

# Journal of Conflict Management & Sustainable Development



The Comesa-SADC-EAC Tripartite Free Trade Area  
Agreement and Regional Integration in Africa:  
Achieving The African Economic Community Dream?

*Wilfred A Mutubwa*

Rule of Law, Economic Development and Investment  
Arbitration under Bilateral Investment Treaties (BITS)

*Njoki Mboce*

Multinational Corporations and Natural Resources  
Exploitation in Africa: Challenges and Prospects

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The Neglected Link: Safeguarding Pollinators for  
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Book Review: Resolving Conflicts through  
Mediation in Kenya, 2nd Edition

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The Role of Court-Annexed Mediation in  
Resolving Succession Disputes in Kenya:  
An Appraisal

*Justus Otiso*

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## Editor's Note

Welcome to the second Issue of the first Volume of the *Journal of Conflict Management and Sustainable Development* (Journal of CMSD, Vol.I, Iss. No.2). The Journal of CMSD provides a platform where scholars can share and access ideas on the themes of conflict management and sustainable development.

The link between these two themes has been acknowledged in the *Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development* — adopted by world leaders in September 2015 at the United Nations Summit. The *Agenda* rightly points out that:

*Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development. The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.*

It is for this reason that the Journal carries articles revolving around the themes of, inter alia, Conflict Management; Environmental Conflicts; Gender; Social Reform and Development; Climate Change; Energy; Food Security; Human Rights; Water; the place of pollinators in sustainable development agenda; African Development; the Environment and Sustainable Development in general which are central to the efforts in realisation of sustainable development goals.

The current Issue also recognises that trade is key to development and also forms part of the sustainable development debate. As such, some of the articles are dedicated to this important topic in the context of building sustainable peace and security through integration amongst other ways.

The Editor hopes that articles contained in this Issue will elicit some feedback on the issues raised from readers and scholars alike.

**Dr. Kariuki Muigua**, Ph.D.; FCI Arb; Chartered Arbitrator; Accredited Mediator.

Managing Editor. December, 2017

# **Journal of Conflict Management and Sustainable Development**

## **A Journal Published Twice a Year – Volume I Issue Two**

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## **The Comesa-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream?**

*By: Wilfred A Mutubwa\**

“...I am an African...

Whatever the setbacks of the moment, nothing can stop us now!

Whatever the difficulties, Africa shall be at peace!

However improbable it may sound to the sceptic, Africa will prosper!

Whoever we may be, whatever our immediate interest, however much we carry baggage from our past, however much we have been caught by the fashion of cynicism and loss of faith in the capacity of the people, let us err today and say – nothing can stop us now!...”

### **1.1 Introduction**

Ever since decolonisation, Africa has always aspired for political and economic integration. The now defunct Organization of African Unity (OAU) charter underscores this dream in most succinct terms<sup>1</sup>. The story of an African Economic Community and an African government can therefore be traced as far back as to the formation of the OAU in 1963. In the year 2000, the OAU was transformed and rebranded into the African

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\*\*Thabo Mbeki, 8<sup>th</sup> May 1996, Cape Town at the adoption of the Republic of South Africa Constitution Bill.

<sup>1</sup> OAU Charter, 25<sup>th</sup> May 1963 concluded by the 33 then independent African states. The OAU Charter in its preamble speaks to cooperation among states and unity transcending national differences. The OAU summits of 1973 and 1976, and Monrovia Declaration of 1979 also underscored this objective. OAU charter available at [www.au.int/en/sites/default/files/.../7759-sl-oau\\_charter\\_1963\\_0.pdf](http://www.au.int/en/sites/default/files/.../7759-sl-oau_charter_1963_0.pdf). Accessed on 4<sup>th</sup> July 2016.

Union (AU)<sup>2</sup> with one of its core objectives being to “accelerate the political and social economic integration of the continent, and to coordinate and harmonise policies between the existing and future Regional Economic Communities (RECs) for the gradual attainment of the union”.<sup>3</sup>

Fifty three years after the formation of the OAU and the decolonisation of the entire African continent, echoes of the clarion call by the founding fathers of the OAU on Africa’s integration still reverberate over its valleys and mountains.<sup>4</sup> This call is largely informed and inspired by the desire of Africans to redress the arbitrary balkanisation of the continent through colonisation following the Berlin and Brussels conferences held by its colonial powers in the late 19<sup>th</sup> century.<sup>5</sup>

The Abuja treaty establishing the African Economic Community (AEC)<sup>6</sup> identifies Regional Economic Communities (RECs) as centres and building blocks towards the establishment of an African Economic Community and ultimate economic and political integration of Africa, and as catalysts for the continent’s growth.<sup>7</sup>

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<sup>2</sup> The Constitutive Act of the African Union (AU Act) viewed at [www.au.int/en/sites/default/files/constutive\\_EN.pdf](http://www.au.int/en/sites/default/files/constutive_EN.pdf). Accessed on 28<sup>th</sup> June 2016. The AU was created on 9<sup>th</sup> September 2000 at an extra ordinary session of the AU in Sitre Libya when the AU Act was signed by the 53 member states of the defunct OAU. Accessed on 3<sup>rd</sup> July 2016.

<sup>3</sup> *Ibid*, Article 3(l).

<sup>4</sup> Recent support for the idea of the proposed federation includes President Alpha Omar Konare former President of Mali and former Chairperson of the AU Commission who spoke on the commemoration of Africa Day on May 25, 2006. Notable also is the late Libyan President, Mummar Al-Gadhafi who was the AU Chairman in 2009. Most recently, in the year 2015, President Robert Mugabe of Zimbabwe lent his voice to this call.

<sup>5</sup> Also called the scramble and partition of Africa, Berlin (1884-1885) and Brussels (1889-1890) conferences in which European powers in a bid to avoid war among themselves, carved out African boundaries and territories among themselves as overseas colonial possessions. For a discussion on the reasons for the scramble and partition of Africa , see Foeken Dick “On the Causes for Partition of Central Africa 1875-85” *Political Geography*, Vol. 141 1995, 80 to 100.

<sup>6</sup> See the preamble to the Abuja treaty available at [www.au.int/en/sites/.../treaties/7775-st-treaty\\_establishing\\_the\\_aec.pdf](http://www.au.int/en/sites/.../treaties/7775-st-treaty_establishing_the_aec.pdf). Accessed on 3rd July 2016.

<sup>7</sup> See the communique of the third COMESA-EAC-SADC Tripartite summit page 2 thereof at [www.tralac.org/images/Recources/Tripartite-FTA/Third-Tripartite-summit-communique-10062015.pdf](http://www.tralac.org/images/Recources/Tripartite-FTA/Third-Tripartite-summit-communique-10062015.pdf). Accessed on 4<sup>th</sup> July 2016.



It follows therefore that both the AU and AEC treaties underline the importance African states attach to the ultimate economic integration of the continent. Although there have been various efforts at the economic integration on the African continent, none has been as profound and far reaching as the COMESA- SADC-EAC Tripartite Free Trade Area Agreement (TFTA). Previous efforts at Africa's integration have largely been blueprints, declarations and political statements driven by an Afrocentric sentiment.<sup>8</sup> Efforts at economic integration have hitherto also been limited to sub regional levels.<sup>9</sup> There has also been a significant attempt at the harmonisation of business laws, but equally at the sub regional level.<sup>10</sup>

The signing of the COMESA- SADC-EAC Tripartite Free Trade Area Agreement (TFTA)<sup>11</sup> is, therefore, perhaps the most significant of efforts yet towards the economic integration of the African continent as envisaged in the Abuja Treaty. If and when fully realised, the TFTA will represent a giant step by African states towards the realisation of the AEC as espoused in the Abuja Treaty.

The TFTA is the largest Free Trade Area Agreement (FTA) on the African continent. It brings together 26 member states of the Common Market for Eastern and Southern Africa (COMESA)<sup>12</sup>, Southern Africa Development

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<sup>8</sup> For example, the Lagos Plan of Action for Economic Development of Africa 1980-2000 was a blueprint on economic development adopted by the OAU following its Monrovia, Liberia – July 1979 16<sup>th</sup> ordinary session where a declaration on collective self-reliant international economic order for Africa was agreed. Another such effort is seen in the AU Agenda 2063, an ambitious economic prosperity of the continent, 100 years after the OAU's formation. Full text of the AU Agenda 2063 is available at [www.un.org/africa7osaa/pdf/agenda2063.pdf](http://www.un.org/africa7osaa/pdf/agenda2063.pdf). Accessed on 3<sup>rd</sup> July 2016.

<sup>9</sup> Uzodike U.O, "The Role of Regional Economic Communities in Africa's Economic Integration: Prospects and Constraints" 2009 *Africa Insight* Vo. 39/2 at 2 and 5.

<sup>10</sup> A case in point is the Organization for Harmonisation of African Business Laws (OHADA). See OHADA Treaty on at [www.ohadalegis.com/anaglais/triteharmonisationab.htm](http://www.ohadalegis.com/anaglais/triteharmonisationab.htm). Accessed on 31<sup>st</sup> March 2016. For a discussion OHADA, see Fagbayibo B, "Towards the Harmonisation of laws in Africa: is OHADA the way to go?" 2009 *CILSA* 309-322.

<sup>11</sup> See the full text of the Agreement establishing The Tripartite Free Trade Area at [www.tralac.org/images/docs/7531/tfta-agreement-June.2015.pdf](http://www.tralac.org/images/docs/7531/tfta-agreement-June.2015.pdf). Accessed on 3<sup>rd</sup> July 2016.

<sup>12</sup> The COMESA is the successor of the Preferential Trade Area for Eastern and Southern Africa (PTA), established by treaty in 1981. Following the decision of the

Community (SADC)<sup>13</sup> and the East African Community (EAC).<sup>14</sup> The 26 member countries that comprise the bloc represent 48 percent of the AU membership, 57 percent of the African continent's Gross Domestic Product (GDP) or USD 1.3 trillion, and a combined population of 632 million.<sup>15</sup> Looked at as an economy, it would be the 13<sup>th</sup> largest economy in the world with a merchandise trade of US\$ 55 billion.<sup>16</sup>

The TFTA agreement is a Regional Integration Agreement (RIA) in the nature of a customs and Free Trade Area hence subject to Article XXIV of the WTO 1994 guidelines.<sup>17</sup> These guidelines are imperative or ideal to the proper functioning and coordination of RIAs.<sup>18</sup> The guidelines underscore two critical points. Firstly, that the purpose of regional integration is the creation of a truly multilateral trading system with few or completely devoid

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Authority of the PTA states taken at its tenth meeting held in Lusaka, Zambia from 30-31 January 1992. The COMESA treaty was signed by state parties on 5<sup>th</sup> November 1993 in Kampala, Uganda and ratified on 8<sup>th</sup> December 1994 in Lilongwe, Malawi. COMESA Treaty Accessed at [www.comesa.int/attachments/article/28/COMESA\\_treaty.pdf](http://www.comesa.int/attachments/article/28/COMESA_treaty.pdf). Accessed on 4<sup>th</sup> July 2016.

<sup>13</sup> Established as the Southern African Development Coordinating Conference (SADCC) on 1<sup>st</sup> April 1980 and transformed into SADC on 17<sup>th</sup> August 1992 in Windhoek, Namibia where the SADC treaty was adopted. See [www.sadc.int/documents/publications/sadc-treaty](http://www.sadc.int/documents/publications/sadc-treaty). Accessed on 7<sup>th</sup> March 2016.

<sup>14</sup> The EAC treaty was signed on 30<sup>th</sup> November 1999 and entered into force on 7<sup>th</sup> July 2000, following ratification by its original members; Kenya, Uganda and Tanzania. Burundi and Rwanda acceded to the EAC treaty on 18<sup>th</sup> June 2007 and became full members of the community with effect from 1<sup>st</sup> July 2007. The Republic of Southern Sudan acceded to the treaty on the 12<sup>th</sup> day of April 2016. Ethiopia is also expected to join the block shortly. EAC Treaty available at [www.eac.int/treaty](http://www.eac.int/treaty).

<sup>15</sup> David Luke and Zodwa Mabuza, "The Tripartite Free Trade Area Agreement; A milestone for Africa's Integration Process" *Bridges Africa* volume 4 Number 6. 23<sup>rd</sup> June 2015 at [www.ictsd.org/bridges\\_news/bridges\\_Africa/news/the\\_tripartite-free\\_trade\\_area](http://www.ictsd.org/bridges_news/bridges_Africa/news/the_tripartite-free_trade_area). Accessed on 7<sup>th</sup> March 2016.

<sup>16</sup> *Ibid*.

<sup>17</sup> Article XXIV: Territorial Application-Frontier Traffic- Customs union and Free Trade Areas.

[www.wto.org/english/res\\_el/booksp\\_e/analytic\\_index\\_e/gatt\\_1994\\_09\\_e.htm](http://www.wto.org/english/res_el/booksp_e/analytic_index_e/gatt_1994_09_e.htm) Accessed on 14 March 2016.

<sup>18</sup> The full text of the said WTO Article available at [www.wto.org/english/res\\_e.htm](http://www.wto.org/english/res_e.htm) on 7<sup>th</sup> March 2016.

of any tariff and non-tariff barriers to trade. Secondly, that RIAs are seen as building blocks towards a truly multilateral global trading system.<sup>19</sup>

Despite over five decades of efforts towards political and economic integration of Africa, mostly at the sub-regional level, little tangible results have been achieved at an effective free trade arrangement that assures of a truly multilateral trade system covering the whole or most of the continent. This research is therefore an interrogation of the TFTA with a view to answering the question; whether or not the TFTA Agreement brings Africa closer to the attainment of the AEC. This investigation is undertaken within the context and seen through the prism of Article XXIV of the WTO 1994 guidelines on the ideals of regional integration as a platform for growth of multilateral global trade. Impediments to the integration effort under the TFTA also form part of this discourse. Recommendations and suggestions on how to surmount the problems identified are then postulated.

This paper comprises five parts. The first part captures a synopsis of the study and conceives its salient features. The second part discusses the theoretical framework of regional integration, Free Trade Areas and the WTO multilateral trade regime. The third part illuminates the philosophical foundations, historical development and structure of TFTA in the context of the AEC Treaty and WTO 1994 arrangement on multilateral trade. The penultimate part of this work, part four, offers an in depth prognosis of the challenges, potential pitfalls and problems of the TFTA. That part also projects the prospects of the TFTA. Part five postulates conclusions and offer recommendations.

## **2.0 Conceptual Framework**

### **2.1 Introduction**

From the earliest known free ports in Challis and Direus in modern day Greece and in the Roman empire port of the Aegean island of Delos, the fundamental

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<sup>19</sup> Gantz, D, "Regional Trade Agreements" in *The Oxford Handbook of International Trade*. Oxford. Oxford University Press at 237 to 265 posits that RIAs provide a deeper and faster international trade reform than the entire WTO effort. This thinking, he advances, is more current following failure of WTO multilateral talks (Doha round 2001). He therefore recognises sub-regional efforts as building blocks to greater multilateralism.

economic basis for free trade has implicitly always been political.<sup>20</sup> Schulze advances that the arguments in favour of integration have always invariably been based on the need for the nation's general economic welfare, and in the ultimate global welfare.<sup>21</sup> Schulze is not alone in this view. Mirrany examines at least three political science approach theories to integration: functionalism, neo-functionalism and intergovernmentalism, and opines that the functionalist idea of integration, is premised on the gradual process towards peace and unification with mutual benefits that it is hoped lead to ultimate political unification.<sup>22</sup> Uzodike equally contends that although the integration process takes place in the economic, social and technical contexts, the same cannot be separated from the political realm. Indeed, he contends that the same have political ramifications and as such the political perspective is imperative for a proper understanding of the dynamics of integration.<sup>23</sup>

In the context of Africa, Mukamunana and Moeti argue that the early roots of integration on the continent can be traced back to the 1960s when regional integration "was perceived largely as an instrument for safeguarding recently acquired political freedom, and a strategy to be used to facilitate economic development".<sup>24</sup> They also observe that during the independence movements in the 1960s, African political leaders emphasised the need for regional cooperation and unity, a Pan African notion that was eventually underlined in the OAU charter.

The rationale for integration is therefore imperative to briefly consider, as the paper now Proceeds to do.

## 2.2 Rationale for Integration

The motivation for integration of states can be discerned from the three principal theories of integration; functionalism, neo-functionalism and intergovernmentalism. Despite conceptual differences, the three approaches

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<sup>20</sup> Schulze H.C.A.W, 1997. *International Tax-Free Zones and Free Ports*. Durban. Butterworths at p. 1.

<sup>21</sup> *Ibid*.

<sup>22</sup> Mirrany D, *A Working Peace*. Chicago: Quadrangle books, 1966.

<sup>23</sup> Uzodike, note 9 above at p.2.

<sup>24</sup> Mukamunana R and Moeti K, "Challenges of Regional Integration in Africa: Policy and Administrative Implications", *Journal of Public Administration*, Conference Proceedings, October 2005, at p.90.

converge and find unanimity in the conclusion that integration is motivated by both or either political or economic reasons.

### 2.2.1 Political Justification

Functionalism as a theory is characterised by a sectorial approach to integration premised on a gradual process towards peace and unification.<sup>25</sup> The theory underscores that cooperation in economic and social fields, may spill over into the political field and lead to ultimate political union.<sup>26</sup> The neo-functionalism approach is basically a variation of functionalism.<sup>27</sup> The approach goes further than the functionalism assumptions of gradual building of peace and unification to explain why nations surrender or pool aspects of their sovereignty so as to enjoy benefits of integration.<sup>28</sup> The theory therefore recognises that whereas the state is the primary actor in integration, it is not alone nor does it act in isolation. Sub-state actors (political parties and interest groups) and supranational institutions (regional institutions) equally give momentum to the integration process.<sup>29</sup> Nationally and regionally constituted bodies therefore may have motivations and interests that predispose them towards favourable integration. According to neo-functionalists, therefore, states deepen their interdependence by taking joint actions in one sector after another through the process of upgrading of common interests.<sup>30</sup> A 2003 WTO secretariat report notes that political considerations have taken primacy in the creation of RTAs thus overshadowing and transcending economic reasons. The pertinent part of the report reads:

*“Political considerations are also reported to be key to the decision to foster regional trading arrangements. Governments seek to consolidate peace and increase regional security with their RTA partners, or to increase their bargaining power in multilateral negotiations by securing commitment first on a regional basis,*

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<sup>25</sup> Mirrany, note 22 above.

<sup>26</sup> Uzodike, note 9 above at p.4.

<sup>27</sup> Forere, M, “Is the Discussion of the United States of Africa Premature? Analysis of ECOWAS and SADC Integration Efforts” *Journal of African Law*, Vol. 56, No.1 (2012) at p. 30. The concept of neo-functionalism is said to have been popular in the 1950s and 60s and is attributed to Haas E, *The Uniting Of Europe*, Stanford: Stanford University press, 1958.

<sup>28</sup> Uzodike, note 9 above.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

*or as a means to demonstrate good governance and to prevent backsliding on political and economic reforms. They may also be used by larger countries to forge new geopolitical alliances and cement diplomatic ties, thus ensuring or rewarding political support by providing increased discriminatory access to a larger market. Increasingly, the choice of RTA partners appears to be based on political and security concerns, thus potentially undermining or diluting the economic rationale which might be used in support of participation in RTAs.”<sup>31</sup>*

### 2.2.2 Economic Justification

Intergovernmentalism, on the other hand, defines integration as an inter-state process of negotiating by heads of states where the state's economic interests transcend any other interests.<sup>32</sup> While large states drive the process, small ones use regional institutions as a strategy to deal with more expansive and complex issues.

This economic approach is founded on the assumption that productivity is enhanced if states engage in economic activities in which they have comparative advantage which in the ultimate reduces the cost of production and with a ripple effect of reducing prices of goods and services.<sup>33</sup> On the economic front, Schott suggests that regional integration may provide a depth of incremental trade reform going beyond what has occurred under the WTO multilateral trade system.<sup>34</sup> These include aspects such as consumer protection and competition law.<sup>35</sup> Socio-economic and human rights protection are also more emphasised and given the highest priority at RTA levels than at the WTO multilateral level. <sup>36</sup>Cottier and Foltea note

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<sup>31</sup> WTO Secretariat, Regional Trade Agreements Section, Trade Policies Review Division, “The Changing Landscape of RTAs” 2003, paras 23 and 24.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> Schott JJ, “Free Trade Agreements: Boon or Bane of the World Trade System? In Schott JJ (ed.), *Free Trade Agreements: US Strategies and Priorities* (Washington, DC: IIE, 2004) at p. 10-11.

<sup>35</sup> Gantz, note 19 above at p.241, cites the example of the North American Free Trade Agreement (NAFTA) chapter 11 which provides for mandatory investor state international arbitration of disputes)

<sup>36</sup> *Ibid* at p. 242 cites Article 1a ff of the Treaty of Lisbon 2007 amending the Treaty on European Union and the Treaty establishing the European community. The same goes for African RECs, although observance of the provisions

that economic rationales for concluding preferential agreements include the search for larger markets and for deeper integration, in particular among neighbouring countries.<sup>37</sup> The 2003 WTO secretariat report aptly summarises the economic basis for integration in the following terms:

*“RTAs can also be used by some countries as a vehicle for promoting deeper integration of their economies than is presently available through the WTO, particularly for issues which are not fully dealt with multilaterally, such as investment, competition, services, preferential access may confer long term advantages in a market and may enable a supplier to steal an irreversible march on the competition. Discriminatory liberalization might also be attractive for countries which seek to reap gains from trade in product areas where they cannot compete internationally. Smaller countries particularly would see RTAs as a defensive necessity, while even larger economies may turn to RTAs to avoid being left out in the cold. Membership in RTAs can provide a means of securing foreign direct investment, particularly for a country with low labour costs which has preferential access to a larger, more developed market.”<sup>38</sup>*

### 2.3 Classification of Regional Integration Agreements

Balassa classifies integration models based on the characteristics and objectives which typify them.<sup>39</sup> The relevant typological nomenclature for free trade concepts and models of Regional Integration therefore take the following forms: Free Trade Areas, Customs Unions, Common Markets, Economic Unions and total Economic Integration/Political Unions.<sup>40</sup> These five forms of integration are preferred by most RECs in Africa because of their stepwise or progressive nature that ascends from FTAs through to

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especially of human rights and good governance set out in African RECs remains far from satisfactory. See preambles to the TFTA agreement, SADC, COMESA and EAC treaties. This aspect is discussed in detail in chapter 4 of this work.

<sup>37</sup>Cottier T, and Foltea M, “Constitution and Function of the WTO and Regional Trade Agreement” in Bartles L, 2006.Regional Trade Agreements and the WTO Legal System. Oxford, Oxford University.

<sup>38</sup> WTO, note 32 above

<sup>39</sup> Balassa B, *The Theory of Economic Integration*, London: George Allen &Unwin Ltd, 1961.

<sup>40</sup> Uzodike, note 9 above at p. 5.

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Political Unions.<sup>41</sup> This model is also called the linear market progression paradigm.<sup>42</sup>

However, some RIAs defy the stepwise progression and skip some of the steps in the linear progression model or remain rooted at a mid-stage such as the customs union or common market. Some RIAs get stunted in their ascendancy due to challenges which shall be addressed in the penultimate section of this work, while some achieve their goals at either the customs union, or common market or economic union stages, while others still aspire to trudge all the way to political union.<sup>43</sup> A brief outline of the fore-listed integration concepts is therefore useful in putting this discourse firmly into context.

### 2.3.1 Free Trade Areas

A FTA is either a bilateral or multilateral mechanism established by agreement or treaty between nations with an intention of furthering the liberalisation of world trade. The goal is usually to liberalise trade between member states with the ultimate goal of liberalising world trade.<sup>44</sup> As a nascent and initial step towards integration, member states of a FTA are free to maintain or independently

modify their external tariff and other barriers to imports from third states.<sup>45</sup> A uniform tariff on imports is usually not yet achieved at this stage, but partners receive preferential access to each other's markets. Each member country retains national tariffs against non-members.<sup>46</sup> Rules of origin with some intra-bloc quotas and tariffs may also be maintained.

### 2.3.2 Customs Unions

It is said to be the oldest concept of regional economic integration and is characterised by integration of factors of production and the free movement

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<sup>41</sup> Hartzenberg T., "Regional Integration in Africa" 2011-Trade Law Centre for Southern Africa". WTO Working Paper at p.5.

<sup>42</sup> The concept is interrogated in more detail in chapter 4 of this work.

<sup>43</sup> E.g. COMESA aims at becoming a Common Market, Southern Africa Customs Union (SACU) was established as a Customs Union with no ambition to go beyond that, while the EAC aims at political federation.

<sup>44</sup> Schulze, note 20 above at. p. 5.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*



of goods with exclusive privileges between member states.<sup>47</sup> The significant difference between a FTA and a Customs Union is that whereas the former bloc members are free to maintain or independently modify their external structure of tariffs and other barriers with third parties, customs unions erect a common tariff wall and import quotas towards non-members.<sup>48</sup> Closer cooperation on the sharing of customs revenues collected from imports from third non-member states is yet another feature of a customs union. Usually a common or coordinated customs administration system is put in place at this stage. Member states however remain distinct states. Rules of origin are therefore unnecessary at this stage. Customs Unions are therefore more deeply integrated than FTAs. In the linear progression model, Customs Unions should have evolved from a FTA as the members grow towards a Common Market.<sup>49</sup>

### 2.3.3 Common Markets

A Common Market bears similar features to those of a Customs Union but includes further elements of free movement of factors of production (labour and capital).<sup>50</sup> Uniform regulations regarding the movement of people and capital are put in place at this stage. The aim is to achieve market integration through trade liberalisation and integration of product markets and free movement of goods.

A common market is considered the first stage of deep integration. The benefits of a customs union is to achieve trade efficiencies by movement of capital, skills and labour to places where opportunities abound. For the common market to succeed non-tariff barriers have to be dismantled, fiscal and monetary policies realigned. This, it is hoped, will lead to economic interdependence that transcends national policies and the welfare of member states.<sup>51</sup>

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Examples of Customs Unions on the African continent include; Southern Africa Customs Union (SACU), which was established over a century ago, and customs unions under the EAC, ECOWAS and the AEC as stages in their various integration progressions.

<sup>50</sup> Uzodike, note 9 above at p. 30.

<sup>51</sup> Mirus R and Rylska N, *Economic Integration: Free Trade Areas vs. Customs Union* available at [www.ualberta.ca/business](http://www.ualberta.ca/business), at .p.4. Accessed on 27<sup>th</sup> July 2016.

### 2.3.4 Economic Unions

An Economic Union takes the form of a common market but proceeds further with harmonisation of national economic policies such as tax rates, common monetary and fiscal policies and common currency.<sup>52</sup> This is the next step in integration after the common market. It adds the following to the common market; a harmonised fiscal, monetary and labour market policies. Tax and monetary policies determine where a business locates, and because labour market policies affect migration patterns and production costs, these will require streamlining by member states.<sup>53</sup> Differences in national transportation, regional and industrial policies which distort competition among firms and nationals of member states are eliminated.

To achieve effective Economic Union, it, therefore, enjoins members to form supranational institutions that legislate on the rules of trade for the union and leaving administration of the rules to national, joint or regional secretariat organs. Recourse for dispute resolution and interpretation of the trade rules is to a supranational administrative and judicial tribunal so as to ensure the benefit of a uniform application of the rules. An economic supranational commercial law therefore replaces national law.<sup>54</sup>

Further, an Economic Union is made effective by a common currency.<sup>55</sup> This has the cost of having states cede monetary sovereignty but assures them of consistency and certainty in exchange rates which would otherwise influence decisions on location of businesses, borrowing costs and exchange risks associated with particular member country's currency.<sup>56</sup>

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<sup>52</sup> Uzodike, note 9 above.

<sup>53</sup> Mirus and Rylska, note 51 above.

<sup>54</sup> *Ibid.*

<sup>55</sup> Examples of monetary Unions in Africa abound. The East African Monetary Union Protocol (EAMU) signed in November 2013, envisages progressive convergence of all EAC member currencies into a single currency in 10 years, by year 2024. The pre-1977 EAC had a common currency. SADC has as one of its ultimate goals under the Rapid Strategic Development Plan (RISDP) its principal plan, to achieve a Monetary Union by 2016. ECOWAS also planned to establish a single currency by 2013.

