GOOD GOVERNANCE AND FOREIGN DIRECT INVESTMENT:

A Legal Contribution to a Balanced Economic Development in the East African Community (EAC)

GOOD GOVERNANCE AND FOREIGN DIRECT INVESTMENT:
A Legal Contribution to a Balanced Economic Development in the East African Community (EAC)

GOED BESTUUR EN DIRECTE BUITENLANDSE INVESTERINGEN:
Een juridische bijdrage aan een evenwichtige economische ontwikkeling in de Oost-Afrikaanse Gemeenschap (EAC) (met een samenvatting in het Nederlands)

PROEFSCHRIFT

ter verkrijging van de graad van doctor aan de Universiteit Utrecht
op gezag van de rector magnificus, prof.dr. G.J. van der Zwaan,
ingevolge het besluit van het college voor promoties in het openbaar te verdedigen
op dinsdag 25 augustus 2015 des middags te 12.45 uur

door

Mbembe Binda

geboren op 22 november 1979
te Kisangani, Democratische Republiek Congo

Promotor: Prof. dr. G.H. Addink

This thesis was accomplished with financial support from the Netherlands organization for international cooperation in higher education (Nuffic).

To the loving memory of my father,
Mbembe Ndoy Egide (16/09/1942 – 21/12/2012).

Acknowledgments

I would not have successfully reached the finishing line of the four-year marathon that led to the completion of this doctoral thesis without the advice, orientations, encouragement, support or company of many people whom I encountered at different times during this journey either by necessity or by chance.

I am most grateful to Prof. dr. G.H. Addink for having trusted me since the beginning by accepting to supervise this research even when my own ideas were not yet clear enough on what could be the final outcome. He dedicated his time and provided every means of support in guiding my steps in the constellation of theories and principles that I had to deal with. Without compromising his usual academic rigour, he gave free rein to my ideas and allowed me express them in my most convenient way.

I also express my gratitude to the members of the evaluation committee who have accepted to give their time and expertise in the evaluation of this thesis.

I would like to express my special thanks to Jet Tigchelaar. She is my true friend. She was present at the inception of my idea to start a PhD research at Utrecht University and her contribution was decisive for the materialization of this idea. During the four years I have spent on writing this thesis, Jet never abandoned me when I was abroad or in the Netherlands despite her so demanding schedule. With her, I rode my longest distance by bicycle in the Netherlands, I learnt to read and use a map, I explored Amsterdam and Utrecht canals by canoe, I tasted, at her cost, various cuisines in multiple restaurants in Utrecht, Amsterdam, Leiden, etc. She provided me with the so much needed company when loneliness was about to get the upper hand, and shared her own experience in writing a PhD in order to comfort me when doubts surfaced.

My gratitude is also directed towards the administrative staff of the department of constitutional and administrative law at Utrecht University. They provided every support that was needed so that I could write my thesis with the utmost serenity. Together with them I also extend my thanks to Peter Morris for editing this writing and to Titia Kloos for her follow up during the editing process.

My roommates, Paulien, Sandra, Melissa, and later Hilke, with whom I spent every single day during a substantive part of this journey, provided a very friendly and inspiring atmosphere that allowed me to be productive. Words might not be enough to describe my gratitude for all the academic and extra-academic lessons I learnt from each of you. I simply say *dank je wel*. I would also like to take this opportunity to thank all the other PhD candidates with whom I had the opportunity to interact. Each one's personal stories and challenges were thought-provoking.

In the Netherlands I met many people and most of them have contributed in one way or another to the completion of this thesis. While I cannot exhaustively name them all, I principally address my heartfelt thanks to Flory for long breaks in Kiswahili or in French that reminded me of home, to Patient Gumuliza and his family for their hospitality for the last and decisive two-month stay in Utrecht, and to Marjolein for her hospitality at her home in Nijmegen and for the teaching opportunity she gave me.

Geraldine Umugwaneza, the deputy-registrar at the East African Court of Justice, and Stephen Agaba, the Principal Legal Advisor at the East African Community, were very helpful during my research trips to Arusha. They provided first-hand information, recommended relevant documentation, and introduced me to the right people at the EAC Headquarters. Thanks a lot.

My family and friends paid probably the heaviest toll for my long absence. However, I know they are happy that thanks to their abnegation I have successfully taken up this challenge. I thank all of those who stood by my side all along this journey, but I am especially thankful to my mother for her unconditional support and for taking care of my son, Nelson. With these lines I extend my gratitude to Prisca for her constant support.

All others, men, women, both young and old, who directly or indirectly supported me but whose names are not mentioned here, I acknowledge that they are my unsung heroes. Maybe they would not have wished to be thanked, even anonymously. But anyway I say thank you.

List of acronyms and abbreviations

ACP	: African Caribbean and Pacific Group of States
AfDB	: African Development Bank
AGOA	: African Growth and Opportunity Act
AICD	: Africa Infrastructure Country Diagnostic
BIC	: Burundi Investment Code
BIT	: Bilateral Investment Treaty
CCIA	: COMESA Common Investment Area
CEPGL	: Great Lakes Economic Community
CET	: Common External Tariff
CIAA	: Common Investment Area Agreement
CIAP	: Common Investment Area Protocol
COMESA	: Common Market for Eastern and Southern Africa
CPI	: Corruption Perception Index
DRC	: Democratic Republic of Congo
EABC	: East African Business Council
EAC	: East African Community
EAC-CMP	: East African Community Common Market Protocol
EACCO	: East African Community Certificate of Origin
EAC-CST	: East African Community Single Customs Territory
EAC-CUP	: East African Community Customs Union Protocol
EAC-DS	: East African Community Development Strategy
EAC-FMP	: East African Community Free Movement of Persons
EAC-FMW	: East African Community Free Movement of Workers
EAC-IP	: East African Community Industrialization Policy

EACJ	: East African Court of Justice
EAC-RoE	: East African Community Right of Establishment
EAC-RoO	: East African Community Rules of Origin
EACSO	: East African Common Services Organization
EADB	: East African Development Bank
EAHC	: East African High Commission
EALA	: East African Legislative Assembly
EC	: European Communities
ECIM	: ECOWAS Common Investment Market
ECJ	: European Court of Justice
ECOWAS	: Economic Community of West African States
ECtHR	: European Court of Human Rights
EEC	: European Economic Community
EP	: Export Promotion
EPA	: Economic Partnership Agreement
EU	: European Union
FDI	: Foreign Direct Investment
FTA	: Free Trade Area
GATS	: General Agreement on Trade in Services
GDP	: Gross Domestic Product
HDI	: Human Development Index
IBRD	: International Bank of Reconstruction and Development
ICSID	: International Centre for the Settlement of Investment Disputes
ICT	: Information and Communication Technology
IFI	: International Financial Institution
IIAG	: Ibrahim Index for African Governance
IMF	: International Monetary Fund
IPA	: Investment Promotion Authority
IS	: Import Substitution
JIPS	: Joint Investment Promotion Strategy
KIPA	: Kenya Investment Promotion Act
LDC	: Least Developed Countries
MERCOSUR	: Southern Common Market
MFN	: Most Favored Nation
MIC	: Model Investment Code
NT	: National Treatment
NTB	: Non-Tariff Barrier
ODA	: Official Development Aid
OECD	: Organization for Economic Cooperation and Development
RDB	: Rwanda Development Board

RIC	: Rwanda Investment Code
RRA	: Rwanda Revenue Authority
SADC	: Southern African Development Community
SWOT	: Strength, Weakness, Opportunity and Threat
TFEU	: Treaty on the Functioning of the European Union
TIA	: Tanzania Investment Act
UIA	: Uganda Investment Authority
UIC	: Uganda Investment Code
UICIA	: Ugandan Citizenship and Immigration Act
UK	: United Kingdom
UN	: United Nations
UNDP	: United Nations Development Program
UNECA	: United Nations Economic Commission for Africa
URA	: Uganda Revenue Authority
US/USA	: United States of America
USD	: American Dollar
WGI	: Worldwide Governance Indicator
WTO	: World Trade Organization

Table of contents

Chapter I

General introduction

1.1. TELEOLOGICAL INTERCONNECTION BETWEEN REGIONAL INTEGRATION, FOREIGN DIRECT INVESTMENT AND GOOD GOVERNANCE

Three concepts particularly drew attention during the 20th Century debate on international development, namely regional integration, foreign direct investment (FDI) and good governance. Although, historically, each of these concepts appeared during relatively different periods of time, they all gained global momentum in the 1990s when each was suggested - at a specific time and in a given context – as a remedy for the chronic economic development deficiency of the third world countries, especially the Sub-Sahara African countries.[1] This implies that despite their original contextual and semantic differences, regional integration, FDI and good governance are teleologically linked to one another and, consequently, they are in many regards interdependent.

Indeed, the African economic development setbacks are usually caused by African countries' small and fragmented markets characterized by weak production structures, bad policies, poor infrastructure, a low level of social capital stock, a lack of political rights, and a lack of openness to trade.[2] This makes it very challenging for African economies to penetrate the global economy. Yet, a permanent sidelining of Africa from the global economy would mean further isolation and more poverty, which in the long run would simply end up by suffocating the entire continent. It is in this context that regional integration for African countries is considered to be 'a question of survival in the new global economy'.[3]

By definition, regional integration is basically "a process by which countries in a geographic region cooperate to either reduce or eliminate barriers to the free flow of products, people or capital. It can also be referred to as any type of arrangement in which countries agree to coordinate their trade, fiscal and monetary policies with the aim of increasing trade, improving competitiveness and maximizing welfare".[4]

---

[1] See for instance World Bank, *Governance and Development*, Washington DC, The World Bank Publication, 1992 (hereinafter World Bank 1992); United Nations Economic Commission for Africa (UNECA), *Economic Report on Africa 1999: The Challenges of Poverty Reduction and Sustainability*, Addis Ababa, 2000 (hereinafter UNECA 2000); World Bank, *Trade Blocs*, Washington DC, 2000.

[2] P. Coller and J. Gunning, 'Explaining African Economic Performance', *Journal of Economic Literature*, Vol. 37, 1999, pp. 64-111 cited by UNECA, *Assessing Regional Integration in Africa*, EAC Policy Research Report, 2004, p. 21 (hereinafter UNECA 2004).

[3] UNECA 2004, p. 22..

[4] K. Kimbugwe et al., *Economic Development Through Regional Trade: A Role for the New East African Community?*, Basingstoke, Palgrave Macmillan, 2012, p. 12.

Consequently, regional integration benefits participating countries by offering new trade opportunities, enlarging the market, and increasing competition within the regional integration area.[5] This creates a large-scale and competitive market that favours not only the expansion of domestic companies but also the attraction of foreign investment,[6] more importantly FDI. The combination of these two elements is crucial for the economic development of countries participating in a regional integration initiative. But for African countries, being able to attract FDI is not just beneficial in terms of economic development but is also very indispensable in their struggle to gain an advantageous foothold within the orbit of the global economy. It is no wonder that the attraction of FDI has been increasingly placed at the heart of regional integration initiatives between African countries. Generally speaking, "membership in a regional economic community is often associated with higher FDI flows", and these flows have a net positive impact on economic growth.[7] FDI generally impacts on economic growth thanks to its spill-over effects on wages and productivity in the host country in addition to the accumulation of capital and the generation of jobs. However, the impact of FDI inflow on economic growth in the host country is not straightforward. Some conditions need to be satisfied. Among those preconditions, observing the principle of good governance in terms of a conducive regulatory and institutional framework appears to have a paramount role to play.[8]

This brief overview highlights the interdependence between these three concepts. In other words, regional integration increases FDI inflow in the region while good governance is needed for this inflow to have a sound impact on the economic growth of the participating countries. The logical implication could be that a good combination of these three elements would be crucial for any successful regional integration.

---

[5] UNECA 2004, p. 10.

[6] There are two main kinds of foreign investment. On the one hand, there is the portfolio investment, a passive investment in securities which entails no active management or control of the issuing company, which is done solely for financial gain. The impact of foreign portfolio investment in the host country's economy, let alone the regional integration area, is very limited. On the other hand, FDI, whereby a business entity based in one country invests in another business entity located in another country, has a lasting impact on the economy. See for instance J.S. Ahlquist, 'Economic Policy, Institutions, and Capital Flows: Portfolio an Direct Investment Flows in Developing Countries', *International Studies Quarterly*, Vol. 50, 2006, pp. 681-704.

[7] UNECA 2004, p. 16.

[8] See for instance J.H. Dunning, 'Determinants of Foreign Direct Investment: Globalization-Induced Changes and the Role of FDI Policies', in B. Tungodden, N. Stern and I. Kolstad, *Toward Pro-Poor Policies: Aid, Institutions, and Globalization*, New York, World Bank and Oxford University Press, 2004, pp. 279-290; and J.L. Staats and G. Biglaiser, 'Foreign Direct Investment in Latin America: The Importance of Judicial Strength and Rule of Law', *International Studies Quarterly*, Vol. 56, 2012, pp. 193-202.

This is clearly one of the considerations which was taken into account by the Treaty creating the East African Community (EAC), a regional integration between five African countries, i.e. Burundi, Kenya, Rwanda, Tanzania and Uganda.[9] The EAC was created in 1999. This year did not just fall within the timeframe marking the peak period for the revitalization of regional integration efforts in the world, but it also coincided with the moment when both FDI and good governance were gaining momentum on the international development agenda. It is little wonder, then, that the Treaty of Arusha unequivocally professes an attachment to good governance principles while placing the attraction of investment at the heart of its regional development strategy.

1.2. THE EAST AFRICAN COMMUNITY: OLD WINE IN NEW BOTTLES?

1.2.1. Historical background

Unlike most regional integration initiatives that mushroomed in Africa in the 1990s, the EAC is not really new. It is probably among the earliest regional integration attempts that Africa has known in its history. In fact, the idea of having economic integration in the region goes back to 1897 when the work on the Kenya-Uganda Railway started being carried out.[10] The construction of this railway was initiated by the Imperial British East African Company (IBEAC) to enable the flow of business from Kilindini harbour in Mombasa to the shores of Lake Victoria in Kisumu.[11] Following the Berlin Conference in 1885, Germany was given the coast of Tanganyika (the current Tanzanian mainland) while Britain took control of the territories of Kenya and Uganda. However, the British already had important lands to administer in southern Africa. So they were somehow sceptical of having to spend more resources in administering the newly acquired territories. Therefore, they thought it better to entrust IBEAC with the task of administering the East coast part. [12] Apart from its main administrative role, connecting the shores of the

[9] The attraction of investment and the observation of good governance principles appear to be key factors in the EAC regional integration process. See for instance Paragraph 11 of the Preamble, and articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community (hereafter Treaty of Arusha) as amended on 14th December 2006 and 20th August 2007.

[10] Paragraph 2 of the Preamble to the Treaty of Arusha.

[11] The Nairobi Chronicle, *Kenya-Uganda Railway: A Short Story*, online at http://nairobichronicle.wordpress.com/2008/08/09/kenya-uganda-railway-a-short-history/ consulted on 1st August 2013. At that time, Kisumu was part of Uganda. See I.D. di Delupis, *The East African Community and Common Market*, London, Longman Group Limited, 1970, p. 19. See also A. Hazlewood, *Economic Integration: The East African Experience*, London, Heinemann, 1975, p. 26. [Hereinafter A. Hazlewood 1975]

[12] It was actually very difficult to discern the precise relationship between the British government and this company. J.S. Galbraith, 'Italy, the British East Africa Company, and the Benadir Coast, 1888-1893', *The Journal of Modern History*, Vol. 42, N° 4, December 1970, pp. 549-563

Indian Ocean to Lake Victoria was the principal task of IBEAC. However, the company faced not only local resistance but also clashes with other colonial powers that led to a civil war in 1892. This war literally bled the company's finances to the point where it could no longer carry out the construction of the railway. Following IBEAC's inability to successfully implement the work on the railway, the British government took over the construction of the railway between 1897 and 1901. At the same time, the British Crown fully regained the administration of the East coast territories. Upon the completion of the railway, it was managed by a Kenya-Uganda common administration.[13]

For reasons of economic efficiency, the British had recourse to common institutions or entities to administer some vital aspects relating to the Kenyan and Ugandan territories.[14] This was a consequence of a common belief in Britain that their dependencies in East Africa, taken individually, were not economically viable.[15] Therefore, organizing those dependencies in one bloc was considered to be the most efficient way of sustainably administering them. The establishment of the Customs Collection Centre (CCC) in 1900, the East African Currency Board (EACB) in 1905, and the Postal Union (PU) in 1919 are the best examples of the British community-oriented administration of the Kenyan and Ugandan territories.

The common management of such important aspects of the everyday life of the British Eastern African territories for the purpose of economic sustainability may be considered as the earliest origin of regional integration in East Africa.

1.2.1.1. A failed attempt at deeper integration

It follows from the background provided above that the reasons that drove the early regional integration attempt in East Africa were more economic, i.e. facilitating the movement of goods from the Indian Ocean to the shores of Lake Victoria through the construction of the Kenya-Uganda railway, rather than political. This initiative slowly moved towards a customs union that included Tanganyika. In fact, Kenya and Uganda were British protectorates without any international legal personality. Their common control by Britain facilitated the establishment of a customs union between these two territories in 1919.[16] In the meantime, Tanganyika

[13] I.D. di Depupis, *op. cit.*, p. 19.
[14] The establishment of the Customs Collection Centre (1900), the East African Currency Board (1905), the Postal Union (1919) are the best examples of the British community-oriented policy in the administration of the Kenyan and Ugandan territories.
[15] I.D. di Delupis, *op. cit.*, p. 25.
[16] Commentators do not agree on the exact year in which this customs union started. For instance, di Delupis and Hazlewood agree that the customs union started in 1917 while Kimbugwe et al. talk

was under German control until the end of World War I. It was only following the Treaty of Versailles in 1919 that Tanganyika was placed under British mandate before it became a territory under British Trusteeship with the advent of the United Nations (UN) in 1945. Legally speaking, Britain had limited authority over Tanganyika compared to what it had over Kenya and Uganda, but it was granted the authority to involve Tanganyika in a "customs, fiscal and administrative union of federation with adjacent territories".[17] Accordingly, Tanganyika joined the customs union in 1927. The customs union established a free inter-territorial movement of locally produced goods. Within this customs union, imports had to pay re-export duties to move from one territory to another. Later on, this barrier was finally removed with the introduction of the 'transfer form' which allowed for the traceability of an imported product in the customs union's territory so that the customs duties incurred at the point of entry could be transferred to the territory where the goods were actually consumed.[18] The customs union became fully-fledged in 1940 with the establishment of the East African Customs and Excise Department, which implemented, among other things, a Common External Tariff (CET).[19]

While business aspects of the three territories were integrated and managed jointly, the administration of the *polis* remained separated. But Britain started thinking that things would be better if these territories were federated. In 1924 a parliamentary commission was sent to East Africa to explore the possibilities for intensifying cooperation between the British East African dependencies.[20] The commission's report acknowledged that the idea of a federation was less supported in the region. So an alternative solution needed to be found. The commission suggested that frequent conferences between the Governors of the territories would provide room for a certain level of policy coordination.[21] Besides the Governors of Kenya, Uganda and Tanganyika, those of Northern Rhodesia (the current Zambia) and Nyasaland (the current Malawi) were also invited to the conference. It was agreed that the conference should only deal with "matters of common interest to all the

about 1919. See I.D. di Delupis, *op. cit.*, p. 20; A. Hazlewood 1975, p. 21; and K. Kimbugwe et al., *op. cit.*, 2012, p. 61). The same applies to the year when Tanganyika joined the customs union. For Ingrid di Delupis Tanganyika joined in 1923 whereas Kimbugwe et al. are of the view that Tanganyika joined in 1927. The Treaty of Arusha informs us that the customs union was established in 1919 (the Treaty of Arusha, Preamble paragraph 2). Although the Treaty remains silent as to the date when Tanganyika joined the customs union, its provision on the start of this customs union coincides with Kimbugwe's suggestion.

[17] Article 10 of the Mandate Agreement cited by I.D. di Delupis, *op. cit.*, p. 25.

[18] K. Kimbungwe et al., *op. cit.*, p. 62.

[19] *Ibidem*

[20] I.D. di Delupis, *op. cit.*, p. 20.

[21] I.D. di Delupis, *op. cit.*, p. 20.

territories".[22] The Governors' conference was a *de facto* creature that proved ineffective due to its lack of any binding authority. In the end, the Governors of Northern Rhodesia and Nyasaland pulled out of the Governors' conference which ended up being a forum for cooperation on common matters between Kenya, Uganda and Tanganyika.[23]

In order to strengthen the ties between the three remaining territories, Britain created the East African High Commission (EAHC) with the 1947 Order in Council. The EAHC had two organs: the Commission, the executive organ, which was composed of the Governors of Kenya, Uganda and Tanganyika; and the Central Legislative Assembly, the legislative organ, which was composed of twenty members. The EAHC was theoretically a real supranational body as it was intended to be "an East African Authority, and not simply a conference of governors representing individual territorial interests".[24] But, from a legal point of view, the EAHC could not be considered to be a real supranational body because none of its members was an independent state at that time. Nevertheless, formally speaking, the EAHC may be seen as the earliest attempt at creating a supranational body in East Africa. But this attempt could not work properly as regional matters were usually dealt with by its members from a territorial standpoint.[25]

However, unlike in some other supranational organizations at that time, the EAHC laws had direct effect and were directly applicable in the member territories.[26] The direct application of EAHC laws and instructions was among the reasons for a soft management of the thirty-one departments and services it controlled. The main activities of the Commission included *inter alia* the administration of common services, the collection of taxes and customs duties, communications, social, research, scientific, and economic services, as well as defence.[27]

1.2.1.2. Impact of the acquired national sovereignty on integration efforts

As with the Governors' conference, Britain maintained a significant influence on the EAHC despite its statutory independence. As much as the British government

[22] East African Commission Report, August to December 1924, London, H.M. Stationery Office (Cmd. 2387) quoted by I. D. di Delupis, *op. cit.*, p. 21.
[23] It should be noted that well before Northern Rhodesia and Nyasaland dropped out, it had become obvious to the British that these territories had specific features that made them different from the three others. That could be the reason why Britain did not dare to expend efforts in constraining them to stay under the same roof as the Kenya-Uganda-Tanganyika trio.
[24] A. Hazlewood 1975, p. 32.
[25] *Ibidem*
[26] I.D. di Delupis, *op. cit.*, pp. 31-40.
[27] *Ibidem*

funded the EAHC, the former had an overseeing authority over the activities of the latter. But more importantly, Britain played a cohesive role that kept the three territories working together. However, while the running of this rudimentary regional integration benefited the development of the territories and their inhabitants, this was not the primary objective of the British. For Britain, the community was just a strategy to transform small East African territories into a bigger unit that could be economically sustainable and which could serve British interests. The regional integration assisted in the establishment and free movement of British citizens and companies, which strongly boosted the wealth of British businesses within EAHC member territories.[28] But as the wind of independence started blowing in Africa, Britain noticed that its East African territories had become less and less enthusiastic when it came to the prospect of creating a political federation. This was a sign for the British that EAHC member territories would likely disunite upon their independence. Such a situation would result in the collapse of the EAHC, which would dramatically jeopardize British interests in the region. In anticipation of this scenario, a conference was called in London in 1961. Britain made sure that a provision was inserted in that conference's final declaration guaranteeing that all EAHC common services would survive regardless of the constitutional changes that would occur in the region. To ensure that this provision would be observed, the East African Common Services Organization (EACSO) was created to provide an institutional framework.

It came as no surprise that the EACSO was not really different from the EAHC. It inherited everything from the former EAHC except that the EAHC's commission was replaced by the East African Authority.[29] The Central Legislative Assembly survived with a slight modification of its composition to reflect the new era. Most of the laws and acts enacted during the EAHC period remained unchanged or were only slightly modified. One thing that needs a special note is that the East African Court of Appeal became an organ of the EACSO with a new procedure. This court became the court of last instance for the three countries, which practically meant that decisions from the highest national courts could be appealed before the East African Court of Appeal.[30]

[28] F.I. Nixson, *Economic Integration and Industrial Location: An East African Case Study*, London, Longman Group Limited, 1973, p. 25.

[29] The difference between the EAHC and the EASCO also related to membership: the Governors of the former territories were replaced by the Presidents of newly independent Republic of Kenya, Tanganyika and Uganda.

[30] For instance, in 1967 59 civil cases and 207 criminal cases were appealed before this court. It should be noted that the court's jurisdiction was extended to other territories, including Somaliland,

Tanganyika's special relationship with Britain precipitated its independence. Tanganyika therefore became the first independent State among the three territories in 1961.[31] As the only independent State in the EACSO, Tanganyika vigorously advocated the independence of the other two sister territories especially because Julius Nyerere – the then President of Tanganyika – believed that it would be easier for the three African states to form an East African federation after their independence.[32]

Unfortunately, the sovereignty that Nyerere thought could help him and his fellow Presidents from Kenya and Uganda to decide independently about such a political federation ultimately became an obstacle. Indeed Uganda drastically refused to give up any single part of its hard-earned sovereignty, especially in domains like nationality and foreign affairs.[33]

1.2.1.3. Beginning of the malaise and the 1964 Kampala Agreement

The negotiations on the East African federation took place against the background of discontent expressed by Tanganyika and Uganda about Kenya's dominance of the customs union's economy. Indeed Kenya was being favoured by the British colonial authority with the establishment of development infrastructure, industry and the EACSO headquarters located in Nairobi.[34] Therefore Kenya logically had an advanced economy compared to the economies of its fellow partners. Tanzania and Uganda actually started to consider that the higher tariffs applied by the customs union amounted to a kind of extra subsidy that they were granting to Kenyan growth, to the detriment of their own economies.[35] For Tanzania and Uganda, it appeared that the community would be useless if no adequate compensation scheme was put in place to withstand the concentration of all advantages in Kenya.

St Helena, the Seychelles, and Aden pursuant to an agreement between the East African Authority and the United Kingdom. I.D. di Delupis, *op. cit.*, pp. 44, 47-48.

[31] It should be stated that while Kenya and Uganda were colonies of the United Kingdom, Tanganyika was a territory under a Trusteeship regime regulated by the United Nations Charter.

[32] It is said that Julius Nyerere even offered to postpone Tanganyika's independence if this could allow the three countries to move together towards a political federation. A.T. Mugomba, 'Regional Organizations and African Underdevelopment: The Collapse of the East African Community', *The Journal of Modern African Studies*, Vol. 16, N° 2, June 1978, p. 264; I.D. di Delupis, *op. cit.*, p. 48.

[33] I. D. di Delupis, *op. cit.*, p. 49. To highlight the importance accorded by Uganda to its international sovereignty, it would be interesting to note that after its independence Uganda was officially called the "Sovereign State of Uganda". See paragraph 1 of the Preamble to the Treaty for East African Co-operation signed in Kampala on 6 June 1967 (hereinafter the Treaty of Kampala).

[34] A. Hazlewood 1975, p. 38. See also F.I. Nixson, *op. cit.*, p. 52.

[35] A.T. Mugomba, *op. cit.*, p. 265.

In 1964, a conference to this end was convened in Kampala.[36] In substance, the conference was tasked to find solutions in order to contain the trade imbalance between the three countries. The conference came up with an agreement known as the Kampala Agreement that identified the following five ways to remedy the situation:

(a) Immediate action with certain interterritorially connected firms to increase production in a deficit country and thereby reduce imports from a surplus country.
(b) Agreement as to the immediate allocation of certain major industries.
(c) The application of a system of quotas whereby exports from surplus countries would be progressively reduced, and local production increased in the deficit countries according to the building up of the productive capacity of the deficit country.
(d) Increased sales from a country in deficit to a country in surplus.
(e) Early agreement within the East African Common Market on a system of inducements and allocations of industry in order to secure the equitable distribution of industrial development as between the three countries[37].

Basically, the suggested measures may be grouped into two main categories: the redistribution of industries and the imposition of export quotas on products. The redistribution of industries was agreed to be done either by establishing branches of major Kenya-based industries in Uganda and Tanzania or simply by allocating major new industries to the three countries on an equal basis. The industry redistribution strategy was accompanied by the urge to increase production in a deficit country.

