### **5.3 RECOMMENDATIONS**

This paper makes the following recommendations towards the improvement of dispute settlement for the East African Community:

#### **5.3.1: The EAC Dispute Settlement Mechanism should clearly state the kind of disputes to be dealt with.**

I recommend that the East Africa Community dispute settlement instruments should clearly outline the different disputes for which the appropriate dispute settlement mechanism should apply. This is important in creating certainty and avoiding unnecessary conflict with the already established judicial dispute settlement mechanism under the East African Court of Justice. This is the position in many successful regional blocks. For example any dispute between CEFTA members arising out of their trade in industrial and agricultural products, services or competition issues, and any dispute in which only one of the parties is also a WTO member, has to be resolved under the CEFTA Dispute Resolution Mechanism. The new EU Directive on Mediation, Directive 2008/52/EC adopted on 21 may 2008 makes arrangements for the promotion and use of mediation in certain civil and commercial matters. The East African Community should adopt the same approach.

**5.3.2: The EAC dispute settlement mechanisms should clearly give a procedure for the utilization of the mechanisms.**

It is my recommendation that the instruments should clearly provide the procedure for the various dispute settlement mechanisms. This should go further to provide for where it is possible to use more than one mechanism either concurrently or subsequently, and in the latter case, which one should come first. The procedure should also handle the apparent fear of conflict between bodies established to resolve disputes peacefully and the Jurisdiction of the East African Court of Justice. We ought to borrow from, for instance the CARICOM dispute settlement system that elaborately outlines the procedure for the various mechanisms of peaceful dispute settlement. Under CARICOM, there have been clear procedures for consultation and conciliation. The EU Directive 2008/52/EC outlines the mediation procedure, including all matters touching on confidentiality and time limitations for the mediation process.

**5.3.3: There should be a clear institutional framework for the EAC dispute settlement mechanisms.**

Under the EU, there are elaborate procedures of how a dispute is brought before the Special Conciliation Commission. Likewise, CARIFTA provides for a Conciliation Commission. The East African Community may establish such a Commission as an institution. It may be called the Conciliation Commission of the East African Community to give effect to conciliation.

Under the EU, every Judge of the Community has right to invite parties to have recourse to mediation. The member states are obliged to set up a mechanism by which agreements resulting from mediation can be rendered enforceable. The EAC countries can also adopt this to act as a forum for mediation.

I also recommend for the establishment of an Arbitral Tribunal for the East African Community to akin to the one established under the EU and the Carribean Community. This will make arbitration proceedings to be certain.

**5.3.4: There should be clear rules for the EAC pacific settlement of disputes mechanisms.**

The established institutions must have rules to govern their operations. The rules will also give the procedures. For instance, CEFTA 2006 adopts UNICITRAL rules to govern mediation proceedings. This can be useful to the East African Community. I also recommend for mediation rules of East Africa to guide mediation proceedings.

The EAC can also adopt the rules and procedures established under the various arbitral tribunals established under the EU and CEFTA in coming up with rules and procedures to establish the

arbitral tribunal of the East African Community. They may be called the arbitration rules of East Africa.

**5.3.5: A list of conciliators, mediators and arbitrators should be clearly provided for.**

I recommend for the establishment of a list of conciliators, mediators and arbitrators to be kept by the Secretary General of the East Africa Community. They may be appointed from the member countries. Their qualifications must be given and the list may be changed periodically. The EAC can borrow from CARICOM whose conciliation rules empower the Secretary General to maintain a list of potential conciliators. Under CEFTA 2006, there is a provision for the rules to govern the appointment of mediators, The EAC can adopt the same in coming up with rules to govern the appointment of its mediators, conciliators and arbitrators.

**5.3.6: The institutional and financial strength of the peaceful dispute settlement mechanisms should be enhanced.**

I recommend for the strengthening of the peaceful dispute settlement mechanisms both institutionally and financially. These should be established to complement the East African Court of Justice and not necessarily as alternatives. Important lessons can be borrowed from the EU Directive on mediation, which, as one of the four important provisions in relation to mediation, emphasizes facilitation and promotion of access to the settlement of the disputes by mediation. In achieving this, the Directive obliges Member States to encourage the training of mediators and the development of, and adherence to, voluntary codes of conducts and other effective quality control mechanisms concerning the provision of mediation services. This ensures capacity building, which helps in the strengthening of the institutions providing mediation.

**5.3.7 :Matters to be dealt with under The Hague Convention should be clearly enumerated.**

Also, the Community dispute settlement mechanism should be clear on matters which can be submitted to the pacific settlement of dispute mechanism under the Hague Treaty. Such provisions should go further to provide for the procedure of submitting disputes to the mechanism and how bodies like WTO can come in to handle those disputes. This will avoid conflicts between these international mechanisms and the East African Court of Justice on matters of jurisdiction.

**5.3.8: The Protocol for the extended jurisdiction of the EACJ should be adopted.**

I also recommend that the protocol for the extended jurisdiction of the East African Community be adopted. We noted that the EACJ has been crippled because its jurisdiction is limited. This means that its role in expanding regional integration is limited. Its counterpart in the EU has a wider jurisdiction. If the court is granted this jurisdiction, other pacific settlement of disputes methods mechanisms will also operate effectively. For instance, the rules of arbitration of the court may assist arbitration proceedings. The court may also give guidance to other organs and hence promote integration.

**5.3.9: The EAC should consider enacting The EAC Convention for the Pacific Settlement of Disputes.**

I also recommend that the East African Community considers coming up with a Convention for the peaceful settlement of disputes to mirror the European Convention for the peaceful settlement of disputes. This Convention will adequately provide for the procedures, rules, mechanisms and Institutions for the pacific settlement of disputes. Such a bold move will also mean that the East African Community gives more leverage to this doctrine. This will give more impetus to the doctrine of the pacific settlement of disputes.

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