<sup>56</sup> *Ibid.*

A Political Union goes even further than an Economic Union and creates an entity with total integration akin to a federated union with a central, supranational political authority whose decisions are binding on members.<sup>57</sup>

A political union therefore refers to a possibility that, at some point, a combination of the above five levels leads to the emergence of a cohesive and consolidated supranational political region. It is marked by the member states giving up their political sovereignty and having common legislation and political structures.<sup>58</sup> Lindberg defines political integration as “the process whereby nations forego the desire and ability to conduct foreign and key domestic policies independently of each other, seeking instead to make joint decisions or to delegate the decision making process to new central organs; and the process whereby political actors in several distinct settings are persuaded to shift their expectations and political activities to a new centre”.<sup>59</sup>

The desired outcome of a political union is often a federal union or a supranational entity with government organs and /or an effective control over entire membership’s region. For example, the AU Constitutive Act and the AEC treaty all aspire to achieve a supranational political and economic authority in the nature of an African Union government of a totally integrated body with the entire continent’s membership.<sup>60</sup> AEC’s institutional capacity and effectiveness is the subject of discussion in the ensuing section of this work.

## 2.4 Summary

The distinction between the political and economic justifications that underpin integration is drawn in the foregoing discourse. These theories, however, remain largely relevant at the theoretical level since the various approaches to integration find convergence in one central theme: that integration is a response by states to shared economic and political needs and aspirations.<sup>61</sup> The formation

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<sup>57</sup> Fagbayibo B., “Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview” 2013 (16) *PER/PELJ* 32-39 at 33.

<sup>58</sup> Omoro MFA, *Organisational Effectiveness of Regional Integration Institutions : A Case Study of the East African Community, 2008 (UNISA DISSERTATION)* at p. 29

<sup>59</sup> Lindberg L, *The Political Dynamics of European Economic Integration*, 1963, Stanford, California: Stanford University Press at. P.6.

<sup>60</sup> See Article 3(c) of AU Constitutive Act, and Article 5 of the Abuja (AEC) Treaty.

<sup>61</sup> Uzodike, note 9 above at p.6.

of RTAs is thus driven by a variety of factors which include economic, political and security considerations. Integration of economies and states seeks to progressively achieve true greater world

The paper now proceeds to discuss the architecture and structure of the TFTA. output and welfare in the following five ways: firstly, by abolishing tariffs and import quotas among members through establishing FTAs; secondly, by establishing common external tariffs and quotas through Customs Unions; thirdly, by creating Common Markets so as to allow free movement of goods, services and labour; fourthly, by harmonising competition, structural, fiscal, monetary and social policies by establishing Economic Unions; and lastly, by unifying economic policies and establishing supranational institutions through Economic and Political Unions.

### **3.0 The Evolution And Structure Of The TFTA**

#### **3.1 Introduction**

A discourse on the TFTA must commence with an understanding of the African Economic Community (AEC) treaty. This inescapable reality is borne out of the appreciation that the TFTA Agreement is a creature of the objectives and aspirations stipulated in the AEC treaty.<sup>62</sup> The two are therefore inextricably intertwined and a discussion of one cannot merit without an understanding and reference to the other. This section will outline the salient features of the AEC treaty before proceeding to set out an exposition of the structure of the TFTA Agreement. Subsequently, an overview of the pertinent aspects, achievements and challenges of the three merging RECs (COMESA, EAC and SADC) will be outlined.

#### **3.2 The Architecture and Structure of the AEC Treaty**

The Abuja Treaty establishing the Africa Economic Community (AEC) is premised on the pan African aspiration underwritten in the OAU charter, for economic integration and ultimate political union of the continent. This objective is vividly captured both in the Constitutive Act of the AU (AU Act) and the AEC treaty. The Constitutive Act of the AU deliberately incorporates the objectives of the AEC Treaty and reaffirms the OAU

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<sup>62</sup> Articles 4 and 5 of the TFTA Agreement.

principles and pan African inspired values of unity and cooperation of African states, in both its preamble and substantive provisions.<sup>63</sup> This emphasis in the AU Constitutive Act renewed the commitment of the AU membership to the goal of the economic integration of Africa while rebranding the OAU to the AU, 38 years after the former's creation.

The AEC treaty acknowledges the substantial efforts already made at sub-regional and regional levels towards economic integration.<sup>64</sup> The treaty places a responsibility upon its 51 members to promote and observe the principles and objectives of the community.<sup>65</sup> The treaty further provides that the community shall, by stages, ensure the strengthening of existing RECs and the establishment of new ones where none exist.<sup>66</sup>

As an economic bloc, the AEC treaty also enjoins its members to eventually harmonise their national policies in order to promote economic activities.<sup>67</sup> This is intended to be achieved, through traditional integration models such as the adoption of a common trade policy vis-a-vis third states, establishment and maintenance of a common external tariff and common market.<sup>68</sup> The members are also expected to gradually reduce tariff and non-tariff barriers to trade and encourage free movement of goods and services within the community. Notably, the treaty also provides for affirmative action for land locked, semi-land locked, least developed countries and islands.<sup>69</sup>

The establishment of the AEC is to be implemented and achieved through a gradual and step-wise approach, with six stages of varying durations including a 34 year transition period.<sup>70</sup> The first stage is for strengthening of existing RECs and establishing of REC's in regions where RECs do not exist. This is envisaged to take a maximum of 5 years. The second stage involves the gradual harmonisation of customs duties of the RECs established under stage one, with third parties, and gradual removal of tariff and non-tariff barriers to regional and intra-community trade. During the second stage,

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<sup>63</sup> Preamble p. 2 and 3, and Article 3(j) and (i) of the Constitutive Act of the AU.

<sup>64</sup> Article 5.

<sup>65</sup> Article 3.

<sup>66</sup> Article 4 (2) (a).

<sup>67</sup> Article 4(2) e.

<sup>68</sup> Article 4(2) (f) and (g).

<sup>69</sup> Article 4(2) (i).

<sup>70</sup> Article 6.

member states are also expected to strengthen sectional integration at the regional and continental levels, particularly in the fields of trade, agriculture, money and finance, transport and communication, industry and energy. The second stage is set to take 8 years from the date of the treaty.

The third stage is envisioned to establish a Free Trade Area at the individual REC level with gradual removal of tariff and non-tariff barriers to intra-community trade and to establish a customs union by means of adopting a common external tariff. This stage is to take 10 years. The fourth stage is to be achieved within a period of two years. During this period, the community intends to harmonize the tariff and non-tariff systems, among the various RECs with a view to establishing a customs union at the continental level by means of adopting a common external tariff.

Stage five, the penultimate stage, is to be completed in 4 years and basically provides for establishment of an African Common Market. Stage six is to be achieved in five years and focuses largely on institutional strengthening and the consolidation of a common market, free movement of people, goods, capital and services. It entails the economic, political, social and cultural integration with a single domestic market and a pan African Economic and Monetary Union with a single African Central Bank and single African currency. Stage six will also see the establishment of pan African parliament with election of its members by continental universal suffrage and setting up of executive structures of the political community.<sup>71</sup>

The AEC treaty aspires to transform Africa into a supranational economic entity. The organs of the community include; the Assembly of Heads of States and Government which is the apex and supreme organ of the community.<sup>72</sup> Beneath it is the council of ministers which is responsible for the functioning and development of the community at the policy level.<sup>73</sup> Also established is a Pan-African Parliament (PAP) whose role is left to a future protocol to define its composition functions, powers and

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<sup>71</sup> *Ibid.*

<sup>72</sup> Article 7 and 8.

<sup>73</sup> Article 11, 12 and 13.

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organization.<sup>74</sup> This has since been achieved with the establishment in 2004 of the PAP.<sup>75</sup>

There is also an Economic and Social Commission consisting of ministers responsible for economic development, planning and integration of members.<sup>76</sup> The Commission reports to the Council of Ministers and makes recommendations to the Assembly of Heads of States and Government. The Commission is the technical policy vehicle of the community.

A secretariat headed by the Secretary General is charged with the day to day operations of the community, implementation of decisions of the council of Ministers and the Assembly of Heads of States and Government, and projects of the community including its monitoring.<sup>77</sup> Specialised technical committees comprising members with relevant expertise in specific strategic areas originate projects and concepts and recommend the same to the assembly through the Council of Ministers and Secretariat. The committees are also tasked with assessing the viability of projects, their execution and coordination.<sup>78</sup>

RECs have been given special focus by the AEC Treaty with an entire chapter dedicated to the place, functions and with emphasis on the strengthening existing RECs and establishing new ones where none exist.<sup>79</sup>

The Court of Justice of the Community is also established.<sup>80</sup> Its jurisdiction extends to ensuring the adherence to the law in interpretation and application of the treaty and to decide disputes submitted to the court pursuant to the treaty and to mete out sanctions as prescribed under the treaty, protocols and rules. The court is to be independent of the member states, who can bring actions before it, and also independent of the other organs of the community.<sup>81</sup>

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<sup>74</sup> Article 14.

<sup>75</sup> Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament.

<sup>76</sup> Article 15 and 16.

<sup>77</sup> Article 21 and 22.

<sup>78</sup> Chapter IV Article 28.

<sup>79</sup> Article 75 and 26.

<sup>80</sup> Chapter IV Article 28.

<sup>81</sup> Article 18, 19 and 20

The AEC is discernibly a very ambitious project. The time frame of 34 years for its implementation seems to acknowledge its monumental implementation task. The six stage plan however seems to have two fundamental shortcomings. Firstly, it is bottom heavy, meaning that it leaves critical matters of the creation of structures and undertaking of programmes which should hold the community together, to the very last five years of its implementation yet these are ideally natured over time, preferably over the prescribed 34 years or most of them, for proper efficacy. Secondly, the implementation milestones set in the AEC treaty still heavily rely on RECs and right to end still maintain and encourage existence of the merging RECs structures yet at that stage the RECs should have transited or evolved into or have been subsumed structures of the AEC.

The metamorphosis from a FTA to the supranational community is expected to be generic and organic without considering the vicissitudes of the evolution process. There is therefore a real and founded danger and apprehension of running parallel systems, at the sub-regional and the continental level. Perhaps this is deliberate and is partly informed by some scepticism on the part of the crafters of the AEC treaty over its full and eventual realisation and as such they would rather have members fall back to the safety of the architecture of their respective RECs, in the event the AEC experiment fails to take off or be achieved.

The promulgation of the AEC treaty is predicated on the OAU charter. The OAU charter further inspired plans on how to achieve economic development in Africa. One such plan is the Lagos Plan of Action for the Economic Development of Africa 1980-2000.<sup>82</sup> The Lagos Plan of Action was a blue print on economic development adopted by the OAU following its Monrovia, Liberia-July 1979 16<sup>th</sup> Ordinary session where a declaration on a collective self-reliant international economic order in Africa was agreed.<sup>83</sup>

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<sup>82</sup> This plan is said to have been borne out of the overwhelming necessity to establish an African social economic order for self-reliance. For a critique of the plan see Appraisal and review on the Impact of the Lagos Plan Action on the Development and Expansion of Intra- African trade <http://repository.uneca.org/handle/10853/14129>. And Towards Economic Emancipation, from Lagos Plan of Action to Nepad. [http://www.sardc.net/.../towards\\_economic\\_emancipation\\_from\\_lagos\\_plan\\_of\\_action\\_to\\_nepad\\_](http://www.sardc.net/.../towards_economic_emancipation_from_lagos_plan_of_action_to_nepad_). Accessed on 4<sup>th</sup> July 2016.

<sup>83</sup> See full text of the plan at <http://www.merit.unu.edu>. Accessed on 4th July 2016.



The recognition in the AU Act and the AEC treaty that both the political and economic unity of Africa can only be achieved progressively suggests an inclination by African States towards a step-wise model towards integration. Further, both instruments also seem to appreciate the pivotal role RECs play as building blocks towards the desired AEC and ultimately the political union of the continent. Fundamentally too, is that the AEC treaty seeks to draw from the structures and experiences of RECs in the progressive attainment of the AEC. In essence, the AU member states which are also the AEC treaty members recognise that economic integration through RECs can be achieved faster than political integration and that even such economic integration must build on the existing structures provided by existing and future RECs in Africa.

It is perhaps instructive that the African continent having built and learnt from 53 years of experience in economic integration at the sub-regional levels would want to progress the march towards the AEC and political union by merging its RECs. This is where the TFTA Agreement enters the scene and stakes its relevance in the African integration matrix.

### **3.3 The TFTA Agreement**

The Agreement establishing the TFTA agreement was concluded on 10<sup>th</sup> June 2015.<sup>84</sup> The agreement followed years of engagement between member states negotiating the TFTA agreement. A tripartite summit of Heads of States and Government representing the three merging RECs held on 22<sup>nd</sup> October 2008 agreed, inter alia, to establish a single Customs Union, beginning with a Free Trade Area.<sup>85</sup> A tripartite memorandum of understanding was signed on 19<sup>th</sup> January 2011.<sup>86</sup> This was soon to be followed by the declaration launching the negotiations of the establishment of the Tripartite Free Trade Area in Johannesburg, South Africa, on 12<sup>th</sup> June 2011.<sup>87</sup>

Similar to the AU Act, the TFTA Agreement acknowledges the place and role of RECs as building blocks for trade liberalisation in Africa.<sup>88</sup> Like the

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<sup>84</sup> Preamble to TFTA Treaty note 7 above at page 2

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* at page 3.

AEC treaty, the Agreement also expressly recognises the successes and best practices of RECs as important lessons from which it can draw on its march towards trade liberalisation under the TFTA Agreement framework.<sup>89</sup>

The objectives of the TFTA can be gleaned from the Agreement. They fundamentally include, among others, a commitment to resolving the challenge of overlapping membership of the tripartite member/partner states to several RECs, job creation and income generation for the people of the member states, progressive liberalization of trade in goods and service, deepening integration among member states and progressively achieving elimination of import duties and other barriers to trade within the bloc.<sup>90</sup> These objectives resonate with the ideals of multilateral trade as promulgated in Article XXIV of the 1994 Agreement.<sup>91</sup>

The TFTA Agreement proceeds from the principle that member states shall accord each other the Most Favoured Nation Treatment but qualifies the same by providing that nothing in the Agreement shall prevent a member state from maintaining or entering into new preferential trade agreements with third countries provided that any advantages, concessions, privileges or favours granted to a third country under such agreements are offered to the other members of the TFTA on a preferential basis.<sup>92</sup> Preferential agreements between member states of the TFTA are also not prohibited except that other members of the TFTA, not parties to such preferential agreement, shall on a reciprocal basis, be accorded benefit of privileges under such an Agreement despite not being party thereto.<sup>93</sup>

In furtherance of its harmonisation of import duties and in a bid to eliminate trade barriers, the TFTA members also agreed to design and standardise their trade and customs documentation and information in accordance with internationally accepted standards and to initiate trade facilitation programmes.<sup>94</sup>

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<sup>89</sup> Article 4 and 5 TFTA Treaty, *Ibid* at pg. 6.

<sup>90</sup> *Ibid*.

<sup>91</sup> Discussed in part 4 of this Article.

<sup>92</sup> Article 7 TFTA Agreement at page 6.

<sup>93</sup> *Ibid*.

<sup>94</sup> *Ibid*.

The organs for the implementation of the TFTA Agreement include the tripartite summit of Heads of States and/or government, which sits at the pinnacle of its organisational superstructure. Just below it is the council of ministers, sectorial ministerial committees and a task force of the secretariats of the RECs, which gives policy guidance to the TFTA. A tripartite committee of experts enjoined to be responsible for overseeing and to guide its technical work, is also established.<sup>95</sup>

A Dispute Settlement Body is also created to administer the rules and procedures as well as settle disputes under the Agreement.<sup>96</sup> The Settlement body shall operate through panels and appellate bodies. The body shall go further to maintain surveillance of implementation of rulings and recommendations of panels and its appellate bodies. The Dispute settlement Body's jurisdiction can only be invoked as a residual mechanism in the event of failure of good faith consultation and negotiations entered into with a view to amicably settling a dispute.<sup>97</sup>

Significantly, the TFTA Agreement is categorical that in the event of inconsistency or conflict between the Agreement and the treaties and instruments of COMESA, EAC and SADC, the TFTA agreement shall prevail to the extent of the inconsistency or conflict.<sup>98</sup> However, the TFTA Agreement does not take a similar position with respect to inconsistencies or conflicts between it and the AU Constitutive Act or the Continental Free Trade Area established by the AEC treaty.

The Tripartite Agreement retains the structure of the merging RECs and hopes to build upon their successes, experiences and structures before progressively incorporating them into its own systems. The seamless transition, therefore, heavily borrows and relies, at least at the technical implementation level, on the COMESA, EAC and SADC structures. It is in appreciation of this important nexus between the TFTA and the merging RECs that a brief exposition of the salient features of the three amalgamating blocs' structures is necessary.

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<sup>95</sup> Article 29 of the TFTA Agreement p. 4.

<sup>96</sup> Article 30 of the TFTA Agreement p. 15.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

*a) The Common Market for Eastern and Southern Africa (COMESA)*

COMESA began as the Preferential Trade Area (PTA) in 1981 and was, by way of treaty, transformed into COMESA in 1994. Its objectives go beyond economic integration to include promotion of peace and security, besides developing the member states' natural and human resources. It establishes an FTA and customs Union and currently consists of 19 members.<sup>99</sup>

COMESA has established a trade and development bank, a clearing house, leather institute, an association of commercial banks and a reinsurance company. The COMESA Court of Justice is also established under Article 7 of the treaty and became operational in 1998. Like most RECs on the African continent, the COMESA treaty decision making hierarchy starts with the summit of Heads of States at the top, the council of ministers responsible for policy making, technical committees and several advisory bodies, in that order.<sup>100</sup>

Article 3(f) of the COMESA treaty cites, as one of its core aims and objectives that it aims to make a contribution towards the establishment, progress and the realisation of the objectives of the African Economic Community.

The bloc has achieved some significant milestones. COMESA has been able to transform from a Free Trade Area to a common market, with relative free movement of goods and ease in movement of persons.<sup>101</sup> The COMESA region has also galvanised members who can now collectively engage in global trade and negotiate with larger economies such as the United States of America (USA) and the European Union. However, movement of labour remains restricted in most member states with work

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<sup>99</sup>COMESA Treaty at [www.comesa.int/attachments/article/28/COMESA\\_Treaty.pdf](http://www.comesa.int/attachments/article/28/COMESA_Treaty.pdf). Accessed on 10<sup>th</sup> June 2016. the COMESA membership includes Angola, Burundi, Comoros, Congo, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somali, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe

<sup>100</sup> Article 7 of the COMESA Treaty at page 13.

<sup>101</sup> With the exception of the difficulties in implementation of the protocol on rules of origin 2015, COMESA has common external tariffs and intra trade quotas meant to protect smaller economies and sectors which are still granted preferential treatment.

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permits still required. Integration into a fully-fledged customs union also remains a challenge due to reasons such as a lack of commitment to projects by some member states, divided loyalty by members with other blocs such as SADC and EAC, low intra-bloc trade due to production of similar raw materials and agricultural goods.<sup>102</sup>

b) *The Southern African Development Community (SADC)*

SADC was first created in 1980 as the Southern African Development Coordinating Conference (SADCC). Its underlying principal objective was to reduce its members' dependence on the then apartheid South Africa.<sup>103</sup> In anticipation of the democratisation of South Africa, SADCC transformed into SADC in 1992 and South Africa joined it in 1994. SADC's predecessor SADCC was not a market integration arrangement in its strict sense but one whose members, known as front line states,<sup>104</sup> adopted a broad development mandate. SADCC, therefore, engaged in cross-border sector specific projects in infrastructure and energy such as the regional development corridors and the Southern African Power pool.<sup>105</sup>

The SADC treaty (and subsequently the SADC trade protocol) does not elaborate a detailed integration plan but such detail is to be found articulated in the Regional Indicative Strategic Development Plan (RISDP) of 2003.<sup>106</sup> The RISDP articulates a roadmap of SADC from a FTA by 2008, to a Customs Union in 2010, a Common Market in 2015, a Monetary Union in 2016 and the introduction of a single currency in 2018.<sup>107</sup> Though not a legally binding instrument, the RISDP bears significant political legitimacy and is recognised as a blueprint towards the integration of SADC Member

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<sup>102</sup> These problems have been discussed in more detail in Chapter 4 of this work. See Ibrahim S G and Nwokedi LO, "Bi-regional integration in Africa: An Evaluation of the Major Challenges of the Common Market for Eastern and Southern Africa (COMESA)" *International Journal of Multidisciplinary Research and Modern Education (IJMRME)* (Online):2454-61 19 ([www.rmodernresearch.org](http://www.rmodernresearch.org)) Volume I, issue I, 2015 p.2. Accessed on 9<sup>th</sup> September 9, 2016.

<sup>103</sup> Hartzenberg, note 41 above at p.5.

<sup>104</sup> Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>105</sup> Hartzenberg, note 41 above.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

states. Article 16 of the SADC treaty established the SADC tribunal whose role is to interpret the treaty and its subsidiary instruments and to adjudicate upon disputes that may be referred to it. It can also give advisory opinions to the summit of Heads of States and Government and Council of Ministers, if called upon. The SADC tribunal was disbanded in the year 2012 after being suspended and staying moribund since 2010.<sup>108</sup> Following a decision of the summit of heads of states held in 2014, a new SADC Tribunal Protocol was signed but has not received the requisite 10 ratifications for it to come into force.<sup>109</sup> It may take years to comply with the ratification processes under the new protocol, which involves compliance with the domestic laws of member states.<sup>110</sup> Under the new protocol, the tribunal's jurisdiction was curtailed to only deal with disputes between state members, and as such its necessity and continued existence is cast in doubt, particularly since member states do not ordinarily sue each other.<sup>111</sup>

The watering down of the mandate of the tribunal and its eventual disbandment by the bloc's summit of heads of states was seen as an attempt to appease Zimbabwe. Zimbabwe had threatened to withdraw from the protocol establishing the tribunal following the adverse decisions and orders by the tribunal against it in the *Michael Campbell v Zimbabwe* case.<sup>112</sup> The developments surrounding the SADC tribunal and their impact and potential import on the TFTA integration process is discussed in the ensuing section of this work.

The SADC approach has been likened to that of the EAC.<sup>113</sup> Both are based on the linear market progression paradigm<sup>114</sup> with the only striking

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<sup>108</sup> The summit of heads of states refused to appoint new judges or to renew the appointments of those serving. See, Erasmus G, "The New Protocol for the SADC Tribunal: Jurisdictional Changes and Implications for SADC Community Law" 2015 at p. 1 Tralac, available at <https://www.tralac.org>. Accessed on 2<sup>nd</sup> September 2016. The new protocol is available at [www.tralac.org](http://www.tralac.org). Accessed on 2<sup>nd</sup> September 2016.

<sup>109</sup> Article 53 of the new Protocol.

<sup>110</sup> Erasmus, note 108 above at p.1.

<sup>111</sup> Article 33.

<sup>112</sup> [2008] SADCT 2 (28 November 2008) SADC Tribunal (SADC).

<sup>113</sup> *Ibid* at page 6.

<sup>114</sup> *Ibid*. The linear model or linear market paradigm is discussed in more detail in part 4.4 of this article.

difference being that while the EAC envisages a political federation, the SADC integration only ends at economic integration with a monetary union.<sup>115</sup> SADC prides itself as having achieved 85% of intra- regional trade amongst its members in a phased programme achieved in 2008. However the set minimum tariff liberalisation was achieved in 2012, way after the target date of 2008.<sup>116</sup> Most member states still lag behind and as a result the strategic plan to achieve a customs union with common external tariffs by 2010, a common market with common policies and production regulation by 2015, a macroeconomic convergence and monetary union by 2016 have not been met.<sup>117</sup> The envisaged monetary union set for 2018 seems unlikely to be achieved. The monetary union was first set to be achieved in 2016 and is now postpone to the year 2018.<sup>118</sup> The fundamentals key for the establishment of monetary union, such as the establishment of a SADC central bank, are still lacking.<sup>119</sup>

#### c) *The East African Community (EAC)*

The Treaty establishing the EAC entered into force in the year 2000.<sup>120</sup>

The original EAC members included Kenya, Uganda and Tanzania. Burundi and Rwanda acceded to the treaty in 2007 and the Republic of Southern Sudan in 2016. Ethiopia and Somalia are also expected to join the bloc shortly.<sup>121</sup>

The original three members of the EAC have long political and economic historical integration ties that go as far back as the colonial period.<sup>122</sup> In 1917, Kenya and Uganda, both English colonies, formed the Customs Union

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<sup>115</sup> Hartzenberg, note 41 above, at p.5.

<sup>116</sup> [www.sadc.int/integration-milestones](http://www.sadc.int/integration-milestones). Accessed on 2<sup>nd</sup> September 2016.

<sup>117</sup> *Ibid*. Also see Padamja K “COMESA and SADC: Prospects and Challenges for Regional Trade Integration” 2004 IMF working Paper WP/04/227.p. 12 and 13.

<sup>118</sup> *Ibid*, SADC treaty, p.13.

<sup>119</sup> *Ibid*.

<sup>120</sup> EAC Treaty at [www.eac.int/treaty](http://www.eac.int/treaty). Accessed on 1th June 2016

<sup>121</sup> Maiyo J “EAC: How New Members will Alter Regional Bloc” available at [www.pambazuka.org](http://www.pambazuka.org). Accessed on 5<sup>th</sup> September 2016.

<sup>122</sup> East African was colonized by the British in the late 19<sup>th</sup> Century as a homogenous entity known as: The East Africa Protectorate, before Tanganyika come under the German hegemony and later, after the First World War, reverting to British rule.

which Tanganyika later joined in 1927.<sup>123</sup> The East Africa Commission was operational between 1948 and 1961.<sup>124</sup> The East African Common Services Organization (EACSO) existed between 1961 and 1967.<sup>125</sup> Under this arrangement services such as telecommunication, infrastructure, electricity generation and transmission, an airline and tax resources collection were shared between the three East African Countries. A common central bank also issued a common currency, the East African Shilling. There also existed the East African Court of Appeal, which was the apex judicial body within the EAC. The EACSO was succeeded by the East African Community between 1967 and 1977. However the EAC was dissolved in 1977, mostly due to ideological differences between the then Heads of States of the EAC countries.<sup>126</sup>

A Mediation Agreement was then negotiated and concluded in 1984 by which the three member States (Kenya, Tanzania and Uganda) agreed to explore areas of future cooperation. This birthed the permanent Tripartite Commission for East African Cooperation on 30<sup>th</sup> November 1993 and a permanent secretariat of the EAC in Arusha, Tanzania in 1996. The EAC treaty was later signed in 1999 and entered into force on 7<sup>th</sup> July, 2000.

The EAC model is based on four integration pillars: the Customs Union, Common Market, Market Union and Political Federation.<sup>127</sup> The Customs Union Protocol has been in force since 2005 and is founded upon Article 75 of the EAC Treaty. The Customs Protocol establishes a FTA where zero duty is imposed on goods and services among members and a Common External Traffic (CET) towards imports from third countries when sold to any EAC partner state. Another function of the Customs Union Protocol is to establish common rules of origin.<sup>128</sup>

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<sup>123</sup> Supra note 75.

<sup>124</sup> *Ibid* at page 1.

<sup>125</sup> *Ibid*.

<sup>126</sup> *Ibid*. During the cold war era-Kenya and Uganda pursued a capitalist approach while Tanzania preferred a socialist approach.

<sup>127</sup> [www.eac.int/intergration\\_pillars](http://www.eac.int/intergration_pillars). Accessed on 4<sup>th</sup> July 2016.

<sup>128</sup> [www.eac.int/resources/documetns/protocol-establishment-eac-customs-union](http://www.eac.int/resources/documetns/protocol-establishment-eac-customs-union). Accessed on 5<sup>th</sup> July 2016.



The second pillar of the EAC is the Common Market Protocol which became fully fledged in 2010.<sup>129</sup> The protocol sets out rules that encourage free movement of the factors of production including free movement of goods, persons, labour, rights of establishment, rights of residence, free movement of services and free movement of capital. The principles that underline the EAC Common Market are: non-discrimination of nationals of other partner states on account of nationality, equal treatment of nationals of other states, ensuring transparency in matters concerning the other partner state and sharing of information for the smooth implementation of the protocol.<sup>130</sup>

The East African Monetary Union (EAMU) Protocol was signed on 30<sup>th</sup> November 2013.<sup>131</sup> It envisages a monetary union within 10 years and sets the foundation for the progressive convergence of member currencies into a single currency. The partner states have therefore agreed through the protocol to harmonise monetary and fiscal policies; harmonise financial, payment and settlement systems harmonise financial accounting and reporting practices; harmonise policies and standards or statistical information; and establish an East African Central bank.<sup>132</sup>

The last pillar of the EAC integration effort is the political federation. This is more of a goal or an aspiration than it is an actual instrument in the nature of a protocol. The political federation is the ultimate goal of the integration process under the EAC Treaty and is premised upon Article 5(2) of the EAC Treaty.<sup>133</sup> The EAC member states appreciate the fact that the attainment of the political union is a process and not an event and as such it was resolved by a special summit of Heads of States in August 2004, to establish a committee which would consult and advice on the process and progress of political integration.<sup>134</sup> The committee presented its report to the summit on 29<sup>th</sup> November 2004 and following which an office of the

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<sup>129</sup> [www.eac.int/resources/documetns/protocol/establishemnt\\_common\\_market](http://www.eac.int/resources/documetns/protocol/establishemnt_common_market). Accessed on 5<sup>th</sup> July 2016.