This measure was made immediately applicable to four industries already operating in at least two countries, one being a surplus country and another a deficit country. These industries were the East African Tobacco Co. Ltd, the Bata Shoe Company Ltd, East African Breweries Ltd, and British Standard Portland Cement (Bamburi). It was anticipated, for instance, that if the Tanzanian branch of a company which was also operating in Kenya, such as the Bata Shoe Company Ltd, would increase

[36] This conference took place on 29 April 1964 pursuant to the instruction given by the Heads of Government of Kenya, Tanganyika and Zanzibar, and Uganda during their meeting held in Nairobi two weeks earlier. It was constituted in the form of an Emergency Committee made up of the Ministers for Finance and the Ministers for Commerce and Industry of the three countries in order to inquire into the measures that would be necessary to bring about a trade balance between these countries. The resolution of that conference is commonly known as the Kampala Agreement. See 'Kenya, Tanganyika, and Uganda: Kampala agreement on redressing trade imbalance' in *International Legal Materials*, Vol. 3, No. 6, November 1964, p. 1106.
[37] Paragraph 1 of the Kampala Agreement

its production in Tanzania, then the Tanzanian market would no longer need to import Bata footwear from Kenya.

In the same vein, another measure was provided to increase sales from a country in deficit in inter-territorial trade to a country in surplus.[38] This meant that not only the Tanzanian branch of Bata Shoe Company Ltd had to increase its production, but also the market for its products in other countries within the community had to be increased. It was agreed in Kampala that Tanzania was in deficit with regard to Kenya and Uganda, and that Uganda was in deficit with regard to Kenya, which conversely implied that Kenya was in surplus with regard to both.[39] In practical terms, measures to increase production and sales only favoured Tanzania and Uganda.

As far as quotas were concerned, based on the same deficit-surplus divide, a specific percentage was provided for maximum exports from one country to another.[40] As such, it was a twofold quota system.[41] There was a quota, i.e. imports allowed from the surplus country in a particular product line, that would apply where there was existing productive capacity in the deficit country. There was also a suspended quota that would be granted where a deficit country wished to develop productive capacity. It is amazing to note that a suspended quota could be imposed even before a projected firm in the deficit country could start its production.[42]

As the Kampala Agreement was meant to stop Kenya 'milking' its partners, it was obvious that most of the measures were intended to work against Kenyan interests. While Kenya endorsed all the measures introduced by the Kampala Agreement, it imposed a few conditions, however.[43] Roughly, Kenya's main condition was to obtain a commitment from all parties to continue the 'common market'.

[38] A. Hazlewood 1975, p. 57; Kituo cya Katiba, 'Towards an East African Federation: Debate, Rationale and Declaration of June 1963', online at http://www.kituochakatiba.org/index2.php?option=com_docman&task= doc_view&gid=314&Itemid=36 (last accessed 21 August 2013).
[39] Paragraph 5 (Increased purchases from deficit countries) of the Kampala Agreement.
[40] K. Kimbugwe et al., *op. cit.*, pp. 67-68.
[41] Paragraph 4 (The quota system) of the Kampala Agreement.
[42] Kampala Agreement, Paragraph 8 of Appendix 1 (Operation of the quota system).
[43] See Appendix 3 (Statement by the Kenya Delegation) of the Kampala Agreement. In the agreement those conditions are rather referred to as "assumptions". Tanganyika was opposed to the inclusion of the assumptions made by Kenya for two reasons. Firstly, some of the assumptions were allegedly outside the Emergency Committee's terms of reference. Secondly, those assumptions were not discussed during the conference. See paragraph 14 of the Kampala Agreement. So the Kenyan conditions were included as an appendix to the Agreement.

But, in particular, Kenya insisted on the continuation of the common single currency, which had been in circulation since 1920.[44]

Increasing production in deficit countries in order to contain their dependence on imports from Kenya was immediately enforced.[45] At the same time, Tanzania started to impose quotas on Kenyan products even before the Quota Committee,[46] which had been established by the Kampala Agreement, had finished its deliberations. It was reported that the quotas unilaterally imposed by Tanzania went far beyond what the letter of the Kampala Agreement had provided for.[47] Besides, it was uncertain at that specific time whether Tanzanian companies would be able to satisfy the country's market needs after the drastic restriction of imports from Kenya. This situation created tension in the community especially when Kenya threatened to diminish its contribution to the costs of the common services if Uganda and Tanzania maintained their restrictions on Kenyan products in their respective markets.[48] They were still embroiled in this argument when Tanzania declared its withdrawal from the common currency and the creation of its own currency in late 1965.

Although Tanzania's decision to create its own currency was not the first of its kind within the community,[49] it was regarded as a serious threat to the survival of the common services. That decision sealed the death of the East African Currency Board established in 1905. Each country became free to introduce its own currency under the supervision of its national central bank. Of course, the introduction

[44] Appendix 3 (Statement by the Kenya Delegation) of the Kampala Agreement: The Kenya delegation, in agreeing with the recommendations of this Report, had assumed that: "(c) *in particular* there will continue to be a common single currency" (emphasis added).
[45] Kituo cya Katiba, *op. cit.*
[46] A committee composed of the ministers for commerce and industry of the Partner States was supposed to administer the quota system. See paragraph 1 Appendix 1 (Operation of the quota system) of the Kampala Agreement.
[47] A. Hazlewood 1975, p. 66.
[48] Kenya's contribution to the cost of common services amounted 50 percent. A. Hazlewood 1975, p. 66.
[49] It should be noted for instance that in 1961 and 1963, respectively, Tanganyika withdrew from the East African Navy and Uganda from the East African Tourist Travel Association. Each claimed that the body concerned did not sufficiently serve their national interests. As for the withdrawal from the currency union, Tanzania alleged that a single central banking system was impossible due to the mere fact of the failure to establish the East African Federation. In reaction, Uganda's Prime Minister said that "East African Cooperation is not dependent on the common currency and Tanzania's decision is not going to affect the common services". See Kenya Weekly News, (Nairobi), 25 June 1965 quoted by A. Hazlewood 1975, p. 65. The declaration by Uganda's Prime Minister was not surprising as Uganda constantly displayed reluctance when it came to the creation of the East African Federation on the ground of the preservation of its national sovereignty. So it was clear that Uganda was ready to support any idea that could reinforce partner countries' individual sovereignty.

of three currencies – albeit freely convertible – within the so-called common market was an added challenge to free trade.

Despite the fact that Uganda readily accepted Tanzania's decision, for Kenya it represented the nullification of the Kampala Agreement which literally implied the dismantlement of the customs union. On the one hand, this agreement was already being abused by unilateral and excessive restrictions by Tanzania on Kenyan products. On the other hand, the currency union, one of the most important Kenyan conditions for the implementation of the Kampala Agreement, was being violated. Therefore, it was the case that either each country had to start applying its own tariffs for the benefit of its individual national economic development or a new deal had to be struck. But, as previous reports and studies had warned that none of the three countries (especially Tanzania and Uganda) would be better off if they pulled out of the community,[50] the three countries found themselves being faced with a dilemma between their unwillingness to cooperate within the community and a fear of the predicted catastrophic situation that would follow their total disunion. Being faced with a manifest kind of Kant's 'unsocial sociability', the most viable option for the Partner States was to negotiate a new deal that would redefine the interaction between them regarding common services.

1.2.1.4. Industrial imbalances in the manufacturing sector at the centre of the Treaty of Kampala

At the end of August 1965, at a meeting held in Mombasa following an invitation sent by Kenya, the Heads of State of Kenya, Tanzania and Uganda agreed to set up a commission that would extensively look at all previous arrangements in order to come up with the most sustainable compromise for the survival of the community. The commission headed by the former Danish Trade and Finance Minister, Professor Kjeld Philip, submitted its report in May 1966.[51] This report played a fundamental role in the enactment of the Treaty of Kampala that created the defunct

[50] For instance, Colonial Office, *East Africa: Report of the Economic and Fiscal Commission*, CMND 1279 and D. Ghai, 'Territorial Distribution of Benefits and Costs of the East African Common Market', *East African Economic Review*, June 1964 cited by A. Hazlewood 1975, p. 69.

[51] This commission was composed of three ministers from each partner state. The Chairman played the role of facilitating the negotiations between the three ministers with the support of experts from the United Nations Economic Commission for Africa.

EAC in 1967.[52] This treaty literally revisited all the provisions of the Kampala Agreement, especially the quota system and the relocation of industries.[53]

However, formally, the structure of the East African Community was no different from that of the EACSO and most of the latter's organs survived or were only slightly revamped. But in terms of innovation, the following is worth noting: the introduction of transfer taxes,[54] the establishment of the East African Development Bank,[55] the Common Market Council[56] and the Common Market Tribunal,[57] and the institution of East African Ministers.[58]

Transfer taxes and the East African Development Bank were established as measures to promote balanced industrial development more extensively compared to the provisions of the Kampala Agreement. Transfer taxes were meant to contain trade imbalances by replacing the quota system on manufactured products that had been introduced by the Kampala Agreement. However, the transfer tax system was a temporary remedy as it was expected to disappear when the balance of trade between these countries would be levelled.[59]

In practice, a less developed country within the community was allowed to protect its domestic market by imposing a tariff on imported manufactured products from a more developed country. Transfer taxes were only applicable to the manufactured products that the imposing country was actually able to produce in a considerable quantity within a period of three months.[60] The rates could not exceed 50 percent of the external tariff charged on that specific product.[61] Moreover, as transfer tax was introduced to level the trade imbalance between EAC countries, the imposing country was supposed to stop charging this tax as soon as the deficit

[52] Article 91 of the same Treaty provided that it would come into force on 1st December 1967.
[53] However, Hazlewood conceded that although the Kampala Agreement was blatantly ignored by the Treaty of Kampala, the inter-territorial planning of industrial locations did not lose its relevance regarding the situation in East Africa (see A. Hazlewood 1975, p. 61).
[54] Article 20 Treaty of Kampala
[55] Article 21 Treaty of Kampala
[56] Article 30 Treaty of Kampala
[57] Article 32 Treaty of Kampala
[58] Article 49 Treaty of Kampala
[59] Individual tax could be imposed for eight years at most, and the whole Transfer Tax System was supposed to end after fifteen years. Article 20(14) and (15) Treaty of Kampala. See A. Hazlewood 1975, p. 73. An analyst predicted, for instance, that the Tanzania-Uganda and Kenya-Uganda deficits would be lessened by 80% in less than a decade. In that hypothesis, the transfer tax system would only remain between Tanzania and Kenya. R.H. Green, 'The Treaty for East African Co-Operation: A Summary and Interpretation', *The Journal of Modern African Studies*, Vol. 5, n° 3, Nov. 1967, p. 417.
[60] Article 20(6) and (7) of the Treaty of Kampala.
[61] See article 20(8) of the Treaty of Kampala. See also A. Hazlewood 1975, p. 73.

between the exporting and the importing country was covered. Transfer tax was expected to foster domestic production in order to increase the competitiveness of companies located in deficit countries within the whole 'common market'.

However, the other side of the coin was that Uganda and Tanzania claimed to have fewer industries than Kenya. Therefore, the transfer tax alone appeared not to solve the issue totally. The response to this question was provided by the Treaty of Kampala through the establishment of the East African Development Bank (EADB) with its main purpose being to promote industrial development[62], especially in Uganda and Tanzania.[63] In order to attain this objective, the EADB was to work closely with other public and private partners concerned with industrial development in the community. With ten million pounds sterling in equity capital, to which loans and some other earned surplus could be added, it was assumed that in fifteen years this bank would have invested between seventy-five and one hundred million pounds sterling in regional industrial development projects.[64] According to the bank's charter, investments should have been distributed among the three countries as follows: Uganda and Tanzania would receive 38.75 percent of the funds each, while 22.5 percent would be reserved for Kenya.[65] In reality this bank was designed to operate rather like a "means of channelling money into the less-developed of the countries".[66]

Still in line with its 'equalizing' spirit, the Treaty of Kampala introduced real decentralization in the administration of common services. This decentralization materialized with the relocation of the headquarters of some common services from Nairobi (Kenya) to Tanzania and Uganda. Most importantly and symbolically the headquarters of the organization itself was moved from Nairobi to Arusha (Tanzania), which can be seen as real evidence of Kenya's commitment to the community's revival.[67]

---

[62] Article 1(a) of Annex VI (Charter of the East African Development Bank) of the Kampala Treaty [hereinafter Annex VI Treaty of Kampala].
[63] Article 1(b) Annex VI Treaty of Kampala. This article stipulated the priority of 'relatively less industrially developed Partner States'.
[64] R.H. Green, *op. cit.*, p. 418.
[65] Article 13 of Annex VI Treaty of Kampala.
[66] A. Hazlewood 1975, p. 79.
[67] Apart from the Headquarters of the EAC which moved from Nairobi to Arusha, Tanzania also hosted the relocation of the East African Harbours Corporation in Dar-es-salaam while the headquarters of the East African Development Bank and that of the East African Post and Telecommunications Corporation were established in Kampala (Uganda). Due to the high costs that would be associated with such a transfer, the headquarters of the East African Airways Corporation and Railways Services remained in Nairobi (Kenya). Article 87(1) Treaty of Kampala.

Although the term "common market" was already used under the EACSO and previous entities, the Treaty of Kampala was the first to put in place statutory machinery aiming specifically at the promotion and the protection of the 'common market'. This was the Common Market Council and the Common Market Tribunal.[68] The former was entrusted with the function of resolving issues that could hinder the implementation of the treaty's provisions relating to the common market.[69] It had the power to make recommendations, unless it had to deal with a case involving a breach of the Treaty. In such a case, the Council would issue a "binding directive" against the Partner State that had breached the Treaty.[70] When the Common Market Council was unable to successfully deal with a case, it could be referred to the Common Market Tribunal as long as the issue was considered to be a breach of the Treaty.[71] However, there could be no confusion between the Common Market Tribunal and the Court of Appeal for East Africa which succeeded the former Court of Appeal for Eastern Africa.[72]

Another innovation brought about by the Treaty of Kampala was the institution of East African Ministers, who were appointed by the Partner States.[73] Each Partner State was entitled to nominate one person qualified to vote pursuant to its national law as the East African Minister. The East African Ministers' function was incompatible with any other high responsibilities in the government of that Partner State,[74] even though these ministers had to be granted ministerial status so that they could attend and speak at meetings of their respective country's cabinet.[75] The East African Ministers were so permanently attached to the East African Commu-

[68] See the title of part III of the Treaty of Kampala "Principal Common Market Machinery". It should be noted that despite the declared intention of the contracting parties to the Treaty of Kampala to establish, among themselves, an East African Common Market, they did not reach this goal as at the collapse of the former EAC even the free movement of goods was not yet fully fledged.
[69] Article 30 Treaty of Kampala
[70] Article 30(d)(i) Treaty of Kampala.
[71] Article 32(1) of the Treaty of 1967 cited by I.D. di Depulis, *op. cit.*, p. 64.
[72] Article 80 of the Treaty of Kampala maintained the Court of Appel for East Africa as one of the institutions of the EAC but this court did not have jurisdiction concerning common market issues. It rather remained as an appellate court for decisions rendered by the national courts of the Partner States. Indeed article 81 of the Treaty of Kampala reads: "The Court of Appeal for East Africa shall have jurisdiction to hear and determine such appeals from the courts of each Partner State as may be provided for by any law in force in that Partner State and shall have such powers in connection with appeals as may be so provided".
[73] See article 49(1) Treaty of Kampala
[74] Article 49(3) Treaty of Kampala
[75] Article 51(6) Treaty of Kampala. One of the reasons why it was decided that it was incompatible for East African Ministers to hold any other governmental responsibilities in their home country was to give them a free rein to only think and act on behalf of the community. Decisions were supposed to be taken by unanimity. In the end, this strategy did not work as expected. The East African Ministers turned out to function exactly like the previous Ministerial "Triumvirate" under the EACSO.

nity that in the case of any absence the nominating country had to appoint a Minister *ad hoc* or an "Acting East African Minister".[76] Each minister had a specific portfolio: common market and economic affairs, communication and research, and finance and administration. Despite this distribution of responsibilities, all the three East African Ministers had to attend the meetings of all councils.[77]

1.2.1.5. Politics and foreign policy matter

With all the above-mentioned innovations, it is clear that the EAC Partner States framed the Treaty of Kampala with the firm resolution to tackle industrial imbalances for good. The entry into force of this Treaty and its measures created a kind of serenity in the EAC. This relative stability was maintained until the coming to power of Idi Amin Dada in Uganda who overthrew Milton Obote, the signatory of the Treaty. Milton Obote was also reputed to have a good relationship with the two other Heads of State, Jomo Kenyatta of Kenya and Julius Nyerere of Tanzania. The advent of Idi Amin was not appreciated, especially in Tanzania whose president refused to recognize Idi Amin's regime.[78] A few months after taking power, Amin started to reclaim lands that Britain had ceded to Kenya.[79] This also affected Uganda's relationship with Kenya.[80]

Amin's coming to power actually introduced a political variable in the existing and still to be resolved economic equation in the EAC.[81] Unfortunately, this happened during a critical period when the region was experiencing an important mutation in foreign policy. Indeed a few weeks before the signing of the Treaty of Kampala, Julius Nyerere had published the Arusha Declaration which contained and explained his socialism ideology. In the middle of the cold war, Tanzania's socialism had put it closer to the Communist bloc despite its claim of pursuing a non-

[76] Article 49(4) and (5) Treaty of Kampala

[77] Five councils were established: the Common Market Council, the Communication Council, the Economic Consultative and Planning Council, the Finance Council, and the Research and Social Council. Apart from the Finance Council where only national finance ministers could sit together with the East African Ministers, membership of the other councils was open to any other delegated national minister (A. Hazlewood 1975, p. 85; I.D. di Depulis, *op. cit.*, pp. 60-63).

[78] A.T. Mugomba, *op. cit.*, p. 268.

[79] S.A. Gitelson, 'Major Shifts in Recent Ugandan Foreign Policy' in *African Affairs*, Vol. 76, N° 304, July 1977, p. 359; A.T. Mugomba, *op. cit.*, p. 369.

[80] The relationship between Uganda and Kenya worsened after the attack on Entebbe airport by Israel to free Israeli hostages held by Palestinians as Amin accused Kenya of having collaborated with Israel in providing Israeli planes with refuelling facilities. S.A. Gitelson, *op. cit.*, p. 269.

[81] A. Hazlewood, 'The End of the East African Community: What Are Lessons for Regional Integration Shemes', *Journal of Common Market Studies*, Vol. XVIII, N° 1, September 1979, p. 52.[Hereinafter A. Hazlewood 1979].

alignment policy in international relations.[82] Kenya, on the other hand, with its purely capitalist system was closer to Britain and the United States, whereas Uganda did not have a clear foreign policy under Idi Amin.[83] It appears that there was a serious lack of a common foreign policy and ideology in the EAC.[84]

To this foreign policy discord, one should add the still existing feeling in Tanzania that measures introduced by the Treaty of Kampala to 'equalize' Partner States' economies were failing to produce the desired tangible results.[85] For Tanzanian officials, development imbalances between the EAC Partner States were a clear consequence of the capitalism that the colonialists had introduced in the region and that Kenya was still applying. According to Nsekela, the head of the Tanzanian National Bank of Commerce in the early 1970s, capitalism attracted growth in some areas which developed quickly by impoverishing relatively disadvantaged areas much more. He actually asserted that "Meaningful common market and meaningful federations can only be constructed on the basis of an ideology which is in large measure common to all participant states. Where the ideology is not shared a federation is unlikely to ensue and if it did there would undoubtedly be a buildup pressure which threatens its continued existence".[86]

The political tension between the three countries meant that there could be no meeting of the East African Authority, made up of the three Presidents, which was the highest organ of the East African Community.[87] Observers agreed that the lack of meetings at the highest level of the community had already sealed the fate of the EAC in 1975 although none of the countries wanted to take the responsibility to expressly repeal the Treaty of Kampala.[88] Indeed, in 1975 severe trade restrictions and the *de facto* nationalization of common services had reached a point of no return. In reality, the community continued to exist only on paper since the leaders no longer possessed any *animus societatis*.[89]

In the end, the sheer will that prevailed upon the revamping of the community in 1967 was not strong enough to resist divergent political ideologies against a back-

[82] S.A. Gitelson, *op. cit.*, p. 268.
[83] A.T. Mugomba, *op. cit.*, p. 269; Susan Aurelia Gitelson, *op. cit.*, pp. 359-380.
[84] A. Hazlewood 1979, p. 52.
[85] For this reason, it is worth mentioning that the Transfer Tax System was abandoned in 1973.
[86] A.T. Mugomba, *op. cit.*, p. 267.
[87] A. Hazlewood 1975, p. 175.
[88] A.T. Mugomba, *op. cit.*, p. 268.
[89] For instance, Tanzania had already closed its border with Kenya, the latter had started its own national airline, while Uganda had practically ceased to participate in Community discussions a few months after Amin seized power. A. Hazlewood 1979, pp. 40 and 52.

ground of disillusion concerning regional integration which had been portrayed as the heavenly goose that laid the golden egg.[90]

1.2.1.6. Collapse of the defunct EAC: An amicable divorce for an unhappy marriage

There is no exact date for the official collapse of the former EAC. However, the failure of the Partner States to approve the Community's 1977-1978 budget sometime in mid-1977 is the most probable last formal breakdown of the EAC as a whole.[91] One might see the decentralization of common services brought about by the Treaty of Kampala as one of the elements that facilitated the disintegration of the defunct EAC. Although the idea of decentralization was *per se* a good one, its implementation could be seen as nothing less than the sharing of matrimonial assets between divorced spouses. Consequently, the distribution of industries and the relocation of corporations' headquarters contributed a great deal to the loosening of the already slack economic interdependence between the Partner States. This decentralization nurtured a kind of national self-sufficiency sentiment in the Partner States that progressively eroded the desire to remain in the community.[92] The decentralization somehow prepared the Partner States for taking over, under their national flags, common services operating on their respective territories. From 1977 onwards the EAC completely ceased to exist and each of the three countries started organizing its own affairs independently. In a sense, an amicable divorce proved to be the appropriate remedy to that unhappy marriage of convenience which was characterized by "constant and pointless bickering" between the Partner States.[93]

However, just as in the case of a divorce from a marriage with children where the relationship is never totally ended, the collapse of the EAC did not totally cut the umbilical cord between the former Partner States. In May 1984, the East African

[90] A. Hazlewood 1979, p. 54.
[91] A. Hazlewood 1979, p. 40.
[92] Nevertheless, this was just a side-effect that the 1967 Treaty drafters could not foresee in as much as these measures were rather thought to be the best way of addressing Tanzania's and Uganda's complaint about Kenyan economic supremacy. Besides, these measures should not be blamed as being the sole cause of the EAC collapse. Commentators do agree that the disintegration of the EAC was rather a consequence of a set of issues "each of which by itself could have been survived, but which together were too much for the weakened body to bear". A. Hazlewood 1979, p. 55.
[93] In 1975, well before the actual collapse of the EAC, an observer from Nairobi compared the EAC economic integration to an unhappy marriage: "We are wedded in an unhappy marriage of convenience. An amicable divorce may be the only way of ending this constant and pointless bickering. Like the parties to a broken marriage, we may find that relieved of the pressures of having to live under the same roof we may learn to cultivate a healthier and more respectful attitude towards one another" in *Weekly Review* (Nairobi) cited by A.T. Mugomba, *op. cit.*, p. 270.

Community Mediation Agreement was signed in Arusha (Tanzania) for the division of the assets and liabilities of the former EAC. Article 14 of this agreement not only provided for the continuation of the operations of some EAC institutions and services,[94] but it also left a window open for future cooperation.[95]

1.2.2. Problem contextualization: Is the rebirth of EAC a triumph of hope over experience?

Almost a decade later, after the emergence of new leadership in the three countries in question the idea of "co-operation" resurfaced in East Africa. On 30 November 1993, pursuant to article 14(02) of the East African Community Mediation Agreement,[96] Presidents Daniel Arap Moi of Kenya, Ali Hassan Mwinyi of Tanzania, and Yoweri Kaguta Museveni of Uganda signed the agreement creating a Permanent Tripartite Commission for Co-operation "responsible for the co-ordination of economic, social, cultural, security and political issues"[97] between these countries. A year later the Tripartite Commission was endowed with a secretariat that supervised, among other things, the elaboration of the 1997-2000 East African Cooperation Development Strategy and carried out a number of activities aiming at intensifying cooperation between the three countries in the assigned domains. On 29 April 1997, after being satisfied with the work which had been done by the Tripartite Commission, the three Heads of State decided to move further. They ordered the Tripartite Commission to start negotiations that led to the agreement that created the Permanent Tripartite Commission being transformed into a treaty.

On 30 November 1999, a new treaty was signed in Arusha by the Presidents of Kenya, Tanzania and Uganda establishing the East African Community.[98] In the preamble to the Treaty of Arusha that entered into force on 7 July 2000 almost twenty-three years after its predecessor had become obsolete one can be read:

…the main reasons contributing to the collapse of the East African Community being lack of strong political will, lack of strong participation of the private sector and civil society in the cooperation activities, the continued disproportionate sharing of benefits of the Community among the

[94] For instance, it was agreed that the Soroti Civil Flying School and the Inter-University Council for East Africa would continue operating as common services and the EADB was authorized to keep its operations as a joint institution. See Article 14(01)(a)(b) of [First Schedule] East African Community Mediation Act, 1987 (Revised Edition 2012).
[95] Article 14 [First Schedule] East African Community Mediation Act, 1987 (Revised Edition 2012)
[96] This article read "The States agree to explore and identify further areas for future co-operation and to work out concrete arrangements for such co-operation".
[97] Paragraph 7 of the Preamble to the Treaty of Arusha.
[98] In Kenya and Uganda, there was no change at the top. But in Tanzania, Hassan Mwinyi was replaced by Benjamin Mkapa in 1995.

Partner States due to their differences in their levels of development and lack of adequate policies to address this situation.[99]

This is a clear indication that the founding Partner States understood perfectly well the reasons that led to the collapse of the previous community as confirmed by their determination "to strengthen their economic, social, cultural, political, technological and other ties for their fast balanced and sustainable development" with a strong conviction that this new deal would "raise the standards of living" of their respective people.[100] It is noteworthy that the Treaty of Arusha is even more ambitious and clearer than all its predecessors as it clearly states that a political federation is the ultimate goal of the integration process that it had launched.

But what is really new or how different is this Treaty from all other previous regional undertakings? What potion has it prepared to overcome all the difficulties that defeated the previous arrangements? Or is it simply a "triumph of hope over experience" like a decision to remarry by a spouse whose first marriage was unhappy?[101] It would be speculative to provide an immediate straightforward response to these questions. But there is one undisputed fact: the current EAC has beaten the longevity record of all its predecessors. More than fifteen years after its creation, it would be interesting to identify the key reasons that precipitated the collapse of the previous regional integration initiatives in East Africa and to examine what remedy has been provided by the Treaty of Arusha in order to avoid the situation where like causes produce like effects.

1.2.2.1. Industrial imbalances: the ghost which haunts the EAC integration process

The history of the EAC, like any other dynamic organization, is punctuated by crises. But the history of the EAC is unique in that one thing appears as a constant element in the causes of the various crises that have shaken this organization since its inception. This element is the imbalance between Partner States' industries. This economic imbalance started to become visible as soon as the Partner States gained their independences in the early 1960s and it proved to be the most redoubtable

[99] 4th paragraph of the Preamble to the Treaty of 2000. Although both treaties ended up by establishing the East African Community, their names are different: the first is the Treaty for the East African Co-operation establishing the East African Community while the second is the Treaty for the Establishment of the East African Community.
[100] Paragraphs 15 and 16 of the Preamble to the Treaty of Ausha.
[101] This was the warning addressed by Hazlewood to the founders of the regional economic integration communities in developing countries urging them to first respond to a set of questions before starting any undertaking. A. Hazlewood (1979), p. 58.

threat to the EAC regional integration process. All through its history, this economic imbalance was variously, but progressively, identified as the cause of the problems within the EAC. In 1964, the Kampala Agreement suggested measures to redress 'trade imbalances' between Kenya, Uganda and Tanganyika.[102] While in 1967 the Treaty of Kampala referred to 'industrial imbalances' that needed to be reduced.[103] The Treaty of Arusha mentions the "differences in [Partner States'] levels of development" in its paragraph 4 as one of the causes of the collapse of the defunct EAC.

As much as the identification of the issue varies, the solutions that have been tried out are also various. Probably because of the urgency with which the Kampala conference was called, the solutions in the Kampala Agreement seem to have been very superficial and not well thought out.[104] Notwithstanding the acknowledgment of the complexity of allocating future industries and the establishment of such a complicated quota system, the Kampala Agreement basically adopted an approach tending to resolve the economic imbalance between the Partner States in a perfunctory way. Partner States wrongly thought that the redistribution of industries could once and for all re-equilibrate the situation on the ground. But they quickly realized that the issue was so deep-seated that a mere redistribution and import restrictions would not be adequate. That is why more structured and longer-lasting measures were suggested by the Kampala Treaty in 1967.