<sup>130</sup> As above.

<sup>131</sup> [www.eac.int/resources/documetns/protocol\\_establishemnt\\_eac\\_moneatry\\_union](http://www.eac.int/resources/documetns/protocol_establishemnt_eac_moneatry_union). Accessed on 5<sup>th</sup> July 2016.

<sup>132</sup> *Ibid.*

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

<sup>134</sup> *Ibid.*

*The Comesa-SADC-EAC Tripartite Free Trade Area Agreement and Regional Integration in Africa: Achieving The African Economic Community Dream?: Wilfred A Mutubwa* (2017) *journalofcmsd Volume 1(2)*  
Deputy Secretary General responsible for political federation was established.<sup>135</sup>

The main organs of the EAC are the summit of Heads of States and Governments, council of Ministers, Coordinating Committee, Sectorial Committees, the East African Court of Justice (EACJ), the East African Legislative Assembly (EALA) and the community's secretariat.<sup>136</sup>

The hierarchical structure of most RECs in Africa takes the same shape. The EAC is no exception. The summit made up of Heads of states and Governments of partner countries gives strategic direction to the community. The Council of Ministers meets twice a year and gives policy direction and decisions for the EAC. The EALA is the legislative organ of the community with the mandate to legislate and oversight the secretariat. It was established under Article 9 of the EAC Treaty. It has 45 members (nine from each partner state).<sup>137</sup> The EACJ is the principal judicial organ of the community and ensures interpretation and application of the EAC treaty and protocols.<sup>138</sup> The Court's seat is currently at Arusha, Tanzania with sub registries in the capitals of the partner states. It comprises 10 judges appointed by the summit of heads of state and governments from sitting judges or jurists of member states and has two divisions, an appellate and first instance division.<sup>139</sup> The EAC secretariat is the executive organ of the community and runs the day to day operations of the community. It is headed by a Secretary General who is appointed by the summit for a non-renewable period of 5 years. The Secretariat ensures the regulations and directions adopted by the council are properly implemented.<sup>140</sup> The long history and seemingly clear and developed structure of the EAC, perhaps vindicates the view taken by commentators to the effect that the EAC, rivalled only by the now defunct European Community (now European

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<sup>135</sup> The Report of the committee on Fast Tracking of East African Federation also known as the Wako committee report after the committee's chairman, Amos Wako, the then Attorney General of the Republic of Kenya. See full text of report at [www.federation.eac.int/index.php?option=com\\_docman & tax\\_doc](http://www.federation.eac.int/index.php?option=com_docman&tax_doc). Accessed on 4<sup>th</sup> July 2016.

<sup>136</sup> Chapter Three of the EAC Treaty. 17.

<sup>137</sup> Chapter Nine of the EAC Treaty. 38.

<sup>138</sup> Chapter Eight of the EAC Treaty 25.

<sup>139</sup> *Ibid*, Article 24.

<sup>140</sup> Article 23(1) of the EAC Treaty.

Union), is arguably one the most deeply integrated RECs in the world and perhaps the most integrated region in Africa.<sup>141</sup>

The EAC draws lessons from the failure and dissolution of the first EAC in 1977 and seeks to build its structures along the defunct pre – 1977 EAC. It however aspires to go further and create a federated political union. The advantage of hindsight certainly informs its cautious progressive evolution so as to avoid the pitfalls that led to its collapse in 1977. This seems to have guided the conscious effort by member states to adopt a step-wise integration model for the EAC.

The EAC has achieved free movement of goods and people within the region but still lags behind in areas of movement of labour, services, right of residence and establishment.<sup>142</sup> This is principally blamed on reluctance by some member states to fully open up their markets to larger more established economies such as Kenya by imposing non-tariff barriers to circumvent the agreed tariffs.<sup>143</sup> A common external tariff remains elusive particularly as member states separately engage third parties such as the EU hence weakening their negotiating leverage. The bloc has long term integration ambitions, with a customs union taking effect in 2010, a monetary union set to be fully implemented in 2023, and ultimately, political union. Despite a myriad of challenges in implementing the customs union, the EAC transitioned into a common market in 2010 after concluding negotiations in 2009.<sup>144</sup>

### 3.4 Summary

This section has examined the architecture of the AEC treaty and the TFTA. The salient features of the three RECs that intend to merge under the TFTA (COMESA, SADC and the EAC) have also been substantively highlighted. The step wise process of transition from the respective RECs

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<sup>141</sup> Fagbayibo B, note 57 above, 42.

<sup>142</sup> [www.eac.int/integration.pillars](http://www.eac.int/integration.pillars). Accessed on 2<sup>nd</sup> September 2016.

<sup>143</sup> Maina B, “Strides in Regional Trade despite Problems” *Daily Nation* Wednesday February 25, 2015.

<sup>144</sup> Makame A, “The East Africa Integration: Achievement and Challenges” 2012 Maastricht: ECDPM available at [www.ecpdm.org/great-insights](http://www.ecpdm.org/great-insights). Accessed on 9<sup>th</sup> September 2016.

through to the TFTA and the ultimate goal of the economic integration of the African continent under the AEC, was also underlined.

In the next part, the potential problems and prospects of the proposed integration of the merging RECs into the TFTA will be discussed.

## **4.0 Problems and Prospects of the TFTA**

### **4.1 Introduction**

On its path to economic integration, the TFTA is bound to meet a myriad of challenges. The challenges and prospects are multifarious; economic, political and geographical. However, even in the midst of these obstacles prospects still abound. This section will address the various challenges that attend the process of attaining the TFTA. Prospects of the TFTA shall thereafter follow before drawing conclusions.

### **4.2 Problems and challenges of the TFTA**

#### *4.2.1 Compatibility with Article XXIV of the 1994 WTO Agreement on Regional Economic Integration*

As a starting point, being a Regional Trade Arrangement/ Agreement (RTA), the TFTA is expected under international law on trade, to reflect the ideals or principles of regional economic integration as prescribed in Article XXIV of the 1994 WTO Agreement.<sup>145</sup> The TFTA Agreement's compatibility with the Article XXIV of the WTO 1994 agreement is, therefore, a convenient place to begin the discourse on the problems of economic integration under the TFTA Agreement.

The WTO/GATT framework, as a whole, is a rule based effort towards a multilateral free trade system or regime with minimum or no barriers, be they tariff or non-tariff.<sup>146</sup> However, in recognition of the fact that a truly globally free trade system is still a mirage, the WTO/GATT recognises and acknowledges RIAs as viable vehicles or building blocks towards a

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<sup>145</sup> Full text of the Article available at [https://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/gatt1994\\_09\\_e.htm](https://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_09_e.htm). Accessed on 19th September 2016.

<sup>146</sup> Cottier, and Foltea, note 37 above.

multilateral trade system.<sup>147</sup> Accordingly, Article XXIV of the GATT/WTO 1994 encourages the establishment of RIAs and proceeds to prescribe regulation for regional integration.

Sub-paragraphs 8(a) and 8(b) of Article XXIV define a Customs Union and a Free Trade Area, respectively. Article XXIV in a nutshell prescribes rules of engagement, regulations or requirements for effective establishment and management of the FTAs and Customs Unions. These are the substantive concerns of this part of the article. From a reading of Article XXIV, the following prerequisites of an RTA are discernible.

Firstly, RTAs should cover substantially all trade in goods.<sup>148</sup> An RTA, be it an FTA or Customs Union, should cover substantially all the trade in goods within members of the RTA. In achieving this, RTAs should remove all tariffs and quantitative restrictions within a reasonable time.

Secondly, RTAs should abolish internal trade restrictions by placing minimum preferential rules of origin.<sup>149</sup> The elimination of discrimination and the granting of national treatment are required to take place either at the date of entry into force of the agreement or within a reasonable time frame. Article XXIV prescribes a minimal, if any, rules of origin so as to discourage discrimination of goods from third party states. The rationale can be understood to be founded on the reasoning that rules of origin exist to not only discourage “trade deflection” but also ensure that imports of product will not always enter the region through low tariff countries hence depriving the other members of revenue and any protection the tariff may provide to the higher tariff party’s enterprise.

Thirdly, RTAs should cultivate ground for an ultimate global multilateral free trade. Under Article XXIV paragraph 4 and indeed running through the entire edifice of the article is an emphasis on the ultimate goal of multilateral free-trade with minimum, if any, restrictions. The article seems, even in its rather permissively couched language, to deliberately not only acknowledge the place of RTAs as building blocks towards multilateralism but also encourage free trade with third parties and growth of the RIAs into much larger viable multilateral trade systems. In a nutshell, the article provides RTAs should not result in stricter or severer barriers to trade for

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<sup>147</sup> Article XXIV WTO 1994, note 145 above.

<sup>148</sup> Article XXIV paragraph 8 GATT/WTO 1994.

<sup>149</sup> Article XXIV, paragraph 5 GATT/WTO 1994.

non-members or third parties. Third parties should not suffer upon liberalization through RTAs.

Having identified the principles espoused by the WTO on regional integration, attention will now proceed to briefly focus, using the principles identified above, on the TFTA's compatibility with identified principles.

Although Article XXIV of the GATT 1994 indicates the elimination or near elimination of tariff and non-tariff barriers to trade, save for necessary circumstances or for limited periods, rules of origin remain common place in African RTAs. The rules exist in almost all FTAs and are always complex. They pose a real potential for disputes both in their administration and comprehension. Ideally the rules are designed to prevent trade deflection in a free trade area where external trade barriers such as tariff levels differ.<sup>150</sup> They are employed to also discourage producers from using what Gantz calls "final assembly screw-driver operations" where such producers use non-regional parts and components from duty free states or regions to enjoy the free trade status of the RTA<sup>151</sup>. Rules of origin are a critical non-tariff barrier to export and import trade and are difficult or near impossible to enforce by developing countries' customs authorities.<sup>152</sup>

The TFTA Agreement recognises that elimination of rules of origin can only be progressively achieved.<sup>153</sup> However, the challenge lies in the timeous elimination of the various rules of origin that subsist under the various merging RECs. To renegotiate and navigate such complex, often conflicting, and dispute prone rules of origin may stifle the growth of multilateral trade under the aegis of the TFTA.

#### *4.2.2 Lack of Institutional Independence*

The TFTA Agreement establishes various institutions that should ensure the effective discharge of its overall mandate. These institutions include the tripartite summit of Heads of States and/or Governments, an executive Council of Ministers, a secretariat, sectorial technical committees of ministers of the trade of the merging RECs; and the Dispute Settlement

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<sup>150</sup> Gantz, note 19 above at p.243 to 244.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> Article 12 of the TFTA Treaty as read with Annexe 4 thereof.

Body as its judicial arm.<sup>154</sup> The realisation of the TFTA largely depends on the technical committees of the secretariat of the merging RECs.<sup>155</sup>

According to Fagbayibo, to achieve supranationalism an integration entity must be independent enough to implement the integration initiatives.<sup>156</sup> Although the realisation of the TFTA is dependent on the organs of its merging RECs, critical institutions of those RECs remain devoid of institutional independence. At the very elementary, institutional independence connotes a measure of subscription to the doctrine of separation of powers and the concept of judicial independence particularly for the judicial organs.<sup>157</sup> These constitutional principles which are mostly applied in national legal systems also find credence on the international plane. In practical terms, though interdependent, the executive (summit of heads of states and council of ministers and secretariat), legislative and judicial arms (the dispute settlement body) of a REC such as the TFTA should remain distinct and retain their independence even as they coexist within the broader organisational framework.

There is real and founded apprehension, going by the growing body of evidence of lack of independence or the outright undermining of independence of organs of RECs in Africa. This trend is more likely to permeate the organs of the TFTA because the TFTA structure and organs mirror the very same features of the RECs it intends to amalgamate including those which have a history of its executive organs undermining the independence of other organs. This is more worrying when such organs are invariably judicial organs which are meant to oversight the executive arm, check on excesses, interpret treaties and protocols, and determine rights and obligations of members and their citizens, between members *inter se* and even with third party states or individuals and entities.

Lack of institutional independence in the TFTA organs can therefore be traced back to the merging RECs where evidence of such void abounds. For

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<sup>154</sup> The features of the TFTA are discussed in detail under part 3.2 of this article.

<sup>155</sup> TFTA treaty Article 29.

<sup>156</sup> Fagbayibo B, note 57 above at. p.49.

<sup>157</sup> The doctrine of separation of powers is attributed to the French philosopher Montesquieu and it in essence requires the executive, legislative and judicial powers of the state to be separate as far as possible but remain inter-dependant for a proper functioning of a constitutional democracy by offering each other the requisite and necessary checks and balances.

instance, the judicial organs of the SADC, EAC and COMESA are largely moribund institutions whose jurisdictional competence and authority are of dubious merit. The judges who sit in the respective courts and tribunals of these RECs are hand-picked by the summit of Heads of States and governments of the various RECs.<sup>158</sup> Similarly, the appointment of members of the Dispute Settlement Body of the TFTA is also the function of the executive organ of the TFTA.<sup>159</sup> This inherently undermines the independence of the Court or tribunal and goes against the very basic principle of governance of separation of powers.

Demonstrably, and as an escalated consequence of the forgoing trend, the observance and execution of decisions of the AEC Court of Justice is in doubt, if the experiences of the EACJ and SADC tribunals are anything to go by.

A case in point poignantly illustrates this point. The sanctity of the EACJ's decisions came into sharp focus in the aftermath of the case of *Prof P. Anyang Nyong'o and the Attorney General of the Republic of Kenya et al.*<sup>160</sup> The EACJ had agreed with the Applicants and ruled against the Republic of Kenya to the effect that Kenya's mode of nominating members to the EALA was inconsistent with the EAC treaty.<sup>161</sup> The Republic of Kenya, a member state and a subject of the Court, together with other member states, resisted the decision of the EACJ.

As a result, the constitution, jurisdiction, and juridical value that the EACJ adds to the integration of East African states has been the subject of intellectual discussion particularly in light of the *Prof Nyong'o* case.<sup>162</sup> It has

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<sup>158</sup> See parts 3.3 3.4 and 3.5 of this article for a detailed discussion of the institutional structure of the COMESA Court of Justice, EACJ and SADC Tribunal.

<sup>159</sup> Annexe 13 to the TFTA Agreement. See the full text at [www.tralac.org/images/Recourses/Tripartite\\_FTA/FTAT\\_Annexe\\_13\\_DisputeSettlementRevisedDec2010.pdf](http://www.tralac.org/images/Recourses/Tripartite_FTA/FTAT_Annexe_13_DisputeSettlementRevisedDec2010.pdf). accessed on 1<sup>st</sup> July 2016.

<sup>160</sup> Judgment of 30<sup>th</sup> March 2007, Ref.Nr.1 of 006 available at

<http://www.eac.int/en/judgments.html>. Accessed on 1<sup>st</sup> July 2016.

<sup>161</sup> A Similar decision was reached by the same court in the case of *East Africa Law Society et.al v The Attorney General of Kenya et.al* Judgment of 8<sup>th</sup> September 2008, Ref.Nr.3 of 2007, available at <<http://www.eac.int/en/judgments.html>> Accessed on 1<sup>st</sup> July 2016.

<sup>162</sup> See for instance Van der Mei A.P. "Regional Integration: The Contribution of the Court of Justice of the East African Community" *ZaoRv* 69(2009), 403-425. Also see Gathii J "Mission Creeper for Relevance: The East African Court of Justice is



been concluded that despite well intentioned institutions and bold provisions in treaties and protocols, institutional independence is yet to be achieved by EAC organs, particularly the EACJ, despite adulations earned by EAC as being the most deeply integrated REC in Africa.<sup>163</sup> National interest and preferences of heads of states and governments seem to always override those of RECs and their organs. This is a patent threat to the integration of Africa.

Another litmus test to the independence of regional courts arose in the case of *Mike Campbell (PVT) Ltd v Zimbabwe*.<sup>164</sup> This was a case that brought into sharp focus the judicial supremacy contest pitting regional courts/tribunals, on the one hand, and national courts, on the other. The case also demonstrated the lack of independence of REC organs over the overbearing summit of head of states and governments and by implication the deficiency of the rule of law in the management of affairs of RECs in Africa.

In the *Mike Campbell* case, the SADC tribunal had awarded the Applicant, a company owned, by majority shareholding, by a South African Citizen against the government of Zimbabwe. The Applicant moved the Zimbabwean High Court to enforce the tribunal's decision but this was rejected. The Zimbabwean High Court disallowed Mr. Campbell's prayers on the ground that the land reforms upon which Mr. Campbell lay his claims was public policy and therefore for public good. The applicant had brought an action against the government of Zimbabwe following his forceful eviction from his land following its seizure through a state sanctioned policy that allowed its independence war veterans to do so. The Zimbabwean government first resisted the jurisdiction of the SADC tribunal over the matter, and upon failure on this ground absconded appearing before the tribunal. The Zimbabwean government was found by the SADC tribunal to be in contempt of the tribunal's orders and in multiple breach of the SADC treaty. The applicant thereafter successfully sought to enforce the decision

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Human Rights strategy." *Duke Journal of Comparative and International law* Vol. 24:249 and Ojienda T "The East Africa Court of Justice in the Re-established East African Community: Institutional Structure and Function in The Integration Process" 2005 *East Peace & Hum Rts* 220-240.

<sup>163</sup>Van der Mei A. P, note 162 above at 424 and 425.

<sup>164</sup> [2008] SADCT 2 (28 November 2008) SADC Tribunal (SADC).

of the tribunal through diplomatic protection in South Africa and subsequently moved to attach the assets of Zimbabwe in South Africa.<sup>165</sup>

Both the South Africa supreme court of Appeal and Constitutional court rejected Zimbabwe's appeals after the South African High Court at Pretoria had allowed the seizure of Zimbabwe assets. Zimbabwe, through its Justice Minister then wrote purporting to withdraw from the SADC Tribunal Protocol. In May 2011, in an extraordinary summit of Heads of States and governments of SADC held in Namibia, all the SADC tribunal members were replaced and/or not reappointed rendering the tribunal suspended. That decision by the SADC summit of Heads of States and Governments came under sharp criticism as it undermined not only the SADC tribunal's authority as an institution but also SADC as a REC.<sup>166</sup> SADC's credentials as a REC governed by the rule of law and its members' commitment to that ideal were seriously cast in doubt.

Credit should be given where it is due. The *Mike Campbell* case is celebrated for two firsts.<sup>167</sup> Firstly, as the first case in which assets/property of a state were seized in compensation for human rights violations by a state. Secondly, because it marked a triumph for both the SADC tribunal in flexing its muscles on its independence and the South Africa Court's resilience, in the face of internal and external political pressure, in upholding human rights, judicial independence and finality of the decision of the SADC tribunal.

Platitudes for the SADC tribunal and EACJ for rising to the occasion and striking a blow for judicial independence, have not been few.<sup>168</sup> Both EACJ and SADC tribunal have demonstrated their ability to underscore their

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<sup>165</sup> Diplomatic protection is a principle developed in international law which allows one to invoke the diplomat assistance of one's state against another to enforce rights recognised in international law.

<sup>166</sup> Zongwe D "The Contribution of *Campbell v Zimbabwe* to the Foreign Investment on Expropriations" *Osgoode Hall Law School CLP Research Paper* 51/2009 Vol. 05 No. (09 2009) available at <http://digitalcommons.osgoode.yorku.ca/clpe.Nd/oru> N.P. Also see "A moment of Truth for the SADC Tribunal" *SADC Law Journal* Volume 1-2011. Both SADC Lawyers' Association and international commission of jurists (ICJ) Africa office and the Pan African Lawyers Union roundly criticized the suspension of the SADC tribunal and sought the intervention of the African Court on Human and Peoples' Rights.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

independence from national influences and regional politics. However, by the very architecture of these institutions, the control of judicial organs by the executive arm of the RECs (namely the summit of heads of states and council of ministers), exercised through the appointment mechanisms, funding and enforcement of their decisions, has the unfortunate effects such as the suspension or dissolution of strong judicial organs, always as a lingering possibility.

Again, not many national judicial organs and courts have the ability or wherewithal to be as independent of political pressure and mechanisations as was demonstrated by South African courts in the *Mike Campbell case*. In fact, most national or municipal judicial organs in the TFTA countries are so beholden to or subservient to the executive heads of those states that their lack of independence and inability to enforce an unpopular decision of the TFTA judicial tribunal is a foregone conclusion. A case in point is the Zimbabwean High court in the *Mike Campbell case* where the court acted and pronounced itself to the whim of the state.

In the TFTA matrix, one therefore meets the reluctant converts such as Zimbabwe and the EAC members, on the one hand, and the progressives such as South Africa, on the other hand. What that portends to the TFTA is a situation akin to that in the *Mike Campbell case*, which will potentially foment disharmony and inevitably clogs the wheels of integration in the TFTA. Such situation provides a real threat to the march towards the AEC.

#### *4.2.3 Inability to observe agreed timelines*

There is also an inability to keep to the implementation timelines agreed to. Protocols which are time bound in implementation are observed more in breach than otherwise. Member states are always seeking extensions to timelines set in protocols and protection of markets. For instance, the EAC market union was envisaged to have been fully achieved by the year 2010.<sup>169</sup> It is still yet to be achieved with the movement of capital, labour and services still restricted by barriers within the member states. A similar situation abounds for COMESA. The Customs Union was scheduled to be in place by the year 2004. Twelve years later, this is still yet to be achieved

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<sup>169</sup> See the COMESA market strategy available at [www.comesa.int/comesa-strategy](http://www.comesa.int/comesa-strategy). Accessed on 5<sup>th</sup> July 2016.

with a myriad of barriers erected within the trading bloc's members. The SADC monetary union that was, under the RISDP, to be achieved by the year 2016 is also still a pipe dream.

Fagbayibo observes that there is a strong nexus between the effective implementation of integration initiatives and the autonomy of regional institutions.<sup>170</sup> In essence, he opines that the implementation of integration initiatives cannot be left to the conveniences, vagaries or the goodwill of heads of states or the vicissitudes of national or regional politics.<sup>171</sup> Implementation of the TFTA should, therefore, be left in neutral hands. The peril of leaving the grand task of implementation of integration in the hands of heads of states and governments comes with the risk of collapse of the integration process when such political goodwill ebbs or wanes. An example of this is to be seen in the demise of the EAC in 1977 following disagreement between Presidents Julius Nyerere and Idi Amin, of Tanzania and Uganda respectively.<sup>172</sup> Recent history has also shown that the momentum in the New Partnership for Africa's Development (NEPAD) has dissipated following the exit from the political scene of its principal architects, Presidents Olusegun Obasanjo and Thabo Mbeki.<sup>173</sup>

#### 4.2.4 Differences in Legal Systems and Philosophies

Yet another institutional impediment that belies the harmonious integration of the COMESA, SADC and EAC into the TFTA is to be found in the different legal systems subscribed to by their various member states. While the majority of the states are largely common law English speaking, some such as Rwanda and Burundi are francophone civil law jurisdictions. South Africa, on the other hand, takes a Roman – Dutch approach. The approaches to legislation and legal practice in these three legal systems materially differ and could pose challenges in their harmonisation.<sup>174</sup>

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<sup>170</sup> Fagbayibo B, note 57 above.49.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> Kariuki F "Challenges Facing the Recognition and Enforcement of International Arbitral Award within the East African Community", (2016) 4(1) *Alternative Dispute Resolution* P.64 at 89.

This problem is even more sorely felt when it comes to interpretation of treaty rights and obligations before national courts on the premise of RTAs. Writing in the context of enforcement of international Arbitration Awards, Kariuki's views are critical to consider particularly with respect to what the differences in legal systems and philosophies portend for the TFTA. He notes that differences in procedural rules and practices, evidentiary laws and significant differences in public policy considerations pose challenges to the predictability and consistency in application of legal norms.<sup>175</sup>

It is this writer's considered view that a transnational *sui generis* approach that evolves a uniquely African approach which borrows from the best practices of the aforementioned more established legal systems should hence be explored.

The problem of implementation and enforcement of decisions of international Courts and tribunals has always dogged international judicial bodies, both in the realm of civil and human rights claims and the TFTA Disputes Settlement Body will not be an exception.<sup>176</sup> There is no silver bullet solution to this problem but a ray of hope is perhaps seen in the OHADA harmonisation of the business laws including a common arbitration law for its member states and a provision of intelligibility, simplicity and ease in the execution of foreign arbitral awards and judgments emanating from OHADA member states.<sup>177</sup>

*4.2.5 Political Instability, Poor Governance and Lack of Respect for Human Rights*  
Democracy, human rights and good governance are now accepted principles that transcend political unions, to include matters economic. African states have made significant strides towards achieving these ideals although much

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<sup>175</sup> *Ibid* at p.89.

<sup>176</sup> Writing on the African Court on Human and Peoples Rights (ACHPR). Pityana B.N. "Reflections on the African Court on Human and Peoples Rights" at p. 3 and 4 available at [www.unisa.ac.za/contents/about/.../](http://www.unisa.ac.za/contents/about/.../), Prof Pityana elucidates the resistance of African states to be bound by the Court particularly on matters concerning human rights hence the reluctance by a significant number of members to ratify the ACHPR Protocol. Also see Kenyariri C, "Dispute Resolution within the East Africa Community: an Examination of the East African Court of Justice and its Jurisdiction" UNISA 2008 Unpublished Dissertation.

<sup>177</sup> See generally, Fagbayibo B "Towards the Harmonisation of Laws in Africa: Is OHADA the way to go?" 2009 CILSA 309-322.

remains to be done. Sadly, to date despotic regimes and armed conflict are still common place in Africa. As Fagbayibo rightly puts it, supranational organisations can only assert their influence in a stable climate.<sup>178</sup> Transnational commerce cannot thrive in one democratic state while the state contiguous thereto is averse to principles of good governance.

The TFTA agreement and indeed all the treaties of COMESA, SADC and EAC recite the commitment of its members to democratic ideals and respect for human rights.<sup>179</sup> The AU Act equally echoes similar sentiments. However the reality on the ground falls short of the stated principles. As Gathii notes, most states do not enter into RECs as evidence of their commitment to respect human rights and will often resist human rights standards imposed by RECs which they do not domestically subscribe to.<sup>180</sup> Human rights reports and indicators still place most sub-Saharan African states, most of which are members of the TFTA, at the foot of the human rights observance pyramid.<sup>181</sup> This makes a mockery of most African states' subscription to the observance of human rights and democratic ideals on paper, while engaging in the exact opposite in deeds.

The lack of democratic credentials by most African States coupled with their poor human rights records spell an existential threat to economic advancement of the TFTA. As shown in practice, economic development, foreign direct investment and infrastructure can neither be attracted to nor reside in areas plagued by constant conflict, instability and wars.<sup>182</sup>

Fagbayibo suggests disciplinary sanctions at the regional level against despotic regimes.<sup>183</sup> Although he proffers no suggestions on the manner and nature of disciplinary powers to be invoked at the regional level, it is

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<sup>178</sup> Fagbayibo, note 57 above at 58.

<sup>179</sup> See preambles to the TFTA agreement, SADC, COMESA and EAC treaties.

<sup>180</sup> Gathii, note 106 above at 250.

<sup>181</sup> See for example the Amnesty International 23<sup>rd</sup> February 2016 Human rights report 2015/2016 available at

<https://www.amnesty.org/en/latest/research/2016/ann>. Accessed on 5<sup>th</sup> July 2016.

<sup>182</sup> Luiz, J and Charalabous, H, "Factors Influencing Foreign Direct Investment of South African Financial Services Firms in Sub-Saharan Africa" March 27, 2009 *Working Paper, University of the Witwatersrand* at p. 11 cites governance and political risk as an important consideration affecting FDI into Sub-Saharan Africa. Available at [www.econrsa.org/system/files/publications/working\\_papers/wp118.pdf](http://www.econrsa.org/system/files/publications/working_papers/wp118.pdf). Accessed on 4<sup>th</sup> October 2016.

<sup>183</sup> Fagbayibo, note 57 above at p.57.

doubtful that any such measures could be meted out by regional bodies whose apex decision making organ is populated by bedfellow tyrants and autocrats. They are more likely than not to contemptuously veto such efforts even if coming from judicial organs of the REC as has been demonstrated on several occasions discussed in the earlier parts of this article.

#### *4.2.6 Poor Implementation of the Linear Market Integration Model*

The linear market integration model or paradigm, according to Hartenzberg, is favoured by most RECs in Africa and is characterised by “stepwise integration of goods, labour and capital, markets and eventually monetary and fiscal integration”.<sup>184</sup> In other words, African RIAs are inspired by an aspiration to evolve over time into a single economic unit, some even into a political federation.<sup>185</sup>

Hartzenberg however criticises this model on two fundamental grounds. First, that supply side constraints may be more significant than the linear integration model. She opines that a deeper integration agenda that encompasses services, investments, competition policy and other behind-the-border issues can address the national level supply side constraints better effectively as compared to an agenda which focuses exclusively on border measures.<sup>186</sup>

Another criticism Hartzenberg levels upon African RIAs is that the continent itself is not only geographically and politically but also economically fragmented and marginalized. Hartenzberg observes that Africa continues to engage on the periphery of the global economy and its share of the world trade continues to shrink.<sup>187</sup>

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<sup>184</sup>Hartenzberg, note 41 above at 1.

<sup>185</sup> For example the EAC treaty has as one of its objectives, its evolution into a political federation. See also Bachinger, and Hough J “New Regionalism in African of Integration” 2009. *Africa Insight* Vol. 3912 at p. 43-44 A similar aspiration is shared by the African Union through the African Economic Community for an envisaged African Government. For insights into the economic –political aspirations and the transitional problems. See also, Forere, note 12 above.

<sup>186</sup> Hartzenberg, note 41 above.

<sup>187</sup> *Ibid.*

Hartzenberg blames this sad state of affairs to the low per capita income levels and small populations which result in small markets<sup>188</sup>. Most of the countries produce similar primary agricultural good or raw materials without value addition. This, therefore, makes trade among them unviable. Many sub-Saharan African economies are also landlocked hence contributing to high costs of doing business. These facts are true for most countries comprising the TFTA. Intra-regional trade has remained low.

Empirical data is demonstrative of this fact. More than 80 percent of Africa's exports are still destined for outside markets with the EU and the United States of America (USA) forming more that 50% of this total.<sup>189</sup> Asia and China are the other significant markets. On the other hand, Africa imports more than 90 per cent of her goods from outside the continent.<sup>190</sup> Statistics indeed paint a grim picture. In 2008, 12 Sub-Sahara Africa (SSA) states had populations of less than 2 million while 19 had a GDP of less than US 5 billion, six of which had a GDP of less than US \$1 billion. In sub-Sahara Africa, there exists Low per capita densities of rail and road transport infrastructure which in colonial times was designed to transport primary products to ports, poorly developed cross country connections are the outcome.<sup>191</sup>

Hartzenberg concludes by questioning the appropriateness of the linear integration model in addressing the real problems that inhibit regional and global trade performance. In light of the above problems, she notes that the proliferation of RTAs in sub Saharan Africa has done little to promote intra-regional trade or indeed to enhance the global trade performance of African countries.<sup>192</sup>

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<sup>188</sup> Hartzenberg, note 41 above at 3. Further empirical data can be seen in the analysis by Gibb, R "The State of Regional Integration: The intra and inter regional dimensions in Regional Integration in Southern Africa" in Clampman C. 2001. *Regional Integration in Southern Africa*. Johannesburg. South African Institute of International Affairs.

<sup>189</sup> *Ibid*.

<sup>190</sup> *Ibid*, 9-12.

<sup>191</sup> *Ibid*.

<sup>192</sup> *Ibid*.



#### 4.2.7 Inherent Discrimination

RECs /RTAs such as the TFTA are agreements only binding among state parties. It therefore follows that they are by nature discriminatory and are thereby in conflict (though this conflict is legally permissible) with the non-discrimination principle under Article I GATT 1994 (most favoured nation treatment). Geographically discriminating arrangements also find place in RTAs and tend to be designed so as to increase regional rather than global trade and hence welfare. It has been argued that in fact such geographical arrangements are often of minimal economic benefit and may actually cause more economic harm than benefit<sup>193</sup>. This can be said to be true for the TFTA which is geographically discriminatory in favour of member states of the COMESA, EAC and SADC.

#### 4.2.8 The “Spaghetti Bowl” problem

This is a term coined from the works of Bhagwati and Panagariya.<sup>194</sup> They argue that the multiple membership of countries in RECs has resulted in overlapping of tariff regulations, objectives, divided loyalty and other obligations with the undesirable effect of “a limb and spoke”<sup>195</sup> system of RECs with complex and multiple regulation. This has in turn led to the weakening of the global trade system. It equally creates an enforcement nightmare to customs officials and observance difficulties to traders. This is a situation whose consequences even the WTO secretariat has warned of.<sup>196</sup>

Bachinger and Hough observe that today every African country is a member of averagely four different trade blocs, creating the famous spaghetti bowl of RIAs and that the plan of the AU is to integrate the various RIAs into one large economy with the ultimate goal of unifying the continent and creating a United States of Africa by 2030.<sup>197</sup>

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<sup>193</sup> *Ibid*, at 3.

<sup>194</sup> In J Bhagwati and A Panagariya (Eds,) *The Economics of Preferential Trade Agreements* (Washington DC: AE: press, 1996) at 8-27.

<sup>195</sup> This is Gantz’s description of the “spaghetti bowl” problem. See Gantz, note 19 above at p. 244. Bachinger, K and Hough, J., “New Regionalism in Africa; Waves Integration” 2009. *Africa Insight* Vol. 39/2 at 43-44.

<sup>196</sup> *Ibid*.

<sup>197</sup> Bachinger, K and Hough, J., “New Regionalism in Africa; Waves Integration” 2009. *Africa Insight* Vol. 39/2 at P.43-44. The AU Agenda 2063 is an ambitious plan

In the TFTA context, for instance, most SADC members are also parties to an Economic Partnership Agreement (EPA) with the European Union (EU) through the Southern African Customs Union (SACU).<sup>198</sup> South Africa is also a party to a free trade agreement with the EU which four other member states of SACU have not accepted. The parties to SADC are also members of the COMESA, while some members of the EAC are also members of the SADC and COMESA<sup>199</sup>. The EAC, on its own, also has trade agreements with the EU.<sup>200</sup> This complex web of a multiplicity of multilateral trade agreements, not to mention bilateral ones, involving the very same parties has been a source of not only divided loyalty, expensive engagements for poor African economies to maintain, confusion for transnational business people as to the applicable regime, but also encouraged trade deflection and negatively affected the attainment of multilateral trade in Africa, and as a ripple effect consequence, on the global plane as well.

A further layer of multilateral trade integration in the form of the TFTA while maintaining the old allegiances and fidelities to COMESA, EAC and SADC as is proposed in the TFTA Agreement may end up complicating and entangling the “spaghetti bowl” even further, so that one may not be able, at the end of the day, to tell the true existence or value of any of the four RECs from each other. They will all be lost in the complex web and drowned in the swamp of treaties and the myriad of protocols attendant thereto at both the TFTA level and its constituting RECs.

The maintaining of parallel REC structures while developing the TFTA may have been well meaning so as to seamlessly transition at the end of the integration process. However, in the intervening period the existence of

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for a prosperous Africa building on the African RECs based on a 25, 10, 5 year and short term plan for integrating the continent. The agenda envisages political Unity of the Africa will be culmination of the Economic and Political integration process characterised by a continental government and institutions by 2030.

<sup>198</sup> R. Kirk and M Stern. “The New South African Customs Union. Agreement 2005.” *The World Economy* 28(2) 169.

<sup>199</sup> For Example Zambia, Tanzania and Zimbabwe are members of both SADC and COMESA. Tanzania is also a member of EAC

<sup>200</sup> Economic Partnership Agreement between the EU and the EAC, available at [www.trade.ec.europa.ed/doc/lib/docs/2009/january/tradoc\\_.142194.pdf](http://www.trade.ec.europa.ed/doc/lib/docs/2009/january/tradoc_.142194.pdf). Accessed on 5<sup>th</sup> July 2016.

several organs pulling in different directions in terms of policies and peculiar individual objectives does not augur well for the timeous infusion and integration of the merging RECs into the TFTA.

Articles 4(2) (a), 6 (2) (a) of the AEC treaty and the preamble TFTA Agreement expressly encourage the continued existence of and establishment of “future” RECs. Yet, the essence of the TFTA Agreement and AEC treaty is to build a multilateral trading and economic system that cuts across the entire continent, as opposed to sub regional trading blocs. It is therefore tempting to conclude that in their attempt sell the idea of the AEC and the TFTA, the drafters of both instruments sought to appease states’ fixations, investment (in time, money and systems) and sentimental attachment to their respective RECs. The TFTA and AEC may have found acceptance but at the same time sacrificed and undermined the very objectives for which they were set up.

To allow and actively encourage the setting up of new sub regional trading blocs will, invariably, regress the realisation of both the AEC and TFTA. This is tantamount to taking three steps forward and two backwards so as to allow the new RECs to catch up with the integration process. In the end, the process will inevitably stall or run on the spot. The permissive language used in the AEC treaty and the TFTA with respect to maintaining the existing and establishment of *future* RECs is injudicious, misconceived and inconsistent with their overall integration objectives.

The cost of administering trade agreements is another significant hurdle. All the TFTA members belong to at least 4 RECs, excluding bilateral and multilateral trade arrangements.<sup>201</sup> These arrangements require administration both internally (within the state), at the REC level and at the WTO level. Attendant to these administrative costs is the need to fund the operational costs of the trade arrangements, its secretariats and the bureaucracies attendant thereto. Looked at in the context of frail foreign aid weaned and dependent sub Saharan states which form the bulk of the TFTA, and which have to juggle their priority expenditure with the meeting of its many subscription obligations arising from the multiple trade arrangement memberships, the choice seems obvious. Consequently, many states are serial and chronic defaulters in meeting their treaty subscription

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<sup>201</sup> Bachinger and Hough, note 197 above.

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obligations and as a result the integration organs are poorly funded hence slowing down the integration process. This is a reality which may face the TFTA Agreement.

#### 4.2.9 Negotiating Imbalances

It has been advanced that there is a dearth of capacity within developing nations with regard to negotiations with the cost of negotiating RECs outweighing the benefits of training large and well qualified trade bureaucrats to conduct complex negotiations simultaneously at both WTO and REC levels.<sup>202</sup> This has led to unbalanced negotiations with a bias towards the well-funded and better prepared larger states.

The state members of the TFTA are at different stages of development and economic prosperity. South Africa, for instance, is the highest ranked economy in sub-Sahara Africa, has a sea port and a relatively large population<sup>203</sup>. Its institutions are more advanced or developed<sup>204</sup>. Most of its partners in SADC, and in this context in the TFTA, comprise of land locked nations with low populations, low GDP and low per capita incomes<sup>205</sup>. Obviously, the result is an uneven negotiating playing field, with South Africa seemingly engaging to draw advantage in its favour. Invariably therefore, in trade negotiations, countries with larger and stronger economies always benefit most from integration agreements.<sup>206</sup>

### 4.3 Prospects of the TFTA Agreement

Rathumbu identifies the goals of regional integration as improvement and development of both the economies and lives of the residents of the party states.<sup>207</sup> His view is one that can be said to be socio-economic. According to Mirus and Rylska, economic theory suggests that free trade on a

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<sup>202</sup> Gantz, note 19 above at p.244.

<sup>203</sup> See Hartzenberg, note 68 above at 13 for a detailed comparison of the economies of sub-Sahara Africa and which form the TFTA.

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

<sup>207</sup> Rathumbu, I.M, 2008. *Regional Economic Integration and Economic Development in Southern Africa*. Unpublished Master's Thesis (UNISA).

worldwide basis should ultimately be the best outcome for economic integration as it best guarantees greater world output and social welfare.<sup>208</sup>

However, despite the gloomy picture painted by commentators, prospects for the TFTA integration process exist and hence there is reason to remain optimistic. Gantz advances that RTAs may provide “a depth of international trade reform” and achieve free-trade at a much faster rate than agreements reached among the entire membership of the WTO which numbers 153.<sup>209</sup> According to Gantz, following frustrations in achieving free global trade, particularly after the stalling of the Doha Development Agenda<sup>210</sup> round of talks under the WTO, more states are of the thinking that trade liberalization may be achieved a bit easier in a sub-global level. This, to him, is the real motivation for the proliferation of RTAs in what is generally referred to as the new regionalism, a concept he suggests has emerged and manifested itself particularly after the GATT 1994. It was indeed noted in the 2003 World Trade Report<sup>211</sup>, that the conclusion of RTAs may be driven by the search for access to larger markets, which might be easier to engineer at the regional or bilateral level, particularly in the absence of a willingness among WTO members to liberalize further on a multilateral basis.<sup>212</sup>

Gantz acknowledges that debate still persists on whether by entering into a RTA, and a state thereby being required to make internal legislative and policy adjustments such as to its tax regime, whether such state is less likely to adopt protectionist policies since that would trigger retaliatory acts or requests for dispute settlement by other parties. He however is optimistic that although pessimists criticize RTAs as a claw-back to the doctrine of state sovereignty and its exercise, entering into RTAs would discourage

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<sup>208</sup> Mirus and Rylska, note 51 above at p.2.

<sup>209</sup> Gantz, note 19 above at p.241.

<sup>210</sup> Also referred to as the Doha Development Round, is the current multilateral trade-negotiation round of the World Trade Organization (WTO) which commenced in 2001 and whose objective is to lower trade barriers around the world and hence facilitate increased global trade.

<sup>211</sup> *World Trade Report* (Geneva: WTO, 2003).

<sup>212</sup> Cottier and Foltea, note 13 above at p. 45; WTO Secretariat, *Regional Trade Agreements Section*, Trade Policies Review Division, *The Changing Landscape of RTAs*, November 2003 paras 22-4.

protectionist internal policies of member states and would be good for free global trade<sup>213</sup>

One other benefit of RECs such as the TFTA is that it gives an opportunity to negotiating states to learn from that experience in readiness for global trade negotiations. It acts as an incubation laboratory for ideas on free trade with the ultimate intention of escalating that experience same to the global platform.<sup>214</sup>

RECs in Africa were conceived on a pan African platform and are said to espouse an aura of comradeship and strength in numbers to emerging economies particularly in multilateral negotiations with bigger and better economically endowed trading partners such as the EU, USA and within the context of the WTO<sup>215</sup>. Forere argues that pan African sentiment influenced the formation of most RIAs in Africa shortly after most African states gained independence and that perhaps this explains the motivation behind the AEC treaty and the ultimate aspiration of an Africa Union government. The quest for economic and political integration of Africa has always been founded on the continent's ambition for self-reliance and economic independence (from their imperial or colonial masters) by newly independent states. Forere, however warns that this sentiment does not help absolve the continent and its RIAs from the chronic ailments that restrict its achievement of a true free global trade. Beyond inspiration, Forere opines, pan African sentiment offers little solution to the real issues that hold back intra Africa trade.<sup>216</sup>

Apart from economic integration and its attendant socio-economic development, three other prospects of the TFTA integration efforts abound. Firstly, the TFTA builds on the pan-African sentiment to enable the state parties to speak with one voice and accord in multilateral trade fora such as the WTO. This it is hoped will attract favourable trade concessions for its members. Secondly, the TFTA members can leverage on their large consolidated population and common market to negotiate better investment terms with large and better established countries and markets at a bilateral level such as the EU, USA and China. The TFTA presents an

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<sup>213</sup> Gantz, note 19 above at p.242.

<sup>214</sup> Gantz, note 19 above at p. 244.

<sup>215</sup> Forere, note 27 above at p. 29-54.

<sup>216</sup> *Ibid*.

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opportunity to develop a *sui generis* or uniquely African legal system that borrows from the best practices of the various shades of legal systems that obtain from its member states.

#### **4.4 Summary**

This part has highlighted the various political, economic and social problems and challenges that are likely to undermine the achievement of the goal of integration of the African continent through the TFTA and ultimately the AEC. The likely benefits of integration leading to achieving faster economic growth and multilateral global trade have also been discussed. The next part will draw conclusions and offer recommendations.

### **5.0 Conclusion and Recommendations**

#### **5.1 Introduction**

In order to achieve its economic and political integration aspirations, Africa has employed RECs as the preferred instrument. In terms of economic integration, the realisation of the Africa Economic Community (AEC) is the ultimate goal. The TFTA agreement is, therefore, an important and indispensable building block towards the realisation of the integration of Africa under the AEC. This work has provided an analysis of the TFTA Agreement and proceeded to interrogate its place in Africa's progression towards the AEC as envisaged in the Abuja Treaty. Conclusions drawn from the foregoing discussion and recommendations that flow therefrom now follow.

#### **5.2 Conclusions**

This discourse commenced by highlighting the various regional economic integration typologies. These were classified into three categories based on their objectives and characteristics. The first level entails modest integration by means of an agreement to apply symmetric preferential treatment of imports and assign supporting functions and instruments to jointly operated institutions.<sup>217</sup>

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<sup>217</sup> Mirus and Rylska, note 51 above at p .2.

The second level of economic integration entails the harmonisation of instruments over which the parties retain control, and through which, due to different national approaches, obstacles to a common market exist. This could be the case in the area of migration of workers, competition policy and production standards. More co-operation and supranational institutions, such as a joint tribunal on competition policy, are also characteristic of this second level.<sup>218</sup>

The third and highest level of economic integration adds coordination of national policies and the creation of further supranational bodies which entail not only economic but increasingly political integration. Examples here are the creation of a common currency and central bank, even a supranational parliament as in the case of the EU and as envisaged in the Abuja treaty establishing the AEC.<sup>219</sup>

The problems and prospects of the TFTA are also discussed. Key among these include the institutional weakness of the TFTA structure; lack of political stability in many member states; poor democratic and human rights records; multiple membership to various RECs with similar or near similar objectives, and thus a duplication of efforts and inefficient use of resources; chronic poverty; production of similar unfinished largely agricultural raw products which reduces intra-regional trade; weak administrative structures which leads to proliferation of cheap products (dumping) and trade deflection; a problematic implementation of the linear progression mode; a high dependency on aid and imports from Europe and Asia; and poor infrastructure.

The African Economic Community was envisioned to be fully set up and running by the year 2030. The plan was predicated upon a 34 year period from the conclusion of the Abuja treaty in 1991. Now, 14 odd years to the year 2030, many of the milestones, some set for its first and second phase and which should have been completed more than a decade ago, are yet to take off. Most of its organs remain moribund. At this rate, to achieve the six stages of the AEC's implementation in the remaining 14 years seems like a herculean mission. It is, therefore, increasingly looking likely that a fully

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<sup>218</sup> *Ibid.*

<sup>219</sup> The structure of the AEC is discussed in detail in Chapter 3 of this work.



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functioning AEC cannot be achieved by the year 2030 as was anticipated during its conceptualisation and in 1991.

In the short term, the establishment and implementation of TFTA is unlikely to be a panacea to the problems that bedevil integration in Africa. It is also not the desired silver bullet. However, this larger bloc of African states represents a significant and conscious effort by a majority of African States to progress into a multilateral economic system or community encapsulated in the Abuja Treaty. The TFTA is an affirmation that the dream of a United States of Africa remains alive and well, and that while the integration story of Africa is yet to be fully written, new chapter has just unfolded.

### **5.3 Recommendations**

It is clearly evident in TFTA Agreement that RECs are the chosen vehicles to drive the African continent into the desired horizon of economic and ultimate political integration. Currently, the three merging RECs manage the TFTA integration process through a task force consisting of the secretariats of the three RECs. This arrangement has the potential to frustrate the expeditious realisation of the TFTA integration. The implementation of such an important and weighty task should be a full time engagement.

This shortcoming may lead to two potential problems. Firstly, the joint secretariat may not be fully committed throughout the implementation of the TFTA, with greater attention paid to their respective RECs. Secondly, the divided loyalty has the effect of undermining or slowing down the implementation of the TFTA Agreement, since the very persons charged with this responsibility are also implementers of their various RECs strategic programmes. The net effect this situation may potentially result in a clash in priorities, objectives, split focus and general “sibling rivalry” between the three merging RECs.

It is, therefore, suggested that the TFTA's implementation should be a full time engagement, with its own fully fledged secretariat with full time implementers of the Agreement. This will expedite the transition from the merging RECs to the TFTA. This will also underscore the member states' commitment to the full integration of the TFTA as opposed to the retaining residence in the RECs while giving the TFTA a lukewarm or half-hearted commitment.

It is also recommended that the dissolution of the three merging RECs - COMESA, EAC and SADC - into the TFTA be undertaken without any further ado. Formation of new or future RECs at the sub-regional level should not be allowed or even encouraged. This will spur expeditious integration instead of adopting a route which favours a parallel development of the TFTA organs simultaneously, with the retention of existing RECs. Implementation of this recommendation will eliminate suspicion, foster competition and obliterate divided loyalty between members of the TFTA. It will also focus attention on the TFTA's growth and strengthening, and will draw the African continent one step closer to the true realisation of AEC and ultimate federation.

The TFTA will not achieve its desired goals if its most economically vulnerable members remain on the periphery of economic development. For purposes of ensuring inclusivity, it is proposed that economic affirmative action in favour of least developed economies, landlocked and islands member states be undertaken. As it is now, within the contexts of the three merging RECs, countries like South Africa in SADC and Kenya in the EAC have remained dominant economies, thus leading to reluctance by other smaller economies to fully embrace economic integration and free intra-bloc trade.

Deliberate road, rail and power projects targeted at opening up the least developed countries to trade with preferential terms of trade and temporary protection of such countries' markets should be stipulated in the TFTA agreement. This will encourage trade and spur economic growth in the least developed, land-locked and island member states of the TFTA, leading them to fully embracing economic integration.

Strong independent institutions are imperative for the integration process. It is, therefore, recommended that the principle of separation of powers in the governance organs of the TFTA be entrenched. For instance, its judicial or dispute resolution organ should be distinct and independent of influence from the executive organs thereof. The appointment of Judges or third party neutrals should be removed from the summit of heads of states and government. Rather, they should be competitively recruited from the rank of experts within member states. The recruitment should be independently undertaken by a panel of eminent persons knowledgeable in matters of regional integration and international law. Thereafter, the candidates can be

vetted by the council of ministers and formally appointed for a fixed term of office. This will obviate the institutional independence difficulties faced by the SADC tribunal and the EAC Court of Justice discussed above. It will also ensure that the Courts and tribunals are strong enough to address questions of governance and human rights.

The successful implementation of the TFTA, and indeed the AEC integration effort, largely depends on the institutional strengths within the member states. It is, therefore, an inexorable basic requirement that the internal systems of state members adhere to fundamental democratic and governance standards. These include transparent and accountable systems of governance that are devoid of corruption. It also implies the efficiency, predictability and consistency of laws, and their guaranteed implementation and enforcement. Free, fair and peaceful elections, which guarantee an environment that is secure to investments is one other indispensable and imperative minimum. Adherence to principles of good governance and democracy will allow for effective implementation of the TFTA, and any other agreements or protocols that may be concluded by the bloc.

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## **Rule of Law, Economic Development and Investment Arbitration under Bilateral Investment Treaties (BITS)**

By: **Njoki Mboce\***

### **Abstract**

*This paper examines the connection between the rule of law, Bilateral Investment Treaties (BITS), and the effect of implementing these on a host state's economic development. The paper demonstrates that BITS and the concept of the rule of law share common tenets. The author proffers an argument that proper implementation of the core principles under BITS goes a long way in demonstrating a host-state's adherence to the rule of law. The author further argues that this leads to consistency and predictability of investor treatment, boosting a host state's foreign investments and thereby boosting its economic development. As to the extent of a host state's benefit under the BITS, this is a discussion for another day. This paper will however briefly examine arguments against investment arbitration under BITS.*

*This discourse is premised on the fact that despite many Sub-Saharan countries, including Kenya, implementing in the recent years aggressive business-climate reforms to attract international capital, Sub-Saharan Africa is still considered one of the uncertain regions to do business. It is suggested that a key reason for this perception is that Sub-Saharan Africa countries are inconsistent in their actions when it comes to reforming the BITS.*

*This paper briefly examines a relevant recent (March, 2015) award by an arbitral tribunal in an international case. In this case, Canada lost to an American investor upon being found to have breached its obligations under the BITS principles. This demonstrates that aside from losing out on potential investments, non-compliance with existing BITS obligations leads to financial liability of a host state.*

### **1.0 Introduction**

Do Bilateral Investment Treaties (BITS) <sup>1</sup> enhance or impede the excellence of domestic rule of law? Does this have an impact on economic

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development of a host state? It is arguable that such influence depends heavily on the specific legal, political, and social contexts of individual countries.<sup>2</sup> Rule of law is debatably one of the most contested concepts in legal discourse.<sup>3</sup>

### 1.1 General Nature of BITS

A BIT in its very nature generally affords a qualifying investor certain protections and rights in respect of its investment in a state with which its own state of nationality or domicile has concluded a BIT. Some of the basic protections under BITS for investors are: compensation for expropriation; national and 'most favoured nation' treatment; freedom from arbitrary, unreasonable or discriminatory measures impairing their investment; fair and equitable treatment; the sovereign's commitment to honour and uphold its obligations under the treaty and free capital repatriation. The rights include that of a foreign investor to claim against the host state in the event of breach of BITS. Majority of these BITS contain alternative dispute resolution clauses, especially arbitration provisions, allowing investors to bring claims against states for treaty violations, often referred to as investor-state arbitration (ISA).<sup>4</sup>

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<sup>1</sup> A BIT is an agreement between two countries that sets up "rules of the road" for foreign investment in each other's countries. See US China Business Council, 'Bilateral Investment Treaties: What They Are and Why They Matter,' June 2014. Available at [https://www.uschina.org/sites/default/files/2014%20USCBC%20BITS%20-%20What%20They%20Are%20and%20Why%20They%20Matter\\_0.pdf](https://www.uschina.org/sites/default/files/2014%20USCBC%20BITS%20-%20What%20They%20Are%20and%20Why%20They%20Matter_0.pdf) access date February, 2016; See also Juillard, P., 'Bilateral Investment Treaties In The Context Of Investment Law,' OECD Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe 28-29 May 2001, Dubrovnik, Croatia. Available at <http://www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf> access date February, 2016.

<sup>2</sup> Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, Vol. 45:1151, International Law and Politics, pp.1152-1200, p.1153.

<sup>3</sup> See David Collier, et al, 'Essentially contested concepts: Debates and applications,' *Journal of Political Ideologies*, Vol. 11, No.3, 211-246, October, 2006; Richard H. Fallon, Jr, "The Rule of Law" as a Concept in Constitutional Discourse,' *Columbia Law Review*, Vol. 97, No. 1 (Jan., 1997), pp. 1-56.

<sup>4</sup> Franck, *supra* note 4, at 53-54. These investor-state dispute mechanisms grant



## 2.0 The Effect of Rule of Law, Bits and Economic Development in Kenya

While many Sub-Saharan countries, including Kenya, are in the recent years implementing aggressive business-climate reforms to mobilize domestic investment and attract international capital, Sub-Saharan Africa is still considered one of the uncertain regions to do business.<sup>5</sup> It is suggested that a key reason for this perception is that Sub-Saharan Africa countries are inconsistent in their actions when it comes to performing their BITs dispute settlement mechanism and inconsistent decisions by the arbitral tribunals.<sup>6</sup> National investment laws and international treaties make it possible for private investors to initiate arbitration proceedings against host states even when there is no contractual agreement between an investor and a host state. This paper demonstrates that in the absence of the rule of law, it would be almost impossible to find a proper implementation of BITS. This is demonstrated through the sharing of core tenets between the two. Host states that breach their obligations under their respective BITS suffer not only from a lack of investor confidence, but are also subjected to settling of hefty arbitral awards.

It is therefore necessary for Kenya to enter into BITS and to honour its BITS obligations by adhering to the rule of law.

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private investors, corporations, or individuals the right to sue a sovereign state in an international tribunal and receive binding awards of compensation from the state. Isabelle Van Damme, Eighth Annual WTO Conference: An Overview, 12 J. INT'L ECON. L. 175, 176 (2009).

<sup>5</sup> Source: World Bank, 2010 Doing Business Indicators, cited at Benjamin Leo, *Where are the BITs? How U.S. Bilateral Investment Treaties with Africa Can Promote Development*, centre for global development essay, August 2010, accessible at [www.cgdev.org/content/publications/detail/1424333](http://www.cgdev.org/content/publications/detail/1424333).