Economically speaking, the renewal of the transfer tax and the creation of the EADB may be considered to be well thought-out measures to tackle the identified 'industrial imbalance'.[105] On the one hand, the transfer tax system was more elaborated and more user-friendly than the quota system recommended by the Kampala Agreement. For instance, unlike the quota system that blindly applied to all imports from surplus Partner States, the transfer tax only applied to manufactured goods specifically indicated in Annex IV of the Treaty.[106] On the other hand, while the allocation of the EADB's funds for the progressive establishment of industries in priority - less industrially developed - Partner States was a recognition by the

[102] The Kampala Agreement starts with the title "The rectification of E.A. trade imbalances" and this is echoed in paragraph (1) of this agreement that reads: "The Ministers have examined the problems of trade imbalances…"
[103] Paragraph 5 of the Preamble to the Treaty of Kampala.
[104] For details about these measures, see supra (1.2.1.4.).
[105] Under Chapter V of the Treaty of Kampala entitled "Measures to Promote Balanced Industrial Development", three measures were provided, namely fiscal incentives, transfer tax, and the establishment of the EADB.
[106] See article 20(2), (3) and (4) Treaty of Kampala. Paragraph (5) of the same article provides that the list of manufactured goods to be subjected to the transfer tax should be updated annually by the East African Customs and Excise Department.

Partner States that balancing industrial development in the region was a long-term process, the decentralization of existing industries was surely intended to provide short-term satisfaction to the protagonists.[107]

The fact that the Treaty of Kampala narrowed down the general 'trade imbalance' to 'industrial imbalances', the latter being confined to manufacturing industries, was obviously a better diagnosis of the disease that was eating into the regional integration process in the EAC. Actually, with the Treaty of Kampala, the regional integration process in the EAC could be considered to have taken two steps forward and one step backwards. Two steps forward because of a better diagnosis of the issue and the prescription of good treatment. But one step backwards because it ignored the fact that industrial development had to be realized within the respective national (political) framework of each Partner State. Partner States' national frameworks involved a wide range of factors which, taken alone or together, could drastically impact on cohesion within the regional integration. Therefore, it was no wonder that the occurrence of political turmoil of a magnitude which had never been experienced before questioned the solidity of the EAC's foundations.

However, along with the political crisis that precipitated the decline of the defunct EAC, some Partner States were also dissatisfied with the measures introduced by the Treaty of Kampala. This explains why the transfer tax system had already been abandoned in 1973.[108] The decentralization did not work properly, especially because of the failure of the transfer of funds to the regional headquarters of various institutions in the Partner States.[109]

As for the Treaty of Arusha, it pinpoints the differences in the levels of development between Partner States. If it is agreed that a country's level of development is proportional to its level of industrialization, it would appear that the Treaty of Arusha and the Treaty of Kampala converge in identifying 'industrial imbalances' as the main threat to the economic integration between the EAC Partner States. According to the Treaty of Arusha, it is the differences in Partner States' industrialization levels that has perpetuated the inequitable sharing of the benefits between the Partner States. Without any doubt, the deplored industrial imbalance between the Partner States has even increased with the inclusion of two smaller and poorer countries, Burundi and Rwanda, in 2007. Needless to say, the very sentiment of a

[107] To do justice to the Kampala Agreement negotiators, it is fair to reiterate that the problem of the allocation of future industries was raised as well. However, it was acknowledged to be a complex issue. Therefore, it was referred to a committee of experts. See point (6) of the Kampala Agreement.
[108] See A.T. Mugomba, *op. cit.*, p. 266.
[109] See A.T. Mugomba, *op. cit.*, p. 264.

disproportionate sharing of the community's benefits disturbed some Partner States in the past to such an extent that the whole regional integration initiative failed. But as much as the Treaty of Arusha has clearly reiterated that industrial imbalances were one of the main reasons for the collapse of the previous EAC, it is striking to observe that more than fifteen years after its entry into force the Partner States still do not find it urgent to come up with appropriate mechanisms and policies to tackle this issue. The unconcerned attitude of Partner States vis-à-vis this fatal threat is so shocking that it contrasts with their individual efforts to foster each one's own industrial development. These efforts are manifested *inter alia* through their aggressive national policies to attract FDI.

1.2.2.2. Inequitable FDI inflow as the persistent sub-basement of industrial imbalances in the EAC

It is a well-established fact that FDI inflow into an economy fosters its industrial development.[110] This implies that, notwithstanding many other economic factors, industrial imbalances between the EAC Partner States may reflect, to some extent, the uneven distribution of FDI, especially in the manufacturing industry. Available data do not provide a breakdown of the types of FDI that EAC Partner States attract in order to enable a proper analysis of the FDI inflow into the manufacturing industry between them. But considering Partner States' asymmetric factor endowments,[111] it is more or less predictable that there would be a very strong imbalance in the amount of FDI that they attract individually. However, if it is difficult to clearly distinguish the impact of FDI inflow into the manufacturing industry on the current industrial development of the Partner States, a careful review of the EAC's history reveals that FDI inflow resulted in a significant share of the responsibility in the inception of the so deplored industrial imbalances at least between the three founding EAC Partner States, namely Kenya, Tanzania and Uganda. It is a fact that Kenya has been the most industrialized country in the EAC since before the tide of independence. It should be reiterated that it was the resistance of Tanzania and Uganda against the invasion of their respective markets by manufactured products from Kenya that led to the Kampala Agreement being signed in 1964 and the collapse of the former EAC in 1977.

---

[110] See for instance S. Barrios, H. Gorg, and E. Strobl, 'Foreign direct investment, competition and industrial development in the host country', *European Economic Review*, Vol. 49, Issue 7, October 2005, pp. 1761-1784; J.R. Markusen, A.J. Venables, 'Foreign direct investment as a catalyst for industrial development', *European Economic Review*, Vol. 43, 1999, pp. 335-356; and E. Borensztein, J. De Gregorio, J-W. Lee, 'How does foreign direct investment affect economic growth', *Journal of International Economics*, Vol. 45, Issue 1, June 1998, pp. 15-135.

[111] Cf. infra (5.3.1)

However, in order to understand the industrial development in East Africa, one needs to pay particular attention to the development of Nairobi since the latter had strong implications for East Africa as a whole.[112] Nairobi owes its existence exclusively to the Kenya-Uganda railway. The site was chosen for its strategic location to enable easy connections with the surrounding country, which made it the ideal place for the future capital city.[113] As a consequence, Nairobi developed so quickly that by 1919 it was functioning as an administrative, railroad, political, commercial, service, military and industrial centre in East Africa.[114] The rapid development of Nairobi was supported by foreigners who flocked from various locations for trade following the construction of the railway. Indians and Europeans constituted the most important foreign population that started early investment in the Nairobi area.[115] European settlers were very much involved in the agri-business while Indians controlled trade and commerce.[116] This led to an industrial concentration in Nairobi and its surroundings, which progressively spread to all Kenya.

This is irrefutable evidence that the early foreign investment in Nairobi, especially the settlement of Europeans, gave Kenya its industrial pre-eminence over Tanzania and Uganda. Nairobi as an economic area did not have extraordinary external economies of scale compared to other centres in East Africa that could justify its attractiveness for industries. Apart from Nairobi's geographical position that offered excellent opportunities for supplying the rest of the East African market, especially the area of Moshi-Arusha in Tanzania and the Eastern Uganda region, the most important asset for Nairobi's development was the settlement of Europeans as clearly stated below:

"[I]f it had not been for the presence of European settlers in Kenya, it is quite possible that Kampala would have developed as the leading political, commercial and economic centre. European influence there dates back to 1890 when Lugard first established a fort on Kampala Hill, and Kampala itself had existed as a political (if not an economic) entity for 400 years, through the monarchy of the Baganda tribe – the Kabakaship (as compared with Nairobi which did not in fact exist before the railway reached that particular point). But European settlers came to Kenya rath-

[112] F.I. Nixson, *op. cit.*, p. 51.
[113] It is reported that already in August 1899, the government administration of Ukamba Province was transferred from Machakos to Nairobi. F.I. Nixson, *op. cit.*, p. 52.
[114] *Ibidem*
[115] More than 30,000 workers were recruited from India for the construction of the railway. At the end of the construction, about 6,500 of these workers decided to stay in East Africa. However, it was assumed that Indians would not develop the natural resources of Nairobi and its surroundings due to their interest in trade rather than in agriculture. Therefore, the colonial power decided to encourage Europeans to settle in the region by offering large parcels of land to Europeans at very cheap prices. See F.I. Nixson, *op. cit.*, p. 22.
[116] In 1904 the Bank of India had opened a branch in Nairobi, and by 1905 Indians controlled about 80 percent of the capital and business activity in Nairobi. See F.I. Nixson, *op. cit.*, p. 23.

er than Uganda, and it was in Nairobi that economic and political power rapidly concentrated.[117]

In other words, this establishes that European FDI inflow in Nairobi and its sur-roundings in the early 1900s played a fundamental role in making Kenya the most industrialized country in the EAC.

1.2.2.3. A Common market as the stimulus for FDI agglomeration

It is understood that in the beginning the inflow of European FDI into Kenya was the result of an administrative decision that encouraged Europeans to settle in Nairobi combined with the locational advantages of the area. But this does not explain why the expansion of industries in Kenya was correlated with the lack of an industrial presence in Tanzania and Uganda. Yet, as has been said above, Nai-robi (and the whole of Kenya) did not have external economies of scale which were so exceptional that it would exclusively attract all foreign investments to the detriment of the other cities located in the two other countries. Why, despite the relatively equal attraction of Kampala, for instance, did industries not choose to relocate to this city instead of remaining concentrated in Nairobi and its surround-ings? In principle, the construction of the railway should have had a similar impact on both Nairobi and Kampala for the simple reason that Kenya and Uganda were both British territories. After all, the railway was intended to connect the two cities.

Various theories have been elaborated by economists to explain what drives the choice of industrial location in a country.[118] But all those theories converge on one point, that is "[i]n a free economy, the correct location of the industrial enterprise lies where the net profit is greatest".[119] Key factors that are taken into considera-tion when assessing the most optimum place of industrial location include, *inter alia*, transportation costs, labour costs, agglomeration forces, and to some extent institutional factors such as interest, insurance, taxes, etc.[120] Among those factors, transportation costs play a substantial role.[121]

---

[117] F.I. Nixson, *op. cit.*, p. 68.
[118] The most important being the least-cost theory developed by Weber and Hoover, the market area – locational interdependence theory supported by Fetter and Hotelling, and the maximum profit theory developed by Losch and Greenhut. These theories are clearly reviewed by Nixson. (F.I. Nixson, *op. cit.*, pp. 5-14). See also M.N. Jovanovic, *Geography of Production and Economic Integration*, London and New York, Routledge, 2001, pp. 5-74.
[119] A. Losch, *The Economics of Location*, 2nd ed., Yale University Press, 1954 cited by F.I. Nixson, *op. cit.*, p. 14.
[120] M.N. Jovanovic, *op. cit.*, p. 6.
[121] *Idem*, p. 20-21.

An empirical study conducted in the mid-1960s found that the average increase in the transport costs of raw materials from Mombasa to Kampala was about 70 percent higher than from Mombasa to Nairobi.[122] This means that if investors in various manufacturing businesses decided to move their factories from Nairobi to Kampala, they would face an increase of about 70 percent in the cost of transporting imported raw materials and intermediate goods from Mombasa. However, the same study revealed that, *ceteris paribus*, despite the increase of 70 percent in the transport cost, the total production cost of those factories in Kampala would not increase to more than 1 percent.[123] This implies that, economically speaking, it was sustainable for most industries located in Nairobi to shift to Kampala without compromising their profitability. Therefore, the reason why industries were reluctant to move to Kampala was not related to the fear of increased transport costs but rather because they wanted to stay in Nairobi that offered "a concentration of effective demand unmatched elsewhere in East Africa".[124]

While this assertion is true, there is another element that could explain the concentration of industries in Nairobi. It is the existence of the customs union between Kenya and Uganda, and later Tanzania. Being an intermediary stage of a regional integration process, a customs union is very important for manufacturing industries as it consecrates the free movement of goods produced in the territory of the member states. The economic geography holds that the removal of barriers to trade affects the location of industries.[125] The case at hand confirms the findings according to which regional integration generally fosters the spatial concentration of industries in the region that has a pronounced advantage in terms of its access to international markets.[126] But, in principle, regional integration has a strong impact on the location of industries in markets with imperfections.[127]

---

[122] F.I. Nixson, *op. cit.*, p. 45.
[123] F.I. Nixson, *op. cit.*, p. 46.
[124] F.I. Nixson, *op. cit.*, p. 47.
[125] See among other authors P. Krugman, *Development, Geography, and Economic Theory*, London, MIT Press, 1995; D. Puga, 'The rise and fall of regional inequalities', *European Economic Review*, Vol. 43, 1999, pp. 303-334.
[126] M.N. Jovanovic, *op. cit.*, p. 44; M. Crozet and P.K. Soubeyran, 'EU enlargement and the internal geography of countries', *Journal of Comparative Economics*, Vol. 32, 2004, pp. 265-279. See also P. Monfort and R. Nicolini, 'Regional Convergence and International Integration', *Journal of Urban Economics*, Vol. 48, 2000, p. 304. It should be reminded that an imbalance in the distribution of industries is a common issue that affects even politically unified entities, developed countries included (see for instance P. Monfort and R. Nicoloni, *op. cit.*, p. 287). The two papers referred to in this footnote apply to the issue of industries' distribution in the context of a single country. But as rightly suggested by Nixson, for an historical analysis, East Africa should be regarded as a single unit (see F.I. Nixson, *op. cit.*, p. 15). Nevertheless, in the current context of the EAC where a common market is being implemented with the free movement of persons, goods, services and capital, it is completely appro-

Only one reliable study could be found on the impact of the EAC common market on the location of industries.[128] It is an old study which was conducted under the Treaty of Kampala but its findings are surprisingly topical. This study confirms the occurrence of FDI agglomeration in the EAC. However, with the development of the EAC common market since 2010, the likelihood of an agglomeration effect even becomes inevitable. Indeed, in general, the free movement of workers is one of the key factors that led to industrial agglomeration within a common market.[129] Yet, the EAC-CMP provides for the free movement of workers within the community along with the free movement of goods, services and capital. In such a common market, it could be suspected that companies would centralize production, managerial and logistical resources, and serve the common market from one base.[130]

One of the easiest ways to explain FDI agglomeration could be that, as testified by the case of Nairobi in the EAC, the choice of the destination for the very first FDI could be motivated by an historical event. It could also be any other factor. But once FDI becomes settled in a specific location, "related businesses gravitate towards it".[131] This would lead to the concentration of industries in some countries to the detriment of others, which in the end creates an industrial imbalance which is so often deplored in East Africa. Economists warn that agglomeration can lead to a point where the disadvantaged countries may not be able to compete internationally and, instead, may start shrinking. And when that point is reached, "the new theory of trade and strategic industrial policy suggests that nothing can stop agglomeration for a long time".[132] But a certain threshold of development needs to be attained before the manifestation of such a self-reinforcing aspect of foreign investment.[133]

priate to consider the EAC as a single unit and, consequently, to examine its industrial location issue from an interregional standpoint.

[127] M.N. Javanovic, *op. cit.*, p. 5.

[128] F.I. Nixson, *op. cit.*, 181p.

[129] M. Amiti, and C.A. Pissarides, 'Trade and industrial location with heterogeneous labor', *Journal of International Economics*, Vol. 67, 2005, pp. 392-412; and J. Francois, 'Factor Mobility, Economic Integration and Location of Industry', in R.E. Baldwin and A. Brunetti (Eds.), *Economic Impact of EU Membership on Entrants: New Methods and Issues*, New York, Springer, 2001, pp. 73-91.

[130] A. Mold, 'The Impact of the Single Market Programme on the Locational Determinants of US Manufacturing Affiliates: An Econometric Analysis', *Journal of Common Market Studies*, Vol. 41, Number 1, 2003, p. 55.

[131] M.N. Jovanovic, *op. cit.*, p. 25. Agglomeration is generally motivated by efficiency reasons. For more details about the economic advantages of agglomeration for FDI, please see A. Marshall, *Principles of Economics*, London, Macmillan, 1890 referred by M.N. Jovanovic, *op. cit.*, pp. 22-23.

[132] M.N. Jovanovic, *op. cit.*, p. 26.

[133] D. Wheeler and A. Mody, 'International investment location decisions: the case of U.S. firms', *Journal of International Economics*, 1992, p. 71 cited by M.N. Jovanovic, *op. cit.*, p. 25.

1.3. PROBLEM STATEMENT

As described above, the history of the EAC provides evidence that, following trade liberalization between Partner States, industrial agglomeration as a consequence of an inequitable FDI inflow is more than a hypothetical situation. It is an historically undisputed fact that Kenya was favoured as the preferred destination for European and Indian FDI in the colonial era. This preferential treatment permitted this country to become industrially more advanced than the two other founding Partner States, Tanzania and Uganda. While Kenya has been able to keep the advances in its industrial development up to date vis-à-vis Tanzania and Uganda, the industrial gap between the Partner States has been simply widened with the inclusion of Burundi and Rwanda. Consequently, the EAC is an economic integration area where the differences in Partner States' development levels are strikingly alarming.

It would be short-sighted to attribute the current differences in Partner States' development levels exclusively to historical decisions. Apart from the colonial decisions that favoured the industrial development of one Partner State to the detriment of others, there exist important structural discrepancies in terms of factor endowments between them. The combination of historical events with a disproportionate distribution of factor endowments between Partner States predispose the EAC to be an unbalanced region, especially with the implementation of a fully-fledged common market where goods, persons (including workers), services and capital enjoy total free movement rights. In other words, the implementation of the free movement of goods, persons, services and capital would foster an unequitable FDI inflow between Partner States.[134]

This unequitable attraction of FDI would create polarization within the EAC whereby one or two countries with the best combination of FDI determinants, i.e. market access,[135] economic growth, human capital stock, infrastructure, regulatory framework, and agglomeration effects would logically attract more FDI than others. In the new economic geography (NEG), the Partner States that present strong potential to attract more FDI are considered as 'central' economies, while those with weak potential are called 'peripheral'. According to the NEG, structural differences between central and peripheral economies affect their respective ability to

[134] For more about the impact of regional integration on the location of industries, see P. Krugman, *op. cit.*, 1995.
[135] It is generally agreed that regional integration affects FDI determinants. For instance, in a common market, a factor like market size becomes less significant as an FDI determinant for a single country since companies would increasingly focus on regional rather than local markets. A. Mold., *op. cit.*, p. 38.

attract industrial capacity.[136] Accordingly, *ceteris paribus*, the individual efforts of each Partner State to attract more FDI to foster its own industrial development could not change the balance of power between 'central' and 'peripheral' Partner States. On the contrary, such individual efforts would lead to a fierce intra-EAC competition for FDI inflow, which in the end would unfortunately increase the gap between the two groups. Following the industrial agglomeration theory, the 'central' Partner States would attract more and more FDI – which implies becoming increasingly industrialized – while 'peripheral' ones would attract less and less FDI. Without any doubt, such a situation would arouse old demons of the inequitable sharing of the benefits of the community between Partner States which has compromised previous regional integration initiatives in the EAC.

The occurrence of such a 'central-peripheral' divide in the FDI inflow into the EAC would lead to a Rambo situation. According to an unfolding theory of regional integration between developing countries, the "increasing extra-regional FDI and export flows for one member state cause losses for other members" since FDIs are "common pool resources".[137] Consequently, the most frustrated Partner State(s) would become a Rambo with the dominant strategy of defection.[138] Depending on the importance or the number of defected Partner States, the frustration over an unbalanced FDI inflow might lead to the collapse of the EAC.

The threat of an EAC collapse over Partner States' frustration based on an inequitable FDI inflow could be accused of being an overstatement. But, whatever its magnitude may be, this threat is real and should be taken seriously at least for two reasons. The first reason is history-based. As highlighted above, previous crises in the EAC were closely related to the inequitable FDI inflow between Partner States, although it must be acknowledged that in the colonial era the term FDI was not yet commonly used. The second reason concerns the importance that is accorded

[136] See also A. Mold, *op. cit.*, p. 38. For more details about NEG, see J.P. Neary, 'Of Hype and Hyperbolas: Introducing the New Economic Geography', *Journal of Economic Literature*, Vol. 39, June 2001, pp. 536-561.

[137] S. Krapohl and S. Fink, 'Different Paths of Regional Integration: Trade Networks and Regional Institution-Building in Europe, Southeast Asia and Southern Africa', *Journal of Common Market Studies*, Vol. 51, Number 3, 2013, p. 474.

[138] S. Krapohl and S. Fink, *op. cit.*, p. 475. It should be remembered that the "term 'Rambo' does not refer to the Hollywood movie, but to a game-theoretical constellation of two actors. A Rambo situation is an asymmetrical game, where one player has a dominant strategy to co-operate, whereas the Rambo's dominant strategy is defection". S. Krapohl, K.I. Meissner and J. Muntschick, 'Regional Powers as Leaders or Rambos? The Ambivalent Behaviour of Brazil and South Africa in Regional Economic Integration', *Journal of Common Market Studies*, Vol. 52, Number 4, 2014, p. 880 referring to K. Holzinger, 'Common Goods, Matrix Games and Institutional Response', *European Journal of International Relations*, Vol. 9, Issue 2, 2003, pp. 173-212. For more details see *infra* Chapter V (5.3.2.1. Defection as a strategy for frustrated Partner States).

to FDI inflow by both the Partner States and the EAC Treaty. For Partner States, it is commonly believed that FDI is the most appropriate supplement, if not an alternative, to conditionality-tied Official Development Aid (ODA).[139] This belief motivates most countries, EAC Partner States included, to undergo various reforms to maximize the inflow of FDI into their territories. Consequently, it would not be surprising for a Partner State to vehemently oppose anything that could deter or divert the flow of FDI into its territory, even if it is a regional integration requirement.

As for the EAC, the Treaty of Arusha mentions the attraction of investments as a means for the realization of rapid and balanced regional development.[140] To understand to the fullest extent the expectations raised by the EAC concerning the attraction of investment, one should remember that treaty makers deplored unbalanced regional development as a key factor that caused "continued disproportionate sharing of the benefits of the community among Partner States", which is identified as one of the "main reasons contributing to the collapse" of the EAC.[141] But as much as EAC treaty makers attribute the collapse of the former EAC to economic factors such as the differences in the levels of development of the Partner States, they equally highlight the role of the absence of good governance. Paragraph 4 of the preamble to the Treaty of Arusha, quoted above, clearly indicates that although the Partner States acknowledge the incidence of their differences in economic development as a key element in the continuation of the inequitable sharing of the benefits of the community among them, they actually seem to accord the biggest share of responsibility to the 'lack of adequate policies' to address those economic differences. The adequacy of policies is an integral part of good governance.[142] Accordingly, it would not be too much extrapolation to infer from the preamble to the Treaty that the treaty makers deplore the absence of good

[139] Despite the controversial econometric results of the impact of FDI on the host country's economy, developing countries – including EAC Partner States – have massively embarked on a battle to secure more FDI inflows. This battle is fought on all grounds, including particularly the reform of national policies and regulations and the availability of various forms of incentives to attract FDI. For details of the impact of FDI inflow on the hot country's economy, see *infra* Chapter V (5.1.2. Impact of FDI on the host country's economy). The attraction of FDI is even considered by some authors as the rationale for regional integration in developing regions. See for instance S. Krapohl and S. Fink, *op. cit.*, p. 474.

[140] Paragraph 11 of the Arusha Treaty preamble which reads "And whereas the said countries, with a view to realizing a fast and balanced regional development are resolved to creating an enabling environment in all the Partner States in order to attract investment…". See also articles 79-80 of Arusha Treaty that stress the need for cooperation in investment and industrial development for balanced industrial growth within the community.

[141] Paragraph 4 of the Arusha Treaty preamble.

[142] Cf. infra section 6.3.

governance as the main cause of the collapse of the former EAC.[143] The same paragraph of the preamble to the Treaty highlights the acknowledgment by the Partner States that the observance of good governance principles could help address the problem of an inequitable inflow of FDI caused by their economic differences. In other words, treaty makers seem to concede that, although economic differences between the Partner States could influence the distribution of FDI in the region, this may not be *per se* a destructive element if good governance-oriented policies' are made and thoroughly implemented in order to neutralize those differences. The interpretation of this paragraph of the preamble to the Treaty of Arusha may sound like an overstatement of the role that good governance can play in the EAC regional integration process. But a look at other provisions of the Treaty such as articles 6(d) and 7(2) suggests that it is indeed a clearly expressed intention of the Partner States to allow good governance to be the central principle in the architecture of the EAC. This is supported by the fact that, pursuant to these two articles, good governance is the only principle in the Treaty to be at the same time a fundamental and an operational principle of the community. This univocally underscores that the Partner States aspired to consider good governance as an indispensable component of the appropriate mechanism that should be established to foster a balanced economic development in the EAC.

In contemplating the good governance as one of the remedies for the EAC's chronic problem of the inequitable distribution of FDI, which has been fostering unbalanced development in the region, the treaty makers themselves had already decided to rely on good governance as one of the pillars of the regional integration success.

However, when one confronts these Treaty provisions – especially where a serious case is made for the observance of good governance principles, and the paramount role of investment - with actual practice, the paradox becomes very intriguing. The regulatory framework of investment is lacuna-like, if not non-existent. As early as 2006, the Partner States adopted well-elaborated five-year Joint Export and Investment Promotion Strategies (JIPS) where most of the threatening issues related to the attraction of FDI were thoroughly identified and adequate solutions were recommended. At the end of the JIPS implementation period, most of its provisions had never reached fruition. The same sad observation could be made regarding the fourth EAC Development Strategy (EAC-DS) that advocated the enactment of an EAC common investment strategy in tandem with the development of

[143] Indeed beyond even 'adequate policies', 'strong political will' and 'strong participation of the private sector and civil society' which are also named as having defaulted in the implementation of the Treaty of Kampala, and are closely related to good governance principles. Cf. infra section 2.3.

a mechanism for the equitable sharing of benefits and costs of EAC integration by 2016.[144] The drafting of the EAC Industrialization Policy (EAC-IP) is another appealing case. Echoing the Treaty's concern about the lack of good governance as a cause of the disproportionate distribution of FDI, the EAC-IP rightly mentions 'addressing gaps in governance frameworks', 'addressing institutional gaps' and 'instituting a conducive legal and regulatory framework' among the challenges facing industrialization in the EAC.[145] In contrast, astonishingly no reference is made to the key role that FDI location could play in the industrialization of the community and how Partner States' economic levels could affect FDI distribution. Therefore, no single measure is suggested by the EAC-IP to tackle the issue of the uneven distribution of FDI, hence industries, within the EAC common market.

In the end, the fact remains that, despite the rhetorical recognition of the need to develop a mechanism related to the attraction of investment in the EAC in order to foster a balanced regional economic development, Partner States have paradoxically displayed exasperating nonchalance concerning the adoption of good governance-based legal and institutional framework and its subsequent implementation.

Based on this observation, the main question for this research is: what should be the appropriate legal and institutional framework for an equitable FDI inflow into the EAC and how good governance principles should be applied within these frameworks in order to attain a balanced economic development?

Addressing this question implies providing responses to a set of sub-questions, such as: (i) Which approach is needed when discussing good governance in the FDI inflow debate, and which good governance principles are relevant in this regard? (ii) What is the legal and institutional framework of FDI in the EAC? (iii) What does the EAC common market mean and what does it entail for the attraction of FDI? (iv) Why and how the attraction of FDI in the EAC common market may undermine the regional integration process in the region? (v) What role can good governance play in addressing this issue and how should it be handled?

---

[144] See EAC, *EAC Development Strategy (2011/2012-2015-2016): Deepening and Accelerating Integration*, Arusha, Tanzania, August 2011, pp. 65 and 154. (Hereinafter 4th EAC-DS).

[145] The challenges facing industrialization in the EAC are exhaustively listed in the EAC-IP. Development disparities among Partner States are simply marginally listed in the table summarizing the threats to the industrial sector. For more details, see EAC, *East African Community Industrialization Policy 2012-2013*, Arusha, 2011, p. 9 available online at http://industrialization.eac.int/index.php?option=com_docman&task=cat_view&gid=38&Itemid=70 accessed on 10 February 2015. (hereinafter EAC-IP).