<sup>6</sup> Uche Ewelukwa Ofodile, *Africa and the System of Investor-State Dispute Settlement: To Reject or Not to Reject?* (12 October, 2014).

### **3.0 Definition of the Rule of Law and its place in BITs from a Domestic Perspective<sup>7</sup>**

Rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

The core purpose of BITs is to protect investments made by nationals of one signatory state in the territory of the other signatory state.<sup>8</sup> BITs typically require that investments be treated on a non-discriminatory basis.<sup>9</sup> This is assessed both by reference to domestic investors (national treatment) and investors from other countries (most-favoured nation)<sup>10</sup>, joined by several absolute standards, most notable is the requirement of “fair and equitable treatment.” The precise content of the “fair and equitable treatment obligation is a hotly contested issue, in its various permutations, fair and equitable treatment demands that states act in a predictable and non-arbitrary fashion, in good faith, transparently, and/or in keeping with due process of law. <sup>11</sup>

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<sup>7</sup> The United Nations definition of the Rule of Law as stated in a Presentation at ICCA 2016 Congress Roadshow Johannesburg, 28 July 2015, by Claire de Tassigny Schuetze, Legal Counsel and Permanent Court of Arbitration Representative in Mauritius: Investor-State Arbitration and the Rule of Law. [http://www.arbitrationicca.org/media/3/14388535080960/investment\\_arbitration\\_from\\_a\\_rule\\_of\\_law\\_perspective\\_de\\_tassigny\\_schuetze.pdf](http://www.arbitrationicca.org/media/3/14388535080960/investment_arbitration_from_a_rule_of_law_perspective_de_tassigny_schuetze.pdf) access date February, 2016.

<sup>8</sup> Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, Vol. 45:1151, International Law and Politics, pp.1152-1200, p.1154.

<sup>9</sup> DiMascio, Nicholas, & Joost Pauwelyn, “Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?” *The American Journal of International Law* Vol. 102, No. 1 (Jan., 2008), pp. 48-89.

<sup>10</sup> Ibid.

<sup>11</sup> Benjamin K. Guthrie, *Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law*, Vol. 45:1151, International Law and Politics, pp.1152-1200, p.1155.

#### **4.0 International Perspective on Enforcement of BITS within the Rule of Law<sup>12</sup>**

The decision by the arbitral tribunal in the case of Claytons and Bilcon of Delaware Inc.-vs- the Government of Canada (2015) examined three principles under BITS which have a common thread with the concept of the rule of law as discussed in this paper: national treatment, most-favoured nation treatment and minimum standard of treatment.<sup>13</sup> The arbitration pertains to the alleged governmental conduct that relates to the management and operation of the Claimant's investment and the administration and implementation of the EA.

In this arbitral reference, the claimant, Claytons and Bilcon of Delaware Inc., (Bilcon) were U.S. investors who own and control shares in a Canadian subsidiary named Bilcon of Nova Scotia to operate the Whites Point project, the purpose of which was to provide a reliable supply of aggregate for Bilcon of Delaware and the Clayton Group of Companies. Bilcon entered into a partnership with a Nova Scotia company, Nova Stone Exporters, to develop a quarry and marine terminal at Whites Point Quarry. The partnership was acquired entirely by Bilcon in 2004.

The Claimants alleged that the Environmental Assessment (EA) that was undertaken by the Government of Canada and the Government of Nova Scotia for the Whites Point project, along with the administration and conduct of the EA, were arbitrary, discriminatory and unfair. The Claimants did not dispute the fact that EAs were required before construction and operating of industrial projects was to begin, although they allege that Canada's environmental regulatory regime was applied to the project in an arbitrary, unfair and discriminatory manner.

The governments of Canada and Nova Scotia jointly conducted the EA for the Whites Point project from 2003 to 2007. As the governments jointly determined that the project engaged widespread public concern and the

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<sup>12</sup> This summary on the arbitral tribunal's decision in the case of Claytons and Bilcon of Delaware Inc.-vs-. the Government of Canada (2015) accessed on <http://www.international.gc.ca/trade-agreements-accordscommerciaux/topics-domaines/disp-diff/clayton.aspx?lang=eng> access date February, 2016.

<sup>13</sup> This case is being governed by the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitral Rules). Kenya has heavily adopted the UNCITRAL Arbitral Rules in her arbitration rules.

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possibility of significant adverse environmental effects, the EA was referred to a Joint Review Panel (JRP), which was comprised of three professors from Dalhousie University.

The JRP gathered information on the environmental effects of the Whites Point project, held public hearings, and issued a recommendation to government decision-makers that the Whites Point project should not be permitted to proceed because it would have a significant and adverse environmental effect on the “community core values” of the Digby Neck. “Community core values” were defined by the JRP as shared beliefs by individuals in a group that constitute defining features of the community. Nova Scotia and the federal government rejected the project in late 2007. The Government of Canada specifically concluded, under the former Canadian Environmental Assessment Act, that the project was likely to cause significant and adverse environmental effects that were not justified.

## **5.0 Award on Jurisdiction and Liability**

In its March 17, 2015 Award on Jurisdiction and Liability, the Arbitral Tribunal found Canada liable for having breached its obligations under Articles 1105 and 1102 of the North American Free Trade Agreement (NAFTA)<sup>14</sup>. A majority of the Tribunal found Canada liable for having breached its minimum standard of treatment obligation under Article 1105(1) of the NAFTA. This provision requires that investors of NAFTA Parties be treated “in accordance with international law, including fair and equitable treatment and full protection and security” and prescribes the customary international law minimum standard of treatment of aliens as the applicable standard. The majority’s findings were based on the fact that the JRP’s recommendation relied on the application of a standard, “core community values,” that was not found in Canadian law and therefore that there was a lack of due process because the proponents were not given an opportunity to make a case based on this criterion.

The majority also found Canada liable for having breached its National Treatment obligation under Article 1102. This provision requires Canada to accord NAFTA investors treatment no less favourable than that which it accords, in like circumstances, to domestic investors. The majority’s finding

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<sup>14</sup> North American Free Trade Agreement, 32 I.L.M. 289 and 605 (1993).

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was based on the fact that the standard applied by the JRP had not been applied in other environmental assessments and the government had not shown any legitimate non-discriminatory reason for such difference in treatment.

As at present, following the issuance of the Award on Jurisdiction and Liability, the arbitration has moved into a damages phase, where the parties will submit evidence and argument to the Tribunal concerning the quantum of a compensation award. On June 16, 2015, Canada filed a notice of application in the Federal Court of Canada for the setting aside of the Tribunal's award of March 17, 2015. In the setting aside proceedings, Canada was arguing that the Award on Jurisdiction and Liability contains decisions on matters beyond the scope of the submission to arbitration, contrary to Article 34(2) (a) (iii) of the Commercial Arbitration Code as enacted and set out in the Schedule to the Commercial Arbitration Act and is in conflict with the public policy of Canada contrary to Article 34(2) (b) (ii) of the Commercial Arbitration Code.

## 5.1 Arguments against Investment Arbitration under BITS

A key challenge to investment arbitration under BITS is inconsistent decisions by the arbitral tribunals. Critics of investment arbitration under BITS in developing countries argue that investment arbitration undermines local governance because its unpredictability and inconsistency expose developed countries to unknown potential litigation risk every time they attempt to exercise their sovereign legislative and regulatory powers.<sup>15</sup> They argue that investment arbitration under BITS diverts government funds from the public to cover administrative fees, legal fees, and provide

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<sup>15</sup> See Joshua Boone, footnote 50: '...Grant Kesler, Metalclad's former CEO, said that 'the arbitration process is too...indeterminate'. '...This was said after the same arbitration awarded his company over 16.5 million in compensation. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 131 (Aug. 30, 2000); Jack J. Coe, Jr., *Toward a Complementary Use of Conciliation in Investor-State Disputes: A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 9-10 (2005); cf. Trakman, Leon, *Investor State Arbitration or Local Courts: Will Australia Set a New Trend?* (January 26, 2012). *Journal of World Trade*, Vol. 46, No. 1, 2012, pp. 83-120; UNSW Law Research Paper No. 2012-1; See also Paulsson, Jan. "Avoiding unintended consequences." *Appeals Mechanism in International Investment Disputes* 241 (2008), 244.

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for typically large monetary compensations that can and have been awarded to investors by the arbitration tribunals.<sup>16</sup> The opportunity costs of losing a claim are much higher for developing rather than developed nations.<sup>17</sup>

Arguably, past decisions by arbitration tribunals regarding violations of investment treaties have been vastly inconsistent.<sup>18</sup> Such inconsistencies inhibit the developing host state from making informed decisions about regulations and legislations that effect investment treaty provisions because there is no consistent, predictable interpretation regarding the scope or application of the BITs provisions.<sup>19</sup>

This unpredictability and inconsistency stems from the fact that these arbitration proceedings have been highly secretive, and therefore, one tribunal would not have any idea what another tribunal's decision was or

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<sup>16</sup> Joshua Boone, How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies, 1 Global Bus. L. Rev. 187 (2010-2011), p.192; See Pia Eberhardt & Cecilia Olivet, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom,' (Corporate Europe Observatory and the Transnational Institute, November, 2012).

<sup>17</sup> Kevin P. Gallagher and Elen Shrestha, Global Development And Environment Institute Working Paper No. 11-01: Investment Treaty Arbitration and Developing Countries: A Re-Appraisal (May 2011), p.9.

<sup>18</sup> Joshua Boone, (How Developing Countries can Adapt Current Bilateral Investment Treaties to Provide Benefits to Their Domestic Economies, 1 Global Bus. L. Rev. 187 (2010-2011), pp190- 191 at footnote 51: '*...For example, Mr. Lauder, a U.S. Citizen, brought a claim against the Czech Republic under the U.S./Czech Republic BIT, but he has his investment restructured under a Dutch Investment group. Upon the alleged violation of theCzech Republic Mr. Lauder and the Dutch firm each brought a separate claims under the applicable BIT. These identical claims resulted in different conclusion on all but one point. Id at 60-61.*'; See also Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent*

*Decisions*, 73 Fordham L. Rev. 1521 (2005).

<sup>19</sup> See Joshua Boone, footnote 52: '*...For example, the terms "investment" and "investor" are not properly defined and have often been understood to have broad definitions thereby allowing for a vast array of potential claims to be brought against a sovereign*'; See also Susan D. Franck, 'The Nature And Enforcement Of Investor Rights Under Investment Treaties: Do Investment Treaties Have A Bright Future,' *University of California, Davis*, Vol. 12, No. 47, 2005, 47-99.

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the reasoning behind it.<sup>20</sup> This prevents any legal precedent to form and forces an already *ad hoc* tribunal to make *ad hoc* decisions without any guidance.<sup>21</sup> Furthermore, ISA forces developing countries to divert funds from use for public benefit to payment of administrative fees, legal fees, and dispute settlement awards.<sup>22</sup>

According to a report by the United Nations Conference on Trade and Development on implication of ISAD to developing countries as well as related literature as discussed by Joshua Boone, administrative fees and legal fees on their own can reach into the millions.<sup>23</sup> For instance, in the situation of Argentina, arguably one of the largest defaults in history, the claims aggregated in the multi-billions.<sup>24</sup> These claims not only direct needed public funds towards non- public interests, but also any potential benefit that a developed country may have received from the additional FDI brought in by the BIT could be easily nullified by one large award.<sup>25</sup> This, therefore, makes

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<sup>20</sup> See Joshua Boone, footnote 53; See also Steffen Hindelang, 'Study of Investor-State Dispute Settlement ('ISDS') and Alternatives of Dispute Resolution in International Investment Law,' available at [https://publixphere.net/i/salon/page/STUDY\\_ON\\_INVESTORSTATE\\_DISPUTE\\_SETTLEMENT\\_ISDS\\_AND\\_ALTERNATIVES\\_OF\\_DISPUTE\\_RESOLUTION\\_IN\\_INTERNATIONAL\\_INVESTMENT\\_LAW\\_BY\\_PROF\\_DR\\_STEFFEN\\_HINDELANG\\_LLM\\_I](https://publixphere.net/i/salon/page/STUDY_ON_INVESTORSTATE_DISPUTE_SETTLEMENT_ISDS_AND_ALTERNATIVES_OF_DISPUTE_RESOLUTION_IN_INTERNATIONAL_INVESTMENT_LAW_BY_PROF_DR_STEFFEN_HINDELANG_LLM_I); See also Susan D. Franck, 'The Legitimacy Crisis In Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,' *Fordham Law Review*, Vol. 73, 2005, 1521-1625, 1611.

<sup>21</sup> See Joshua Boone, footnote 54; See also Susan D. Franck, 'The Legitimacy Crisis In Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,' *Fordham Law Review*, Vol. 73, 2005, 1521-1625, 1613.

<sup>22</sup> See Joshua Boone, footnote 55; See also Pia Eberhardt & Cecilia Olivet, 'Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom,' (Corporate Europe Observatory and the Transnational Institute, November, 2012); See also Claire Provost & Matt Kennard, 'The obscure legal system that lets corporations sue countries,' *The Guardian*, Available at <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid>

<sup>23</sup> See Joshua Boone, footnotes 56-60.

<sup>24</sup> See Joshua Boone, footnotes 56-60; See also John Muse-Fisher, 'Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds,' *California Law Review*, Vol. 102, Iss. 6, 2014, 1671-1726.

<sup>25</sup> See generally, Kevin P. Gallagher and Elen Shrestha, 'Investment Treaty Arbitration and Developing Countries: A Re-Appraisal,' *Global Development and Environment Institute Working Paper No. 11-01*, 2011; See also 'Chapter 4: Who

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a BIT essentially prejudicial as opposed to beneficial to developing host states.<sup>26</sup>

## 6.0 Conclusion

As argued by Professor Schuauer on consistency and precedent, there is a concern to “treat like case alike” and that failure to treat similar cases similarly “is arbitrary, and consequently unjust or unfair.”<sup>27</sup> This argument as demonstrated in this paper exemplifies a nexus between the core principles of the rule of law and BITS.

This discussion seems to reach a consensus on the need for consistency and predictability among both proponents and opponents of investment arbitration under BITS. Consistency would likely promote the conception of fairness across the system, while inconsistency may lead to the opposite result. Although those who win specific cases are unlikely to complain about the result, inconsistencies adversely impact others immediately affected by the result as well as future users of the system.<sup>28</sup>

The discussion demonstrates that BITS a proper implementation of BITS in line with the rule of law principles gives a standard of treatment of foreign investors within a host state. This gives a predictability of treatment of foreign investors. Predictability is a long accepted pillar of the rule of law.<sup>29</sup> Consistency leads to predictability of an outcome and this would facilitate economic development of a host state.

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guards the guardians? The conflicting interests of investment arbitrators,’ (International Trade, 2012), *Corporate Europe Observatory*, available at <http://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators>

<sup>26</sup> See Joshua Boone, page 194; See also generally, Valentine Nde Fru, *The International Law on Foreign Investments and Host Economies in Sub-Saharan Africa: Cameroon, Nigeria, and Kenya*, ( e-book, LIT Verlag Münster, 2011). Available at [https://books.google.co.ke/books?id=Y9uig70i64cC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.co.ke/books?id=Y9uig70i64cC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false)

<sup>27</sup> Franck, S.D., at p. 65; See also Aranguri, Cesar. "The Effect of BITs on Regulatory Quality and the Rule of Law in Developing Countries." (2010).

<sup>28</sup> Ibid, at p. 65.

<sup>29</sup> Franck, S.D., *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*, University of California, Davis [Vol. 12:47], 2005, pp.47-99, at 63. <http://jilp.law.ucdavis.edu/issues/volume-12-1/franck1.19.pdf> accessed on 21/09/10.



## **Multinational Corporations and Natural Resources Exploitation in Africa: Challenges and Prospects**

By: **Christopher Oyier\***

### **Abstract**

*This paper examines the critical role multinational corporations (MNCs) continue to play in natural resource exploitation in Kenya and Africa. The paper traces the historical inception of the MNCs in Africa and discusses the imperial interests that they continue to represent in modern day Africa. This paper additionally addresses the continuing debate between proponents of MNCs and those opposed to their activities in Africa, that is, whether the MNCs mean well for Africa's development or whether they are instruments of pursuing interests adverse to the resource-rich African nations. The paper also raises questions whether African countries would be better off without the MNCs and if there are prospects of meaningful engagement of MNCs for the benefit of the host African countries.*

## **Multinational Corporations and Natural Resources exploitation in Africa: Challenges and Prospects**

### **1.0 Introduction**

Multinational corporations or transnational corporations can be defined as those with operational facilities and other assets in at least one country other than its home country.<sup>1</sup> Given the productive capacity of these organizations, their financial resources and ability in terms of investment, establishment and distribution, they constitute genuine transnational actors in the economic domain.<sup>2</sup> The rise of MNCs is attributable to globalization that has facilitated a shift from distinct national economics to a global economy in which larger firms grow and dominated major sectors of the

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<sup>1</sup>John H. Dunning & Sarianna M. Lundan, *Multinational Enterprises and the Global Economy* (Edward Elgar Publishing, 2008) 5.

<sup>2</sup> L.T. Wells, "The Multinational Business Enterprises: What kind of Business Organization?" (1971) 25 International Organization 3, 447-464.

world economy.<sup>3</sup> Very large MNCs have budgets that exceed those of small countries. Due to their vast economic power, MNCs are able to frustrate policies of the traditional nation-state or undermine its political sovereignty.<sup>4</sup> According to an Oxfam Report of 2017, the world's ten biggest corporations together have revenue greater than that of the government revenue of 180 countries combined.<sup>5</sup> According to the same Report, since 2015, more than half of the global wealth has been in the hands of the richest 1 per cent of people.<sup>6</sup> Typically, the richest people in the globe through the MNCs control a substantial volume of world's trade. Most critics describe MNCs presence in Africa as a form of neo-colonialism. In the exploitation of natural resources, the MNCs have continued to perpetuate the economic plunder of the colonial governments. By their utter enormous economic power, MNCs wield immense influence in global economy and politics. The aim of this paper is to examine a number of issues surrounding the relationship between MNCs and natural resource exploitation in Africa. Primarily, this paper will argue that MNCs represent a new form of economic imperialism that has resulted in further impoverishment of the African continent. The first part of this paper traces the rise of MNCs and the onset of their activities in Africa. The second part of this paper then highlights the MNCs operations in natural resource exploitation in Africa, drawing examples from different countries. The third part of this paper explores some of the tactics used by MNCs to ensure their dominance in African natural resource exploitation is maintained. The final part of this paper discusses options that African governments can adopt to enter gainful as opposed to exploitative partnerships with the MNCs in their jurisdictions.

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<sup>3</sup> Emma Chukwuemeka, "African Underdevelopment and the Multinationals – A Political Commentary" (August 2011) 4 *Journal of Sustainable Development* 4, 111.

<sup>4</sup> Ibid.

<sup>5</sup> OXFAM Briefing Paper, "AN ECONOMY FOR THE 99%: It's time to build a human economy that benefits everyone, not just the privileged few" (January 2017), 3 at [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp-economy-for-99-percent-160117-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-economy-for-99-percent-160117-en.pdf) accessed on 19/9/2017.

<sup>6</sup> Ibid.

## **2.0 Theory and origins of MNCs**

MNCs represent large companies with operations in many countries outside the country in which they are incorporated. Since the multinational corporation is by definition equivalent to foreign direct investment, theories of foreign direct investment must account for why one country invests in another and why this investment is carried out within organizational boundaries of a firm.<sup>7</sup> As it became ever more evident that foreign direct investment and MNCs were not the same, once again the statistical data on foreign direct investment often failed to capture the fundamentals of the story of multinational enterprise.<sup>8</sup>

Two broad sets of theories have attempted to explain the existence of MNCs. These are, the 'macro-economic theories' which try to explain MNCs from international economics and trade point of view, and "micro economic approaches" which are based on the theories of firm and industrial organization.<sup>9</sup> This paper will only discuss two macro-economic theories that are relevant to this discussion.

The first theory is the Foreign Direct Investment (FDI) by MNCs as international capital flows.<sup>10</sup> Under this theory, it was believed that MNCs occur in countries where the return on investment is higher. This theory realises that exportation may not be the best alternative because of trade barriers, perishability, or a need to produce a product tailored to the local market.

The location theory is the second theory that explains how MNCs come to be. Under this second theory, production takes place where the factor costs for production are the lowest and where there exist raw materials, cheap labour, and untapped markets. This view also recognises that

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<sup>7</sup> Bruce Kogut & Udo Zander, "Knowledge of the Firm and the Evolutionary Theory of the Multinational Corporation"(1993) 24 *Journal of International Business Studies* 4, 638.

<sup>8</sup> Mira Wilkins, "The History of Multinational Enterprise" in Alan M. Rugman & Thomas L. Brewer, *Oxford Handbook of International Business* (Oxford Scholarship Online: November 2003) at <<http://www.oxfordscholarship.com/view/10.1093/0199241821.001.0001/acprof-9780199241828-chapter-1?print=pdf>> accessed 21/9/2017.

<sup>9</sup> Salih KUŞLUVAN, "A Review of Theories of Multinational Enterprises" (2013) 13 *Dokuz Eylül Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi* 1, 165.

<sup>10</sup> Ibid.

corporations prefer greater control over management, product quality, and patented processes, hence they set up local plants.<sup>11</sup>

Thirdly, the comparative advantage theory explains that MNCs lead to the improvement of production and exports if it is transferred as a package of capital, managerial skills and technology from an industry which has a comparative disadvantage in the investing country compared to the recipient country, thus contributing to the productivity and comparative advantage of the host country.<sup>12</sup> According to this theory, the MNCs seek to invest in and secure the production and importation of commodities which home country lacks or produces at a higher cost.<sup>13</sup>

## **2.1 Historical context of MNCs in Africa**

Historically, the earliest historical origins of transnational corporations can be traced to the major colonising and imperialist ventures from Western Europe which began in the 16th century and proceeded for the next several hundred years.<sup>14</sup> During this period, firms such as the British East India Trading Company were formed to promote the trading activities or territorial acquisitions of their home countries in the Far East, Africa, and the Americas.<sup>15</sup> The companies were used explore for natural resources such as minerals and petroleum in Africa and the American colonies. The prominent examples of such companies include the Imperial British East Africa Company (IBEACO) which administered the East African Protectorate on behalf of the British government; British South Africa Company (BSACO) that exercised commercial and administrative rights in south central Africa and the Royal Niger Company in West Africa. The

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<sup>11</sup> Samia Raki, "Multinational Corporations (MNCs): Meaning, Origin and Growth" at <<http://www.economicdiscussion.net/multinational-corporations/multinational-corporations-mnacs-meaning-origin-and-growth/20921>> accessed on 20/9/2017.

<sup>12</sup> KUŞLUVAN, 167.

<sup>13</sup> Ibid.

<sup>14</sup> Jed Greer & Kavaljit Singh, "A Brief History of Transnational Corporations" (2000) Global Policy Forum, at <<https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html>> accessed on 20/9/2017.

<sup>15</sup> Troy Paredes, "The Importance of Corporate Law: Some Thoughts on Developing Equity Markets in Developing Economies" (2006) 19 Pac. McGeorge Global Bus. & Dev. L.J., 401.

desire of European powers to capture and exploit African natural resources ensured the entrenchment of these companies in the colonies.

After World War II, MNCs from the United States dominated foreign investment activities following corporate mergers and further capital concentration.<sup>16</sup> Major technological advances in shipping, transport, computerisation, and communications accelerated MNCs' increasing internationalisation of investment and trade, while new advertising capabilities helped MNCs expand market shares.<sup>17</sup> American MNCs such as General Motors and Ford Motors emerged on the world scene during this period.

Since the mid-1980s, a large rise of MNC-led foreign direct investment has occurred especially in the developing countries. Burdened by debt, low commodity prices, structural adjustment, and unemployment, governments throughout the less-industrialised world, MNCs were viewed as the embodiment of modernity and the prospect of wealth: full of technology, rich in capital, replete with skilled jobs.<sup>18</sup> With the 1990s and early twenty-first century privatizations, MNCs have extended their operations in public utilities (both in telecommunications and power facilities).<sup>19</sup> This forms the entry point of MNCs' activities in natural resource exploration in Africa. The activities of major MNCs are concentrated in the energy sector, that is, oil exploration, extraction and marketing. The next section discusses briefly some of the MNCs that engage in natural resource exploitation in Africa.

### **3.0 MNCs operations in Africa**

Africa alone is home to about 30% of the world's mineral reserves, 10% of the world's oil, and 8% of the world's natural gas.<sup>20</sup> With good governance, transparent management, respect for community needs and the environment, revenues from extractive industries can have a dramatic impact on reducing poverty and boosting shared prosperity.<sup>21</sup> However,

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<sup>16</sup> Ibid, Greer & Singh.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, Wilkins, 18.

<sup>20</sup> The World Bank, "Extractive Industries" (2017) at  
<<http://www.worldbank.org/en/topic/extractiveindustries/overview>>accessed  
25/9/2017.

<sup>21</sup> Ibid.

there is no doubt that the abundance of natural resources has not translated into national wealth for the African countries. The question then becomes, who controls and benefits from these natural resources. It is tempting to outrightly point fingers directly at the MNCs that form the dominant players in the African extractive sectors. However, regard must be had to the nature, context and complexity of the MNCs operations in African extractive sectors. From the brief historical background above, it emerges that the MNCs largely represent the interests of their predecessor colonial companies. The core characteristic of the colonial companies was the alienation of natural resources and the imposition of new forms of centralized political authority over land and resources that previously had been controlled by more localized institutions.<sup>22</sup> The contextual MNCs have continued to expropriate the benefits from the natural resources.

The colonial context of this expropriation requires further discussion. Whereas natural resources were previously grounded in the communities and the public sphere, the colonial powers at once upset this paradigm by divesting the control over natural resources from the communities to the crown. Successive African governments retained this western model in their legal systems. For instance, Article 62 of the Constitution of Kenya vests all minerals and mineral oils, rivers, lakes, government forests, and wildlife in the national government to be administered by the National Land Commission.

Following such legislative protection, the administration of natural resources in most African countries is a preserve of the state machinery. Citizens play a minimal role in the management of major natural resources such as oil, gas and coal, if any. Drawing from Kenya still, any transaction that involves the grant of a right or concession for the exploitation of any natural resource of Kenya is subject to ratification by Parliament.<sup>23</sup> This provision mandates the Kenyan Parliament to enact legislation providing for the classes of

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<sup>22</sup> James C. Murombedzi, "Inequality and natural resources in Africa" (World Social Science Report 2016, UNESCO) at

< <http://unesdoc.unesco.org/images/0024/002459/245936e.pdf>>accessed 25/9/2017.

<sup>23</sup> Constitution of Kenya 2010, Article 71.

transactions subject to ratification.<sup>24</sup> Kenya has made considerable progress in the extractives sector especially in oil exploration and exploitation in Turkana County. As is the norm, the companies in charge of extraction of oil in Turkana are foreign MNCs, led by Tullow Oil. The citizens hence have no say in the contract between the MNCs and the state. Thus, from the onset, those whose livelihoods depend on the activities of the MNCs are excluded from decision-making.

There is no doubt that multinational companies investing in Africa have the resources, and the responsibility, to contribute to Africa's development.<sup>25</sup> Why has this not been the case then? Numerous problems arise from MNCs operations in the extraction of natural resources in Africa. A number of the challenges and their root causes are subsequently discussed.

## **4.0 Challenges posed by MNCs in Africa**

### **4.1 Prioritisation of projects**

The projects that most MNCs undertake in a number of African countries have no clear justification with the development needs of the host states. Other than the extractives, the MNCs are often responsible for major infrastructural projects that are largely funded by debt borrowing. The international financial institutions such as the World Bank and Western donors are the major financiers of these projects. Since 1992, for instance, the Bank has approved more than \$18.5 billion for oil, gas, and coal projects in twenty-five developing countries.<sup>26</sup> Borrowing from the IMF and the World Bank is normally pegged on conditions such as economic liberalisation. Ultimately, these funds end up in the budgets of the MNCs

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<sup>24</sup> The *Natural Resources (Classes of Transactions Subject to Ratification) Act*, No. 41 of 2016 has since been enacted to give effect to Article 71 of the Constitution of Kenya, 2010 and for connected purposes.

<sup>25</sup> Witney W. Schneidman, "Multinational Corporations and Economic Development in Africa"(July 25, 2007) at <<https://www.csis.org/analysis/multinational-corporations-and-economic-development-africa>> accessed on 25/9/2017.

<sup>26</sup> Heather Turcotte, "Slippery Security: National, International and Global Security Issues within Petroleum Production, (2002)I ALTERNATIVES: TURKISH J. INT'L REL. 109, 133.

that are huge players in the African extractive scene. Thus, ultimately, the funds end up benefitting the nationalities of these MNCs.

## **4.2 Liberalisation of developing markets**

As the world economy is opening up with a fall in regulatory barriers to foreign investment, better transport and communications, freer capital movements MNCs find it easier to invest in African countries without significant difficulties. Most African states have waived or reduced investment restrictions in a bid to attract foreign investment. This has typically led to the relaxation of regulations, working standards, environmental safeguards, community development initiatives, and human rights violations to draw in corporate entities. It has also been argued that due to this liberalisation, wealthier countries are shutting down their higher cost domestic manufacturing operations and sending them overseas to developing countries where they can take advantage of lower wages and, for example, less restrictive environmental regulations.<sup>27</sup> Critics of globalization such as Joseph Stiglitz have maintained that the deregulation of developing economies under the pressure from the World Bank and Western donors has negatively impacted on the development potential of these developing countries.<sup>28</sup>

## **4.3 Balance of payments problem and debt accumulation**

Africa's resource-rich countries continue to experience high dependence on natural resource exports for both foreign exchange and revenues. For example, of the total increase in export values in African countries between 2000 and 2005, fuels accounted for 65 percent; manufactures, 24 percent; and food and raw materials about 5 percent each.<sup>29</sup> Before the first oil shock on the 1970s, the average oil-rich African country enjoyed favourable

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<sup>27</sup> SUNY Levin Institute, "Investment and Globalization" (2013) at <<http://www.globalization101.org/uploads/File/Investment/invall.pdf>>accessed on 28/9/2017.

<sup>28</sup> Joseph E Stiglitz, *Globalization and its Discontents* (Vol. 500. Norton: New York, 2002).

<sup>29</sup> AfricanBank, "Africa's Natural Resources: The Paradox of Plenty" (2007 Ch4 11/10/07) at<<https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/%28E%29%20AfricanBank%202007%20Ch4.pdf>> accessed on 28/9/2017.



macroeconomic conditions: robust economic growth, moderate inflation, manageable fiscal deficits and external debt, and external current account surpluses.<sup>30</sup> The current situation in which most resource-rich African countries are plagued in conflict, foreign debt and poverty point to the origin of the problem as the proliferation of MNCs in the African extractive sector. It is frequently contended that the MNCs sup up local capital either by borrowing locally or by receipt of investment incentives.

#### **4.4 Control over the MNCs**

The operations of MNCs in developing countries are sometimes difficult to control through local law. Where the policy goals of the host nation and the MNCs clash, the host government may find itself unable to control the decision-making capacity of the company. In reality, multinational corporations not infrequently escape effective accountability for their activities, especially in those countries where regulation is weak, enforcement lax, the judicial system ineffective, the government corrupt, or simply inadequate.<sup>31</sup> The host government is thus likely to end up paying huge amounts as compensation to the MNC. This has the potential of crippling small economies. But even where none of these problems exist, in order to encourage and protect foreign investment, developing states may have to conclude bilateral investment treaties (BITs) which restrict their ability to regulate foreign investors, who can, if necessary, resort to binding arbitration in case of breach.<sup>32</sup> Similarly, since the MNCs have strategic assets or control in other jurisdictions, redress mechanisms becomes complex in case they are found in breach of local laws.

#### **4.5 Collapse of local industries**

MNCs compete with local firms and outdo them due to the inherent technological and capital superiority of the former. By removing local resources to the factories of their mother states MNCs often deprive the host states of additional jobs and incomes involved in processing the raw materials. The most fatal impact for host states in this respect is the

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<sup>30</sup> Ibid, 102.

<sup>31</sup> Patricia Birnie, Alan Boyle & Catherine Ridgewell, *International Law and the Environment* (3<sup>rd</sup> edition, Oxford University Press, 2009) 326.

<sup>32</sup> Ibid.

collapse of local industries due to competition for raw materials, labour and markets. More often than not, the host state has a policy interest in the continuance of local industries whose main aims are not necessarily profit-making, but the promotion of employment of the citizens. MNCs main focus is on profit maximization.

#### **4.6 Dodging of taxes**

Many of the MNCs use their power, influence and connections to capture politics and ensure that the rules are written for them.<sup>33</sup> MNCs maximize profit in part by paying as little tax as possible in the host countries. They do this by using tax havens or by making countries compete to provide tax breaks, exemptions and lower rates.<sup>34</sup> If taxes are high in one jurisdiction, profits that would be subject to tax can be shifted to another tax jurisdiction through manipulation of affiliate transactions.<sup>35</sup> In essence, companies also lobby hard for tax breaks as a reward for basing or retaining their business in African countries.<sup>36</sup> According to the Oxfam Report, Kenya is losing \$1.1bn every year in tax exemptions for corporations, nearly twice its budget for health.<sup>37</sup>

#### **4.7 Environmental concerns**

MNCs operations in extracting natural resources in Africa contribute to various forms of pollution. For instance, Shell (a MNC) has been accused for being responsible for over 6.4 million litres of oil spilled into it over the last 30 years in the Niger Delta.<sup>38</sup> Exploitation of natural resources leads to

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<sup>33</sup> Ibid, OXFAM Briefing Paper.

<sup>34</sup> Organisation For Economic Co-Operation And Development (OECD), "Tax Effects on Foreign Direct Investment" (2008) at <<https://www.oecd.org/daf/inv/investment-policy/40152903.pdf>>accessed on 29/9/2017.

<sup>35</sup> Frian Aarsnes & Egon Pöyry, "The taxation of Multinationals in Africa: FISCAL COMPETITION AND PROFIT REPATRIATION (including transfer pricing)" at <<https://www.oecd.org/site/devaeo10/44276251.pdf>> accessed on 29/9/2017.

<sup>36</sup> Oxfam International, "Multinational companies cheat Africa out of billions of dollars" (2015) at < <https://www.oxfam.org/en/pressroom/pressreleases/2015-06-02/multinational-companies-cheat-africa-out-billions-dollars>>accessed on 3/10/2017.

<sup>37</sup> Ibid, OXFAM Briefing Paper.

<sup>38</sup> Steven Pearce, "Case Study of MNC Pollution in the Third World: A

other problems such as deforestation and desertification, air pollution, as well as the pollution of water supplies. Since host countries are at a weaker bargaining position, the blacklisting of MNCs for environmental violations becomes a challenge. The host state has to weigh the potential loss of employment and revenue and will in most cases ignore the environmental degradation from the extractive activities of MNCs.

## **5.0 Conclusion**

This paper has highlighted the emergence, development and entrenchment of the MNCs in Africa's extractives sector. As noted in the ensuing sections, the activities of MNCs in exploitation of natural resources in Africa largely benefit the mother countries and not the host countries. Although MNCs are believed to have benefits such as the introduction of new technologies, research and development and growth in innovations, the adverse impacts of these organizations call for re-examination of their role in African economies. Solutions such as information disclosure, exemplified by the Extractive Industries Transparency Initiative (the "EITI") and the Publish What You Pay (the "PWYP") Campaign, promotes the publishing of corporate payments to governments enhance accountability.<sup>39</sup> Apart from ensuring accountability, African states must devise ways of ensuring that community participation in natural resource management takes a more meaningful role beyond provision of employment by the MNCs.

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comprehensive look at the environmental impact that MNCs have in the Developing World" at < <https://stevenwpearce.wordpress.com/2015/06/07/case-study-of-mnc-pollution-in-the-third-world/>> accessed on 3/10/2017.

<sup>39</sup> Emeka Duruigbo, "The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa" (2005)26 U. Pa. J. Int'l Econ. L. 1, 68.

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## **The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya**

By: **Kariuki Muigua**

### **Abstract**

*Efforts to achieve sustainable development have never been greater the world over. Most, if not all states and non-governmental organisations, are coming up with multisectoral measures to promote the sustainable development agenda, based on the global framework on sustainable development. Kenya has also not been left behind as there is evidence of various actions and programmes put in place to promote sustainable development in all sectors of the economy. However, one area that is arguably indispensable but has received minimal attention is safeguarding pollinators as important players in the sustainable development agenda.*

*This paper critically discusses and offers recommendations on ways in which Kenya can ensure that pollinators, which play a critical role in environmental conservation and food and nutritional provision, are safeguarded as important players in the sustainable development debate.*

### **1.0 Introduction**

The prevailing debate on sustainable development the world over mainly revolves around minimizing adverse human impact on the environment as part of maximizing Ecosystem Services. The debate has been about balancing anthropocentric and ecocentric approaches to environmental protection and conservation. However, one area of biological diversity conservation that has received little or no attention, especially under the current Kenyan environment and natural resources laws, is the plant-pollinators' community that plays an indispensable role in natural resources and environmental regeneration for ecosystem Services.

Globally, biodiversity loss has been attributed to various factors, including, habitat loss, pest invasion, pollution, over-harvesting and disease.<sup>1</sup>

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Pollination services are provided both by wild, free-living organisms (mainly bees, but also to name a few, many butterflies, moths and flies), and by commercially managed bee species. Bees are considered the predominant and most economically important group of pollinators in most geographical regions.<sup>2</sup> Past reports carried in the Kenyan local dailies have highlighted the problem, asserting that Kenyan farmers are driving bees, wasps, butterflies and other pollinators to extinction, consequently threatening food supply.<sup>3</sup> Despite this, there is arguably inadequate evidence demonstrating Kenya's commitment to protect these important organisms as part of biodiversity conservation, and ultimately, achieving the right to food security for all, as guaranteed under the Constitution of Kenya 2010<sup>4</sup>.

The inadequate or lack of legal responses to pollinators' protection in the Kenyan environmental and natural resources laws has had adverse effect on the pollinators, and arguably, their protection is currently based on a general approach to environmental conservation for provision of ecosystem services. Pollinators are part of the biodiversity and, if any measures geared towards biodiversity conservation are to succeed, they must include pollinators.

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<sup>1</sup> Wilcove D.S, Rothstein J, Dubow A, Phillips and Losos E., "Quantifying threats to imperiled species in the United States", *BioScience*, 48, 1998, pp. 607-615 (As quoted in Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., *Global honey bee colony disorders and other threats to insect pollinators*, (United Nations Environmental Programme, 2010), p.1. Available at [https://www.researchgate.net/profile/Peter\\_Neumann5/publication/305160493\\_Disorders\\_of\\_bee\\_colonies\\_around\\_the\\_world\\_and\\_other\\_threats\\_to\\_insect\\_pollinators/links/5783b17208ae37d3af6c005c/Disorders-of-bee-colonies-around-the-world-and-other-threats-to-insect-pollinators.pdf](https://www.researchgate.net/profile/Peter_Neumann5/publication/305160493_Disorders_of_bee_colonies_around_the_world_and_other_threats_to_insect_pollinators/links/5783b17208ae37d3af6c005c/Disorders-of-bee-colonies-around-the-world-and-other-threats-to-insect-pollinators.pdf) [ Accessed on 24/11/2017].

<sup>2</sup> Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., *Global honey bee colony disorders and other threats to insect pollinators*, op cit., p. 1.

<sup>3</sup> "Bees, butterflies face extinction, threatening Kenya food production," *Business Daily Africa*, Monday, April 18, 2016 16:36. Available at <http://www.businessdailyafrica.com/economy/Bees-butterflies-face-extinction-threatening-Kenya-food/3946234-3164704-xvcgld/index.html> [Accessed on 24/11/2017].

<sup>4</sup> Constitution of Kenya, 2010, Art. 43: 43. Economic and social rights(1) Every person has the right—(c) to be free from hunger, and to have adequate food of acceptable quality;

This paper seeks to highlight and critically discuss some of the challenges that affect these important players in the sustainable development discourse and also suggest some of the legal and non-legal mechanisms through which they can be addressed.

## **2.0 Pollinators as Key Players in Environmental Conservation Discourse: The Neglected Link**

Pollinators are important for the provision of ecosystem services. Indeed, it has rightly been pointed out that ‘the modern concept of ‘ecosystem services’ has progressed significantly in recent decades, past its conception as a communication tool in the late 1970s to explain societal dependence on nature, to incorporate economic dimensions and provide help to decision makers for implementing effective conservation policies which support human wellbeing and sustainable development’.<sup>5</sup> Pollination is vital to the ecosystems and to human societies and the health and wellbeing of pollinating insects is considered as crucial to life, be it in sustaining natural habitats or contributing to local and global economies.<sup>6</sup>

While some plants are capable of self-pollination, the highest percentage of plant pollination is attributed to animal-mediated pollination. Animal-Pollinators have been defined as ‘animals that enable reproduction of many species of flowering plants by transferring pollen from one flower to another of the same species’.<sup>7</sup>

Therefore, while there may be several types of pollinators, this paper is mainly concerned with the animal pollinators which include, inter alia, bees, beetles, bees, flies, moths, butterflies, bats and birds, amongst others, in

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<sup>5</sup> Dolf de Groot, ‘Protecting natural capital for human wellbeing and sustainable development,’ *Science for Environment Policy – A Weekly News Alert*, Special Issue: Ecosystem Services, Issue 20, May 2010, p.1. Available at [http://ec.europa.eu/environment/integration/research/newsalert/pdf/20si\\_en.pdf](http://ec.europa.eu/environment/integration/research/newsalert/pdf/20si_en.pdf) [Accessed on 24/11/2017].

<sup>6</sup> Kluser, S., Neumann, P., Chauzat, M.P., Pettis, J.S., Peduzzi, P., Witt, R., Fernandez, N. and Theuri, M., *Global honey bee colony disorders and other threats to insect pollinators*, op cit., p. 2; See also generally, Ollerton, J., Winfree, R. and Tarrant, S., “How many flowering plants are pollinated by animals?” *Oikos*, Vol.120, No., 2011, pp.321-326.

<sup>7</sup> San Luis Obispo County, ‘Pollinator Information & Resources’, *Ranching Sustainability Analysis Info Sheet*, available at <http://cesanluisobispo.ucdavis.edu/files/136181.pdf> [Accessed on 24/11/2017].



what is commonly referred to as biotic pollination.<sup>8</sup> Biotic pollination is meant to be a symbiotic process in which both the animal pollinators and the plants benefit in terms of food for the former and pollination process for the latter.<sup>9</sup> This discourse is thus meant to address the factors and practices that adversely affect this mutual relationship between the two groups.

Considering that 'plants serve as air and water filters, are an indispensable part of the water cycle, prevent erosion of valuable soil re-sources, and give us numerous foods, fibers, and medicines, pollinators are considered as critical to biodiversity, ecosystem services, agricultural productivity, world economies, and human quality of life'.<sup>10</sup> Any threats to these animal-pollinators therefore threaten the whole chain of natural provision of ecosystem services.

### **3.0 Protection of Pollinators: the Legal and Policy Framework**

Internationally, there are a number of policy and legal instruments on biodiversity conservation that carry provisions geared towards conservation of pollinators. One of the most relevant of these is the 1992 *Convention on Biological Diversity*<sup>11</sup> was adopted during the Earth Summit in Rio de Janeiro, with the objective of conservation of biological diversity; the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.<sup>12</sup> While the Convention does not specifically mention pollinators, it accords "Biological diversity" a broad definition to

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<sup>8</sup> "Pollination in the Tropics," available at <https://wolfweb.unr.edu/~ldyer/classes/396/plantanimal.pdf> [Accessed on 24/11/2017].

<sup>9</sup> Ibid.

<sup>10</sup> San Luis Obispo County, 'Pollinator Information & Resources', op cit., p.1.

<sup>11</sup> United Nations Environment Programme, *Convention on Biological Diversity*, 1760 UNTS 79; 31 ILM 818 (1992), United Nations, Treaty Series, vol. 1760, p. 79. The Convention was adopted by the Intergovernmental Negotiating Committee for a Convention on Biological Diversity, during its Fifth session, held at Nairobi from 11 to 22 May 1992. Kenya signed the Convention on 11 Jun 1992 and ratified it on 26 Jul 1994.

<sup>12</sup> *Convention on Biological Diversity*, Art. I.

mean 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems'.<sup>13</sup>

The Convention also defines "Biological resources" to include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity.<sup>14</sup> Pollinators are thus covered under these broad definitions as part of the biodiversity to be protected and conserved under the Convention. The Convention outlines under Article 6 thereof state obligations on the general measures for conservation and sustainable use of the biological diversity within their territories.<sup>15</sup>

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<sup>13</sup> *Convention on Biological Diversity*, Art. 2.

<sup>14</sup> *Convention on Biological Diversity*, Art. 2.

<sup>15</sup> Article 6. General Measures for Conservation and Sustainable Use Each Contracting Party shall, in accordance with its particular conditions and capabilities:

- (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned; and
- (b) Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 7 thereof also requires each Contracting Party to, as far as possible and as appropriate, in particular for the purposes of Articles 8 to 10:

- (a) Identify components of biological diversity important for its conservation and sustainable use having regard to the indicative list of categories set down in Annex I:

Annex I provides for monitoring and identification with regard to ecosystems and habitats containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance: or, which are representative, unique or associated with key evolutionary or other biological processes.

- (b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;
- (c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through sampling and other techniques; and
- (d) Maintain and organize, by any mechanism data, derived from identification and monitoring activities pursuant to subparagraphs (a), (b) and (c) above.

The Agenda 21<sup>16</sup> also contains provisions under chapter 15 thereof on the conservation of biological diversity. The objectives and activities in chapter 15 of Agenda 21 are intended to improve the conservation of biological diversity and the sustainable use of biological resources, as well as to support the Convention on Biological Diversity.<sup>17</sup> Agenda 21 specifically acknowledges that our planet's essential goods and services depend on the variety and variability of genes, species, populations and ecosystems. Biological resources feed and clothe us and provide housing, medicines and spiritual nourishment. The natural ecosystems of forests, savannahs, pastures and rangelands, deserts, tundras, rivers, lakes and seas contain most of the Earth's biodiversity. Farmers' fields and gardens are also of great importance as repositories, while gene banks, botanical gardens, zoos and other germplasm repositories make a small but significant contribution. Chapter 15 also acknowledges that the current decline in biodiversity is largely the result of human activity and represents a serious threat to human development.<sup>18</sup> The highlighted biodiversity also include animal-pollinators, although not specifically mentioned as such. The *Aichi Biodiversity Target 7* seeks to ensure that, by 2020, areas under agriculture, aquaculture and forestry are managed sustainably, ensuring conservation of biodiversity.<sup>19</sup>

The technical rationale for the Aichi Target 7, according to the Convention on Biological Diversity Secretariat, is that the ecologically unsustainable consumption of water, use and run-off of pesticides and excess fertilizers, and the conversion of natural habitats to uniform monocultures, amongst other factors, have major negative impacts on biodiversity inside and outside of agricultural areas, as well as on forest, inland water and coastal ecosystems.<sup>20</sup> The Secretariat supports sustainable management on the basis that it not only contributes to biodiversity conservation but can also deliver benefits to production systems in terms of services such as soil fertility,

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<sup>16</sup> *Agenda 21* (A/CONF.151/26, vol.II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.

<sup>17</sup> *Agenda 21*, Para. 15.1.

<sup>18</sup> *Agenda 21*, Para. 15.2.

<sup>19</sup> Aichi Biodiversity Targets - Convention on Biological Diversity (CBD), <https://www.cbd.int/sp/targets/>

<sup>20</sup> Convention on Biological Diversity Secretariat, "TARGET 7 - Technical Rationale extended (provided in document COP/10/INF/12/Rev.1)," available at <https://www.cbd.int/sp/targets/rationale/target-7/> [Accessed on 1/01/2018].

erosion control, enhanced pollination and reduced pest outbreaks, as well as contributing to the well-being and sustainable livelihoods of local communities engaged in the management of local natural resources.<sup>21</sup>

Party states are thus expected to put in place domestic measures that are geared towards achieving these targets. The Constitution of Kenya 2010 envisages the place of international legal instruments under Article 2 which recognises them as forming part of the laws of Kenya.<sup>22</sup> The Constitution also places obligations on the state to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.<sup>23</sup>

The *Environmental Management and Co-ordination Act 1999*<sup>24</sup> (EMCA) calls for conservation of 'biological diversity' which is defined under the Act to mean 'the variability among living organisms from all sources including, terrestrial ecosystems, aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, among species and of ecosystems'.<sup>25</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> Constitution of Kenya, 2010: Article 2 .....(5) "The general rules of international law shall form part of the law of Kenya.".....(6) "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

<sup>23</sup> Ibid., Article 69(1).

<sup>24</sup> *Environmental Management and Co-ordination Act*, Act No. 8 of 1999, Laws of Kenya [Revised Edition 2012 [1999]; See also the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act, No. 5 of 2015, which was enacted to amend the Environmental Management and Co-ordination Act, 1999.

<sup>25</sup> Ibid., sec. 2.

In a bid to promote conservation of biological diversity, EMCA provides that the National Environment Management Authority (NEMA) should, in consultation with the relevant lead agencies, prescribe measures necessary to ensure the conservation of biological diversity in Kenya and in this respect the Authority should: identify, prepare and maintain an inventory of biological diversity of Kenya; determine which components of biological diversity are endangered, rare or threatened with extinction; identify potential threats to biological diversity and devise measures to remove or arrest their effects; undertake measures intended to integrate the conservation and sustainable utilisation ethic in relation to biological diversity in existing government activities and activities by private persons; specify national strategies, plans and government programmes for conservation and sustainable use of biological diversity; protect indigenous property rights of local communities in respect of biological diversity; and measure the value of unexploited natural resources in terms of watershed protection, influences on climate, cultural and aesthetic value, as well as actual and potential genetic value thereof.<sup>26</sup>

Notably, EMCA provides for conservation of biological resources in situ and ex-situ. With regard to conservation in situ, it requires the Authority to, in consultation with the concerned lead agencies, prescribe measures adequate to ensure the conservation of biological resources in situ and should issue guidelines for— land use methods that are compatible with conservation of biological diversity; the selection and management of protected areas so as to promote the conservation of the various terrestrial and aquatic ecosystems under the jurisdiction of Kenya; selection and management of buffer zones near protected areas; special arrangements for the protection of species, ecosystems and habitats threatened with extinction; prohibiting and controlling the introduction of alien species into natural habitats; and integrating traditional knowledge for the conservation of biological diversity with mainstream scientific knowledge.<sup>27</sup>

With regard to Conservation of biological resources ex-situ, the Authority is required to, in consultation with the relevant lead agencies— prescribe measures for the conservation of biological resources ex-situ especially for those species threatened with extinction; issue guidelines for the

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<sup>26</sup> Ibid., sec. 50.

<sup>27</sup> Ibid., sec. 51.

management of—(i) germplasm banks; (ii) botanical gardens; (iii) zoos or aquaria; (iv) animal orphanages; and (v) any other facilities recommended to the Authority by any of its Committees or considered necessary by the Authority; ensure that species threatened with extinction which are conserved ex-situ are re-introduced into their native habitats and ecosystems where— (i) the threat to the species has been terminated; or (ii) a viable population of the threatened species has been achieved.<sup>28</sup>

For purposes of protection of environmentally significant areas, the Cabinet Secretary may, in consultation with the relevant lead agencies, by notice in the Gazette, declare any area of land, sea, lake or river to be a protected natural environment for the purpose of promoting and preserving specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general.<sup>29</sup>

Other provisions in EMCA that are germane to protection of pollinators relate to standards of pesticides and toxic substances, where the Act provides that the Standards and Enforcement Review Committee, in consultation with the relevant lead agencies should—prepare and submit to the Authority draft standards for the concentration of pesticides residues in raw agricultural commodities, for the purposes of this paragraph raw agricultural commodities—(i) include fresh or frozen fruit and vegetables in their raw state, grains, nuts, eggs, raw milk, meat and other agricultural produce; (ii) do not include any agricultural produce or good which is processed, fabricated or manufactured by cooking, dehydrating, milling, or by any other similar means; establish, revisit, modify and submit to the Authority draft standards to regulate the importation, exportation, manufacture, storage, distribution, sale, use, packaging, transportation disposal and advertisement of pesticides and toxic substances with the relevant organisations; establish and submit to the Authority draft procedures for the registration of pesticides and toxic substances; establish and submit to the Authority draft measures to ensure proper labelling and packaging of pesticides and toxic substances; constantly review the use and efficacy of pesticides and toxic substances and submit the findings of such review to the Authority; recommend to the Authority measures for

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<sup>28</sup> *Environmental Management and Co-ordination Act, 1999*, sec. 52.

<sup>29</sup> *Ibid.*, sec. 53(1).

monitoring the effects of pesticides and toxic substances on the environment; recommend to the Authority measures for the establishment and maintenance of laboratories to operate as standards laboratories for pesticides and toxic substances; recommend to the Authority measures for the establishment of enforcement procedures and regulations for the storage, packaging and transportation of pesticides and toxic substances; constantly collect data from industries on the production, use and health effects of pesticides and toxic substances and avail such data to the Authority; keep up-to-date records and reports necessary for the proper regulation of the administration of pesticides and toxic substances; do all other things as appear necessary for the monitoring and control of pesticides and toxic substances.<sup>30</sup>

EMCA further provides that subject to the provisions of this Act or any other written law applicable in Kenya, any person who intends to manufacture, import or process a new pesticide or toxic substance or who intends to reprocess an existing pesticide or toxic substance for a significantly new use, must apply to the Authority for the registration of the pesticide or toxic substance, before importing, manufacturing, processing or reprocessing such pesticides or toxic substance.<sup>31</sup>

Furthermore, the application referred to in subsection (1) should include the name, trademark, and the molecular structure, proposed categories of use, an estimate of the quantity of the pesticides or toxic substances and any data related to health and other environmental effects thereof that the Authority may require.<sup>32</sup>

While animal pollinators include many insects and animals, bees seem to be the most popular in Kenya and around the world (perhaps based on the fact that beekeeping has traditionally been practised in the country over a long time for economic as an enterprise), with even attempts having been made to address them while excluding all the others. For instance, Kenya's *National Beekeeping Policy* which was developed by the Ministry of Livestock in 2009 with the overall objective of enhancing the contribution of the beekeeping sector to food security, employment creation and

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<sup>30</sup> *Environmental Management and Co-ordination Act, 1999*, sec. 94.

<sup>31</sup> *Ibid.*, sec. 94(1).

<sup>32</sup> *Ibid.*, sec. 94(2).

environmental conservation in the country.<sup>33</sup> This leaves all the other beneficial organisms predisposed to elimination through destructive agricultural practices and chemical use.

Kenya's *National Environment Policy 2012* accords the term 'environment' a very broad meaning to 'include the physical factors of the surroundings of human beings including land, water, atmosphere, sound, odour, taste, the biological factors of animals and plants and the social factors of aesthetics, and includes both the natural and the built environment'.<sup>34</sup> The *National Environment Policy* rightly points out that 'the main human activities contributing to environmental degradation in Kenya include unsustainable agricultural land use, poor soil and water management practices, deforestation, overgrazing, and pollution'.<sup>35</sup> 'These activities contribute a great deal to degradation of the country's natural resources such as land, fresh and marine waters, forests and biodiversity threatens the livelihoods of many people. They undermine the sink function of the environment which operates through such processes as nutrient recycling, decomposition and the natural purification and filtering of air and water.'<sup>36</sup>

Regarding conservation of biodiversity, the *National Environment Policy* provides that 'Kenya is internationally recognized as a mega diverse country in terms of richness in biodiversity. It also recognises that biodiversity contributes to a wide variety of environmental services, such as regulation of the gaseous composition of the atmosphere, protection of coastal zone, regulation of the hydrological cycle and climate, generation and conservation of fertile soils, dispersal and breakdown of wastes, pollination of many crops, and absorption of pollutants. Furthermore, human health and well-being are directly dependent on biodiversity. Biodiversity also provides genetic resources for food and agriculture, and therefore constitutes the biological basis for food security and support for human livelihoods'.<sup>37</sup>

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<sup>33</sup> Republic of Kenya, *National Beekeeping Policy 2009*, para. 2.2.

<sup>34</sup> Republic of Kenya, *National Environment Policy 2012*, (Government printer, 2012, Nairobi), para. 1.1.

<sup>35</sup> Republic of Kenya, *National Environment Policy 2012*, (Government printer, 2012, Nairobi), para. 2.1.

<sup>36</sup> Ibid, para. 2.2.

<sup>37</sup> Ibid, para. 4.10.1.