These questions are addressed in this research based on the assumption according to which FDI inflow strongly fosters economic development in the host country.[146]

1.4. ORIGINALITY AND RELEVANCE OF THIS STUDY

As explained above, two theories are put into contribution to highlight the impact of a common market on the distribution of FDI between the member states.[147] The first is the industrial agglomeration theory, developed and tested by economists. Whereas the second is the 'Rambo theory', which is a new unfolding theory of regional integration between developing countries.[148]

An exegetic analysis of these theories informs us that they both agree that, in a common market between asymmetric member states, the likelihood of FDI inflow (industrial) polarization is extremely high. For the Rambo theory FDI inflow is a common pool resource which bears an underlying characteristic of competition, the non-excludability of consumption between member states.[149] Accordingly, the attraction of a specific type of FDI by one member state reduces the availability of that same type of FDI for the other member states. This creates roughly two poles in the common market. On the one hand, one or two member states which benefit from the common market and, consequently, attract a disproportionately higher amount of FDI. And, on the other hand, the other member states who correlatively lose their initial share of FDI as a consequence of pooling their potential in the common market.

Whereas, when using another approach, the agglomeration theory reaches the same conclusion. According to this theory, the free movement of factors impacts

[146] For detailed econometric evidence and perspectives, see T.H. Moran, E.M. Graham and M. Blomstrom (Eds.), *Does Foreign Direct Investment Promote Development?*, Washington D.C., Peterson Institute for International Economics, 2005.

[147] It should be reiterated that these two theories have been successfully tested and, therefore, this research does not intend in any way to enter into a discussion on the rich and vast body of complex case studies conducted thereon. However, when the need is felt an overview of their leading ideas is provided to enable a contextualization of the debate. But even in this case, the wording and the findings of the referred to theories are simplified in order to meet the understanding of an average legal researcher or policy-maker.

[148] Unlike most of the renowned theories about regional integration that inadequately grasp the realities of regional integration between developing countries simply based on the standards set by European regional integration (see for instance W. Mattli, The Logic of Regional Integration: Europe and Beyond, Cambridge, Cambridge University Press, 1999), the Rambo theory has the merit of putting the attraction of FDI at the centre of regional integration initiatives between developing countries. In so doing, it adequately provides a theoretical framework for this research. Therefore, in relation to this theory, the main task of this research was to assess whether it can be successfully tested in the EAC.

[149] S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 882.

on the location of industries. It is submitted that in a common market - whether within one country or within a regional integration initiative - FDI in manufacturing industries is likely to flow into the region or the territory of the member states who have already achieved a certain level of industrial development in a similar area. This leads to the creation of a core-periphery divide between members of the common market. Core countries are those which attract higher FDI thanks to the common market, while the 'losers' constitute the periphery.

Following this polarization, the Rambo theory predicts that, in developing regions with asymmetries like the EAC, at least one of the countries in the periphery would end up adopting Rambo behaviour which means defection from the regional integration process. As a remedy, this theory suggests that "institution-building may have positive effects on the region's extra-regional economic relations" provided that "no member state gains by acting unilaterally".[150] The only way to ensure that no member state would be tempted to defect in order to attract gains by acting unilaterally is to involve extra-regional actors out of which FDI flows. In line with this, this theory contends that "extra-regional actors need to exclude defecting member states of a particular region from the consumption of extra-regional investment" since if they do not "punish defection of a particular member state, but reward unilateral action with economic privileges, this member state loses interest in the regional co-operation".[151] While this contention is true, it should be acknowledged as a shortcoming of the Rambo theory in that it insinuates that the fate of regional integration between asymmetric developing countries completely depends on the willpower of extra-regional actors.[152] In other words, the suggested remedy against a Rambo situation is not within the control of the actors concerned, such as the EAC Partner States.

Yet an economic study, specifically based on an EAC case study, suggests that FDI inflow polarization can be contained through adequate decision-making by the EAC Partner States themselves.[153] This study recognizes that market forces alone can hardly address the issue of FDI agglomeration to an extent which could be politically acceptable to the Partner States. It is for this reason that it is suggested that the governments concerned would have to take collective action to promote a more equitable distribution of industry.[154] To this end, "institutional influence over

[150] S. Krapohl and S. Fink, *op. cit.*, p. 476.
[151] S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 882.
[152] "The success of regional integration depends on the reaction of extra-regional actors". See S. Krapohl and S. Fink, *op. cit.*, p. 474.
[153] F.I. Nixson, *op. cit.*, p. 181.
[154] F.I. Nixson, *op. cit.*, p. 70.

industrial location" is suggested as "providing a lasting and effective solution".[155] In substance, this study suggests that there should be a central allocating body within a mutually acceptable institutional framework that would "select a group of industries which would only be profitable given the whole of the East African market" and allocate them following the "stated priorities" by each Partner State and the "rate of growth of industry" in each of them.[156]

This case study agrees with the contention of the Rambo theory according to which an institutional arrangement could provide a solution to the problem of FDI polarization in a common market between developing countries. But it goes further in suggesting that there could be an alternative to reliance on extra-regional actors as a precondition for successful regional integration between developing countries. Clearly this case study highlights the fact that despite the external character of FDI, the Partner States may retain control over their integration process with the adoption of an adequate policy, namely the institutional allocation of FDI.

However, this is an economic study that tried to provide economic responses to economic issues. Despite the fact that it correctly reminds us that the suggested economic remedy to the problem of FDI agglomeration in the EAC should be implemented within the "framework of institutions created by the Treaty for East African Cooperation", this study does not provide further details on the regulatory and institutional regime that should be used. Of course, that would be too demanding for just an economist researcher.

Since the publication of the study discussed above, not much has changed in the economic power balance in the EAC. Despite the collapse of the former EAC on which this study was based, FDI inflow still constitutes a potential threat to the EAC regional integration process.

The present research is a legal contribution to the solution of the long-lasting issue of unbalanced industrial development in the EAC. This is done by interbreeding the Rambo theory with the suggestion made by Nixson's case study. In other words, the present research demonstrates how, while observing the principle of good governance and without the decisive involvement of extra-regional actors, EAC Partner States can use the regional regulatory and institutional framework to lock themselves into regional integration commitments.

---

[155] *Ibidem.*
[156] F.I. Nixson, *op. cit.*, p. 145.

This means that with an effective implementation of good governance-imbued common investment regulations coupled with a host-oriented investment strategy, the EAC Partner States may change the game of FDI inflows. As FDI inflow is first of all a business matter, the EAC Partner States need foreign investors as much as the latter needs the former. If Partner States adopt and firmly implement a common investment policy in order to promote the EAC as a single investment area with only the Secretariat acting in the name and on behalf of the Partner States, this will dissipate intra-EAC competition on FDI attraction – which is the vector of the Rambo strategy. This will strengthen the community by increasing its bargaining power. So instead of relying on benevolent extra-EAC actors for the survival of the community, the adoption of an adequate common investment policy would rather affect the behaviour of these extra-EAC actors which might want to change the way they look at regional integration initiatives between developing countries. This change should run along the spectrum from the classical assistance beggars to modern efficient business partners. The existence of a well-functioning and bigger common market should rather be seen as an asset for Partner States to persuade (and not implore) extra-EAC actors not to reward the unilateral actions of a Rambo, if any. In this way, the common investment policy would be a self-reinforcing tool in the control of Partner States to insure the stability of the regional integration process; hence, to be masters of the destiny of their own economic development. Anyway, a Rambo situation in a well-functioning common market is not economically beneficial for foreign investors and other business-minded extra-regional actors which would be targeting the common market as a whole. This is at least one lesson to be learnt from the EU's strategy to negotiate EPA not with individual countries, but rather with constituted regional integration communities.

In this sense, while the present research provides a detailed legal framework for the operationalization of Nixson's economic findings for a balanced economic development in the revamped EAC, it also provides an opportunity for the rethinking of an aspect of the Rambo theory.

1.5. SCOPE OF THE STUDY AND THE METHODOLOGICAL APPROACH

Based on the main issue which it addresses, this research is a nexus between economics and law. It is obvious from the onset that, apart from its economic postulates, this study involves a strong multidisciplinary dimension which means that principles from various branches of the law are at stake. Good governance principles call for a thorough consideration of administrative law, grasping FDI realities

necessitates the intervention of both business law and international law mindsets, while the regional integration aspect of the topic can be well compounded within public international law theories.

To the challenge related to the multidisciplinary dimension of this topic, one should add the fact that these three areas are in a state of constant evolution, which makes the task of any researcher who attempts to address the three of them in one go as complicated as the situation of a marksman who is required to shoot three moving targets at the same time. The task is difficult but not impossible. Nevertheless, the multidisciplinary character of the topic and the evolving nature of the themes involved make this research particularly vulnerable to accusations of incompleteness or oversimplification, especially when it is scrutinized by experts in one field or another. But, the very nature of the present research cannot allow an in-depth study of each and every associated scientific area. This would take a very long time and would require an encyclopedic knowledge, which the current researcher does not possess. For this reason, as one of the objectives is to shed light on one of multiple aspects of the crux that has taken decades to be addressed in the EAC, the immediate and practical concern is to tackle the tiny intersection point between these various branches.

Besides, an adequate mechanism to address the issue of the disproportionate sharing of community benefits among the EAC Partner States is a leviathan that may be addressed from various angles. Although the history of the EAC tells us that the attraction of FDI plays a great role in the economic development of the Partner States, it is worth reiterating that FDI inflow is just one of the factors that can influence the economic development of the host country. Similar as much as the treaty consecrates the indispensable role of good governance in addressing the situation of the disproportionate distribution of FDI in the EAC, it must be understood that good governance is just one of the elements and, therefore, the observance of good governance principles should be implemented in conjunction with other equally important measures such as economic and political ones in order to produce the most sustainable impact. Consequently, it is very important to keep in mind that the present research only focuses to the interaction between good governance and FDI in the EAC for a balanced economic development from a legal perspective, which is just a tiny – but maybe a determinant - piece of the pie.

However small it might be, it still sounds too broad to fit in a comprehensive research. That is why this study narrows down in order to focus exclusively on FDI inflow into the manufacturing industry (the production of goods and services).

Indeed, the manufacturing industry lies at the heart of EAC Industrialization Strategy (EAC-IS) and major intra-EAC exports consist of manufactured products such as food products, beverages, tobacco, cement, etc. which implies "potential growth in manufacturing in the region backed up by regional demand".[157] Despite the fact that FDI in the extractive industries such as oil and mining could be important (in terms of annual volume) for some Partner States, this study does not primarily apply to them for the mere reason that the products of these industries are not as sensitive to the common market as manufactured products.[158] In addition, FDI inflow in the extractive industries does not produce spillover effects which are as strong as those in the FDI inflow in manufacturing. However, the choice of narrowing down the application of this study to only FDI inflow in the manufacturing industries could be challenged on the ground that sources reporting a comprehensive breakdown of the types of FDI flowing into the EAC are not easily accessible, if not unavailable. This is true, but it is also true about the availability of recent reliable empirical findings on the EAC common market in general. It is for this reason that this research takes into consideration economic assumptions concerning FDI inflow in manufacturing industries which have been developed and tested in other regions with the hope that they may apply to the EAC.[159]

Like most legal research, this one was conducted using mainly a desktop approach that involved an extensive consultation of the literature, an analysis of both regional and national legal instruments, and a close consideration of the relevant case law.

---

[157] EAC, *EAC Investment Guidebook*, Arusha, October 2013, p. 7 (hereinafter EAC Investment Guidebook 2013), p. 7.

[158] This is also in line with the early warning made in 1970 that "it is in the allocation and location of industries that are not tied up to particular raw material sources that the real problems will be encountered" in EAC. See F.I. Nixson, *op. cit.*, p. 148.

[159] It would not be surprising to find in the economic literature contradictory studies from prominent authors about the strength of FDI impacts depending on whether it flows into the manufacturing industries or into the extractive ones. In economic studies, there are many theories that would be very complex for a single research to grasp. So it could be very demanding for a single research based on economic assumptions to explore and test all the theories. For instance, in the economic debate, it is argued that the identity of the FDI home country is an important variable in the assessment of the impact of FDI on the host country's economic development. Taking this assertion into account would imply a further narrowing down of the scope of this research to FDI inflow from a specific country or zone into the manufacturing sector of the EAC Partner States. While this approach would make the conclusion of this research as specific as possible, it would not serve the purpose of improving a broad regulatory framework as intended by this study. But the dynamic of economic theories should not preclude the choice of a model on which to base for further research. This is especially true as, in principle, it is rather impossible to make a study with some economic premises that would not attract criticism from other economists since "strictly speaking, all [economic] theories are wrong, as they are without exception based on restrictive and unrealistic assumptions". Consequently, "empirical testing is about relative rather than absolute merit, and about conditional rather than general validation". M. Brulhart, 'Economic Geography, Industry Location and Trade: The Evidence', *The World Economy*, Vol. 21, Issue 6, 1998, p. 779.

A few interviews were conducted with experts in EAC regional integration at the headquarters of this organization in Arusha and with relevant public servants at the Rwandan Ministry of the EAC, the Rwanda Development Board, the Ministry of Trade and Industry, and at the Rwandan Private Sector Federation. These interviews were intended to obtain confirmation or clarification of the information contained in documents previously examined. Therefore, it was decided not to include a list of the interviewees in this work. However, where the information collected was to be credited exclusively to the interviewee, an appropriate reference is immediately furnished.

In terms of space, this research focuses on the territories of the Partner States of the EAC. Accordingly the EAC, as a supranational authority, is under the spotlight where its interaction with the Partner States is particularly scrutinized. More precisely, the Treaty of Arusha and the EAC Common Market Protocol (EAC-CMP) are analyzed, especially their provisions on the free movement of persons, goods, services and capital as these freedoms are closely related to FDI location in the community. The analysis of EAC-CMP goes hand in hand with Partner States' laws and policies on FDI. But this work does not research the alignment of individual Partner States' laws and policies with EAC-CMP. Instead, various reports have been considered to this end and only the most relevant aspects of this interaction are considered. In other words, this research deals much more with the EAC as a whole rather than with its individual components since its final aim is to identify a legal and institutional framework that would foster a balanced economic development in an EAC-wide perspective.

Despite its economic nexus, no empirical research was conducted as such. Although such an approach would have been good for the accuracy of the research findings, it was completely out of reach for the present researcher given his exclusive legal background. For this reason, tested assumptions were rather chosen as the foundation of this research.

It is worth mentioning that one of the most difficult aspects that this research had to deal with was the topicality of the concepts involved. Good governance, FDI and regional integration are all in a state of constant evolution. While consensus seems to have been reached on the definition of FDI and regional integration,[160] this is not yet the case concerning good governance. One of its most controversial aspects concerns its indicators. In anticipation of the comments made in the next

[160] The current Eurozone crisis seems to question most of the established theories of regional integration, however.

chapter, it must be stressed that good governance indicators are multiple. The terminology used and the content thereof widely differ according to various institutions. The World Bank is without doubt the institution that drew the attention of the international community to good governance. Accordingly, it also took the lead in elaborating what could be considered as the indicators of good governance, which are globally referred to as Worldwide Governance Indicators (WGI). WGI are more and more widely used by policy makers and researchers whenever it comes to measuring good governance.[161] Therefore, it would have been logical to adopt WGI in this research. But instead of considering WGI, this research rather prefers the academic approach to good governance indicators as detailed in the next chapter.

Considering the constant evolution of the domain involved in this research, it is crucial to stress that this research was carried out between 1 March 2011 and 30 October 2014 in order to freeze the timeframe in which the accuracy of data, legal texts, the policies referred to herein, and the comments thereon could be assessed. However, some other posterior developments or information were given due consideration as and when they came to the attention of the present researcher.

1.6. RESEARCH OUTLINE

The questions of this research are dealt with in seven chapters, the general introduction and the conclusion included. The general introduction constitutes chapter one, while the general conclusion is, of course, the last chapter. To be comprehensive, the general outline of this work should be read as follows: each of chapters two, three, and four should be considered as a standalone chapter. Each of these chapters deals with one of the three core components of the topic of this research, i.e. good governance, foreign direct investment, and EAC common market (regional integration). This allows the customization to each of these concepts in order to facilitate their understanding in the context of this research, especially that each of them is by nature broad and in constant evolution. However, in order to preserve the consistency which is needed for a book, a minimum connection is maintained between each chapter and the final aim of the work. Thereafter, chapter five bridges chapter three and chapter four in exposing how the free movement of FDI in the common market can generate tension within the EAC. In the end, chapter six shows how good governance can contribute to solve this problem at the regional level.

[161] D. Kaufmann, A. Kraay and M. Mastruzzi, *The Worldwide Governance Indicators Project: Answering the Critics*, Policy Research Working Paper 4149, March 2007, p. 2 (hereinafter D. Kaufmann et al. 2007).

But more specifically, chapter two is dedicated to the conceptual and normative framework where good governance, as one of the main concepts of this research, is examined. Before presenting the meaning of good governance for this research, some efforts are made to look back at the historical origins of this concept. This exercise becomes important in the process of defining good governance as it should be understood in this research, especially in trying to find out whether the concept has suffered any alteration in its meaning over time. To be considered as a principle of law, as discussed in the same chapter, good governance had to maintain a certain level of consistency in its substantial meaning. This chapter ends with a presentation of good governance indicators as developed by various institutions and academia, while drawing a preference for the academic design.

Chapter three discusses the legal framework of FDI in the EAC. For the purpose of clarity and comparison, this chapter exceptionally draws parallels between the EAC Partner States' legislation governing FDI. Specific attention is given to their differences regarding the conditions set by each Partner State to admit and protect FDI. A small degree of light is shed on the ignored EAC-drafted regional investment code, the Model Investment Code (MIC), which, despite its harmonizing intention, has been given no attention at all by the Partner States.

Considering the impact of the common market on FDI location, chapter four delves into the EAC-CMP freedoms. This chapter widely discusses in turn the free movement of goods, the free movement of persons, the free movement of services and the free movement of capital. In this chapter a comparison with the European Union (EU) single market is made in various areas to gauge the practicability of the EAC-CMP. This comparison involves an exploration of the major case law of the European Court of Justice to highlight, where need be, its role in intensifying regional integration. Naturally, this comparative approach has helped to highlight the many similarities between the EAC and the EU integration processes, while efforts were also made to explain the differences especially in the interpretation of some common principles.

As for chapter five, it takes a close look at the role of FDI inflow in the economic development of the host State. This is done with the intention to highlight why the attraction of FDI in the manufacturing industry is very critical for each EAC Partner State. This chapter reviews the economic theories and factors that make an FDI inflow the Achilles' heel of the community. A regional integration-related theory underpinning this view is also provided and tested based on the current state of affairs of the EAC laws and policies.

At the end, just before the general conclusion, chapter six extensively returns to the indispensable role that good governance plays in the EAC integration process in being not only the bedrock of stable external trade for the EAC but also the cornerstone of the entire integration system. The second part of this chapter advocates a good governance-oriented common investment policy as a condition for any imaginable equitable FDI attraction within the EAC common market. It extensively explores the applicability of the principle of subsidiarity to allow the transfer of competence concerning FDI from the EAC Partners to the Secretariat and the best investment strategy to thwart FDI competition between EAC Partner States as a precondition for a more balanced economic development in the EAC.

Chapter II

Good governance: concept and normative framework

2.1. INTRODUCTION

Good governance is a key concept for this research. This presupposes that understanding the meaning of this concept is very important to grasp the significance of the entire work. Indeed, because of the polyvalent character of good governance, it is indispensable for any research where this concept is involved to carry out due diligence in framing its actual meaning. Good governance is not just a polyvalent concept but it is also multidimensional, depending on the scope assigned to it by the research in question.

This chapter is dedicated to providing a comprehensive framework within which good governance should be understood and assessed as far as this research is concerned. In order to do so, it is important to first track the oldest historical origin of good governance practices. This historical retrospective is crucial in the quest for obtaining an adequate definition of good governance.

In legal research such as this, the meaning of good governance would not be useful if, from the onset, this concept does not present any legal connotation. Since at first sight good governance does not seem to contain any significant legal overtones, it is paramount to find out whether it has any legal nature. Needless to say, the identification of the legal nature of good governance would help to locate its place within the hierarchy of legal norms, which in the end would inform us about its strength and primacy among other norms existing in the legal arena.

This research expects to come up with good governance as an element that would improve national and regional Foreign Direct Investment (FDI) policy-making in the East African Community (EAC). Therefore, this *de lege ferenda* perspective requires that the content of good governance against which compliance would be assessed must be clearly set out in order to allow a thorough review, should this be necessary.

2.2. AN ATTEMPT TO DEFINE GOOD GOVERNANCE

When carrying out research on good governance, the first thing that draws one's attention is the high volume of works that have addressed this topic. Just as an extremely rich literature on good governance is in existence, it is paradoxically astonishing that this concept has not attained unanimity regarding its definition. This lack of unanimity surrounding the definition and the content of good governance makes the quest to determine its boundaries indispensable, at least for this study. In order to do so, a historical retrospective of the concept needs to be pro-

vided before skimming through various meanings that good governance has inspired since its resurgence in the 1980s.

2.2.1. Historical evolution of good governance-related practices

2.2.1.1. Good governance in Antiquity

It could be very challenging to retrace the exact distant origin of good governance in history. Commentators only agree that it is a very old concept. For some scholars, the foundation of good governance lies in the "law and development movement" that flourished in the mid twentieth Century inspired by Max Weber.[162] Nevertheless, whether we agree with those who retrace the origins of good governance back to the creation of the universe or with those who support the notion that good governance is an invention of the contemporary era, it is generally acknowledged that 'good governance' was mentioned for the first time as such in a 1989 report by the World Bank. However, this should not be a reason for not trying to establish the historical evolution of this concept through the ages.

There are very few academic works which have attempted to go as far back as to the time of Antiquity in order to discover the origins of good governance. Most scholars who adopted this perspective quickly concluded that good "governance is as old as human history"[163]. Although this affirmation certainly is and remains true, a careful consideration of history informs us that good governance has existed since Antiquity. Indeed, the premises of good governance practices may be traced back to the Achaemenid Empire, founded by Cyrus the Great.[164] This Emperor was probably the first in history to have created the world's largest ever empire, considering that the territory under his control embraced all the previous civilized states of the ancient Near East, which then vastly expanded and eventually he conquered most of Southwest Asia and much of Central Asia, parts of Europe and the Caucasus, from the Mediterranean Sea and Hellespont in the West to the Indus River in the East.[165] Commentators do not put much emphasis on Cyrus's military power in justifying his conquests. But they do agree that the expansion of the Achaemenid Empire should be mainly credited to the manner in which Cyrus ad-

[162] F.N. Botchway, "Good Governance: The new, the principle and the elements", *Florida Journal of International Law,* Vol. 13, 2000-2001, p. 171.
[163] See for instance T.G. Weiss, "Governance, Good Governance and Global Governance: conceptual and actual challenges", *Third World Quarterly*, vol. 21, No 5, October 2000, p. 795.
[164] P. Briant, *Histoire de l'empire perse de Cyrus à Alexandre*, Vol. I, Paris, Fayard, 1996, pp. 9 and 25. See also A. T. Olmstead, *History of the Persian Empire (Achaemenid period)*, Chicago, The University of Chicago Press, 1948, pp. 34-58.
[165] Wikipedia, "Cyrus the Great", http://en.wikipedia.org/wiki/Cyrus_the_Great, accessed on july 27th, 2011. See also P. Briant, *op. cit.*, p. 9.

ministered the territories he conquered.[166] For instance, unlike many other conquerors, Cyrus the Great did not interfere with the local traditions and religions of the lands which he conquered;[167] instead he displayed profound respect in worshiping their gods.[168]

The outstanding characteristic of Cyrus the Great's empire was its meticulous administrative organization. In Antiquity when there was no internet, no fax, no telephone, no post, and no other quick means of transport or communication it is indeed impressive to learn how Cyrus the Great put structures in place to monitor such a vast empire. The Achaemenid administrative machinery functioned like a federal state. "A key element of establishing and retaining imperial authority in Anatolia involved creating regional governing centers and administrations that would remain loyal to the central authority while exercising a degree of local autonomy".[169] In fact, the Empire was divided into Satrapies, led by Satraps who were personal representatives of the Emperor with their primary duty being to maintain order in their respective areas.[170]

Cyrus' magnanimity towards the people and the leaders of the lands he conquered coupled with his sense of effective administration mark his ruling as the quintessence of a government totally dedicated to the welfare of his subjects. These are no less than early manifestations of strong leadership skills and testify to the rudimentary existence of good governance practices in Antiquity. This observation is con-

[166] This follows from the ideological strategy that Cyrus used in his conquest, as rightly put by Briant: "En réalité, aucune victoire militaire ne fut aisée ni immédiate. Le sort relativement humain réservé aux rois vaincus n'impliquait pas de la part des vainqueurs, la reconnaisance d'un pouvoir déchu : Il s'agissait, dans une première étape, d'agir en accord avec leur politique de « continuité » et, en même temps, de favoriser le ralliement des élites ». [Actually, no military victory was easy or immediate. The relatively human treatment given to conquered kings did not imply the recognition of a fallen power by the victors: it was first of all to act in accordance with their policy of "continuity" and, at the same time, to foster the rallying of elites. (unofficial translation)]. See Pierre Briant, *op. cit.*, p. 91.

[167] For instance, the people of the conquered lands were not compelled to speak Persian, the language of the conqueror. On the contrary, they were allowed to continue speaking in their own language and using their own particular form of writing. It is reported that in Babylon Cyrus made his declarations in the local language, Akkadian, and those declarations were written in Cuneiform. Pierre Briant, *op. cit.*, p. 88.

[168] A. T. Olmstead, *op. cit.*, p. 53.

[169] E.R.M. Dusinberre, *Empire, Authority, and Autonomy in Achaemenid Anatolia*, Cambridge, Cambridge University Press, 2013, p. 33.

[170] Satraps' responsibilities included a division of civil and military responsibilities, which were subject to checks and balances. Pierre Briant, *op. cit.*, pp. 76-77.

firmed by Xenophon and the Bible. They acknowledge Cyrus respectively as the "ideal ruler"[171] and as "a benign and chosen ruler"[172].

For Professor Richard N. Frye, Cyrus' governance meant that he became "the epitome of the great qualities expected of a ruler in antiquity".[173] Little wonder that the Cyrus Cylinder currently in the British Museum, which is considered to be the ancestor of the Universal Declaration of Human Rights, is one of his lasting legacies.

2.2.1.2. Good governance after Antiquity

Cyrus' good governance footprints were later followed by Ashoka[174], an Indian Emperor from the *Maurya* Dynasty who ruled over almost all the Indian Subcontinent from 270 BC to 232 BC[175]. Ashoka's ruling is mainly known thanks to the deciphering of various edicts he published during his reign[176]. Those edicts are known as The Edicts of King Ashoka. A reading of these edicts reveal two important things. One is King Ashoka's obsession with ruling in accordance with Dhamma, which can be translated as law, duty or righteousness[177]. In other words, it could be said that Ashoka was obsessed by the rule of law, which is considered to some extent as being a component of good governance[178]. The Emperor's attachment to the rule of law plainly appears in one of the Seven Pillar Edicts that reads:

---

[171] Xenophon, *Cyropaedia* Book I, cited by L. Mitchell and C. Melville, "'Every Inch a King". Kings and Kingship in the Ancient and Medieval Worlds' in L. Mitchell and C. Melville (Eds.), *Every Inch a King: Comparative Studies on Kings and Kingship in the Ancient and Medieval Worlds*, Leiden, Brill, 2013, p. 6.

[172] See The Holy Bible, Old Testament, Isaiah 45: 1 – 13. Note also that Cyrus is mentioned several times in the Old Testament where he is seen as an outstanding leader.

[173] R.N. Frye, "Cyrus II", Encyclopedia Britannica, at http://www.britannica.com/EBchecked/topic/148758/ Cyrus-II, accessed on July 25, 2011.

[174] Note that Ashoka and Asoka are indistinctly and interchangeably used in literature to mean the same person.

[175] J.S. Strong, *The Legend of King Asoka: A study and Translation of the Asokavadana*, Princeton, Princeton University Press, 1983, p. 3.

[176] The first deciphering was done in 1837 by James Prinsep, a civil servant in Benares, who successfully made sense of inscriptions engraved in two columns located respectively in Delhi and Allahabad. J. Bloch, *Les inscriptions d'Asoka traduites et commentées*, Paris, Belles Lettres, 1950, p. 19.

[177] J.S. Strong, *op. cit.*, p. 4. Also known as 'Dharma' in Sanskrit. See J. Bloch, *op. cit.* p. 31. The meaning of Dhamma as used in the Edicts of Ashoka is controversial. Some commentators see in it a personal profession of faith made by Ashoka, which cannot be analyzed in any way as a policy or governance instrument (see for instance J. Bloch, *op. cit.* p. 29), while the vast majority of scholars submit that these Edicts, and Dhamma referred to therein, were meant to maintain order in the empire and, therefore, they were intended for the public. Nevertheless, these scholars do concede that some Edicts have a personal character. (See for instance R. Thapar, *A History of India*, Vol. 1, Marmondsworth, Penguin Books, 1966, p. 85 cited by J.S. Strong, *op. cit.*, p. 14). Common sense, the phrasing and the mode of the publication of these edicts suggest that the second school of thought should be adhered to.