The *National Environment Policy* also highlights the fact that loss of biodiversity is going on at unprecedented rate, with the most important drivers being land degradation, climate change, pollution, unsustainable harvesting of natural resources, unsustainable patterns of consumption and production, and introduction of invasive and alien species.<sup>38</sup>

To address the highlighted problems, the *Policy* document requires the Government to: Revise and implement the National Biodiversity Strategy and Action Plan (NBSAP); Regulate and encourage sustainable utilization and bioprospecting of biological resources in accordance with international law; Develop mechanisms to ensure that the benefits arising from access to genetic resources, including intellectual property rights, traditional knowledge and technology are shared equitably with communities living in areas where the genetic material originated; and Develop and implement a strategy to contain, control and mitigate alien and invasive species.<sup>39</sup>

The *Pest Control Products Act*<sup>40</sup> is meant to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests and of the organic function of plants and animals and for connected purposes.

All the foregoing national laws have some issues that may affect pollinators in their implementation, but notably, most of them hardly mention pollinators.<sup>41</sup> There is no dedicated law that is meant to protect the

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<sup>38</sup> Ibid, para. 4.10.2.

<sup>39</sup> Republic of Kenya, *National Environment Policy 2012*, (Government printer, 2012, Nairobi), p. 19.

<sup>40</sup> Cap 346, Laws of Kenya, Revised Edition 2012 [1985].

<sup>41</sup> See also the *Wildlife Conservation and Management Act, No.47 of 2013*, Laws of Kenya, which provides for, inter alia, protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. Its scope includes "biodiversity" and "biological resources" the latter of which is defined to include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity; See also the *Forest Conservation and Management Act, 2016* (No 34 of 2016) which was enacted to give effect to Article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country and for connected purposes. The Act envisages sustainable management of forest resources for purposes of inter alia, biodiversity; See also the *Wildlife Conservation and Management (Protection of Endangered and Threatened Ecosystems, Habitats and Species) Regulations, 2017*, Legal Notice No. 242 of 2017, which were enacted to (a) implement the classification of ecosystems,

pollinators and currently, their protection can only be done within the framework of all the above laws.

#### **4.0 Safeguarding the Future: Addressing the Challenges Affecting Pollinators**

It has rightly been pointed out that insect pollinators of crops and wild plants are under threat globally and their decline or loss could have profound economic and environmental consequences.<sup>42</sup> Specifically, insect pollinators are believed to face growing pressure from the effects of intensified land use, climate change, alien species, and the spread of pests and pathogens; and this has serious implications for human food security and health, and ecosystem function.<sup>43</sup>

There is need to avert the danger facing pollinators, and this can be achieved through various ways. While some require radical change in management approaches, others require all stakeholders to work closely and also include other relevant but often ignored groups in implementing decisions.

#### **4.1 Ecosystem Services Approach to Pollinators Conservation**

Studies have indicated that ecological restoration is likely to lead to large increases in both biodiversity and ecosystem services, offering a potential win-win solution if the two goals are combined in restoration projects.<sup>44</sup>

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habitats and species into the following categories critically endangered; endangered; vulnerable; protected; and threatened; (b) provide for protection of ecosystems that are threatened or endangered so as to maintain their ecological integrity; (c) provide for the protection of species that are threatened, endangered, vulnerable, or protected to ensure their survival in the wild; (d) implement Kenya's obligations under international agreements regulating international trade in endangered species; and (e) ensure sustainable management and utilisation of biodiversity.

<sup>42</sup> Vanbergen, A.J., "Threats to an ecosystem service: pressures on pollinators," *Frontiers in Ecology and the Environment*, Vol.11, No. 5, 2013, pp.251-259.

<sup>43</sup> Ibid, p. 251.

<sup>44</sup> Rey Benayas, J.M., Newton, A.C., Diaz, A. & Bullock, J.M., 'Enhancement of Biodiversity and Ecosystem Services by Ecological Restoration: A Meta-Analysis,' *Science*, Vol.28, No.325, 2009, pp. 1121-1124. (As quoted in Dolf de Groot, 'Improved biodiversity and ecosystem services go hand-in-hand,' *Science for Environment Policy – A Weekly News Alert*, Special Issue: Ecosystem Services, Issue 20, May 2010, p.5.)

The Convention on Biological Diversity (CBD) defines the ecosystem approach as follows:<sup>45</sup>

*The Ecosystem Approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Thus, the application of the ecosystem approach will help to reach a balance of the three objectives of the Convention: conservation; sustainable use; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. An ecosystem approach is based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment. It recognizes that humans, with their cultural diversity, are an integral component of many ecosystems.*

To effectively protect animal pollinators, there is a need to entrench biodiversity management and conservation approaches that eliminate or reduce human activities which pose risks to these organisms.

There is also need to empower communities in ways that give them alternative means of making a living for social sustainability as opposed to relying on environment only as well as enabling them make informed decisions that would contribute positively to environmental sustainability.<sup>46</sup>

Integrated Environmental Management provides a set of underpinning principles and a suite of environmental assessment and management tools that are aimed at promoting sustainable development, such as Environmental Impact Assessment (EIA)<sup>47</sup>, which is well developed and

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<sup>45</sup> Convention on Biological Diversity (2000) COP 5 Decision V/6 The ecosystem approach.

<sup>46</sup> Muigua, K., "Realising the Right to Education for Environmental and Social Sustainability in Kenya," available at <http://www.kmco.co.ke/attachments/article/139/REALISING%20RIGHT%20TO%20EDUCATION%20FORENVIRONMENTAL%20AND%20SOCIAL%20%20JUSTICE%20IN%20KENYA-%20%2022nd%20%20October%20edited.pdf>

<sup>47</sup> For instance, Article 6b of the Convention on Biological Diversity provides that each Contracting Party should, in accordance with its particular conditions and capabilities, inter alia, integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 14 (1) (b) thereof also provides that each Contracting Party, as far as possible and as appropriate, should, inter alia, introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that

*The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya*: Kariuki Muigua (2017) *Journal of cmsd* Volume 1 (2) mandatory world-wide<sup>48</sup>, Strategic Environmental Assessment (SEA)<sup>49</sup> which helps to ensure that many of the environmental issues of global importance are considered in policies, plans and programmes at different administrative levels (i.e. national, regional, local)<sup>50</sup>, and Environmental Audit<sup>51</sup> which is the

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are likely to have significant adverse impacts on biological diversity are duly taken into account. The need for EIA was also succinctly expressed in Principle 17 of the 1992 *Rio Declaration on Environment and Development* which affords the strongest evidence of international support for EIA in the following terms;

*Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent authority. (1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).*

<sup>48</sup> DEAT, *Overview of Integrated Environmental Management, Integrated Environmental Management*, Information Series 0, Department of Environmental Affairs and Tourism (DEAT), Pretoria, 2004, p.2. Available at <https://www.environment.gov.za/sites/default/files/docs/series0%20overview.pdf>

<sup>49</sup> While the parent Act (EMCA) was initially silent on SEA, the same was introduced via the *Environmental Management and Co-ordination (Amendment) Act, 2015* (Amendment Act, No. 5 of 2015, Laws of Kenya). The Amendment Act 2015 introduces a definition of SEA under section 2 thereof to mean ‘a formal and systematic process to analyse and address the environmental effects of policies, plans, programmes and other strategic initiatives’. The Amendment Act also amended EMCA by introducing section 57A (1) which provides that all Policies, Plans and Programmes for implementation should be subjected to Strategic Environmental Assessment (S. 42, *Environmental Management and Co-ordination (Amendment) Act, 2015*.)

<sup>50</sup> Fischer, T.B., ‘Strategic environmental assessment in post-modern times,’ *Environmental Impact Assessment Review*, Vol.23, 2003, pp.155–170 at p. 162.

<sup>51</sup> Environmental auditing has been defined as a process whereby an organisation’s environmental performance is tested against numerous requirements, for example, clearly defined policies, legislated requirements and key performance indicators. (DEAT, *Overview of Integrated Environmental Management, Integrated Environmental Management*, op cit., p. 12); Sec. 2 of EMCA also defines “environmental audit” to mean the systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment.

Sec. 68

(1) of EMCA envisages Environmental Audit and Monitoring and provides that ‘the Authority shall be responsible for carrying out environmental audit of all activities that are likely to have significant effect on the environment. An environmental inspector appointed under this Act may enter any land or premises for the purposes of determining how far the activities carried out on that land or premises conform with the statements made in the environmental

systematic, documented, periodic and objective evaluation of how well environmental organisation, management and equipment are performing in conserving or preserving the environment. Kenya has in place a number of other legislation that are relevant to this subject, and would be effective if fully implemented.<sup>52</sup> For instance, the *Environmental Management And Coordination (Conservation of Biological Diversity And Resources, Access To Genetic Resources And Benefit Sharing) Regulations, 2016* which were enacted to repeal the *Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit*

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impact assessment study report issued in respect of that land or those premises under section 58(2).

- (2) The owner of the premises or the operator of a project for which an environmental impact assessment study report has been made shall keep accurate records and make annual reports to the Authority describing how far the project conforms in operation with the statements made in the environmental impact assessment study report submitted under section 58(2).
- (3) The owner of premises or the operator of a project shall take all reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact assessment study report submitted under section 58(2) and shall prepare and submit an environmental audit report on those measures to the Authority annually or as the Authority may, in writing, require.

<sup>52</sup> For instance, see the *Environmental (Impact Assessment and Audit) Regulations, 2003*, Legal Notice No. 101 of 2003 which are to apply to all policies, plans, programmes, project and activities specified in Part IV, Part V and the Second Schedule of the Act. Regulation 4 thereof provides that no proponent shall implement a project -(a) likely to have a negative environmental impact; or (b) for which an environmental impact assessment is required under the Act or these Regulations; unless an environmental impact assessment has been concluded and approved in accordance with these Regulations. It is however worth pointing out that the National Environment Management Authority, pursuant to the *Environmental Management and Coordination Act, Cap 387*, has since prepared the draft *Environmental (Strategic Assessment, Integrated Impact Assessment and Audit) Regulations, 2017* intended to repeal the *Environmental (Impact Assessment and Audit) Regulations, 2003*.

The overall objective of the *Environmental (Strategic Assessment, Integrated Impact Assessment and Audit) Regulations, 2017* is to align it to the *Environmental Management and Coordination Act, Cap 387* which was amended in 2015. The Regulations also seek to address emerging issues such as Strategic Environmental Assessments; environmental and social safeguard procedures and Climate Change. ([https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=32&Itemid=174](https://www.nema.go.ke/index.php?option=com_content&view=article&id=32&Itemid=174))

*Sharing) Regulations, 2006*<sup>53</sup> provides that a person should not engage in any activity that may- have an adverse impact on any ecosystem; lead to the introduction of any exotic species; lead to unsustainable use of natural resources, without an Environmental Impact Assessment Licence issued by the Authority under the Act.<sup>54</sup>

Such provisions, coupled with other laws, if effectively implemented, would go a long way in ensuring that environment-degrading activities that adversely affect pollinators are reduced or eliminated.

#### **4.2 Reduction or Effective Control of Pesticide Use**

A joint Report by the United Nations Food and Agriculture Organisation and Intergovernmental Technical Panel on Soils of the Global Soil Partnership<sup>55</sup> comprehensively renders a high-level scientific opinion on the effects of plant protection products on soil functions and biodiversity. However, while acknowledging that critical issues such as toxicity in non-soil dwelling organisms (e.g. pollinators, birds, larger mammals) and transport of contaminants to the human food chain are of equal or greater importance, the same are not covered by the Report which dwells mainly on the effect of the said products on soil-dwelling organisms. While this assessment by FAO may not be directly relevant to the subject of discussion in this paper, it demonstrates the serious and broad effect the excessive use of pesticides can have on various organisms.

Pest control practices such as Integrated Pest Management that enhance natural pest controls are believed to be effective to reduce or eliminate the use of Pesticides (herbicides, insecticides, fungicides), while at the same time, they greatly benefit pollinators which may be heavily impacted by pesticides.<sup>56</sup> It has been suggested that adoption of integrated pest

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<sup>53</sup> Environmental Management and Co-ordination Act, No. 8 of 1999, Legal Notice No. 160 of 2006.

<sup>54</sup> *Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2016*, Regulation No. 5.

<sup>55</sup> FAO and ITPS, *Global assessment of the impact of plant protection products on soil functions and soil ecosystems*, (Rome, FAO, 2017). Available at <http://www.fao.org/3/I8168EN/i8168en.pdf>

<sup>56</sup> Food and Agricultural Organisation of the United Nations, "Pollination Services for Crop Production: Managing Ecosystem Services for Productive and Healthy Agroecosystems," available at <http://www.fao.org/3/a-at109e.pdf> [Accessed on 29/11/2017].

management (IPM) programs can limit pesticide usage to times of economic damage and spraying at certain times in the pest and crop life cycles, through which pest control can be maximized and amount of pesticide used minimized.<sup>57</sup> This calls for closer working relationship between farmers and the agricultural extension services officers for sensitisation and education on the same.

Scholars have also suggested that incentives should be offered to farmers to restore pollinator-friendly habitats, including flower provisioning within or around crop fields and elimination of use of insecticides by adopting agroecological production methods.<sup>58</sup> Additionally, conventional farmers are advised to be extremely cautious in the choice, timing, and application of insecticides and other chemicals.<sup>59</sup> Agriculture is believed to pose many threats to insect pollinators such as changes in land use, loss and fragmentation of habitat, introduction of exotic organisms, modern agricultural practices, and pesticide use.<sup>60</sup>

The *Pest Control Products Act* defines “pest” to mean any injurious, noxious or troublesome insect, fungus, bacterial organism, virus, weed, rodent or other plant or animal pest; and includes any injurious, noxious or troublesome organic function of a plant or animal.<sup>61</sup> This definition is arguably very broad and quite generic in that any product meant to eliminate the defined organisms is also likely to have adverse effects on the non-harmful or useful organisms. It is therefore important for the Pest Control Products Board to work closely with all the relevant stakeholders in the sector in order to ensure that the approved products have minimal adverse effects on non-targeted organisms.

The Pest Control Products Board established under the Act is empowered to: assess and evaluate pest control products in accordance with the provisions of the regulations made under the Act; consider applications for registration of pest control products and to make recommendations

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<sup>57</sup> Kings River Conservation District (KRCD), “Agricultural Management Practices,” available at [http://www.krcd.org/water/water\\_quality/ag\\_mgt\\_practices.html](http://www.krcd.org/water/water_quality/ag_mgt_practices.html) [Accessed on 4/01/2018].

<sup>58</sup> Nicholls, C.I. & Altieri, M.A., “Plant Biodiversity Enhances Bees and Other Insect Pollinators in Agroecosystems: A Review,” *Agronomy for Sustainable development*, Vol.33, No. 2, 2013, pp.257-274 at p. 257.

<sup>59</sup> *Ibid.*, p.257.

<sup>60</sup> *Ibid.*, p.258.

<sup>61</sup> *Pest Control Products Act*, sec.2.

*The Neglected Link: Safeguarding Pollinators for Sustainable Development in Kenya: Kariuki Muigua* thereon to the Minister; and advise the Minister on all matters relating to the enforcement of the provisions of this Act and regulations made thereunder.<sup>62</sup>

Such a Board ought to closely work with the scientific and technology community and the general public especially the agricultural and pastoral communities in order to reduce or eliminate the use of harmful pesticide products, as a way of minimizing destruction of pollinators and their habitats.

The Board should also have representatives in agricultural trainings and seminars in order to sensitize farmers on any outlawed or potentially dangerous pesticides that have broad spectrum effect on pollinators. This is important for ensuring that the information disseminated to farmers is up-to-date and germane. Such information should also be widely publicized in languages and media that are easy to understand. It is imperative that the general public appreciates that pesticide use is not only harmful to human health but also affects other organisms that may be non-harmful to crop production or even beneficial, as pollinators.

### **4.3 Environmental Education, Awareness and Ethics**

It has been opined that a lack of clear and sustained environmental awareness in many African countries has contributed to environmental degradation within the continent.<sup>63</sup> One of the ways of addressing this problem would be promoting environmental education geared towards raising such awareness and environmental ethics.<sup>64</sup> There have been efforts to address this problem especially by the United Nations and affiliated organisations such as United Nations Environmental Programme (UNEP) which set up the Africa Environmental Education and Training Action Plan (AEETAP) following the 2012 Arusha Declaration 18, which states:

*To agree to strengthen environmental education and training and develop an action plan for Africa, covering formal and non-formal education, capacity-*

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<sup>62</sup> Ibid., Sec. 5 & 6.

<sup>63</sup> Heila Lotz-Sisitka, H.L., et. al., *Africa Environmental Education and Training Action Plan 2015-2024: Strengthening Sustainable Development in Africa*, (United Nations Environment Programme, January, 2017), p.1.

<sup>64</sup> Ibid.



building and information networking components, among others, and to explicitly include a focus on technology enhanced learning in this action plan.<sup>65</sup>

Environmental education has been defined as ‘a process that allows individuals to explore environmental issues, engage in problem solving, and take action to improve the environment, thus enabling individuals develop a deeper understanding of environmental issues and have the skills to make informed and responsible decisions.’<sup>66</sup>

The *Environmental Management and Co-ordination Act, 1999*<sup>67</sup> defines environmental education to include ‘the process of recognising values and clarifying concepts in order to develop skills and attitudes necessary to understand and appreciate the inter-relatedness among man, his culture and his biophysical surroundings.’<sup>68</sup>

The identifiable components of environmental education are: Awareness and sensitivity to the environment and environmental challenges; Knowledge and understanding of the environment and environmental challenges; Attitudes of concern for the environment and motivation to improve or maintain environmental quality; Skills to identify and help resolve environmental challenges; and participation in activities that lead to the resolution of environmental challenges.<sup>69</sup>

If empowered through education, people are able to make their own decisions especially in matters relating to exploitation of natural resources, Environmental Impact Assessment (EIA) and other matters that touch on development but have a bearing on the environment and the livelihoods of the people. The local communities would be able to actively engage potential investors in ensuring environmental sustainability. Principles of public participation<sup>70</sup> in governance and environmental democracy<sup>71</sup> as

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<sup>65</sup> Ibid., p. 5.

<sup>66</sup> United States Environmental Protection Agency, ‘What is Environmental Education?’ available at <http://www2.epa.gov/education/what-environmental-education> [Accessed on 20/01/2018].

<sup>67</sup> No. 8 of 1999, Laws of Kenya.

<sup>68</sup> Ibid., sec. 2.

<sup>69</sup> United States Environmental Protection Agency, op.cit; See also the touchstone definition of “environmental education” which was developed in a 1978 UNESCO conference and published in the “Tbilisi Declaration.”

<sup>70</sup> The Aarhus Convention (Convention on Access To Information, Public Participation In Decision-Making And Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998) (Article 7), Stockholm Declaration on the Human

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envisioned in the current Constitution of Kenya becomes easier to implement.

There is an urgent need to ensure that appreciation and concern for the environment are instilled during the early years of development.<sup>72</sup> It is important to ensure that all sections of the general public understand the fact that provision of most of the economic and social rights as guaranteed in the Constitution of Kenya 2010 is dependent on the state of the environment.<sup>73</sup> As such, environmental matters must be taken seriously and any factors or activities that adversely affect the environment should be minimised or eliminated.

Anthropocentric<sup>74</sup> and ecocentric<sup>75</sup> approaches should be well entrenched in environmental management in order to promote the notion that all living

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*Environment Stockholm, June 1972* (Principle 19) and the *Rio Declaration on Environment and Development Rio De Janeiro June 1992* (principle 10) all recognise the need to involve the populace in environmental decision-making. Principle 19 of the Stockholm Declaration advocates for education in environmental matters for the younger generation as well as the adults giving due consideration to the underprivileged in order to broaden the basis for an *enlightened opinion* and responsible conduct by individuals enterprises and communities in protecting and improving the environment in its full human dimension. (emphasis added) Principle 10 of the Rio Declaration further affirms the importance of environmental democracy. It provides that environmental issues are best handled with participation of all concerned citizens are relevant level. At the national level each individual shall have access to appropriate information concerning the environment that is held by Public authorities including information on hazardous materials and activities in their communities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings including redress and remedy shall be provided.

<sup>71</sup> See Article 69 of the Constitution of Kenya; For a more detailed discussion, see also Muigua, K. & Musyimi, P.N., 'Enhancing Environmental Democracy in Kenya,' available at

[http://www.kmco.co.ke/attachments/article/81/072\\_Envta1\\_Dem\\_Kenya.pdf](http://www.kmco.co.ke/attachments/article/81/072_Envta1_Dem_Kenya.pdf)

<sup>72</sup> Muigua, K., "Realising the Right to Education for Environmental and Social Sustainability in Kenya," op. cit., p.9.

<sup>73</sup> See generally, A. Boyle, "Human Rights and the Environment: A Reassessment," Boyle *UNEP Paper Revised*.

<sup>74</sup> It considers human beings as the centre or the most important being in the universe and looks at nature and its resources in terms of the benefits that accrue to the humankind (Murphy, W.H., "Anthropocentrism: A Modern Version," *Science*, New Series, Vol. 187, No. 4182 (Mar. 28, 1975), pp. 1168-1172).

organisms, including pollinators, should be accorded legal protection and their habitats protected as part of the universe not necessarily because of the benefits that accrue from their ecological activities.

#### **4.4 Use of Scientific Research and Traditional Knowledge**

Continuous scientific research on the effects of various agricultural practices on biodiversity conservation is key in any efforts geared towards protecting animal pollinators. The International Centre of Insect Physiology and Ecology (ICIPE), based in Kenya, conducts research on African insect problems associated with food and health.<sup>76</sup>

There is need for concerted efforts from the Government agencies concerned with agriculture and scientific research to work closely with ICIPE to address some of the problems facing these important players for the realisation of sustainable development agenda.

Agenda 21 advocates for this by calling for improvement in communication and cooperation among the scientific and technological community, decision makers and the public. Notably, Agenda 21 provides that the scientific and technological community and policy makers should increase their interaction in order to implement strategies for sustainable development on the basis of the best available knowledge. This implies that decision makers should provide the necessary framework for rigorous research and for full and open communication of the findings of the scientific and technological community, and develop with it ways in which research results and the concerns stemming from the findings can be communicated to decision-making bodies so as to better link scientific and technical knowledge with strategic policy and programme formulation. At the same time, this dialogue would assist the scientific and technological community in developing priorities for research and proposing actions for constructive solutions.<sup>77</sup>

Arguably, such communication between the scientific and technological community and the policy and lawmakers would go a long way in coming up

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<sup>75</sup> It is an approach that is based on nature-centred as opposed to human-centred system of values. (Amérigo, M., Aragonés, J., De Frutos, B., Sevillano, V., & Cortés, B., "Underlying Dimensions of Ecocentric and Anthropocentric Environmental Beliefs," *The Spanish Journal of Psychology*, 10(1), 2007, 97-103. doi:10.1017/S1138741600006351).

<sup>76</sup> [http://www.icipe.org/about/mission\\_and\\_vision](http://www.icipe.org/about/mission_and_vision)

<sup>77</sup> Agenda 21, para. 31.2.

with policies and laws that are more responsive to the need to protect pollinators. Generalized laws on conservation of biodiversity may not be very effective in addressing the specific challenges affecting pollinators. While the framework law such as EMCA envisages provisions on protection of biodiversity<sup>78</sup>, a closer working relationship between the policy and lawmakers and the scientific and technological community would ensure drafting of effective sectoral laws or guidelines that fully protect pollinators. The Convention on Biological Diversity Secretariat recommends that one of the ways of implementing the Aichi Biodiversity Target 7 would be incorporating customary use of biodiversity by indigenous and local communities, which can often offer lessons of wider applicability and could be enhanced by increasingly delegating governance and management responsibility to the local level.<sup>79</sup>

The Constitution of Kenya 2010 also supports this idea by providing that it recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>80</sup> In addition, it requires the State to, inter alia: recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.<sup>81</sup> Parliament is also required to enact legislation to, inter alia, recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.<sup>82</sup>

Article 69(1) thereof also obligates the State to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; eliminate processes and activities that are likely to

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<sup>78</sup> Sec. 50-53, EMCA, 1999.

<sup>79</sup> Convention on Biological Diversity Secretariat, "TARGET 7 - Technical Rationale extended (provided in document COP/10/INF/12/Rev.1)," op. cit.

<sup>80</sup> Constitution of Kenya 2010, Art. 11(1).

<sup>81</sup> Ibid, Art. 11(2).

<sup>82</sup> Ibid, Art. 11(3).

endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya. Additionally, the Constitution places a duty on every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.<sup>83</sup>

Notably, Parliament has since come up with the *Protection of Traditional Knowledge and Cultural Expressions Act*, 2016<sup>84</sup> which was enacted to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; to give effect to Articles 11, 40 and 69(1) (c) of the Constitution; and for connected purposes. The Act defines "traditional knowledge" to mean any knowledge- originating from an individual, local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, embodied in the traditional lifestyle of a community; or contained in the codified knowledge systems passed on from one generation to another including agricultural, environmental or medical knowledge, knowledge associated with genetic resources or other components of biological diversity, and know-how of traditional architecture, construction technologies, designs, marks and indications.<sup>85</sup>

Traditional knowledge can play a critical role in eliminating some of the problems affecting animal pollinators such as excessive use of pesticides. Traditional farming and conservation practices can go a long way in reducing the use of pesticides in crop production. The general public and specifically the agricultural communities would also benefit from closer working relationships between them and the government agencies to appreciate how some of the traditional practices in farming can be incorporated into their modern farming practices as a way of reducing the use of harmful chemicals in crop production as well as discarding some of the destructive farming practices.

It is important to note that the protection of traditional knowledge or cultural expressions as envisaged in the foregoing Act should: not restrict or hinder the normal usage, development, exchange, dissemination and transmission of traditional knowledge or cultural expressions by members

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<sup>83</sup> Art. 69(2), Constitution of Kenya 2010.

<sup>84</sup> No. 33 of 2016, Laws of Kenya.

<sup>85</sup> *Protection of Traditional Knowledge and Cultural Expressions Act*, 2016, sec. 2.

of a particular community within the traditional practices and in accordance with the customary law and practices of that community.<sup>86</sup> Communities can and should be encouraged and supported to therefore actively utilise traditional knowledge especially relating to agricultural, environmental and knowledge associated with genetic resources or other components of biological diversity in achieving sustainable agricultural production and enhancing protection of the health of animal pollinators.

The knowledge can also be used together with scientific knowledge to come up with agricultural crops that are fairly resistant to some pests thus reducing the indiscriminate use of pesticides. Some of the traditional farming practices coupled with relevant scientific knowledge can also go a long way in achieving elimination or lower pollution levels on the farm or used in wider areas including, indigenous knowledge of soil management, agricultural practices, animal husbandry, irrigation system, crop breeding, harvesting and storage which have been traditionally used successfully and in a sustainable manner.<sup>87</sup> Some of the traditional farming practices that have been cited as capable of protecting pollinators while enhancing sustainable agricultural production include farmers improving the biological stability and resilience of the system by choosing more suitable crops, rotating them, growing a mixture of crops, and irrigating, mulching and manuring land.<sup>88</sup>

It has been suggested that in order to promote sustainable development, partnership between the scientific and technological communities and indigenous people in many areas are essential, which should be founded upon mutual respect and understanding, transparent and open dialogue, and informed consent and just returns for the holders of traditional knowledge through reward and benefits.<sup>89</sup> A working relationship based on such grounds can potentially enhance conservation measures especially for the pollinators.

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<sup>86</sup> Ibid, sec. 19(1).

<sup>87</sup> Thakuria, G., 'Traditional Knowledge for Sustainable Development: A Geographical Analysis,' *International Journal of Research in Applied, Natural and Social Sciences*, Vol. 2, Issue 9, Sep 2014, 39-44, p.42.

<sup>88</sup> Hayati, D., Zahra R. & Ezatollah, K., "Measuring agricultural sustainability," In *biodiversity, biofuels, agroforestry and conservation agriculture*, Springer Netherlands, 2010, pp. 73-100 at p.74.

<sup>89</sup> Thakuria, G., 'Traditional Knowledge for Sustainable Development: A Geographical Analysis,' op cit., p.43.