[178] See infra (2.3.3.1) ; see also, for instance, articles 6(d) and 7(2) of the EAC Treaty.

But through my instruction, a preoccupation with the Law and a love of the Law has grown day by day, and will continue to grow. Also my officers of high, low and middle rank conform with and apply the Law in a way which is enough to persuade those who hesitate. Border superintendents are doing the same. Since it is the rule to govern in accordance with the Law, to administer in accordance with the Law, to make happiness in accordance with the Law and to protect in accordance with the Law.[179]

Ashoka's concern to preserve legal certainty and transparency may be seen, for instance, in the final Pillar Edict:

Wherever there are stone pillars or stone slabs, there this Dhamma edict is to be engraved so that it may long endure. It has been engraved so that it may endure as long as my sons and great-grandsons live and as long as the sun and the moon shine, and so that people may practice it as instructed. For by practising it happiness will be attained in this world and the next.[180]

The second aspect is the repeated concern of the Emperor to rule for the welfare and the happiness of his people. In a paragraph from the Rock Edict VI one can read:

Truly, I consider the welfare of all to be my duty, and the root of this exertion and the prompt dispatch of business. There is no better work than promoting the welfare of all the people and

[179] Non-official translation of « Mais grâce à mes instructions la préoccupation de la Loi et l'amour de la Loi de jour en jour se répandent et se répandront. Mes agents aussi, supérieurs, subalternes et moyens s'y conforment et la font appliquer, assez pour entrainer les hésitants. De même encore pour les surintendants des frontières. Car c'est là la règle (le principe) : gouverner selon la Loi, administrer selon la Loi, contenter selon la Loi, protéger selon la Loi ». Extract of Pillar-Edict I (Delhi-Topra) in J. Bloch, *op. cit.*, p. 161. The transcription of the entire Pillar-Edict I can be found in P. H. L. Eggermont and J. Hoftijzer (Eds.), 'The Moral Edicts of King Asoka', *Textus Minores*, Vol. XXIX, Leiden, E. J. Brill, 1962, p. 23. V.S. Dhammika provides an English translation but it seems to overlook some key words compared to Bloch's French version. In order to highlight these key words, it was preferred to make our own translation into English from Bloch's French version. Dhammika's English version is only considered when it is found to be as close as possible to Bloch's translation because the latter has been referred to by many authors and his methodic juxtaposition of the French translation next to the original text presupposes a thorough and careful translation. See V. S. Dhammika, 'The Edicts of King Asoka', *Access to Insight (Legacy Edition)*, 30 November 2013, online at http://www.accesstoinsight.org/lib/authors/dhammika/wheel386.html accessed on 7 November 2014.

[180] English rendering by V. S. Dhammika, *op. cit.* It should however be noted that Dhammika's translation is structurally different from what would be obtained if one has a direct translation from Bloch's French version. It may be that Dhammika embarked on a literary translation while Bloch resolved to keep the original structure of the text.

whatever efforts I am making is to repay the debt I owe to all beings to assure their happiness in this life, and attain heaven in the next.[181]

These extracts from the Edicts characterize the reforms initiated by Ashoka and the vital principles he followed in order to create a just and humane society. Among other good governance principles, accountability and effectiveness can be seen as a hallmark in the above-mentioned extracts. Besides, a quick look at other Edicts reveals that as an emperor Ashoka valued fair and impartial justice,[182] accessibility and availability to the people,[183] the protection of the environment[184] and religious freedom and tolerance.[185]

Against this background, the Edicts of Ashoka could be considered as the earliest attempt to codify good governance principles.

This historical overview has demonstrated that good governance was practised in ancient societies and by leaders of epochs as old as Antiquity, while later times already understood the necessity to govern while upholding respect for others and aiming at the welfare of the people. The 1948 Universal Declaration of Human Rights which is somehow a modern version of Cyrus's cylinder, and the large expansion of Buddhism in the world which owes much to the Ashoka Edicts are concrete examples of the good governance legacy of two ancient great civilizations.

2.2.1.3. Good governance in Modern Society

Good governance has proved to be an element of stability since ancient times. Rulers such as Cyrus or Ashoka in ancient empires did not wait for elaborated theories or reports to take measures in order to foster good governance practices. In their epochs, there was no specific way to qualify their respective ruling systems. This explains why no express reference to the term "governance" or "good gov-

[181] English rendering by V. S. Dhammika, *op. cit*. See also the French translation provided by J. Bloch, *op. cit*., p. 108-109; the transcription can be found at P. H. L. Eggermont and J. Hoftijzer (Eds.), *op. cit*., pp. 10-11.
[182] For instance, he encouraged judicial officers to do their duty in a proper way to avoid the people under their authority suffering unjust imprisonment or harsh treatment. See P.H.L. Eggermont and J. Hoftijzer (Eds.), *op. cit*., pp. 19-21 and See J. Bloch, *op. cit*. p. 137-138 [Separated Rock-Edict I (Dhauli) and Pillar-Edict IV]
[183] P. H. L. Eggermont and J. Hoftijzer (Eds.), *op. cit*., pp. 10-11; and See J. Bloch, *op. cit*. p. 106-109 [The Rock-Edicts VI and VIII].
[184] See P. H. L. Eggermont and J. Hoftijzer (Eds.), *op. cit*., p. 7; and See J. Bloch, *op. cit*. p. 92-93 [The Rock-Edict I].
[185] See P. H. L. Eggermont and J. Hoftijzer (Eds.), *op. cit*., pp. 15-16 and 25-26; and See Jules Bloch, *op. cit*. p. 121-124 and 165-167 [The Rock-Edict XII and Pillar-Edict V].

ernance" was made in various works of literature where the reign of these two emperors are described.

As such, the wording "good governance" or governance appeared for the first time in a World Bank report in 1989.[186] But the World Bank referred to the term "good governance" not to laud virtuous practices that were taking place at the time when the report was released. On the contrary, good governance was employed as a remedy to the consequences that its opposite "poor governance" had caused to the economy of Sub-Saharan Africa.[187] In other words, good governance appeared in the late 1980s as the World Bank's prescription to heal developing countries, especially the African countries, from the economic slump.

Considering the weight of the World Bank on the international arena and the chronic dependence of African countries on external financing including International Financial Institutions (IFIs) and developed countries, this report was predestined to result in wide reverberations in the international community, which explains the widespread use of the term good governance after the publication of the World Bank's report.

In the beginning, the imposition of good governance as a condition for Official Development Assistance (ODA) was in contrast to the serious lack of a harmonized definition of this concept. To some extent this lack of a harmonized definition could be a reflection of the "lack of enthusiasm in academia for the debate on good governance"[188] which led to wider interpretations, each actor defining his or her own content of good governance based on his or her respective aims. This cacophony, coupled with many reforms that developing countries had to undergo in the name of good governance, somehow contributed to the biased perception that this concept had attracted in its early stages. In Africa, for instance, good governance was seen in certain milieus as a new mechanism engineered by Western countries to interfere with developing countries' internal affairs.[189]

---

[186] World Bank, *Sub-Sahara Africa. From Crisis to Sustainable Growth (A long-Term Perspective Study)*, November 1989, p.60 [hereinafter referred as World Bank 1989].

[187] The term good governance was used for the first time in the Foreword of the report where Barber B. Conable, then president of the World Bank, declared: "A root cause of weak economic performance in past has been the failure of public institutions. Private sector initiative and market mechanisms are important, but they must go hand-in-hand with good governance – a public service that is efficient, a judicial system that is reliable, and an administration that is accountable to its public. And a good balance is needed between the government and the governed"(World Bank 1989, p. vii).

[188] F.N. Botchway, *op. cit.*, p. 164.

[189] See for instance Y. Tandon, "Reclaiming Africa's Agenda: Good Governance and the NGOs in the African Context", *Australian Journal of International Affairs*, vol. 50, No 3, 1996, pp. 300-303.

However, this view can only stand - although with difficulty - if one sticks to the original aim of good governance. As a concept, good governance has evolved over time. Even though upon its birth in the late 1980s good governance was first and foremost a prescription for developing countries, specifically sub-Saharan Africa, the concept has so evolved that it nowadays applies not only to developed countries but its scope has also grown beyond the development agenda. This can be testified by the wide range of literature dealing with good governance in several aspects relating to developed countries.[190] The debate has developed to such an extent that stormy discussions currently relate not only to good governance at the national level but rather at the supranational level.[191]

Despite this remarkable evolution of the debate on good governance, little has been done to harmonize its definition. Although it is unanimously accepted that good governance positively impacts economic development, little has been achieved in agreeing on a universal meaning of good governance, and elements or parameters that should be used to measure whether or not a country or an organization is operating in compliance with good governance requirements. This is a reason why it could be interesting to explore, as far as possible, the existing definitions in order to demarcate the conceptual framework within which this work should be considered.

2.2.2. Meaning of good governance

This part does not purport to come up with a universally binding meaning of good governance. Although doing this would be desirable, the meaning drawn here will serve, first of all, to describe what good governance is in the context of this research. The approach which is used to this end consists of exploring existing definitions in order to extract their most constant elements for further discussion.

2.2.2.1. Good governance as defined by international institutions

Beforehand, it is important to note that authors use both 'governance' or 'good governance' to mean the same thing. In the beginning of the 'good governance movement' in the 1980s, the World Bank itself used the word 'governance' on several occasions, although the term 'good governance' could also be sporadically

[190] See for instance D.M. Curtin and E.A. Wessel (eds), *Good governance and the European Union. Reflections on concepts, institutions and substance*, Antwerp, Intersentia, 2005; Commission of the European Communities, *European Governance. A White Paper*, (2001) 428 final, Brussels, 2001 (hereinafter EU White Paper).; M.P. Chiti, "Are there Universal Principles of Good Governance?", in *European Public Law*, Vol. 1, Issue 2, 1995; etc.

[191] T.G. Weiss, *op. cit.*, pp. 806-810; D.C. Esty, "Good governance at Supranational Scale: Globalizing Administrative Law", *The Yale Law Journal*, 2006, pp. 1491-1561.

found in the reports.[192] For this reason, definitions provided for both terms will be considered here.

In its 1989 report, the World Bank defined governance as "the exercise of political power to manage a nation's affairs".[193] Two years later the World Bank enriched this definition by adding that governance is "the manner in which power is exercised in the management of a country's economic and social resources for development".[194] To clarify this definition, the World Bank came up with three aspects to be considered in the governance discourse, i.e. "(i) the form of political regime; (ii) the process by which authority is exercised in the management of a country's economic and social resources for development; and (iii) the capacity of governments to design, formulate, and implement policies and discharge functions".[195] Since the World Bank is not allowed to interfere with the political affairs of its members,[196] the aspect of good governance related to "the form of political regime" is obviously out of the grasp of this institution. Hence, the World Bank's definition of good governance has remained focused mainly on economic dimensions. A consequence of the confinement to the economic dimension could be that the World Bank would not have jurisdiction to question any government's legitimacy, structures and decision-making processes. Similarly the Bank would not need to consider the design and the implementation of public policies by its members as a precondition for the allocation of development aid. From a positivist perspective, the World Bank's assistance should be allocated to any country regardless of the type of its government as long as the allocated fund could be used to ensure economic growth and development.[197]

The prohibition of political interference puts the World Bank in a delicate position in pursuing its good governance agenda. Such a position could even have an impact on the results expected from the World Bank's intervention. As such the

[192] World Bank 1989, p. xii, 6, 30, 60 and 162; see also World Bank, *Development in Practice. Governance: the World Bank's Experience*, Washington, World Bank Publication, 1994 [hereinafter World Bank 1994]. It seems that the World Bank willingly avoided using the term "good governance" because of the subjective tone contained in the adjective "good". See N. Maldonado, 'The World Bank's evolving concept of good governance and its impact on human rights', *Doctoral workshop on development and international organizations*, Stockholm, Sweden, May 29-30, 2010, p. 5.
[193] World Bank 1989, p. 60.
[194] World Bank 1992, p. 3.
[195] This is according to the definition of 'governance' provided by Webster's New Universal Unabridged Dictionary (London, Dorset & Baber, 1979). See World Bank 1992, p. 58.
[196] See article IV section 10 of the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD) that reads "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned…"
[197] See article III section 5 (b) of the Articles of Agreement of the IBRD.

"manner in which power is exercised" is closely linked to the identity of those who are exercising it.[198] Therefore, putting the means by which to exercise power under the control of the World Bank without entrusting it with enough jurisdiction over the politicians who hold and exercise that power seems inconsistent, let alone gullible.

In this way, the World Bank's definition has proved partial and ineffective. It is partial because of its congenital inability to control an important aspect of good governance such as its political dimension despite public acknowledgment that "the concept of governance includes a political dimension".[199] It is ineffective simply because ignoring the political dimension of a country's management of economic and social resources in the World Bank's good governance assessment could not ensure adequate results. This ineffectiveness was quickly evidenced a few years after the launching of the good governance agenda. The political context in an aid recipient country was revealed to be one of the determinant factors for economic development as it was rapidly noticed that despite the intensive antidote taken by developing countries between 1992 and 1996 "little change in fact occurred because of the resistance from entrenched socio-economic and political interests"[200].The limits displayed by the World Bank's definition led to a search for better ones.

Close to the World Bank in terms of influence and focusing on development issues is the United Nations Development Programme (UNDP). According to this United Nations (UN) agency governance is "the exercise of economic, political and administrative authority to manage a country's affairs at all levels"[201]. For the UNDP governance encompasses all mechanisms, processes and institutions that can be used by citizens and groups "to articulate their interests, exercise their legal rights, meet their obligations and mediate their differences"[202]. In this perspective,

---

[198] As is well illustrated by Holzer and Kim in the following image: "Just as the dancer cannot be separated from the dance, the organs or actors executing governance in their respective spheres cannot be relegated to the background". See M. Holzer and K. Byong-Joon (eds), *Building Good Governance: Reforms in Seoul*, National Center for Public Productivity and Seoul Development Institute, 2006, preface quoted by A.M. Abdellatif, *op. cit.*, p. 3

[199] P. Landell-Mills and I. Sarageldin, 'Governance and the external factor', *Proceedings of the World Bank Annual Conference on Development Economics 1991*, Washignton DC, Word Bank, 1992, p. 304 quoted by V.P. Nanda, "The 'Good Governance' Concept Revisited", *The Annals of the American Academy of political and Social Science*, 2006, p. 273.

[200] V.P. Nanda, *op. cit.*, p. 274.

[201] UNDP, "Governance and sustainable human development: A UNDP policy document", 1997, online at http://mirror.undp.org/magnet/policy/ accessed on July 28, 2011.

[202] *Ibidem*

governance appears to be a three-legged stool standing at the same time on the economic, political and administrative aspects of the country concerned[203].

The inclusion of the political dimension in this definition fills the gap left by the World Bank. The UNDP, being a specialized institution of the UN, does not have to bow to political considerations. However, this definition is silent about the final aim of governance, unlike the World Bank's definition which clearly states that economic growth and development are the final purpose of governance.

It is also worth noting that the UNDP makes a difference between governance and good governance, although its definition of good governance seems to be rather a description of the latter's characteristics in the following terms:

Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in the society and that the voices of the poorest and most vulnerable are heard in decision-making over the allocation of the development.[204]

A combined reading of the two definitions leads to the observation that governance is the mere exercise of authority to manage a country's affairs whereas good governance implies that authority is exercised in a positive way expressed through the performance of transparent, accountable, effective, and equitable duties which takes into consideration the participation of the people and the promotion of the rule of law. Therefore, one understands that good governance is, as far as the UNDP is concerned, at a higher level than governance. This is particularly true since governance can be "poor" or "bad" when it does not take the above-mentioned values into consideration.[205]

Most of the definitions provided by other international organizations or institutions are built around the ones provided by the World Bank and the UNDP where the focus is on the way in which a country's business is managed.[206] As rightly stated by Addink, the definitions provided by international organizations or institutions give good governance either an economic or a political connotation much

[203] *Ibidem*
[204] *Ibidem*
[205] In general, poor or good governance is interchangeably used as the opposite of good governance.
[206] See the different definitions by the OECD, the Institute of Governance (Ottawa), the Commission on Global Governance, etc. in T.G. Weiss, *op. cit.*, p. 797.

more than a legal one.[207] Yet for this research, it is the legal perspective which matters. It is therefore necessary to have a look at the legal aspects of the definition of this concept.

2.2.2.2. Good governance as defined by legal academics

Legally speaking, good governance is located within the branch of administrative law. In this sense commentators have agreed that at some point there is no significant difference between administration and governance. This implies that, in principle, there should not be any substantial difference between good administration and good governance as "these terms imply activities promoting the general interest by the fulfillment of a public task".[208]

However, attempts to define good governance from a legal perspective have not yet gained unanimity even at the academic level. For instance, good governance is seen by Addink as a "proper use of government's power in a transparent and participative way".[209] But he also concedes that governance is more than this.[210]

Chowdhury perceives good governance as a "normative principle of administrative law, which obliges the State to perform its functions in a manner that promotes the values of efficiency, non-corruptibility, and responsiveness to civil society".[211] For this commentator, good governance is largely associated with statecraft.[212] Similarly, van Boven frames good governance as "a notion embodying a number of general principles of government".[213] On another note, good governance is conceived

[207] G.H. Addink, "Principles of Good Governance: Lessons from Administrative Law" in D.M. Curtin and R.A. Wessel (eds), *Good Governance and the European Union: Reflections on the Concepts, Institutions and Substance*, Antwerp, Intersentia, 2005, p. 27 (hereinafter Addink 2005)
[208] *Idem*, p. 28.
[209] G.H. Addink, et al., *Sourcebook: Human Rights and Good Governance*, SIM special 34, Utrecht, 2010, p. 19.
[210] *Ibidem.*
[211] N. Chowdhury (with C.E. Skarstedt), 'The Principle of Good Governance', Legal Working Paper, *CISDL Series (Recent Development in International Law Related to Sustainable Development)*, Oxford, 2005, p. 4.
[212] This should be contrasted with Lam's view of good governance as every person's duty. For this commentator, good governance is "full accountability to stakeholders (e.g. workers, shareholders, persons on fixed income, various social segments or strata and so on) in the exercise of mandated activities and functions by all concerned, whether they be central or local government, managers of State and business enterprises, or civic and civil society organizations". See N.V. Lam, "A perspective on good governance", *Bulletin on Asia-Pacific Perspectives*, November 2003, p. 48.
[213] T.C. van Boven, 'Is There an Emerging Right to Good Governance?', *Netherlands Quarterly of Human Rights*, vol. 13, 1995, p. 311 cited by N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, The Hague Academy of International Law, 2008, p. 201.

as "the conscious management of regime structures with a view to enhance the legitimacy of the public realm".[214]

These definitions are just a sample to show how commentators have a different understanding of good governance. Each one sees the concept from his or her own perspective. Maybe this divergence in opinions could be justified by the fact that "the idea [of good governance] is heavily value-laden" and so "general in its orientation" that it accepts "a multiplicity of issues and pains at rejecting anything"[215]. In line with this, we cannot but agree with Hayden when he points to the fact that one of the problems with governance's definition is the "challenge of making sense of the wide range of interpretation of governance that the authors bring to the agenda"[216].

2.2.2.3. The meaning of good governance for this research

Efforts to discover what good governance means so as to facilitate the understanding of this work should be subjected to the identification of constant elements on which consensus seems to have been reached. This implies understanding some aspects of good governance in responding to basic questions such as what does it concern, who is involved and how the "who" does the "what". This latter aspect constitutes this work's normative framework, which is presented in a different section.

a) What is good governance all about?

In the different definitions provided in attempts to circumscribe governance, authors agree that it is all about the management of affairs, whether public or private. In the context of this research, governance refers to the management of foreign direct investment (FDI). Dictionaries suggest that "to manage" means *inter alia* "to handle or direct with a degree of skill: as (a) to make and keep compliant; (b) to treat with care; (c) to exercise executive, administrative and supervisory direction of"[217]. In law, generally speaking, this falls ineluctably under the scope of administrative law. From this perspective, as mentioned above, governance is synonymous

[214] G. Hayden and M. Bratton, *Governance and Politics in Africa* (1993) quoted by F.N. Botchway, *op. cit.*, p. 160.
[215] F.N. Botchway, *op. cit.*, 162.
[216] G. Hayden and M. Bratton, *op. cit.*, p. 4.
[217] Merriam-Webster's dictionary online

with administration, and means the act of performing activities "promoting the general interests by fulfillment of public tasks"[218].

It is easy to understand that the management of the FDI may be either well or poorly performed. When governance is poorly performed, measures need to be taken to improve it. But as a matter of fact, good governance principles and standards are still at the development stage. Many patterns have been developed to guarantee that those in charge of administering public affairs do this not only in compliance with the law but also, when the law is silent, in consideration of the public interest. Currently it is generally assumed that a country's governance is within good standards when it is established that the security of persons and society is guaranteed, the framework for the public sector is managed in an effective and accountable manner, and that the economic and social welfare of the people is the central concern of the administrators.[219] These considerations are better reflected in the Cotonou Agreement signed between the European Union (EU) and the African Caribbean and Pacific Group of States (ACP) in 2000. Article 9 of this agreement reads:

Good governance is the transparent and accountable management of human, natural, economic and financial resources for the purpose of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaboration and implementing measures aiming in particular at preventing and combating corruption.

This definition reflects what good governance should mean in the context of this research. Roughly it stems from this definition that good governance necessarily involves the building up of or the existence of effective institutions capable of establishing clear procedures for the decision or policy-making, and the enactment of adequate policies and regulations. In other words, good governance is all about good institutions with appropriate procedures, and adequate policies and laws. These two aspects are closely related and they equally matter. How an institution is structured may definitely impact on its decision-making and on the manner it implements its laws and policies. As presented in the Cotonou Agreement, good governance appears as an ideal to be constantly aimed at. But for this research, the assessment of good governance means the evaluation of the effectiveness of the

[218] H. Addink et al., *op. cit.*, p. 21.
[219] *Idem*, p. 19.

legal and institutional framework, especially in relation to FDI inflow. To do this, the legal and institutional framework of FDI needs to be confronted not just with the result that they were intended or expected to produce but most importantly with the way used to reach that result. This calls for the observance of individual principles of good governance, i.e. properness, accountability, transparency, participation, and respect for human rights. Each of these principles is discussed further.[220]

b) Who is concerned with good governance?

Good governance is a very broad concept which operates at different levels including international, regional and national levels. At the international and regional levels, states and international or regional organizations are the first actors involved in the good governance test. For this research the East African Community (EAC) as a regional organization is the desirable corpus to be considered for the good governance test, even though a specific regional institution in charge of ensuring compliance with good governance in the investment sector does not so far exist[221].

However, since the EAC's laws and regulations are applicable at the national level by Partner States' institutions, it is rational to follow this chain and to include national institutions among the actors which are concerned with good governance in the context of this research.

It should be noted, however, that the discussion on good governance at the national level can take place at least on three dimensions. The first is the *macro* dimension where good governance is understood in its broad sense. This dimension entails an assessment of the functioning and performance of a country as a whole. All the three powers, i.e. the executive, the legislature and the judiciary, are jointly concerned. The second is the *meso* dimension that consists of good governance in its intermediate sense. In this dimension, good governance focuses rather on the executive power, especially the public administration. Finally, in the *micro* dimension, good governance is comprehended in its narrow sense. At this level, all the attention converges on a specific administrative institution to scrutinize how it functions.

[220] See infra section 2.3.3.
[221] The work done by the East African Court of Justice (EACJ) in upholding the observance of good governance is appreciated, but this does not focus specifically on the field of investment. For some cases dealt with by the EACJ on good governance, see infra (2.3.2.3).

In the perspective of this research it is consistent to consider good governance in its narrow sense as the promotion of FDI is entrusted to specific administrative institutions whose functioning and management directly affect foreign investors. Of course, authorities which promote investment are part of a bigger picture and they interact with many other national institutions such as the tax, labour and social security, trade, and land authorities to name but a few. But within the perspective of a one-stop centre, these other institutions are supposed to disappear and the foreign investor would only deal with them virtually through the Investment Promotion Authority (IPA).

The second actor on the scene of good governance is naturally the people. Upon the renaissance of good governance in the late 1980s, the concern of the World Bank in recommending the strengthening of good governance in developing countries was the social and economic welfare of the people. The people are the central element and the final beneficiaries of good governance being complied with by administrative authorities. This applies especially when it concerns services that the people expect to obtain from the public administration.

However, in some areas, such as the promotion of investment, it appears inappropriate to submit that the people should be considered as the immediate claimants of good governance. For this reason, it could be preferable to use the word stakeholder instead of people. The term 'people' sounds broad and abstract while 'stakeholders' is more concrete and could fit within every dimension of good governance. In an analysis where good governance is taken in its *micro* dimension, any person directly involved in or affected by an administrative act is a stakeholder as far as that administrative entity or institution is concerned. For instance, it could also include an ordinary citizen applying to the local authority for a building permit just as to a foreign investor applying to the IPA for an investment certificate. For this research, foreign investors should be considered as the direct beneficiaries of good governance from both IPAs in EAC Partner States but also from EAC organs in the event of the transfer of competence concerning investment from Partner States to the EAC as a supranational entity.

2.3. NORMATIVE FRAMEWORK: THE NEED FOR A HOLISTIC APPROACH VIS-À-VIS FDI

2.3.1. Justification of the choice of the holistic approach

Good governance and investment are among the areas that can hardly be regulated by regional or international instruments as their understanding widely differs de-

pending on the countries concerned. This poses a serious challenge in finding a specific normative framework when carrying out research on these topics, especially with a regional approach. Needless to say, the task could become even more difficult when the research in question is given the task of dealing with a topic that combines both concepts. Given the fact that good governance has so far been defined in various ways and that in most cases it is rather manifested through scattered provisions within diverse regional and national protocols, regulations and policies, it would be tricky to find a specific reference that could be considered to be the normative framework for this research. Following the diversity in the understanding of good governance, it would be fallacious to analyze good governance only through a certain number of its components taken individually.

For this reason, while it is important to understand the consistent components of good governance, it is more judicious to adopt a holistic approach in the discussion about good governance as an overriding principle to be observed by institutions and to be embedded in the spirit of laws, regulations and policies. This approach is imperative for this research as it deals with FDI which can be dealt with by a multitude of institutions and regulated or influenced by various laws and policies. Therefore a holistic approach to good governance is indispensable in its relationship with FDI. The advantage of a holistic approach is that it is consistent either when it concerns analyzing good governance in a procedural context such as the adoption of laws and policies, or when it concerns assessing the functioning of a given institution, or even when it concerns the substance of these laws and policies as well as during their implementation.

This approach is so important because good governance is such a broad concept that some of its components could be conspicuously more necessary in the procedural context rather than, for instance, in the substantive context. But this should not be construed as meaning that good governance could be needed more or less depending on the nature of the context. As a principle, good governance does not necessarily mean the sum of all its subprinciples or components. To facilitate the understanding of this approach it would be useful to discern the precise legal nature of good governance and to find out what are the components that may manifest its existence, especially within the perspective of the promotion and protection of FDI.[222]

[222] It would have been interesting to explore the 'African' cultural approach to good governance at this stage. But such a perspective does not present an added value to what has already been explained. In fact, this research is about how good governance principles can foster equitable economic development between EAC Partner States by enabling a proportionate distribution of FDI. It means that

2.3.2. Legal nature of good governance

The fact that good governance is a polyvalent expression has not facilitated its definition as demonstrated above. When discussed from a legal perspective, it is important to understand the legal nature of good governance for three main reasons. Firstly, it allows one to locate its place within the hierarchy of norms. Secondly, it is useful in discovering the legal regime that could be followed when approaching a topic related to good governance from a legal perspective. And, thirdly, it underlies the enforceability of good governance by the courts.

2.3.2.1. Good governance as a principle

In the discussion on the nature of good governance, a debate exists in the literature as to whether good governance is a principle or a policy. However, for the majority it is a settled concept that good governance is rather a principle. Therefore, within the perspective of examining the legal nature of good governance, it is obvious that the discussion should not address its policy character for the simple reason that a policy is not a legal norm.[223]

Nevertheless, even when an agreement seems to have been reached in recognizing good governance as a principle, a terminological confusion still exists on whether it

good governance should here be considered from the investors' perspective. Most foreign investors in Africa generally come from North America or Europe. Some others come from Asia. Therefore, presenting to them, in one way or another, good governance from an 'African' cultural perspective would not make sense as those investors are used to the 'Western' benchmarking of good governance. This is what they expect upon their arrival in Africa. For instance, as a judicial review of the action of the administration based on well-written procedural and substantive laws is one of the characteristics of the principle of accountability, which is also a sub-principle of good governance, the foreign investor who would be involved in a situation where an administrative action needs to be challenged would expect to appear before a legally established court of law where pre-written and pre-published laws are applied. If he were brought before a traditional 'Mwami' (chief) whose only reference is unwritten customary law and common sense, such a foreign investor would never credit such a process as respecting good governance principles regardless of how fair that process may be. This is essentially the reason why most 'African' cultural practices or perspectives are usually outlawed by 'Western' theories. Actually most of theories, such as human rights and good governance, are made in the West and they are thereafter tested in Africa. This means that their terminology, definition, characteristics, contents, etc. are already predetermined when they come to be applied in Africa. Against this background, such a thing as an 'African' cultural approach to good governance should not genuinely exist. It does not mean that, culturally, 'Africans' are not human rights or are sensitive to good governance. It is simply that 'African' practices do not fit within and cannot be explained by theoretical frameworks which are epistemologically ignorant of the 'African' culture. Some similar arguments can be found in J.A.M. Cobbah, 'African Values and the Human Rights Debate: An African Perspective', *Human Rights Quarterly*, Vol. 9, 1987, pp. 309-331.

[223] Botchway, for instance, is of the opinion that "for its long-term endurance, at least a tentative understanding of [good] governance as a principle would be helpful". For more details on why good governance should be considered as a principle rather than a policy, see F.N. Botchway, *op. cit.*, p. 180-186.

is appropriate to refer to "principle" or "principles" of good governance. But, before going further, it is important to note that when it comes to the legal nature of this concept, a line should be drawn between 'good governance' and 'governance'. If, from the beginning, especially when dealing with the meanings of certain terms, the present research noted and supported that 'governance' should be indifferently understood as synonymous with 'good governance', here is the limit of that synonymy. Governance as a word is neutral and can therefore take either a *good* or a *bad* direction depending on the way it is exercised. In this sense governance has rather a lot to do with public administration and political science. It becomes a centre of interest in law only when it is covered by its value-laden implication contained in the adjective "good". Accordingly, one should agree with Addink when he submits that "governance has a non-normative content" and therefore the term 'good governance' should be used in "normative legal discussion"[224] such as when it concerns circumscribing the legal nature of the concept.

Going back to whether we should refer to "principle" or "principles" of good governance, the answer is that both appellations are correct depending on the context. According to Black's Law Dictionary, a principle is (1) "a fundamental truth or doctrine as of law" or (2) a "comprehensive rule or doctrine which furnishes a basis or origin for others".[225] Good governance as a principle fits better within the second definition as according to the first definition a principle must be rigid and therefore should not admit a "variety in its content" and yet, as far as a principle of law is concerned, it is generally agreed that it needs to be flexible in order to accommodate room for derivatives and to be able to cope with the time evolution and the development of society.[226] For Botchway, a principle can only be flexible if it is understood in the second meaning.[227] But a principle as "a fundamental truth or doctrine as of law" may be considered to exclude flexibility only if it is conceived theoretically. From an epistemological perspective, a principle, conceived as fundamental truth or doctrine, does not necessarily mean a self-evident truth but may rather be understood as a belief which is generally accepted as true or worthwhile. This is at least what Krasner contends in submitting that principles are "beliefs of fact, causation and rectitude".[228] Dzizdornu tries to explain Krasner's definition with these words:

[224] G.H. Addink 2005, p. 29.
[225] Black's Law Dictionary, 9th edition, 2009.
[226] F.N. Botchway, *op. cit.*, p. 181, G.H. Addink et al., *op. cit.*, p. 19.
[227] F.N. Botchway, *op. cit.*, p. 181.
[228] S.D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", in *International Organization*, Vol. 36, No 2, International Regimes, 198, p. 186.

"That they are 'beliefs' suggests that they embody truths or propositions which are, unless there is contrary evidence, so clear that as to constitute the essence of norms and procedures that give realizable content to them. Those propositions relate to the causes in response to which actors find it necessary to aggregate their interests and resources and, consequently, to define the contours of 'rectitude' or correct behavior that give credence to the originating beliefs"[229]

A principle defined and understood as developed by Krasner encompasses good governance as practised in Antiquity and in the Middle Ages and adequately absorbs its current manifestations. Emperor Cyrus the Great in the Achaemenid Empire and, later on, Ashoka first of all believed that ruling for the benefit of their respective people was the only way to ensure general welfare and that led them to take appropriate actions (impartial justice, structured administration, availability to the people, freedom of religion, etc.) leading to that welfare. The same spirit prevailed during the resurgence of good governance in the 1980s under the lead of the World Bank and continues to predominate in all thoughts and conceivable schemes of good governance today.

The predominant truth contained in good governance meant that it has survived for centuries. The fundamental character of that truth is clearly emphasized by the fact that although authors or institutions do not necessarily agree with each other on the exact definition or content of good governance, at least all are unanimous that good governance is the right way to manage the *res publica.*[230] The current debate only strengthens the affirmation that, as a principle, good governance is the "basis or origin for specific prescriptions consistent with the truths" that it embodies.[231] Therefore, when one is talking about good governance in its essence, the terminology should be the "principle of good governance".

However, following Dzidzornu's conception presenting a principle as "the *fons and origio* for specific conduct directed at their practical realization in the context of the arrangements or activities to achieve the specific goals at stake"[232], good governance engenders the appearance of operational qualities. In other words, as a principle which needs flexibility to allow interpretation and application in various cir-

[229] See for instance D.M. Dzidzornu, "Four principles in marine Environment Protection: A Comparative Analysis", *Ocean development & International Law*, Vol. 29, 1998, p. 93.
[230] In line with this, Botchway adds that "Although the language of good governance is dominated by paternalistic and ethnocentric patrons in industrialized countries, international development institutions and academia, the need for it, even if varied and contested, is appreciated by the subject countries and other stakeholders".
[231] D.M. Dzidzornu, *op. cit.*, p. 93.
[232] *Ibidem.*

cumstances, good governance is hollow.[233] Therefore it needs to be filled up with consistent contents. In the literature the content of good governance has been given different names, such as parameters, elements, principles, etc.[234] The last qualification, *id est* principles of good governance, which is also widely used by scholars creates confusion.

This confusion is so important that it can lead to questioning the accuracy of the word "principle" when it is used to mean means and ways through which good governance can be captured both theoretically and in practice. By "principles of good governance", scholars generally mean concepts such as transparency, accountability, effectiveness, participation, properness and the protection of human rights, which are used as "steering mechanisms" to measure and assess the general compliance of a country or an entity with the principle of good governance.[235] In justifying the choice of the word *principles* for these concepts, Addink submits:

"We speak about Principles of Good Governance for the following reasons: a. it clarifies that these are fundamental notions, b. these notions have a legal character, c. clear links with other principles of law exist, d. principles are more flexible than regulations and e. in literature, case-law, and legislation the words Principles of Good Governance are accepted".[236]

In this assertion it is not clear over which other word *principles* was preferred by the author. But in reading point d., it appears that a comparison was made between *principles* and *regulations* as far as their flexibility is concerned. This may help in deducing that the author chose *principles* as opposed to *regulations*. Yet, regulations or rules are defined as "specific prescriptions or proscription for action".[237] With this consideration, there is no doubt that concepts such as transparency, accountability, etc., which are used to measure good governance are not regulations as they are not as specific as they should be in order to be directly applied. They need specific rules to be tested.

Are they therefore *principles* of good governance? The literature, case law and legislation use the term *principles* of good governance. This should not create any confusion because there exists an order of principles where superior principles support

[233] F.N. Botchway, *op. cit.*, p. 184.
[234] Sometimes the same author could use any of these words in the same book indifferently. See for instance G.H. Addink et al., *op.cit.,* p. 22.
[235] G.H. Addink et al., *op. cit.,* pp. 22, 23.
[236] *Ibidem*, p. 19.
[237] S.D. Krasner, *op. cit.*, p. 186.

sub-principles.[238] Accordingly the principle of good governance is therefore a superior principle which supports, explains and justifies lower principles such as transparency, accountability, effectiveness, participation, properness and the protection of human rights. It means that the principle of good governance is the focal point whose normative framework is designed and elaborated through more specific principles. From the point of view that the principle of good governance gives rise to other sub-principles, one can easily paraphrase Addink in confirming that "The principle of good governance is a meta-principle" which is built on other principles.[239]

2.3.2.2. Good governance: a general principle of law

If good governance is a principle, is it then a principle of law? According to Dworkin a principle of law is a "standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality".[240] It could be deduced from this that a principle of law is that undertone of justice and fairness which is supposed to accompany any legal rule. When a legal rule is not sufficiently clear or when its implementation presents some difficulties, the courts may have recourse to a principle of law in order to discover how to decide as fairly as possible. When making reference to principles of law, a judge may go beyond the letter, the spirit, and even beyond the *ratio legis* of that legal rule to extract what could be just or fair for both parties after a review of the circumstances of the case.[241]

In general, a principle of law is contrived by the judge *ab origine*. Some legal principles have been codified in the statutes of many countries or in international treaties. They have therefore acquired the status of written principles. Some others are neither written nor developed, but they do exist.

---

[238] H.B. Avila, *Theory of Legal principles*, Springer, Dordrecht, 2007, p. 90; J. Winter, "A Conception of the content of Law using General and Particular Principles" in M. Borowski, *On the nature of legal principles*, Franz Steiner Verlag, Stuttgart, 2010.

[239] See G.H. Addink et al., *op. cit.,* p. 23. However, according to Francis Botchway what are called good governance *principles* are rather *policies* in the service of the principle of good governance. Leaving aside the fact that policy is not a legal norm, Botchway's view raises another controversial debate in recognising the hierarchy between principles and policy (see for instance Dzidzornu, *op. cit.*, p. 93 who thinks that a policy is more general than a principle and F. Botchway, *op. cit.*, p.182 where he submits that a principle is greater in extent than a policy).

[240] R. Dworkin, *Taking rights seriously*, Duckworth, 1977, p. 22.

[241] See for instance *Henningsen v. Bloomfield Motors, Inc* as developed by R. Dworkin, *op. cit.*, p. 23.

Some authors have tried to classify principles of law. They have made a distinction between axiomatic, structural, and common principles. An axiomatic principle of law is a legal principle which appears to be so fundamental, so obvious, and so self-evident that there is no need to attach it to a specific legal system or origin. When applying an axiomatic principle of law, the judge may not "have recourse to a specific legal basis"[242] as *principiorum non est ratio*.

Structural principles operate in a specific legal order to ensure its harmonious functioning. In this category one may include the principles of primacy and direct effect in European Community law,[243] the principle of complementarity in the International Criminal Court's system, etc.

As for common principles, they apply in regional or sub-regional organizations which include many member states. Each member state has its own legal order with some principles that would not be shared by others. Therefore, common principles are those which are shared by all member states from their respective domestic legal order. Articles 38(1)(c) and 288(2) of the Statute of the International Court of Justice and the European Community Treaty, respectively, are frequently mentioned as making reference to common principles of law. Articles 6 and 7 of the Treaty of Arusha should be also considered as laying down common principles for EAC Partner states.

Structural and common principles are relative as they may vary from one legal order to another. Axiomatic principles transcend legal order or legal system cleavages.[244] An axiomatic principle being "inhérent à la notion même d'ordre juridique" (inherent in the very notion of a legal order), it therefore pre-exists in any legal order and its spirit remains unchanged over time and in all areas. This means that an axiomatic principle of law transcends the *ratio legis* and prevails in a superior framework, *ratio juris*. The principle of legality phrased in *nullum crimen nulla poena sine lege* could be the prototype of axiomatic principles in criminal law. This principle is accepted by every legal order or legal system. Should a legal order reject this principle, it would be just an exception to confirm the principle. States, countries

[242] T. Tridimas, *op. cit.*, p. 2; R.-E Papadopoulou, *Principes généraux du droit et du droit communautaire. Origines et concrétisation*, Brussels, Bruylant, 1996, p.8.
[243] T. Tridimas, *The General Principles of the EU Law*, Oxford, Oxford University Press, 2006, p. 2.
[244] It should be reminded that an axiomatic principle by its very nature may be domesticated (codified) in a given legal order. However, that should not be interpreted to mean that such a principle has lost its axiomatic nature, but that this scenario should rather be understood as a mere application of the maxim *qui potest majus et minimus potest*. This is for instance the case concerning the principle of good governance which is a common principle in EAC law [arts. 6(d) and 7(2) of the Treaty of Arusha].

or organizations could set their own procedures, conditions and exceptions to the principle of legality but the very substance of this principle would still stand: rules must be known beforehand in order to be binding.

Contrary to Tridimas who asserts that a list of axiomatic principles is difficult to provide as it depends "on the society concerned and differs from State to State",[245] axiomatic principles are *per se* universal.[246] It would simply be contradictory to submit that axiomatic principles are "inherent in the very notion" of a legal order[247] and to concede that the same principles may differ from country to country. Axiomatic principles reflect the *quintessence* of the concept of 'general principles of law' as reflected in the earliest attempts to shape its terminology such as with the expression "principles of natural reason" or simply "principles of reason".[248] In this sense, axiomatic legal principles could mean "truths of law in general", therefore implying "those logical and ethical elements in the law which are common virtually to all peoples because they are both rational and human".[249]

The principles of good governance respond quite well to this description. Principles of good governance as developed in the following section, i.e. properness, effectiveness, participation, transparency, accountability and the protection of human rights, are intrinsically all about the importance of logic and ethics in a legal text, as well as in the decision-making process.

As demonstrated above, good governance travelled over the centuries until its formal consecration as such by the World Bank in 1989. Good governance has survived for ages and in many civilizations because of its very consistent content which advocates the welfare of the people as the most legitimate expectation from any governmental action. This expectation is rational and human. This analysis establishes that good governance, from a normative perspective, is a general prin-

[245] T. Tridimas, *op. cit.*, p. 2.
[246] In this regard, Del Vecchio warns that "the assertion that *general* principles are valid only for *each individual people*, meaning that there are as many series of general principles as there are particular systems, certainly would not correspond to the belief in a *ratio juris* of universal character. Moreover, this belief in universality of the *ratio juris* has been a common heritage of our juristic conscience since the days of the Romans, despite whatever may be said to the contrary", G. Del Vecchio, *General principles of law* (Forte translation), 1956, p. 5-6.
[247] See R.-E. Papadopoulou, *op. cit.*, p. 6; T. Tridimas, *op. cit.*, p. 2; M. Akehurst, "Equity and General Principles of Law", *International and Comparative Law Quaterly,* Vol. 25, 1976, p. 817.
[248] G. Del Vecchio, *General Principles of Law* (Forte translation), 1956, p. 4.
[249] G. Del Vecchio, *op. cit.*, p. 5.

ciple of law as it encompasses "immutable principles of justice, acknowledged *semper ubique et omnibus*"[250] for the good of the people.

2.3.2.3. Case law recognition of good governance as a principle of law

The European Court of Justice (ECJ) stands out when it comes to recognizing good governance as a general principle of law. In *Société des usines à tubes de la Sarre v. H.A.*, the ECJ recognised good governance as a general principle of European law in 1957 with the term principles "d'une saine administration".[251] In later decisions, this same court referred to the principle of "good administration", especially within the domain of European public service.[252] According to the ECJ, many provisions in the public service statute have an undertone of good governance principles; therefore these principles should guide all actions by public institutions.

In line with the ECJ's decisions and quoting Attorney General Van Gerven in *Netherlands et al. v. Commission*, Papadopoulou rightly concludes that good governance "constitue un principe de l'ordre juridique communautaire applicable même en l'absence de règles écrites".[253]

Most recently, two decisions delivered almost on the same day by different regional courts unequivocally sealed the recognition of good governance as a general principle of law. The first decision was taken on 16 May 2013 by the European Court of Human Rights (ECtHR) where it acknowledged "the particular importance of the principle of 'good governance'" when the general interest is at stake.[254] As a general principle of law, it is the ruling of the ECtHR that good governance re-

[250] Justice Cardozo in *Otis v. Parker* 187 US 606, 609 cited by R.B. Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations", *American Journal of International Law*, Vol. 51, No. 4 (Oct. 1957), p. 744.
[251] Joint cases 1/57 and 14/57, *Société des usines à tubes de la Sarre v. High Authority* [1957] ECR 201, p. 206 cited by R.-E. Papadopoulou, *op. cit.*, p. 127.
[252] See for instance Case 53-72, *Pierre Guillot v. Commission of the European Communities* [1974] ECR 791; Joined cases 33/79 and 75/79, *Richard Kuhner v. Commission of the European Communities* [1980] ECR 1677; and Case 207/81, *Kuno Ditterich v. Commission of the European Communities* [1983] ECR 1359 as cited by R.-E. Papadopoulou, *op. cit.*, pp. 128-129. It should be reiterated that for this research "good governance" and "good administration" can be used interchangeably (see supra, 2.2.2).
[253] "…constitutes a principle of the Community legal order, applicable even in the absence of written rules" (non-official translation), Joint cases C-48/90 and C-66/90, *Kingdom of the Netherlands, Koninklijke PTT Nederland NV et PTT Post BV v. Commission of the European Communities* [1992] ECR I-565, p. 627 cited in R.-E. Papadopoulou, *op. cit.*, p. 130.
[254] Application No.49317/07, *Maksymenko and Gerasymenko v. Ukraine* [2013], ECtHR, 16 May 2013, para. 63 (hereinafter the *Maksymenko* case).

quires public authorities to "act in good time and in an appropriate and above all consistent manner".[255]

However, it is in a decision on the following day that the judges of the EACJ faced the issue head on. The respondent had alleged that good governance as provided by article 6(d) of the Treaty of Arusha represents "aspirations and broad policy provisions", but the EACJ rejected this allegation and acknowledged that good governance as a principle has been crystallized by the EAC Partner States as "actionable obligations, breach of which gives rise to infringement of the Treaty" especially because "the framers of the Treaty went beyond stating the principle and instead negotiated and agreed upon a specific minimum set of requirements that constitute the good governance package".[256] The EACJ ruling has taken good governance to the next level where it is recognized as an enforceable principle.

The review of the above-mentioned cases by the ECJ, ECtHR, and EACJ underlines the hard work that the courts have done and can continue to do in unequivocally establishing good governance as a general principle of law.

2.3.2.4. The difficult codification of good governance as a general principle

Of course, legal provisions where good governance is laid down *expressis verbis* as a general principle of law are rare, even in European legal texts despite the lead taken by the European judges in crystallizing good governance as a general principle of Community law. While it can be easy for judges to refer in their decisions to terminology such as good governance or good administration, this wording can hardly be used in specific legal acts or laws.

Stricto sensu, laws are made up of rules intending to regulate specific behaviour in society. Legal rules are specific, binding, and rigid. Rules are so "all or nothing" in their operation that when they are broken sanctions must follow.[257] But principles

[255] In this regard, for instance, the court held that "State authorities which fail to put in place or adhere to their own procedures should not be allowed to profit from their own wrongdoing or to escape their obligations (…) The risk of any mistake made by the State authority must be borne by the State itself and the errors must be remedied at the expense of the individuals concerned". *Idem*, para 67.

[256] Reference No. 5 of 2011, *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, Judgment, 17 May 2013, para. 36 (hereinafter the *Mukira* case). See also G.H. Addink, 'Good Governance: A Principle of International Law', in C. Ryngaert, E. Molenaar, and S.M.H. Nouwen, *What is Wrong with the International Law*?, Leiden, Brill, 2015, pp. 297-301(forthcoming – hereinafter Addink 2015a).

[257] R. Dworkin, *op. cit*., p. 24.

are broad and flexible to accommodate several aspects.[258] Principles guide in the decision-making process. This makes it difficult for the legislator to codify a general principle of law. In most situations, codifying a general principle of law necessitates the elaboration of several specific rules. But still no general principle of law can be exhaustively circumscribed within the formulation of rigid rules. That is why most general principles, such as the principle of good governance, can effectively play their role only when they are implicit in legal rules. One must read between lines to discover them.

The task of codifying general principles of law becomes even harder when one has to deal with a meta-principle like good governance. For instance, there exist provisions in the administrative law of many countries around the world enjoining public administration to provide feedback within a specific period of time to whoever claims certain rights or requests authorization to carry out a given activity on the territory of that administrative entity. If the administration fails to respond during the fixed period of time, the authorization or the claimed right would be deemed to be granted to the requesting person. In other words, silence on the part of the administration is interpreted in favour of the applicant. There is no doubt that such a provision promotes good governance.

Putting it that way does sound too superficial, however. As said earlier, good governance is a meta principle, meaning that it is made up of more specific sub-principles. Respecting a given period time for providing feedback, as stated in the example above, can be seen as promoting more the principles of accountability and properness, and to some extent the principle of effectiveness. However, it is not an easy step to analyze that injunction as the consecration of the principle of transparency and the protection of human rights. Therefore any conclusion according to which that provision constitutes the consecration of good governance, while remaining true, could prove shallow, broad and vague. But it may be more accurate to rather read that provision as acknowledging, for instance, the principle of accountability.

Now suppose that such a provision were to be given a title as part of legislation. Which title would be the most convenient: 'the principle of good governance' or 'the principle of accountability'? This example fundamentally illustrates not only how difficult it could be to have good governance, as a general principle of law, confined in a specific part of the law but also why it is rare to have legal rules mak-

[258] On the distinction between principles and rules, see also H. Avila, *Theory of legal principles*, Dordrecht, Springer, 2007, passim.

ing reference *expressis verbis* to the expression 'good governance' since the principle encompasses manifold and distinct legal sub-principles.[259]

Not finding a direct reference to 'good governance' or to any of its sub-principles' terminology in legislative law or in any other legal text does not mean that good governance is not a codified general principle of law. As a general principle of law, good governance is materialized in legal provisions through its sub-principles, which are by their very dimension closer to rules. It must also be stressed that the sub-principles that good governance supports are above all principles.[260] Some of these sub-principles, such as the principles of transparency and participation, provide an orientation on the procedures to be followed by the public administration in the decision-making process; while others, such as the principles of effectiveness and properness, are related to the very substance of the decisions to be taken. Some other sub-principles are mixed. In this category we can include the principles of accountability and the protection of human rights. This simple categorization of good governance sub-principles strengthens once more the view that it is fairly impossible to have all good governance principles gathered under one section of the law. They are rather found in scattered provisions either within the law or within the laws of a particular legal system.[261]

Within the difficult general codification of good governance as a principle, some courageous codification attempts deserve to be mentioned. In this regard, although the Cotonou Agreement can be considered as revolutionary in defining and establishing good governance as its fundamental principle,[262] the EAC is emblematic in two respects. Firstly, good governance is clearly stated as a fundamental and operational principle of EAC regional integration in articles 6(d) and 7(2) of the Treaty. This codification has already proved salutary in helping the EACJ to confidently bypass the restriction on its jurisdiction in human rights issues. Indeed, since the maintenance of universally accepted standards of human rights is mentioned as a component of good governance by both articles, the EACJ took advantage of this gap to adjudicate cases that obviously concerned pure violations of human rights

[259] The case of articles 6(d) and 7(d) of the Treaty of Arusha is one of the rare exceptions. But still they both confirm this codification difficulty as both provisions do not stop at naming good governance as a principle. Instead, they are more elaborated as reference is made to good governance sub-principles, namely democracy, the rule of law, accountability, transparency, social justice, human rights promotion, etc. The still to be adopted EAC Good Governance Protocol may be considered as another illustration.

[260] This means that they meet the definition and all features of principles as discussed above. They are called sub-principles simply in comparison with good governance, which is a meta principle as discussed in this work. For the sake of harmony, the sub-principles may be called principles.

[261] See G.H. Addink 2005, pp. 39-42.

[262] See article 9 of the Cotonou Agreement. (cf. infra section 6.2.1. for that definition)

despite the fact that the EACJ's jurisdiction in human rights is subject to the adoption of an ad hoc protocol.[263] Secondly, the EAC could be the only regional organization to attempt to adopt a protocol which is solely dedicated to good governance as a principle. The draft of the EAC Protocol on Good Governance has been pending for many years awaiting adoption by the Partner States. If this protocol is finally adopted that would constitute a huge step in the process to codify good governance. But, for the time being, the procrastination by Partner States in adopting this protocol seems to confirm the difficulties mentioned above concerning the codification of a general principle of law such as good governance in a specific legal text.

2.3.3. Multiplicity of good governance indicators

The fact that good governance is a meta principle makes it difficult to be measured in order to ascertain whether or not institutions do comply in their procedures, regulations and policies with the values of good governance. Efforts have been made to define how good governance could be measured. But it should be noted that as much as there is little agreement on the definition of good governance, there is also a certain difficulty in agreeing on what should be used for its measurement. Faced with such disagreement, it is crucial to pinpoint criteria that should be considered appropriate to assess good governance in the context of this research.

Finding out how to objectively measure good governance compliance involves *ipso facto* gauging the depth of the epithet *good* in the expression good governance. As all the 'magic' of good governance is hidden in *good*, measuring its depth automatically implies determining the content or substance of good governance. This task is extremely difficult especially as the relativity of "good" has impacted on the development of good governance indicators to the extent that each institution or each branch of knowledge has come up with its own indicators.

2.3.3.1. Overview of indicators

It is quite impossible to exhaustively review all the indicators that have been developed and used in order to measure compliance with the principle of good governance. This is the reason why only an overview of the most important ones in terms of their usage by national and international policy-makers could be helpful.

[263] See article 27(2) of the EAC Treaty.

In order to give credit where credit is due, the World Bank's perspective should come first. As a good governance forerunner, the World Bank endorsed its responsibilities and came up with accountability, transparency, public sector management, and the rule of law as the standards to be used in measuring good governance.[264]

The UNDP adopted a wider view than the World Bank. For the UNDP good governance should rather be ascertained through participation, the rule of law, transparency, responsiveness, consensus orientation, equity, effectiveness and efficiency, accountability, and strategic vision.[265]

In its turn, according to the Office of the United Nations High Commissioner for Human Rights good governance can be measured on the scale of respecting human rights.[266]

The Ibrahim Index for African Governance (IIAG), which has been especially conceived to assess governance in African countries, is more and more acknowledged in different forums where African governance is debated. For this reason it would be incomplete not to mention it. Since 2007, the index has used human development, sustainable economic opportunity, participation and human rights, and safety and the rule of law as good governance parameters.[267]

The World Governance Indicators (WGI) cannot be ignored when discussing good governance measures. Daniel Kaufmann and his colleagues submit that good governance can rather be measured by six indicators that are Voice and Accountability, Political Stability and Absence of Violence, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption.[268] Although they worked under the umbrella of the World Bank, it is obvious that these authors clearly depart from the World Bank's preliminary perspective as presented above. Nevertheless, the WGI cannot be dissociated from the World Bank. But because of the widespread WGI, it is worth shedding some light on them in order to understand their meaning.

---

[264] World Bank 1989, p. vii.
[265] UNDP, *op. cit.,*
[266] A.M. Abdellatif, *op. cit*., p. 6.
[267] "Ibrahim Index" available at http://www.moibrahimfoundation.org/IIAG-methodology/ (last consultation October 31, 2012).
[268] D. Kaufmann, A. Kraay and M. Mastruzzi, 'The Worldwide Governance Indicators: Methodology and Analytical Issues', *World Bank Policy Research Working Paper No. 5430*, September 2010 (hereinafter D. Kaufmann et al. 2010).

2.3.3.2. World Bank-backed WGI

The WGI developed by the World Bank's Macroeconomic and Growth Team of the Development Research Group include Voice and Accountability (VA), Political stability and absence of Violence/terrorism (PV), Governance Effectiveness (GE), Regulatory Quality (RQ), Rule of Law (RL), and Control of Corruption (CC).[269]

The VA indicator serves to measure the country's citizens' participation in choosing their leaders at the governmental level and the extent to which freedom of expression, freedom of association and freedom of the media are implemented.

PV has been established to measure the likelihood of government destabilization by "unconstitutional or violent means, including politically motivated violence or terrorism".[270]

The quality of public services, the quality of policy formulation and implementation, the credibility of the government's commitment to such policies and the quality and the degree of independence of the civil service are assessed under the GE indicator.

RQ evaluates whether the government is capable of promoting private sector development through the formulation and the implementation of adequate policies and regulations.

The WGI creators, on the other hand, use RL to measure the extent to which "agents have confidence in and abide by the rules of the society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence".[271] Finally, the CC indicator gauges the level of corruption in governmental organs in terms of the exercise of public power for private gain and the extent to which the elite and private interests 'capture' the state.