#### 4.5 Addressing Climate Change

As part of efforts geared towards protection of animal pollinators and their habitats, there is need to continually address the problem of climate change, as set out in 1992 United Nations Framework Convention on Climate Change (UNFCCC)<sup>90</sup> which is an intergovernmental treaty developed to address the problem of climate change. Scholars have rightly suggested that climate change may be one of the biggest anthropogenic disturbance factors imposed on ecosystems today.<sup>91</sup> These studies have concluded that climate change affects plants, pollinators and their interactions through increased temperatures, disturbances on rainfall pattern and other many environmental changes, including alteration in the native biodiversity and trophic relationship which result in lower the production of crops.<sup>92</sup>

The *Agenda 2030 on Sustainable Development* urges countries to take urgent action to combat climate change and its impacts.<sup>93</sup> In response to this, Kenya has since taken commendable measures aimed at tackling the problem of climate change. Kenya's *Climate Change Act, 2016*<sup>94</sup> was enacted to provide for the legal and institutional framework for the mitigation and adaption to the effects of climate change; to facilitate and enhance response to climate change; to provide for the guidance and measures to achieve low carbon climate resilient development and for connected purposes.<sup>95</sup> It is important that the provisions of this Act be implemented across the various sectors, especially the ones with a direct impact on environment and

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<sup>90</sup> UN General Assembly, *United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly, 20 January 1994, A/RES/48/189.*

<sup>91</sup> Pudasaini, R., et al., "Effect of climate change on insect pollinator: a review," *New York Science Journal*, Vol. 8, No.3, 2015, pp.39-42 at p.40.

<sup>92</sup> Ibid.

<sup>93</sup> United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, Goal 13.

<sup>94</sup> No. 11 of 2016, Laws of Kenya.

<sup>95</sup> Ibid, preamble. The Act, *inter alia*, provides: a framework for mitigating and adapting to the effects of climate change on all sectors of the economy and levels of governance; a mechanism for coordination and governance of matters relating to climate change; coordination mechanism for formulation of programmes and plans to enhance the resilience of human and ecological systems against the impacts of climate change; for mainstreaming of the principle of sustainable development in the planning for and on climate change response strategies and actions; for promotion of social and economic measures in climate change responses to support sustainable human development; and a mechanism for coordination of measuring , verification and reporting of climate interventions (S.3 (1)).

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biodiversity in particular. Within this framework, it is important to continue tackling the problem of climate change and its effect on biodiversity, especially the animal pollinators.

## **5.0 Conclusion**

It has rightly been argued that since sustainable development is a continuous process that considers all human and natural resource as a means to achieve certain goals or objectives, this development process should not be contradictory with nature but should instead be ecologically comfortable, economically viable and socially acceptable.<sup>96</sup> The protection and conservation of natural resources for future generations arguably depends on, inter alia, pollinators.

Pollinators have an important role to play in crop and food production as well as realisation of the sustainable development agenda. There is need to put in place and employ active and conscious mechanisms specifically geared towards protection of the animal pollinators against adverse effects arising from human activities. Such measures must however go beyond legal responses and include scientific and cultural aspects especially in relation to crop production.

Safeguarding pollinators is a part of sustainable development and is crucial for the realisation of food and nutritional security in Kenya, and indeed worldwide. This neglected link between pollinators and sustainable development needs to be addressed as a matter of urgency.

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<sup>96</sup> Thakuria, G., 'Traditional Knowledge for Sustainable Development: A Geographical Analysis,' op cit., p.39.



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**Book Review: Resolving Conflicts through Mediation in Kenya, 2<sup>nd</sup> Edition**

By: **Valentine Manyasi<sup>1</sup>**

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Mediation is one of the Alternative Dispute Resolution (ADR) mechanisms which has been practised since aeons ago. It focuses on the interests and needs of the parties to the conflict. Article 159 of the Constitution of Kenya 2010, reignited the interest in various ADR mechanisms, including mediation and has elevated the position of mediation and other ADR mechanisms in resolving disputes in Kenya.

Dr. Kariuki Muigua has contributed immensely to ADR through his publications, and particularly in the field of Mediation through this text which was first published in 2012. The 2<sup>nd</sup> edition of this book is thus meant to take the readers through the process of mediation in a simplified yet comprehensive manner, with the latest key amendments on mediation legal and institutional framework in Kenya.

This edition takes keen interest in the new developments that have taken place since the publication of the first edition. It contains guidelines on how best to set up and implement a mediation program that not only responds to the needs of the people, but also achieves the desired goal of enhancing access to justice for all, as opposed to the direction mediation is taking where there is a real risk of formalizing mediation and making it inaccessible to most Kenyans especially the informally educated in society.

This book evaluates how the Court Annexed Mediation Scheme is being implemented in Kenya's legal system. Despite significant success in the pilot project, there are issues that ought to be addressed such as the formalization of mediation and the resulting rules and technical procedures. While understandable, it locks out key players in mediation in the society.

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The Judiciary may also consider coming up with a more accommodative framework for accreditation of more mediators, from across board, that is, formal and informal mediators, especially in light of the constitutional provisions providing for land and environmental disputes through ADR and TDR mechanisms.

It is important to bear in mind that any mechanism that is adopted should not only respond to the needs of the target group, but should also be accessible, cost-effective and one that the parties can easily identify with especially when compared to litigation. For mediation to be properly implemented across the country, the state must allocate the financial infrastructure to facilitate remuneration of mediators as well as enhancing the necessary staffing requirements.

The author has additionally highlighted the use of mediation in resolving family disputes and environmental matters. Mediation has been used successfully, though infrequently, in negotiating and implementing international environmental conventions and treaties and its attributes should be exploited to aid the local framework.

When it comes to land matters, the Constitution encourages communities to resolve the matters using the most appropriate mechanisms available to them. This is also reinforced by the fact that one of the functions of the National Land Commission is to encourage the application of traditional conflict resolution mechanisms in land conflicts. As for family disputes mediation is recommended as it helps preserve the relationships of parties and fosters more cooperation during and after the process.

This book is meant to inform and also elicit debate on the feasibility of the current legal and institutional framework on mediation and ADR mechanisms in entrenching them as tools of access to justice now and in the future. It is therefore recommended as an excellent guide to Mediation in Kenya.

## **The Role of Court-Annexed Mediation in Resolving Succession Disputes in Kenya: An Appraisal**

By: **Justus Otiso\***

### **1.0 Litigation of Succession Disputes In Kenya**

The law of succession is that branch of law that deals with the way in which a deceased's free property is dealt with after his death. This branch of law is governed by the Law of Succession Act<sup>1</sup>. The preamble to the Act states that;

*"It is an Act of parliament to define and consolidate the law relating to intestate and testamentary succession and the administration of estates of persons and for connected purposes."*

Section 2(1) of the Act states that, "the Act constitutes the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act"; and also allows for application of other laws, save where they are otherwise expressly provided in the Act or any other written law.

This is the statute that deals with both the *substantive* and the *procedural* aspects of how the estate of a deceased person should be distributed. The Civil Procedure Act,<sup>2</sup> which is the statute that ordinarily governs procedure in civil suits, is therefore inapplicable except where specifically provided for in other statutes, and in this case, vide section 59 of the Civil Procedure Act,<sup>3</sup> where mediation is recognized as an alternative dispute resolution method.

The law of succession governs the devolution of property from a deceased person to a new owner... it defines the patterns of devolution and establishes the institutions and structures that control the devolution, with

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<sup>1</sup> CAP 160.

<sup>2</sup> Cap 21 Laws of Kenya Revised Edition 2012(2010), National Council for Law Reporting, [www.kenyalaw.org](http://www.kenyalaw.org) accessed 8<sup>th</sup> November 2017

<sup>3</sup> Cap 21 Laws of Kenya, Revised Edition 2012(2010), National Council for Law Reporting, [www.kenyalaw.org](http://www.kenyalaw.org) accessed 8<sup>th</sup> November 2017

the objective of ensuring a peaceful and orderly distribution of the estate of the deceased.<sup>4</sup> Vigor.

The manner in which the property will be dealt with depends on whether the deceased died testate or intestate. Section 3(1) of the Law of Succession Act defines a will as, “a legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death duly made and executed in accordance with the Act.” The Law of Succession Act defines testate succession <sup>5</sup> as, “whereby the deceased had left a will in which he states how his property should be distributed.” Intestate succession occurs when the deceased did not leave any will and it is left to the courts, or if they are in agreement, to the family and other beneficiaries, to decide how the property should be distributed.<sup>6</sup> Both testate and intestate succession have their challenges and this paper will show why mediation is best suited to solve the conflicts that arise out of both testate and intestate succession. Largely, it is in intestate succession that problems arise because more often than not the beneficiaries cannot agree on how to distribute the deceased’s estate.

Testate succession has not been spared either because lately wills are increasingly being successfully challenged in court. Not that there is anything wrong with successful challenge, but the rate is so high that it brings into question whether the deceased wishes are being respected. This may also run counter to the basic principle of succession that the testator should be free to will away their property as they wish. Problems abound because of the time that is taken for the case to be heard and determined. Such problems will be compounded if, upon the decision of the Court, an unsuccessful party decides to appeal.

The period between the filing of the case and its conclusion brings untold suffering to the family and dependants, so that by the time the matter is heard and determined, there have formed rifts where there were none, and chasms where there were disagreements prior to the death of the person whose property is the subject of litigation. Effects are also financial, emotional, and enmities grow to such an extent as to spark family feuds which may last a life time. This is mostly where the estate is large or

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<sup>4</sup> Musyoka, W, *A casebook on the law of succession in Kenya*, law Africa publishing , Nairobi, 2014 ISBN 9966-7448-5-1.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

valuable. The family fabric is destroyed. Such destruction has an effect on the economy as well.

### 1.1 Conflict Defined

The dictionary definition of conflict is “a serious disagreement or argument, typically a protracted one ... or serious incompatibility between two or more opinions, principles, or interests”<sup>7</sup>. A conflict therefore is a clash of interests, actions, benefits, values and opinions between people which are serious and prolonged. Conflicts are therefore more serious than just disagreements because the level of disagreement in a conflict is so high that it cannot be resolved by negotiation between the parties themselves. Further conflicts may exist because of perceptions of the issue are different and therefore a disagreement may exist only in the mind of one person when in actual fact it no conflict, or such conflict is different from that which that person perceives it to be.

According to a leading psychologist, there are three types of issues that concern the parties in every conflict; substantive, emotional ad pseudo substantive issues.<sup>8</sup> Taken at face value, substantive issues are matters that concern the participants and therefore are the problem to be solved or the question to be decided<sup>9</sup>. Emotional issues are categorized into four, namely issues of power, approval, inclusion, justice and identity. These emotional issues are the ones that underlie arguments about substantive issues. Therefore, substantive issues are felt to be important only to the extent that they are vehicles for emotional issues. Pseudo substantive issues on the other hand are emotional issues that are disguised as substantive issues<sup>10</sup>.

Issues are pseudo substantive to the extent that they serve to satisfy individual needs related to emotional issues<sup>11</sup>. The courts are ill qualified to deal with such issues. All that the courts need to do and always do is to determine the facts as before them and in accordance with the evidence and the law. Once conflict exists, the parties can either try and solve the

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<sup>7</sup> Oxford learner’s dictionary.

<sup>8</sup> Dana, D., *Managing Differences: How To Build Better Relationships At Work And Home*, MTI, 4<sup>th</sup> ed. , 2006, p.125

<sup>9</sup> Ibid., p.126.

<sup>10</sup> Ibid., p.131

<sup>11</sup> Ibid., p. 131.



conflict themselves or use formal and established means to settle that conflict. In Kenya, the Constitution recognizes that the formal mechanisms are the courts and tribunals formed thereunder have the exclusive mandate to solve conflicts. That is why mediation is important and best suited to resolving family disputes because they are usually emotionally driven more than they are driven by a quest for following the strictures of the law.

## **2.0 Mediation Defined**

Mediation is a process where a neutral third party (the mediator) helps the parties articulate and understand the underlying perspectives, interests, issues, values and feelings that each person brings to the conflict; generate and evaluate options to resolve the issues presented; and gain consensus around mutually acceptable options<sup>12</sup>. The mediator does not make a decision, and neither does he suggest one. It is the parties themselves that will be responsible for crafting their own solution to the problem. All that the mediator does is to be present, arrange the meeting and facilitate communication between the parties. Once a solution is reached, then the mediator will reduce it into an agreement which the parties sign. The process is voluntary, private and consensual.

### **2.1 The legal and regulatory framework of mediation Kenya.**

Article 159 (2) (c) of the Constitution of Kenya 2010 states that Courts should promote the use of Alternative Dispute Resolution (ADR) Mechanisms such as Mediation, Arbitration, Conciliation, etc. However, it does not make the use of ADR mandatory. This means that parties are free to choose any ADR mechanism that they find suitable. The Civil Procedure Act,<sup>13</sup> was amended in section 59 by a legal notice<sup>14</sup> to provide for Court mandated mediation.

Pursuant to that, the Mediation (Pilot Project) Rules 2015 were promulgated and came into force in April 2016<sup>15</sup>. The pilot project was to be undertaken in Nairobi Milimani Commercial Courts for a period of one

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<sup>12</sup> Love, L.P., *Mediation Of Probate Matters: Leaving A Valuable Legacy*, *Pepperdine Dispute Resolution Law Journal*, Vol. 1, 2001, 255.

<sup>13</sup> Chapter 21 Laws of Kenya, Government Printer, 2010

<sup>14</sup> Legal Notice number 197 of 2015

<sup>15</sup> Legal Notice number 197 of 2015

year, and, if successful, to be rolled out gradually throughout the country. The effect of these rules was that any cases that were filed in the Commercial or Family divisions of the High Court at Milimani Commercial Courts in Nairobi after the coming into force of these rules could not proceed as before. Such cases have to first be screened by the Mediation Deputy Registrar in order to assess their suitability for settlement by mediation. If so found suitable, such cases would be referred to mediation, where the mediator would be chosen by the parties from a list of mediator accredited by the judiciary. Succession cases fall squarely within the Family Law Division of the High Court in Milimani Commercial Courts, Nairobi, and therefore an attempt to resolve them must be first made in accordance with the Mediation (Pilot Project) Rules 2015.

One of the functions of the Mediation (Pilot Project) Rules 2015 was to create a committee to accredit mediators who will take up cases filed at Milimani commercial courts. Once the mediator is successfully appointed, the mediation is supposed to be concluded within sixty days (except in special circumstances where an extension of a further ten days is given) and the mediator is to file his report within ten days of the conclusion of the mediation. In the event that the mediation was fully successful and the parties had reached an agreement, then such agreement is adopted as judgment of the court and is not subject to appeal. Where the parties could not reach an agreement, then the mediator files his report to that effect and the parties are to continue with the case in the normal way. It should be noted that during the time when the matter is referred to mediation, any time limit that is imposed by the Civil Procedure Rules is suspended until the mediation is concluded. If successful, the project was to be launched throughout the country.

## **2.2 The Success of The Pilot Project So Far**

A preliminary report by the Judiciary<sup>16</sup> shows that the pilot project has been successful. During the launch of his Blueprint, the Chief Justice Hon. David Maraga, promised Kenyans that he would embark on clearance of backlog by initiating Alternative Dispute Resolutions mechanisms with the Judiciary

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<sup>16</sup><http://www.judiciary.go.ke/portal/page/reports>, posted on 27<sup>th</sup> February, 2017 (accessed on 14<sup>th</sup> November 2017).

annexed mediation being a key plank of this strategy<sup>17</sup>. Since its launch in May 2016, Court annexed Mediation has successfully resolved about 50 cases with an estimated cost of KShs 500million<sup>18</sup>. The average time frame of resolving the disputes is sixty days<sup>19</sup>. The World Bank has also hailed the success of mediation<sup>20</sup> in Kenya in its feature story of 5<sup>th</sup> October 2017 where it reported as follows;

*“Kenyans are no strangers to waiting for justice. Cases in its civil courts take an average of 24 months to conclude, largely because of the limited number of magistrates and judges available to hear them, but also because of the long distances between courts and the places where most Kenyans live. As a result, Kenya’s judiciary has a massive backlog of civil cases, prompting it to explore alternatives....”*

The average time taken to settle cases via mediation was 66 days, or two months, compared to two years through the normal court process. The information shared during mediation sessions is confidential and is not admissible as evidence in court. The 60-day mediation period is capped, unless the Court grants an extension. There is no appeal process, providing some certainty a matter will be concluded once and for all. However, should no settlement be reached, the case reverts to the courts. Mediation has the potential to address complex cases, including those involving companies in conflict. It is not bound by the rules of litigation, allowing more space for creative resolution. It is a solution by the parties, for the parties. The judiciary’s goal is to normalize mediation in all courts.”<sup>21</sup>

The shortcoming here is that because the reference to mediation is made by the court, parties may feel that their independent decision to go for mediation has been interfered with, hence the mediation as proposed by

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<sup>17</sup><http://www.judiciary.go.ke/portal/page/reports>, posted on 27<sup>th</sup> February, 2017 (accessed on 14<sup>th</sup> November 2017)

<sup>18</sup> <http://www.judiciary.go.ke/portal/page/reports>, posted on 27<sup>th</sup> February, 2017 op.cit.

<sup>19</sup> <http://www.judiciary.go.ke/portal/page/reports>, posted on 27<sup>th</sup> February, 2017 op.cit.

<sup>20</sup> <http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>. (accessed 14<sup>th</sup> November 2017).

<sup>21</sup> <http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>.

court will remove the aspect of “independence” because the decision to go to for mediation will have been made for them by the court rather than by the parties themselves.

### **3.0 Why Mediation Works**

In mediation, parties are more concerned with what works for them rather than rights. It is therefore normal in mediation for parties to come to a solution that may not make sense to other people, or which defies logic, so long as the solution is acceptable to the parties and is not illegal. To this end, therefore, mediation takes cares of the parties’ emotional, substantive and pseudo – substantive needs and issues. It is for this very reason that mediation succeeds and remains the preferred method of solving family disputes.

In other dispute resolution mechanisms, the solutions to the dispute may have been imposed on the parties (e.g. litigation, arbitration, adjudication), or even suggested by the third party neutral (e.g. conciliation, early neutral evaluation, mini trial, dispute resolution bards) and binding (litigation and arbitration). Such other dispute resolution mechanisms do not last long and do not give the kind of party satisfaction and party involvement that comes wit mediation. The solutions therefore sit comfortably with the parties because they crafted them. The confidentiality aspect also means that the parties more readily give out information which helps in solving the dispute faster and more conclusively than would have been the case in other forums.

Mediation is more suitable where the relationship of the disputing parties is important to them and has to continue even after the dispute has been resolved. Unlike in litigation where the disputing parties do not care about the aftermath following a decree, mediation seeks to and ensures that the cordial relationship that existed before the dispute actually survives the brunt of the dispute. In litigation, the converse is often the case.

In succession matters, the dispute is about the distribution of the deceased’s property between siblings, mother (or father) and children, and other dependants who are usually family members as circumstances will dictate. The disputants will still remain as part of one family because they are related. They will meet in birthdays, funerals, weddings and other family functions like harambees and get togethers. They will still need each other in their future and their family functions are interdependent. This is

especially so in the African context where family relations are valued and protected through culture and association.

As one prominent mediator<sup>22</sup> observes;

*“Of all of the cases I have mediated over the past 30 years, the most challenging and rewarding disputes have been those between family members over family property, estates, trusts and businesses. Brothers and sisters may fight over partnership property, but they are really sorting out old issues of sibling rivalry and dominance. Once a patriarch or matriarch of a family has given up control or passed away, adult children are often left in a position of ambiguity or, worse, contrary beliefs about their rightful role. Disputes surface that are usually less about malevolence than about conflicting feelings, misunderstandings of intent, divergent expectations, and resistance to change or unspoken fears. The tremendous financial cost of litigation is only one downside of an intra-family lawsuit. Court pleadings and proceedings are public. One of the principal advantages of private mediation over litigation of sibling and intergenerational family disputes is the confidentiality provided in keeping family fights from the public eye. The light of publicity often cements positions and makes compromise more difficult. There are, of course, other advantages of working out a settlement among warring family factions, including reconciling differences and healing. Courts are limited in the remedies they can impose and framing family disputes in legal terms inhibits the parties’ ability to invent or accept creative solutions. Litigation rarely heals differences or promotes understanding”*

From the above, it is quite clear that parties in dispute will be more interested in the emotional issues and in deed be driven by them rather than the substantive issues in the dispute.

The process is party driven, hence party satisfaction that they contributed to the decision. Further more, the final decision is made by the party themselves hence long lasting and not easy to resile from.

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<sup>22</sup>Folberg, J, “Mediating Family Property and Estate Conflicts: Keeping the Peace and Preserving Family Wealth,” *JAMS Dispute Resolution ALERT*, Vol. 9, No. 2, 2009.

### **3.1 The importance of confidentiality and informality to resolving succession disputes.**

Probate, trust, and guardianship matters often involve family secrets and dispute that are embarrassing to the parties. The confidentiality of mediation may encourage families to speak more openly and allow the true reasons for the disputes to emerge more quickly. Privacy is particularly important to those parties who value "not airing the family's dirty laundry" in public<sup>23</sup>. Moss<sup>24</sup> describes the advantages of early mediation as follows:

*"Disputes are usually more likely to be settled through mediation when mediation is recommended early. For example, when a dispute arises between a fiduciary and a beneficiary involving interpretation of the trust agreement, there is a high probability of success if the parties attempt to have their disagreement mediated before a lawsuit is filed. The parties should be able to compromise before either side becomes too inflexible in the "rightness" of their position".*

Additionally, parties who will continue to live or operate in the same social or business community may benefit from a "discreet conclusion" to their problems. Both the confidentiality and informal nature of mediation give the parties the opportunity to deal with the emotional issues of a case. Disputes in the context of probate, trust, or guardianship law may result in the tangible manifestation of long-standing family problems (e.g., sibling rivalry, perceived favoritism, jealousy over or disapproval of a marriage or other relationship).<sup>25</sup> Parties in these cases may sometimes seek no more than an "emotional" result; an apology perhaps or an opportunity to vent anger over a situation they perceive as unfair<sup>26</sup>.

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<sup>23</sup> Schmitz, S.J, *Mediation and the Elderly: What Mediators Need to Know*, MEDIATION Q., Fall 1998, at 71, 74.

<sup>24</sup> 27 Moss, F.S, *Mediating Fiduciary Disputes*, app. A at A-4 (1998) (unpublished manuscript, on file with author). Even though early mediation is recommended as a time and money-saver, Moss points out that it can also be quite successful when litigation has run for such a protracted period of time that the parties have become frustrated. Also, she notes that a second mediation may be successful even if an earlier one was not. Finally, a mediation, even if unsuccessful, may serve a benefit by facilitating the collection of information in a way far less costly and time-consuming than formal discovery. See *id.* at A-5.

<sup>25</sup> Gary S.N, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 424 (1997).

<sup>26</sup> Gary S.N, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over*

More importantly, the courtroom is not the appropriate arena for the airing and potential resolution of the underlying emotional issues." The emotional context should be considered when planning the timing of a mediation. Typically, early mediation is recommended<sup>27</sup>. However, the parties to a will contest may still be in the process of grieving over the loss of a family member<sup>28</sup>. Similarly, the parties in a guardianship case may still be confronting the shock of the visible decline in capacity of a loved one. The strong emotions surrounding a death or pending disability may well hamper the parties' ability to think clearly, either in the context of litigation or of mediation.<sup>29</sup>

#### **4.0 Why Litigation is Inadequate in Resolving Succession Disputes**

Before the entrenchment of Mediation in the Constitution of Kenya 2010 and the subsequent rolling out of the Mediation Pilot Project by the Judiciary by the enabling statute (the Civil Procedure Act), the courts handled all successions matters through litigation, except where the parties entered into consent and settled the dispute amicably.

In the matter of the Estate of GKK (Deceased) Succession Cause No.1298 Of 2011<sup>30</sup>, which was filed before the promulgation of the Mediation (Pilot Project) Rules 2015, shows the difficulty that the parties, their advocates and the courts themselves go through during the litigation of a succession dispute. In that case, during the hearing of an application to determine the validity of two rival wills, the following were agreed as the issues for determination<sup>31</sup>;

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*Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, (1997). op. cit at pp 426-427<sup>30</sup> Professor Gary states "grief may be a factor in the dispute itself, since the desire to blame someone for the death of a loved one may lead to a lawsuit." op. cit, p 432. 31 Gary op cit, p 421. "If the mediation process is commenced too early in [the grieving process, the parties may be ill-equipped emotionally to make rational decisions that will permit settlement of the controversy." Hewitt, *supra* note, at p 41.

<sup>32</sup> Gary S.N, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, (1997). op. cit at pp 426-427.

<sup>30</sup> In Re Estate of G.K.K (Deceased) [2013] eKLR, <http://kenyalaw.org/caselaw/cases/view/98909/> accessed 20<sup>th</sup> November 2017.

<sup>31</sup> In Re Estate of G.K.K (Deceased) [2013] eKLR,

“(i) To probe the two Wills on record so as to determine;

(a) their authenticity and legality,

(b) What the estate of the Late GKK is comprised of,

(c) The Executors of the Will,

(ii) All other issues regarding the estate shall await the outcome of the Probate of the Will”

In his ruling dated 16<sup>th</sup> June 2013, Isaac Lenaola J (as he then was), made the following observations:

*“Right from the onset, I must state that this matter was very emotive and was highly contested. I also spent considerable time in Court in a bid to assist the beneficiaries temporarily secure the assets of the deceased. I allowed the beneficiaries to participate in the proceedings and address the Court by counsel or in person as they wished in order to ensure that they understood the proceedings from time to time. I also ensured that all orders on record were made by consent to minimize conflicts during the long hearing period”*<sup>32</sup>.

It is proper to conclude that the efforts made by the courts to prevent further conflict even during the time of the hearing and pending the ruling, when the family members could not see eye to eye, bore no fruit. This in itself is supportive of the importance of mediation in such disputes. In the same ruling, the learned judge stated thus;

*“During the hearing, I noticed that the family was divided into two distinct camps; one that was led by TW and AK and the other clearly led by AK. Both Maraga J. (as he then was) and myself, tried to put in place measures to save the large estate from depletion but neither AK nor AK were able to work together and jointly with JK to manage the estate<sup>33</sup>”. The fact that they had the guidance of seasoned advocates did not help the situation. JK, in my view, is a genuine old man with the sole interest of guiding his divided brother's family but in the end the venom exhibited by both camps made him ineffectual... It must be understood that the intention of the Law of Succession Act is the eventual distribution of a deceased's estate. In the*

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<http://kenyalaw.org/caselaw/cases/view/98909/> op. cit, p. 2.

<sup>32</sup> In Re Estate of G.K.K (Deceased) [2013] eKLR,

<http://kenyalaw.org/caselaw/cases/view/98909/> op. cit, p.14

<sup>33</sup> In Re Estate of G.K.K (Deceased) [2013] eKLR,

<http://kenyalaw.org/caselaw/cases/view/98909/> op. cit, p. 23



*present case, whether or not I had validated one of the two Wills, the K family saga would not have ended” (emphasis supplied).”*

From the foregoing, it is clear that advocates for both parties could not prevail upon their clients to maintain good relationships. It can be implied that since this hearing was conducted before the promulgation of the mediation framework, the advocates appearing for the parties were not trained in mediation and therefore could not properly advise or control the parties.

As regards emotional issues, it is also apparent that despite the courts best intentions and efforts to keep the family together, it did not manage to do so. This vindicates the advantages of mediation over litigation because the learned judge, noble as he was in his intentions, was not mediating the dispute but was making a finding on the issues for determination as was placed before him.

The issues themselves were legal issues and did not include any emotional issues which would have been of vital importance to the parties had the dispute gone to mediation. The learned judge concluded by stating;

*“I have sat for one year and I have seen the conduct of each beneficiary. There is no goodwill on any side and sadly, it is the whole family that will continue to suffer, unless sanity prevails”<sup>34</sup>.*

## 5.0 Conclusion

The author is of the considered opinion that whilst some gains have been made in reducing the backlog of case in the family division (54%), the judiciary would have made more meaningful gains if certain measures are put in place. This opinion is fortified by the fact that mediation resolves a much higher percentage of family disputes world wide. Going forward, it is suggested that the Law of Succession Act be amended to provide for parties to go for mediation before filing their case in court. This will further reduce the cases that go to court as they can easily be settle before then. Further, the training of advocates and judicial officers on mediation should be made mandatory. It would also help to mandatorily require advocates to advise their clients to try mediation before taking instructions to proceed to

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<sup>34</sup> In Re Estate of G.K.K (Deceased) [2013] eKLR,  
<http://kenyalaw.org/caselaw/cases/view/98909/> op. cit, p. 24

litigation. This is the usual practice in jurisdictions where mediation has taken root.

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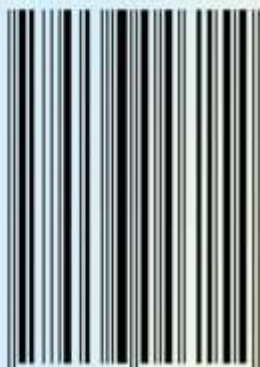
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