These indicators are increasingly being used by policy-makers[272] despite several authors voicing criticisms concerning both their methodology and their content.[273]

---

[269] D. Kaufmann et al. 2010, p. 4.
[270] *Ibidem.*
[271] *Ibidem*
[272] According to the WGI authors, the United States Millennium Challenge Account aid program prominently relies on five of the WGI in its procedures for determining country eligibility. D. Kaufmann et al., 2007, p. 2.

In addressing one of the criticisms, the WGI authors recognized that there is 'free entry' to the market for governance indicators.[274] These authors even encourage scholars not only to combine their data to suit those scholars' own needs but also to "provide alternative definition of some dimension of governance and [to] provide an empirical measure of it".[275] This is an acknowledgment that the WGI - though widely used - may not fit all governance scenarios. Therefore free room is left for the setting up of new indicators depending on the needs in question.[276]

Furthermore, it is obvious that some indicators are repeated in almost all indexes, although sometimes with different terminology. Therefore, harmonization is badly needed otherwise it could be very confusing to find a way out in such a cacophony of indicators, even when they are backed up by respectable institutions. That is where the academic perspective could be useful.

2.3.3.3. Good governance indicators as shaped by academia

Academia have tried to shape the indicators of good governance introduced by the above-mentioned institutions in merging those that have similarities or in isolating those that are deemed to fit rather within concepts other than good governance. However, even within academia there are controversies as to the qualification of these indicators.[277] The debate on the exact content of good governance is still

[273] See for instance C. Arndt and C. Oman, 'Uses and Abuses of Governance Indicators', *OECD Development Center Study*, 2006; S. Knack, 'Measuring Corruption in Eastern Europe and Central Asia: A Critique of the Cross-Country Indicators', *World Bank Policy Research Department Working Paper 3968*, 2006; and M. Thomas, 'What Do Worldwide Governance Indicators Measure?', *Manuscript*, John Hopkins University, 2006 cited by D. Kaufmann et al. 2010, p. 2.

[274] D. Kaufmann et al. 2010, p. 24 (note 17).

[275] D. Kaufmann et al. 2007, p. 5.

[276] In Rwanda, for instance, the Rwanda Governance Board (RGB) has developed the Rwanda Governance Scorecard (RGS) that uses eight indicators to measure good governance. RGS indicators include Rule of Law, Political Rights and Civil Liberties, Participation and Inclusiveness, Safety and Security, Investing in People, Control of Corruption, Transparency and Accountability, Quality of Service Delivery, Economic and Corporate Governance [A. Shyaka (Dir.), *Rwanda Governance Scorecard 2012*, Rwanda Governance Board-RGB, December 2012, p. 7]. While this is a good initiative, RGS is an extra contribution in increasing confusion in the world of good governance indicators. Although the RGS mentions that other 'international indexes and frameworks' have been consulted that worked out on good governance indicators prior to its own publication, the RGS remains semi-silent on why it has chosen to use different methodology and terminology. [See A. Shyaka (Dir.). *op. cit.*, p. 11]. But convincing justification would help in gaining more credibility. This might lead to a situation where the RGS could be acknowledged while its findings would simply remain ignored. See for instance R. Haverman, 'Rule of Law Quick Scan Rwanda: Prospects and Challenges', *HiiL Rule of Law Quick Scan Series*, April 2012, p. 8.

[277] They have indifferently considered the following as parameters: principles, dimensions (V.P. Nanda, *op. cit.*, p. 276; N.V. Lam, *op. cit.*, p.48), elements (F.N. Botchway, *op. cit.*, p. 189; G.H. Addink et al., *op. cit.*, p. 14), attributes and components, (T.G. Weiss, *op. cit.*, p. 801), etc.

resulting in a great deal of ink on paper.[278] As an illustration, when some commentators contend that good governance can be measured through the level of democracy, the rule of law, discretion, and decentralization,[279] another opinion rather considers that democracy and the rule of law are separate concepts and they cannot therefore be used to assess good governance compliance.[280] Whether democracy and the rule of law may be considered as components of good governance depends on the dimension in which good governance is analyzed.[281] In other words, good governance indicators seem to narrow down with the entity to be examined.

One should depart from this interesting debate to consider what has emerged from it, and on which aspects unanimity seems to have been reached. In academia, it has been constantly admitted that governance deserves to be qualified as "good" only when (a) the decision-making process is transparent, thereby allowing the people to fully participate; (b) decision-makers are accountable for their acts; (c) decisions are taken in a proper way targeting their effectiveness; and that (d) all along the decision-making process human rights are protected.

These features have given rise to what are commonly known as principles of good governance,[282] i.e. the principles of participation, transparency, properness, accountability, effectiveness, and the protection of human rights. To assess whether a country complies with good governance standards a test needs to be carried out to measure the level of its people's or stakeholders' participation in decision-making, the decision's properness and effectiveness, the decision-making process' transparency, the decision-makers' accountability, and its respect for human rights.[283]

---

[278] T.G. Weiss, *op. cit.*, p. 801.

[279] See for instance F.N. Botchway, *op. cit.*, pp. 189-209; T.G. Weiss, *op. cit.*, p. 801. This is also the conception of the EAC Treaty in its articles 6(d) and 7(2).

[280] G.H. Addink et al., *op. cit.*, p. 11-14. For Addink, good governance, democracy and the rule for law are the "three cornerstones of the modern state", which implies that none of these concepts should be regarded as a component of another since each should have its own content. However, the same author further recognizes that the respective norms of good governance, democracy and the rule of law are sometimes linked and have influenced each other during their development. See also, A.M. Abdellatif, *op. cit*, passim.

[281] See the three dimensions developed supra [2.2.2.3.(b)]. It can be submitted that while democracy and the rule of law, for instance, should be considered as being encompassed in good governance in its macro dimension, it could be very hazardous to measure compliance with good governance at the *meso* and *micro* dimensions through democracy and the rule of law as they are understood in their primary (broad) meanings.

[282] G.H. Addink et al., *op. cit.*, p. 19.

[283] These principles are extensively discussed in an FDI attraction perspective later (cf. infra section 6.3.2.3)

Participation involves leaving room for the people or stakeholders to have their say and to have their opinion taken into consideration during the decision-making process. It includes consulting the people before taking any measure that could affect them in one way or another, but also during the implementation. In many situations, participation appears to become ceremonial. For instance, decision-makers may prepare well in advance a table of resolutions to fit their wishes and, in order to avoid criticism of non-participation, they simply submit it to the people (or stakeholders) in a very suggestive manner to obtain their formal approval. In these kinds of situations, the people consulted mostly do not have enough power to add their own input in the policy-makers' menu. This is merely a denatured participation. Although it can be a good thing in some cases to have a designed sample of resolutions in advance,[284] this should not be the rule as it undermines the initiatives of the people and unduly influences their consent.

The principle of properness mostly concerns "decision-making, administrative discretionary powers, and judicial control" and it involves the crystallization of legal certainty, the equality of all before the law and proportionality.[285] In this, decision-makers need to demonstrate enough carefulness that can be expected from a *bonus pater familias* when deciding. The properness of a decision also depends on the reasonableness of the grounds that led to it. That is why the reasoning is an important characteristic to be reviewed during the assessment of a decision's properness.

Transparency has more to do with the availability of and the access to information. If policy-makers are to be really accountable for their actions, then information about the process they use and the relevant documents on which their decisions are recorded need to be known and accessible to all.[286] Transparency is also about the openness of government activities to the public.

As a principle, effectiveness is appreciated in relation to assigned objectives or expected results. Therefore an effective decision should be able to attain assigned objectives or expected results within an allocated timeline. According to the definition provided by the Commission of the European Communities in its governance White Paper, measuring the effectiveness of a decision or a policy involves "an evaluation of future impact, and where available, of past experience" of such actions or policy.[287] It is also acknowledged by the White Paper that effectiveness

[284] As is usually the case for a referendum, for instance.
[285] G.H. Addink et al., *op. cit.*, p. 32.
[286] *Idem*, p. 57.
[287] EU White Paper, C287/10.

depends on preparedness, implementation, and the enforcement of all other principles in a "more inclusive way".[288]

As for the principle of accountability, it is a very relative concept which varies in time and space. The scope and the extent of accountability also differ depending on whether it relates to the public sector or the private sector. As said above, in this work our focus is on public sector governance, therefore the principle of accountability should be understood accordingly. In this sense, reference is made to the "authorities being held accountable by their citizens", which means that the authorities should be able to explain and justify any decision or policy that has been made.[289] Therefore, accountability implies that a failure by the "accountor", the authorities, to provide a sufficient explanation in support of their decision to the "accountholder", the citizens or stakeholders, may mean that they have to face the consequences.

A country's good governance compliance is also assessed by measuring the extent to which the promotion and protection of human rights are taken into consideration before the decision is taken, during the decision's implementation and after the decision has been implemented to see whether or not the dignity and the inviolability of the human being have been observed throughout the process. When there is no choice but to ignore some rights, attention should be given to finding what the policy-maker has done to avoid or to lessen the harm. Human rights are not mentioned among the principles retained by the EU White Paper but an assessment of the respect for human rights in an action cannot escape the proportionality test. A decision or policy will be considered as respectful of human rights when "from the conception to its implementation" proportionality concerning the pursued objectives or results has been observed through the "choice of the level of which action is taken (from local to EU) and the selection of the instruments used"[290]. The White Paper explains that proportionality in the European system consists of systematically checking at the very beginning of any decision or policy (a) whether public action is really necessary, (b) whether the European level is the most appropriate one, and (c) whether the measures taken are proportionate to the assigned objectives.

It is worth mentioning that proportionality is a cross-cutting principle which must be observed at all times when measuring good governance compliance through each of the mentioned principles.

[288] *Ibidem.*
[289] G.H. Addink 2005, p. 98.
[290] EU White paper, C287/8.

2.3.3.4. The adequacy of the academic principles compared with the WGI

The use of WGI indicators in measuring good governance as far as FDIs are concerned would not be appropriate for at least two main reasons. Firstly, the WGI apply at a macro level which implies analyzing the governance performance of a country as a whole. However, although this research embraces EAC as a region and its Partner States, it looks at good governance in its *micro* dimension in focusing on how specific institutions discharge their duties. Secondly, and this is in contrast to the first reason, the WGI seem to be too narrow in their phrasing to clearly accommodate some key features of good governance. For instance, it would be very difficult to catch at first glance from the six WGIs the indicator that measures transparency in public affairs.

However, it is striking to notice how all the WGI and their sub-elements can easily and comfortably be integrated within the principles developed by academia, *i.e.* properness, transparency, participation, accountability, human rights and effectiveness.[291]

Despite the divergence in the classification and the terminology used between the World Bank-backed WGI and academia, it worth noting that they both seem to widely agree on the content of good governance. That is why the following lines are intended to demonstrate that academic classification and terminology can better address the loopholes left by the narrowness of the WGI. In other words, it can be submitted that the WGI should be usefully and easily reviewed to adopt value-laden terminologies and the classification used by academia.

According to the academic point of view, good governance in a country or any entity should be assessed through the properness of its decision-making process, the use of discretionary powers by its administrative organs, and its judicial review procedures.[292] Properness therefore implies the preservation of legal certainty and the equality of all before the law while employing a high level of carefulness and proportionality throughout the decision-making process. Properness should also be measured by the extent to which governmental bodies provide reasons to support their decisions. In this regard, from a legal perspective, legal certainty which ensures the sustainability of regulations, including the Constitution, encompasses the PV indicator which measures the level of government stability in a given country. Also RQ which measures the adequacy of governmental policies and regulations under the WGI would still fulfil this role under the academic indicator of

[291] G.H. Addink et al., *op. cit.*, , p.19.
[292] *Idem*, p. 32.

properness when measuring aspects such as equality before the law, reasonableness, carefulness, proportionality, etc.

A close look at the concepts measured in the WGI's RQ reveals that most of the collected data were rather intended for measuring the quality of business regulations, especially the regulations related to competition. Such a narrow perspective may not genuinely reflect the regulatory quality of other domains of the public service. This is where academic indicators are more advantageous. They are so open that they do match the multi-purpose character and the multi-dimensional conception of good governance.

This argument is even strengthened by the lack of a clear specific indicator to measure transparency which is one of the core elements of good governance. Within the WGI, few sources directly measure transparency under the CC and VA indicators.[293] Yet transparency is the intersection point where all other good governance features meet. The fact that transparency is all about the availability, accessibility and timeliness of the information means that it is the crucial element that gives other governance indicators their content. For instance, without clear information about how the administration works or makes decisions, it cannot be possible to hold them accountable. People's participation could seriously be undermined if information is not made available and accessible.[294] Not giving enough attention to the transparency of the decision-making process in the country which is being assessed is a real harmful loophole in the WGI's assessment.

Academics have also established another indicator called participation that does not expressly appear in the WGI. However, the WGI's VA indicator measures, among other things, the ability of the people to participate in the selection of their government. Yet this is exactly what academia's participation indicator does. Therefore, it is a comprehensive aspect that the participation part of VA already has a secured place within academia's participation indicator. The remaining part of VA dealing with freedoms such as the freedom of expression, the freedom of as-

[293] For instance, only five of the twenty sources (ADB-*African Development Bank Country Policy and Institutional Assessments*, ASD-*Asian Development bank Country Policy and Institutional Assessments*, CCR-*Freedom House Countries at the Crossroads*, IFD-*IFAD Rural Sector Performance Assessments*, and PIA-*World Bank Country Policy and Institutional Assessments*) provide data about transparency under CC and in total three sources(GCS-*World Economic Forum Global Competitiveness Report*, IPD-*Institutional Profiles Database*, and WCY-*Institute for Management and development World Competitiveness yearbook*) out of twenty measure transparency under VA. See http://info.worldbank.org/governance/wgi/resources.htm accessed on 22 April 2013.

[294] World Bank and International Finance Corporation, *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises*, p. 54.

sociation and the freedom of the media would plainly include academia's human rights indicator. Indeed the protection of human rights is one of the indicators of good governance as advocated by academia.[295] According to this indictor, the country's laws, policies and regulations, and institutions should be respectful of human rights to pass the good governance test. This spirit appears in some of the measured concepts provided by WGI data sources.[296] Thus it becomes evident that academia's human rights indicator can accommodate, without any discomfort, one part of VA while another part fits in the participation indicator.

The VA indicator also seems to be able to measure the extent to which the government is accountable. But when one reads the details about VA, it is readily obvious that not much information is provided about the nature and the content of that accountability. Accountability as a good governance indicator has been interpreted by academia to mean "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences".[297] In practice, accountability means that governmental organs and institutions have an obligation to explain and to justify their conduct to the people. The latter should have the power to pose questions in order to assess governmental actions so that measures could be taken by the same people if need be. Of course, elections are one way for the people to claim accountability from governmental organs and institutions. But it is not the only way. Other public servants hold offices where they are not elected, and there is no direct way for the people to participate in their selection. From the WGI perspective, this category of public servants escape from the people's monitoring. Such servants are, of course, vertically accountable to their hierarchical supervisors. But accountability also means that governmental organs and institutions should be directly accountable to the people. In this sense, accountability implies access to independent and impartial courts. Thus the people have an opportunity to hold careless or negligent servants accountable before the courts. The stringent accountability of governmental organs and institutions is the best guarantee that they will abide by the rules.

These governance aspects are instead measured by the WGI through the RL indicator. Without intending to discuss here the interaction between good governance

[295] G.H. Addink et al., *op. cit.*, p.112.
[296] For instance EIU-*Economist Intelligence Unit Risk-wire & Democracy Index* specifically assesses 'human rights' while FRH-*Freedom House*'s data provide information about the enforcement of political rights and civil liberties among others. See http://info.worldbank.org/governance/wgi/pdf/va.pdf accessed on 22 April 2013.
[297] M.A.P. Bovens, 'Analysing and Assessing Public Accountability. A conceptual Framework', *European Governance Papers (EUROGOV)*, N° C-06-01, 2006, p. 9.

and the rule of law, it is however judicious to anticipate that the content of the RL indicator of governance according to the WGI may be efficiently measured through the accountability indicator of academia, which is appropriate clear enough to include several aspects covered by RL and CC.

It is important to note that the overall aim of good governance is to improve service delivery by governmental organs and institutions. This means that the policy and the legal and institutional frameworks need to be effective. Effectiveness is the only indicator where both the WGI and academia seem to converge regarding the terminology used and the content thereof. However, although some of the elements of GE such as the quality of public services and policies would be measured through the academic indicator of properness, some others such as the measurement of the government's credibility would be done through the accountability indicator.

As effectiveness can only be measured in comparison with the end (the purpose or aim) of a policy or regulation, it is a difficult task to measure it as such *in concreto* especially concerning long-term activities. For this reason, it is posited by this research that there is always an element of effectiveness in all other good governance indicators. Concretely, properness, transparency, accountability, participation and human rights indicators each have an aspect of effectiveness. That is why effectiveness should not be considered as a separate indicator of good governance. This opinion is also supported by the United Nations Conference on Trade And Development (UNCTAD).[298] In discerning good governance indicators that are relevant to investments, this United Nations General Assembly organ came up with four indicators: predictability, accountability, transparency and participation.[299]

2.4. CONCLUDING REMARKS

Good governance is at the same time an old and a new concept. It is an old concept because its practices could be traced back to Antiquity. However, the first

[298] The United Nations Conference on Trade and Development (UNCTAD) is the organ of the United Nations General Assembly that was created to "maximize the trade, investment, and development opportunities of developing countries and assist them to integrate into the world economy on an equitable basis". See UNCTAD, *Good governance in Investment Promotion*, TD/B/COM.2/EM.15/2, 25 August 2004, p. 3 (hereinafter UNCTAD 2004a); UNCTAD, *Mid-term evaluation: The Good Governance in Investment Promotion Programme*, UNCTAD/DOM/EPU/2007/9, December 2003, p. 3 (hereinafter UNCTAD 2003).

[299] Those parameters were extracted from the experience gained with the Good Governance in Investment Promotion and Facilitation (GGIP) programme launched in early 2002 in Geneva in which Ethiopia, Tanzania, Lesotho, Mali, and the Maldives participated. See UNCTAD 2004a, p. 3; UNCTAD 2003, p. 3.

attempt at the codification of good governance principles could have been when the Indian Emperor, Ashoka, ordered the engraving of his edicts on stone pillars and slabs in various places in his vast Empire. On one of the pillars, Ashoka's attachment to the rule of law and legal certainty is obvious. Based on this, good governance should be considered as a legacy of ancient civilizations.

However, the terminology 'good governance' is fairly new. It appeared for the first time in a World Bank report in 1989. Ever since, good governance has drawn the attention of all areas of research. The multiplicity of actors interested in good governance as a new concept in the international development debate has not facilitated the emergence of an univocal definition. Nevertheless, it can be observed that over the years good governance has gained a more refined definition. But, whatever could be the definition given to good governance, in the legal debate what matters more is its nature, which is a general principle of law recognized as such by international case law, including the case law of the ECJ, EACJ and the ECtHR.

Despite the increasing convergence in the definition of good governance and the ascertainment of its legal nature, the most controversial part of good governance remains the definition of its substance, especially the indicators that should be used to measure compliance therewith. As suggested by certain commentators there is "free entry" to the market for governance indicators. This could be testified by the proliferation of good governance indicators.

In this chapter attention was devoted to two sets of indicators, namely the WGI developed within the framework of a World Bank policy research group, and the principles of good governance developed by academia. While the two sets substantially discuss similar elements, the academic approach is preferred as it responds much better to the multidimensional character of good governance and uses terminology which is more flexible than the one used by the WGI. But in the end, only five indicators out of the six which have been developed by academia were found to be relevant for foreign investment. They are properness, accountability, transparency, participation and the protection of human rights. These indicators constitute the good governance standards that an investment authority should observe holistically on a daily basis when dealing with foreign investment laws and policies in order not only to promote the EAC as a single market but also to foster a balanced development within the region.[300]

[300] The content of each of these principles as far as FDI is concerned is discussed further. See infra section 6.3.2.3.

Chapter III

Legal and institutional framework of foreign direct investment in the EAC

3.1. INTRODUCTION

The legal framework constitutes the skeleton that upholds the structure of any organization. An organization might be strong or weak in its functioning depending mainly on whether its legal framework is harmonious and consistent. This is especially true when it applies to regional organizations, such as the East African Community (EAC) that aspires to exist on its own as a supranational organization while at the same time preserving a considerable margin of sovereignty for its Partner States. The harmony of the legal framework depends in this case on the alignment or the harmonization of national laws with the regional texts.

Attracting Foreign Direct Investment (FDI) for the production of goods and services is very important for a balanced economic development in the EAC. Apart from economic determinants of FDI, the legal and institutional framework of the host country also plays a decisive role. This implies that FDI is sensitive to the drafting of investment-related laws and to the way they are implemented. Substantial differences might create distortion in the internal market in terms of the general amount of FDI attracted by Partner States.

This chapter intends to explore the state of affairs of EAC Partner States' investment legislation. A review of Partner States' investment codes is made with the purpose of highlighting protruding points that need special attention for the attainment of the EAC's regional integration objectives. Towards this end, a few questions are addressed including: What is FDI? What are the criteria to be fulfilled to qualify as a foreign investment in EAC? Which institutions are in charge of FDI in the territories of the Partner States and what are the conditions for the admission and treatment of FDI? Which incentives are available for foreign investors which would like to do business in EAC Partner States? What are the measures that Partner States' laws have put in place to protect foreign investors? In order to do this, a comparative approach is preferred so as to highlight the points where much work still needs to be done in the quest for harmonization. The MIC is also expressly taken into consideration in order to examine the extent to which Partner States' investment legislation have taken its provisions into account.

3.2. EXPLORING THE DEFINITION OF FDI

As such, FDI is not defined in any of the EAC Partner States' legislation. Nevertheless, their investment codes do provide an autonomous definition of the terms "investment" and "foreign investor". Besides, the Burundian investment code is

the only one in the region to expressly refer to "direct investment"[301], although without providing any further definition. For this reason, in order to grasp what should be understood by foreign direct investment in the EAC partner state context there is a need to adopt a word-by-word approach as used by national lawmakers. Furthermore, because a Model Investment Code (MIC), which is intended to harmonize investment-related legislation, does in fact exist at the EAC regional level, we should also look at its provisions to complete the general understanding of the concept.

3.2.1. What is an investment?

3.2.1.1. De lege lata of Partner States

As said above, all EAC Partner States provide a definition of 'investment' and 'foreign investor', in turn. As things now stand, Tanzania has the oldest investment law in the region and, according to section 3 of its Investment Promotion Act, 'investment' is defined as "the creation or acquisition of new business assets and includes the expansion, restructuring or rehabilitation of an existing business enterprise".[302] Uganda, Kenya, and Rwanda adopted a similar definition in respectively 2000, 2004, and 2005.[303]

However, Burundi adopted a very different approach as article 1(3) of the Burundian Investment Code (BIC) defines investment as "capitals employed by any person, being an individual or legal entity, for the acquisition of moveable assets, tangible and intangible, for ensuring the financing of installation costs, as well as funds covering operating costs, essential to the creation or the expansion of enterprises".

Compared with the definition provided by other EAC Partner States, the definition provided by the BIC sounds too narrow in two respects. First, under Burundian law 'investment' is limited to capital intended to the acquisition of movable properties. This limitation omits the possibility to invest in immovable assets. This should be contrasted by the provisions of other Partner States where 'investment' embraces "the creation or the acquisition of new business assets" that could be movable or immovable. Second, BIC confines the capital employed to only financing the

[301] Article 2 of Law No. 1/24 of 10 September 2008 establishing the investment code of Burundi (hereinafter BIC) reads "The purpose of this code is to encourage direct investment".
[302] Tanzania Investment Act, 1997 (hereafter TIA).
[303] See section 1(g) of Uganda Investment Code (revised version, hereafter UIC), 2000; section 2(c) of the Kenya Investment Promotion Act, 2004 (hereafter KIPA); and article 2(8°) of Law n° 26/2005 of 17/12/2005 relating to investment and export promotion and facilitation of Rwanda (hereafter RIC).

creation or expansion of an enterprise. In contrast, the other Partner States include within the framework of investment activities such as restructuring, rehabilitation, or the improvement[304] of an existing business.

3.2.1.2. MIC perspective

In 2006, before even Burundi and Rwanda joined the EAC, a Model Investment Code (MIC) was proposed by the EAC Secretariat with the objective of fostering the harmonization of Partner States' investment laws and policies. This is a non-binding instrument, but with the ambition of supplementing Partner States' laws and policies.[305] The fact that MIC is non-binding has led to Partner States simply ignoring its provisions. Nevertheless, it is worth examining its provisions to see to what extent the MIC intended to harmonize the divergent views of these countries' national legislation as analyzed above.

According to the MIC an investment is "the contribution of local or foreign capital by an investor including the creation or acquisition of business assets by or for a business enterprise"[306]. The same provision goes on to include

(a) expansion, restructuring, improvement or rehabilitation of a business enterprise,
(b) movable and immovable property as well as any other rights in respect of every kind of asset,
(c) rights derived from shares, bonds and other kinds of interests in companies and joint ventures,
(d) title to money, goodwill and other assets and to any performance having an economic value,
(e) rights in the field of intellectual property, technical process and know how,
(f) rights granted under public law including rights to protect, explore, extract and win natural resources.

Obviously this definition is broader and more detailed than that provided by all the Partner States. The details provided by the MIC are similar to what is provided by most international investment agreements.

The difference in the definition of investment between EAC Partner States, on the one hand, and between Partner States' laws and the MIC, on the other, clearly

[304] See section 2 of KIPA.
[305] See sections 3 and 4 of MIC.
[306] Section 2 of MIC, under the 'investment' definition.

highlights the difficulty in having a universal word-for-word definition. This is mostly due to the evolution of the concept over the years and the diversity of legal instruments where scattered definitions of the concept are provided. Among these instruments, it is worth mentioning Bilateral Investment Treaties (BIT) that are signed between capital-exporting and capital-importing countries.[307] In 1995 the Organization for Economic Cooperation and Development (OECD) initiated negotiations for a Multilateral Investment Agreement (MAI) that would have probably come up with a consensual definition of investment, but the efforts failed.[308] Lacking such a consensual definition in national and international instruments, refuge should be sought in case law.

3.2.1.3. Objective criteria developed by the case law of ICSID

The International Centre for the Settlement of Investment Disputes (ICSID) had to elaborate the common features of an investment, as opposed to other commercial activities, when it had to circumscribe the boundaries of its jurisdiction.[309] In the *Salini* case[310], the arbitral tribunal reiterated the following elements as the main characteristics of an investment: (1) a contribution of money or other assets of economic value, (2) a certain duration, (3) an element of risk, and (4) a contribution to the host state's development.

a) Contribution of money or any asset of economic value

In principle, any patrimonial right may qualify as an investment within the description of the ICSID's case law. This includes in-rem, in-personam and intellectual rights. However, regarding in-personam rights, attention should be given to contractual rights. As rightly put by Dimopoulos, "even though contractual rights as such should qualify as investment, the subtle delineation between breach of con-

[307] There exist as many definitions of investment as there exist BITs, and this depends on the expectations and the fears of the signatories. Next to BITs, one could also mention Free Trade Agreements (FTAs).

[308] For details on MAI, see Alfred Escher, "Foreign Direct Investment (FDI)" in Daniel D. Bradlow and A. Escher (Eds), *Legal Aspects of Foreign Investment*, The Hague, Kluwer Law International, 1999, pp. 69-77.

[309] The *ratione materiae* of the ICISD as contained in article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States reads "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally"

[310] ICSID Case N° ARB/02/13, *Salini and Italstradale v. Kingdom of Morocco*, Decision on jurisdiction, 23 July 2001, International Legal Materials, Vol. 42, p. 622 (para 52).

tract and expropriation depends mainly on whether a contractual right also has the other features of an investment".[311]

Anyway, it should be reminded that most BITs and other international investment agreements always enumerate in the definition of investment everything that the parties intend to include as such.

b) Certain duration of performance

With the duration element, the arbitral tribunal expected to exclude punctual operations from the investment framework.[312] This criterion is directly linked to the economic development that all investment host countries expect from investors[313]. The duration becomes a crucial investment feature when it comes to some assets like contracts, bonds and loans, which may also be on a short-term basis. Especially in relation to construction contracts, arbitral tribunals are of the opinion that two to three years should be the minimum for their qualification as an investment.[314]

However, the assessment of the duration as an investment criterion should always be done in relation to other criteria such as the contribution to the economic development of the host state[315]. Therefore, a short-term project may qualify as an investment either if the parties include that specific activity in their definition of investment or if the activity passes the test posed by other criteria.

However, the fact that the parties qualify a given activity in their contract as an investment does not confer jurisdiction on the ICSID to adjudicate on such a qualified activity in the case of a dispute. The tribunal would have the last say in examining "on its own motion whether the requirements of jurisdiction are met" based on its own criteria.[316]

---

311 A. Dimopoulos, *EU Foreign Investment Law*, Oxford, Oxford University Press, 2011, p. 26.
312 A. Dimopoulos, *op. cit.*, p. 28.
313 See, for instance, ICSID Case N° ARB/05/3, *Consorzio Groupement LESI and ASTALDI v. Allgeria (LESI Dipenta)*, Award, 10 January 2005, para. 73.
314 A. Dimopoulos, *op. cit.*, p. 28. The author cites, for instance, ICSID case N° ABR/00/5, *Autopista Concesionada de Venezuela, CA v. Venezuela*, Award, 23 September 203, ICSID Rev-FILJ, Vol. 16, 2001, p. 469 (para. 101).
315 *Ibidem*
316 In an award the tribunal held that "The parties to a dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of article 25 of the Convention". See ICSID case No ARB/03/11, *Joy Mining Machinery Ltd v. The Arab Republic of Egypt*, Award on jurisdiction, 6 August 2004, para. 50.

c) Element of risk

The element of risk as an investment criterion is closely linked to the duration criterion as well. Investment generally needs a certain period of time to start generating profits. In the meantime, anything might happen to the invested capital. For instance, between the 1970s and 1990s, foreign investors in some African countries, including Uganda in the EAC, were faced with the nationalization of their assets. The imminence of such a risk during the investment period necessitates adequate protection measures.[317] The risk element in investment is the principal rationale of why many countries decide to resort to BITs or other forms of international investment treaties to seek protection for their nationals who decide to invest abroad.

d) Contribution to the host country's economic development

The last element consists of the contribution to the host state's development. It has become common knowledge that foreign investment usually contributes to the economic development of the host state.

While arbitral tribunals have had no problem in acknowledging many activities, especially infrastructure projects, as contributing to the development of the host state;[318] the question was highlighted most clearly in Patrick Mitchell v. Democratic Republic of Congo.[319]

In this case the ad hoc committee was not satisfied with Patrick Mitchell's argument that his law firm had contributed to the development of the Democratic Republic of Congo. However, the ad hoc committee did not exclude the possibility that services provided by a legal counselling firm could qualify as an investment under the ICSID Convention if the contribution to the economic development or at least the interest of the state were somehow present.[320]

---

[317] A. Dimopoulos, *op. cit.*, p. 29.
[318] See, for instance, ICSID Case N° ARB/05/07, *Saipem SPA v. The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007; and ICSID Case N° ABR/04/13, *Jan de Nul v. Arab Republic of Egypt*, Decision on jurisdiction, 16 June 2006.
[319] ICSID case N° ARB/99/7, *Patrick Mitchell v. The Democratic Republic of Congo*, Decision on the Application for annulment of the Award, 1 November 2006, paras 29-33 (hereinafter the *Mitchell* case).
[320] See the Mitchell case, para. 33. See also C. Yannaca-Small, "Definition of Investor and Investments in International Investment Agreements" in OECD, *International Investment Law: Understanding Concepts and Tracking Innovations*, 2008, p. 72.

Although these elements are cumulative, subsequent awards after the *Salini* case opined that they are closely interrelated and, therefore, should be assessed in their entirety taking into consideration the circumstances of each case.[321] One of the criteria could be lacking provided that its absence is "compensated by a stronger presence of another".[322]

3.2.2. Foreignness of an investment

3.2.2.1. De lege lata of Partner States

As for the definition of a 'foreign' investor, three things should be highlighted in EAC Partner States' investment codes. But it is worth mentioning at the outset that the BIC does not provide a definition of the term 'foreign investor', therefore in the analysis hereafter the Burundian law will not be taken into account.

The first trend concerns a company incorporated under a foreign law. In this case, the laws of Rwanda[323] and Kenya[324] simply treat such a company as a purely foreign company while according to the laws of Uganda[325] and Tanzania[326] such a company should only be considered as a foreign company if more than fifty percent of its shares are held by persons who do not have, respectively, Ugandan or Tanzanian citizenship.

The second trend concerns a company incorporated under the law of the host country. When a company is incorporated under domestic law, Partner States' investment codes are unanimous that such a company should be considered as a local investment,[327] unless if the majority of the shares are held by foreigners. In other words, when foreigners hold more than fifty percent of the shares, a locally incorporated company attracts the status of a foreign company.

The third trend concerns partnerships. The terminologies used to decide on the foreignness of a partnership are very different. While Kenya and Tanzania main-

[321] ICSID case N° ARB/03/29, *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, Decision on Juridisdiction, 14 November 2005, para. 130.
[322] ICSID Case No. ARB/07/21, *Pantechniki S.A. Contractors & Engeneers (Greece) v. Republic of Albania*, Award, 30 July 2009, p. 9.
[323] See article 2(5°)(b) of RIC.
[324] See section 2(c) of KIPA.
[325] See section 9(b) of UIC.
[326] See section 3 of TIA under the definition of "foreign investor".
[327] See section 9(c), section 2(c) under "local investor" by an *a contrario* interpretation; section 3 under "local investor" by an *a contrario* interpretation; and article 2(5°)(c) respectively of UIC, KIPA, TIA, and RIC. Note that while Tanzanian and Kenyan laws refer *expressis verbis* to the 'majority of shares', Ugandan and Rwandan legislators chose the terminology of 'more than fifty percent of shares'.

tain their terminological unity in considering as a foreign investment any partnership where the "controlling interest is owned" by persons other than their respective nationals, Uganda and Rwanda appear to be apart. For Uganda, a partnership constitutes a foreign investment when "the majority of partners are not citizens of Uganda" while the Rwandan law provides that "the bigger number of shares" should not be held by a Rwandan citizen for a partnership to qualify as a foreign investment.

'Controlling interest', 'majority of partners', and 'bigger number of shares' are not synonyms though sometimes one single situation may match all three at one go. The legislators in these countries did not define what they mean by each of the above expressions. Therefore it is up to business partners which claim that their partnership is a foreign or a local investment to prove to the competent authority that they fulfil the conditions laid down in the law in question.

The above analysis clearly reveals that EAC Partner States mainly use two benchmarks in deciding on the nationality of an investment. They refer to the citizenship of the shareholders or partners and to the company's incorporation. With reference to shareholders' or partners' citizenship in order to define the nationality of an investment, Partner States underlie the element of control. In this sense, the place of incorporation is meaningless if it appears that the investment concerned is held in the majority by the nationals of the EAC host Partner State. Based on this, it could be said that the primary criterion in the assessment of the foreign nature of an investment under EAC Partner States' laws remains the nationality of the shareholders or business partners.

Partner States' general tendency to focus on the nationality of the shareholders as the determining criterion for the foreign nature of an investment is not in accordance with customary international law. Indeed customary international law rather considers the incorporation doctrine.[328] Although it could be very difficult to decide the nationality of multinational companies following the main criterion chosen by the EAC Partner States, using the criterion of the majority of the shareholders to decide on the company's nationality appears to benefit foreign investors, especially when they hold the majority of the shares in a locally incorporated company. This is particularly important if the company would face expropriation issues from

[328] *Barcelona Traction, Light and Power Co.* [1970], ICJ reports 1. According to the International Court of Justice (ICJ) the state where the company is incorporated or where it has its effective seat (siège social) should be considered when deciding upon the company's nationality. See A. Dimopoulos, *op. cit.*, p. 33; and N.S. Rodley, 'Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case', *Indiana Law Journal*, Vol. 47, Issue 1, p. 80.

the host government.[329] In such a case if a locally incorporated company were to automatically have the nationality of the host state regardless of its shareholders' citizenship, it would be very difficult for these shareholders to seek any assistance or protection from their home country. The company's nationality would prevail over that of its shareholders.

As far as natural persons are concerned, the law of the country they claim to be from should be considered in assessing their nationality. The issue of dual citizenship that posed many problems in the past seems to have been resolved. According to international law, the nationality of a person having the nationality of both the host state and the home country should be decided based on the "dominant and effective nationality" test.[330] However, this test is not absolute as international investment agreements may decide otherwise. Therefore, "the qualification of investments of dual nationals as foreign remains dependent on the specific legal instrument".[331]

It is surprising to note that all Partner States' laws are silent on the inclusion of citizens or companies incorporated under the law of another Partner State in the definition of a local investor. However, this might be understandable since most of their investment laws were enacted before the entry into force of the EAC common market. The Rwanda Code of Investments is the only legislation that took into consideration regional integration aspects in defining the foreignness of an investment. But this was done with reference to the Common Market of Eastern and Southern Africa (COMESA). Tanzania is the only EAC country that does not belong to COMESA, therefore one could expect that at least the three other Partner States would reflect regional integration in their national investment laws in openly considering citizens and companies from other COMESA members as local companies.

[329] Case concerning *Elettronica Sicula S.P.A. (ELSI) v. Italy* [1989], ICJ Reports 15. This case is very illustrative of how a State can protect the shareholders of a foreign company. ELSI was a company constituted by two American citizens in Italy. This company was incorporated under Italian law. After a long bankruptcy procedure, the two American owners did not recover anything. The United States resorted to diplomatic protection against Italy for violations of Friendship, Commerce and Navigation (FCN) Treaties.
[330] A. Dimopoulos, *op. cit.*, p. 34.
[331] A. Dimopoulos, *op. cit.*, p. 33. The author cites the ICSID that excludes nationals of the host country from the definition of a foreign investor even if they have the nationality of another Contracting state, and many BITs that grant protection to investors having the nationality of both signatories.

3.2.2.2. Foreign investment according to the MIC

According to section 2 of MIC, a foreign investor is (a) any natural person who is not a citizen of the Partner States, or (b) any company incorporated under the laws of any country other than the Partner States, or (c) any company incorporated within a Partner State in which the majority of the issued share capital is owned by foreign nationals, or (d) any partnership in which the controlling interest is owned by a person who is not a citizen of Partner States, or (e) any person or company or partnership defined above that has made an investment in the Partner State.

From this definition, it is clear that the MIC has referred to the same criteria as the Partner States in assessing the foreignness of an investment. It is also impressive to note how the MIC anticipated the EAC-CMP in encouraging Partner States to recognize as domestic those investment companies incorporated under the law of their fellow Partner States. In fact, before the entry into force of the EAC-CMP (2010), which provides for the right of establishment for physical and legal persons within the EAC common market, such recognition would be both legally and practically challenging.

The extent to which the MIC is downplayed by the Partner States is intriguing. It is true that the non-bonding character of this regional instrument does not advocate its consideration. But, another reason could be that, as a harmonizing legal agreement, maybe much would be expected from it. As a regional model investment code, one could legitimately expect firm suggestions as to investment aspects of which harmonization would be more urgent. It includes aspects such as minimum investment capital, the percentage of voting rights to consider an investor as having control or a significant influence over a local enterprise, the clear limitation or exclusion of some sectors from the basket of investments incentives, and the laying down of arbitration as the privileged way to solve foreign investor-host country conflict.

These are some of the critical issues that need careful consideration in investment regulation and policy-making in a regional economic integration agreement. The lack of clear, firm and harmonized regulations on these issues would trigger a 'race to the bottom' competition between Partner States as each of them, in order to secure more foreign investments for their own national economic development, would be tempted to lower the standards to a strict minimum in order to attract the maximum amount of investors. This race to the bottom would be very harmful even to individual national development if, in the meantime, nothing were to be

done at the regional level to oblige countries to omit from the basket of incentives certain vital sectors such as health, the environment, and labour.

In this regard, the example set by the Asia Pacific Economic Cooperation (APEC) should be inspiring. Indeed the APEC countries expressly mention that regulations related to health, safety and the environment should never be softened as investment incentives.[332] Of course, that kind of competition could seriously undermine the integration process itself and *ipso facto* the expected regional economic development. To avoid this kind of misfortune, the MIC should have provided minimum requirements for the key investment aspects referred to and ought to have provided suggestions as to what is thought to be the minimum or fair after taking into consideration both the investors' and the host country's interests.

Section 4 of the MIC provides that the code should "supplement a Partner State's investment laws and policies when any or all of its provisions are adopted". This provision, coupled with section 3(1) laying down the non-binding character of the MIC, are complementary. However, the desired complementarity highlights a major loophole in the EAC structure, at least in relation to the the MIC's implementation. How could a non-binding document be adopted by Partner States if there is no institutional framework to encourage the latter to take the MIC's provisions into consideration during the enactment of their respective investment codes? Probably if there were a monitoring body in the EAC to follow up any updating of Partner States' laws or policies, then maybe the MIC would be followed and improved as some of its vague provisions would have been detected.

3.2.3. The Concept of Foreign Direct Investment

Apart from the Burundian Code of Investment, neither the MIC nor any other Partner State's investment codes make a clear reference to *direct* investment. As said previously, even the BIC that refers to direct investment in its article 2 does not provide any further definition.

3.2.3.1. General considerations

The available literature contrasts *direct* investments from *portfolio* investments. The distinctive criterion distinguishing between a direct investment and a portfolio investment is the degree of control or influence over the assets of a foreign enter-

[332] D.D. Bradlow and A. Escher (Eds), *Legal Aspects of Foreign Direct Investment*, The Hague, Kluwer Law International, 1999, p. 15-16.

prise.[333] A portfolio investment is mainly made to generate income for the investor rather than for managerial control of a foreign enterprise. As such, a portfolio investment is a passive investment like "bonds and other kinds of interests in companies and joint ventures, title to money, goodwill and other assets and to any performance having an economic value" contained in points (c) and (d) under the MIC's definition of foreign investment. This work is only interested in FDI, hence portfolio investments are not extensively discussed here.

The absence of a clear definition of FDI in both domestic and regional instruments in the EAC may be understandable as FDI is simply one component of investment in general, whose regime and treatment are rather the major concern of all investment stakeholders (national or international). Nevertheless, it is interesting to mention that a definition of 'direct investment' is indeed provided in the explanatory notes of Annex VI of the EAC-CMP relating to the schedule on the removal of restrictions on the free movement of capital. According to point (3) of the explanatory notes, direct investment should be understood as "investments of all kinds by natural or legal persons that serve to establish or maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity". As such, this definition does provide enough information to distinguish a direct investment from a portfolio investment. In substance, no adequate indication is given to measure the "lasting and direct" links mentioned in this definition.

In general, IMF and OECD literature are constantly referred to when discussing the definition of FDI. According to the IMF, FDI "is the category of cross-border investment associated with a resident in one economy having control or a significant degree of influence in another economy".[334] This definition is similar to the one adopted by the OECD, but with slightly different wording.[335]

---

[333] D.D. Bradlow and A. Escher, *op. cit.*, p. 20-21. See also I. Stone, "British Direct and Portfolio Investment in Latin America Before 1914", *The Journal of Economic History*, Vol. 37, No. 3 (Sep., 1977), pp. 690-722, at 691.

[334] International Monetary Fund, *Balance of Payments Manual*, 6th edition, 2008 [2011 updated version], p. 100 (para 6.8) [hereafter IMF 2011].

[335] "Foreign direct investment reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor". See Organization for Economic Co-operation and Development, *OECD Benchmark Definition of Foreign Direct Investment*, 4th edition, 2008, p. 48 (para. 117) [hereafter OECD Benchmark 2008].

Despite the claim of having adopted the same definition for FDI as the fourth edition of the OECD Benchmark Definition of Foreign Direct Investment, it is noticeable that the idea of and the words establishing a lasting interest which existed in the previous edition of the IMF's balance of payments manual and which are repeated in the OECD's last definition have been abandoned. This could be considered as a warning that a long-term relationship with which a lasting interest was associated is no longer a determining factor to qualify an investment as FDI. The new definition rather stresses the ability of the foreign investor to have "control or a significant degree of influence" over the decision-making process or the overall management of the enterprise.

According to the IMF, the control or influence exercised by a direct investor over an enterprise can either be immediate or indirect.

3.2.3.2. Immediate FDI

It is *immediate* when the foreign investors own equity that gives them voting rights in the enterprise. As said above, holding ten percent of the voting power is considered by both the IMF and the OECD to be the minimum threshold for a foreign investor owning equity in an enterprise to exercise immediate control or influence thereon.

Whether a foreign investor has control of or a significant degree of influence in an enterprise's management is a matter of fact which should be assessed *in concreto*. However, the IMF has made a recommendation with regard to the percentage of the voting power that a foreign investor should hold in order to be used as an objective criterion to gauge the investor's control or influence over the enterprise's management "for international consistency and to avoid subjective judgments".[336] In line with this, the IMF advises that foreign investors should be considered as having full control over an enterprise whenever they own "more than 50 percent of voting power" in that enterprise, while they should be deemed to possess a significant degree of influence when they hold between 10 and 50 percent of the voting power in the company in which a direct investment has been made.[337]

This may lead one to conclude that the EAC countries have opted for the 'full control' test to qualify an investment as a FDI within their territories as their laws

[336] IMF 2011, p. 101 (para. 6.12). The OECD also advocates the strict application of this threshold but with the aim being to "ensure statistical consistency across countries". See OECD Benchmark 2008, p. 49 (para. 117).
[337] *Ibidem*

and the MIC all lay down the condition that more than fifty percent of the shares should be held by foreigners in order to qualify as FDI. While this may be true, it is worth mentioning that the number of shares does not necessarily imply an equivalent amount of voting rights.[338]

3.2.3.3. Indirect FDI

Control or influence over an enterprise is *indirect* when the foreign investor, instead of directly owning voting power in the enterprise concerned, rather owns these rights in another enterprise that, in turn, has voting power in the enterprise in question. It is the view of the IMF and the OECD that a direct investor relationship exists between two enterprises if the second enterprise fulfils vis-à-vis the direct investor the necessary conditions to be qualified as an immediate subsidiary, an immediate associate, an indirect subsidiary (a subsidiary of a subsidiary), or an indirect associate (whether a subsidiary of an associate or an associate of a subsidiary). An indirect associate in terms of an associate of an associate is excluded from the direct investment relationship as the ability of the associate at the second level to influence the management of another enterprise is "considered to have become too diluted to be significant"[339].

A direct investment relationship always involves two entities: the direct investor and the enterprise in which a direct investment has been made. In an FDI context, the direct investment enterprise is the business operating in the capital-importing country, commonly called the host country.

For this research, it is a company or a partnership established in any EAC member state and which has received investment as defined by the MIC, whereas a foreign direct investor is a foreign investor - as defined by the concerned partner state's legislation – who has control or a significant degree of influence over the investment enterprise located on the territory of any of the EAC partner states. Control and a significant influence are to be understood according to the IMF and OECD standards.

[338] Note that the percentage of the shares held and the associated voting power depend on the enterprise's constitution. However, many companies adopt the principle one share one vote.
[339] The IMF defines a subsidiary and an associate, in the context of FDI, as respectively "a direct investment enterprise over which the direct investor is able to exercise control" and "a direct investment enterprise over which the direct investor is able to exercise a significant degree of influence, but not control". See IMF 2011, pp. 102-103 (para. 6.15-6.16).

3.3. ADMISSION AND TREATMENT OF FDIS IN EAC

3.3.1. Institutions in charge of investment

Empirically, it is established that cross-country variations in FDI flows are associated with the promotion of investment.[340] Consequently, the establishment of IPAs has become "a central part of most countries' development strategies".[341] This is particularly true for all EAC Partner States where the admission and treatment of FDI are handled by specialized investment promotion authorities(IPA). Indeed each Partner State has established its own IPA with the main purpose being to encourage the flow of both national and foreign investment into the country. In Burundi, it is the Burundi Investment Promotion Authority,[342] also known as the API (its French acronym standing for Agence pour la promotion des investissements au Burundi). In Kenya, investment matters are handled by the Kenya Investment Authority (KenInvest),[343] while the Rwanda Development Board does the same in Rwanda,[344] the Tanzania Investment Centre in Tanzania,[345] and the Uganda Investment Authority (UIA) in Uganda.[346]

But the mere creation of an IPA is not enough. To be worth its creation, an IPA must be effective in carrying out its functions. IPAs are usually entrusted with carrying out multiple activities. But these activities can be summarized in four

[340] J. Morrisset and K. Andrews-Johnson, *The Effectiveness of Promotion Agencies at Attracting Foreign Direct Investment*, FIAS, Occasional Paper 16, 2004, p. 4.
[341] *Idem*, p. 1.
[342] API was created by Decree No. 100/177 of 19 October 2009 (Bulletin Officiel du Burundi No. 10bis/2009, p. 2080) [hereinafter API law].
[343] KenInvest was established in 2004 by KIPA.
[344] The RDB was created by Organic Law No. 53/2008 of 02/09/2008 establishing the Rwanda Development Board (RDB) and determining its responsibilities, organization, and functioning (hereinafter RDB law)..
[345] The TIC was created in 1997 by the TIA. It should be reminded here that the constitutional design of Tanzania is complex. Despite the fact that Zanzibar is part of Tanzania, it sometimes has its own institutions. This is for instance the case with the Zanzibar Investment Promotion Authority (ZIPA) created in 2004 by the government of Zanzibar in order to facilitate and promote investment in Zanzibar. In this research, consideration was only given to the laws and institutions of the central government (Tanzania) as before the EAC Zanzibar and its institutions were not considered separately from the mainland.
[346] The UIA was created in 1991 by the investment code of 1991 which was later revised in 2000. It is worth noting that a difference appears between Partner States that have a Common Law tradition (Kenya, Tanzania and Uganda) and those having the Civil Law background (Burundi and Rwanda). In Common Law countries, the investment authority is created and organized by the same law establishing the investment code, while in the Civil Law countries, the investment law is established first, and thereafter the institution in charge is created by separate legislation.

groups.[347] The first is image building, which includes "advertising, production of promotional material, and participation in events such as fairs and conferences".[348] The second group is investment generation. It consists of all the activities that an IPA may engage in to convince a particular investor to invest in the country. It includes meetings between the IPA's staff and prospective investors such as meeting face to face; by phone, mail, and telemarketing; or through missions abroad. But investment generation may also involve the organization of meetings between investors and potential local partners by the IPA or the conducting of "sectoral or market studies for specific groups of investors".[349] The third group, investor services, appears to be the core function of IPAs. Services that IPAs offer to investors can be broken down into three categories, i.e. pre-investment services, implementation services, and post-investment services.[350] Pre-investment services generally include "giving potential investors information about the country and about procedures required of investors".[351] In the implementation phase, IPAs provide assistance in terms of business or tax registration, sectoral licensing, land, construction, and utilities, etc. especially when they act as one-stop shops.[352] Finally, the post-investment services include periodic meetings with investors who are already established in order to obtain information about various problems they might be facing and to try to find adequate solutions.[353] Last but not least, the fourth group of activities carried out by IPAs can be called policy advocacy.[354] Policy advocacy is closely related with the quality of the investment regulatory framework. It is about IPAs' responsibility to constantly work towards the improvement of the investment climate by evaluating investment laws and policies in order to make recommendations for improvement to the government.

When taking a close look at the laws establishing IPAs in the Partner States, it is quite clear that each of them is statutorily entrusted with the responsibility to perform all the four functions discussed above,[355] although some functions are more clearly stipulated than others. For instance, the provision of 'investor services' is clearly stated in the laws of all the Partner States except Rwanda. Indeed, the Rwanda Development Board (RDB) has among other things the responsibility to

[347] L.T. Wells and A.G. Wint, *Marketing a Country: Promotion as a Tool for Attracting Foreign Investment,* Revised Edition, FIAS, Occasional Paper 13, 2000, pp. 20-49.
[348] J. Morrisset and K. Andrews-Johnson, *op. cit.*, p. 38.
[349] *Idem*, p. 42.
[350] L.T. Wells and A.G. Wint, *op. cit.*, p. 161.
[351] *Ibidem.*
[352] J. Morrisset and K. Andrews-Johnson, *op. cit.*, p. 39.
[353] *Ibidem.*
[354] J. Morrisset and K. Andrews-Johnson, *op. cit.*, p. 36.
[355] See article 4 of API law, article 15 of KIPA, article 3 of RDB law, article 6 of TIA, and article 6 of UIC.

'facilitate and help investors meet environmental standards in the execution of their projects'[356]. However, it does not clearly appear under article 3 of the RDB law whether this institution is also in charge of facilitating investors to obtain necessary permits, licences, approvals, registrations, etc. to start and operationalize their investments as is the case for article 6(d) of the Tanzania Investment Act (TIA). Nevertheless, the provision of such services to investors by the RDB may be inferred from the interpretation of article 3(2°) which vests this institution with the responsibility 'to promote local and foreign investments in Rwanda'.

The effectiveness of an IPA to carry out its functions depends a great deal on its institutional structure and reporting mechanisms.[357] The efficiency of an IPA's institutional structure can be assessed through its age, legal status, institutional affiliation and linkages with the government, linkages with the private sector, reporting arrangements, oversees offices, the amount of mandates it has, and the staff's characteristics and salary policy.[358] As far as the EAC Partner States are concerned, it can be observed that their IPAs are relatively young,[359] and all of them were created by law (which gives them the status of public institutions). The linkage between Partner States' IPAs and their respective private sector is statutorily guaranteed in that a specified number of members from the private sector are members of the IPA board.[360] Concerning the reporting arrangement, it is argued that the IPA's reporting method has a great influence on its visibility, hence on its ability to attract FDI. It is submitted that this influence is generally magnified when the IPA's board is chaired by the country's prime minister or president.[361] In this regard, two cases need to be underscored. The first is that in Kenya the National Investment Council was established whose chairmanship is exercised by the Presi-

[356] See article 3(11°) of RDB law.
[357] J. Morrisset and K. Andrews-Johnson, *op. cit.*, p. 45.
[358] *Idem*, p. 46.
[359] Notwithstanding what was previously mentioned as the date of the establishment of Partner States' IPAs, it is important to note that some of them have existed under different names or forms since a relatively long time. This is for instance the case with KenInvest which is the successor to the Kenyan Investment Promotion Centre that was formed in 1986 after operating as an investment advisory Department at the Ministry of Finance since 1982. The UIA exists since 1991 before even the UIC was actually revised in 2000. The same thing applies to Rwanda where before the creation of the RDB in 2008, the Rwanda Investment Promotion Agency already existed, which had been created in 1998 before it changed in 2004 into the Rwanda Investment and Export Promotion Agency (RIEPA). See EAC, 'Information Guide to Investors', p. 11.
[360] See article 7(2)(b) of TIA, article 6(8o) of RDB Law, article 3(2)(e) and (f) of UIC. The participation of the private sector on the board of the KIA is not clear. Maybe in appointing six other members pursuant to article 16(2)(g) of the KIA, the Minister responsible for matters relating to investment would list people from the private sector. But for this, those people should have sound knowledge in the field of law, economics, commerce, industry or management [article 16(4) of KIPA].
[361] J. Morrisset and K. Andrews-Johnson, *op. cit.*, p. 45.

dent of Kenya or a Minister that he should designate.[362] The second concerns Rwanda where, pursuant to the RDB law, this institution is put under the direct supervision of the office of the president of the republic.[363] Except that the chairpersons of IPA boards are directly appointed by the president of the republic in Tanzania and in Kenya,[364] it should be reiterated that no Partner State entitles its president or its prime minister to be a members of their respective IPA board. Instead, the majority of the Partner States put the IPAs under the supervision of the Minister in charge of trade as testified by the primary role played by this minister in appointing the members of the IPA board.[365]

Regarding the existence of an overseas office, it should be said that none of the Partner States' IPAs has opened an office abroad, despite the fact that some of them have been legally entitled to do so.[366] So far, all Partner States' IPAs are carrying out their investment promotion activities through their respective embassies.

The primary mandate of IPAs is to promote an investment flow into the country concerned. But due to budgetary constraints and consistency, IPAs are sometimes given some extra functions such as export promotion, privatization, etc. In the EAC it can be observed that IPAs in all the Partner States are specialized in investment promotion only,[367] which can presuppose their efficiency according to a widespread belief that "agencies focusing exclusively on investment promotion should be more effective than those dealing with several activities simultaneously".[368]

Finally, aspects related to the characteristics of the staff and salary policy applied by the IPA can also influence its effectiveness.[369] As said above, all the IPAs in the EAC Parter States are public institutions which generally gives their staff the status

[362] See article 26(1)(a) of the KIPA.
[363] See article 4 paragraph 2 of the RDB law.
[364] See article 16(2)(a) of the KIPA and article 7(2)(b) of the TIA.
[365] See article 16 of the KIPA, article 6 of the RDB law, article 7 of the TIA, and article 3 of the UIC.
[366] It is for instance the case with the KIA and RDB. See article 15(2)(b) and article 2 paragraph 2 of respectively the KIPA and the RDB law.
[367] This follows from the reading of article 4 of the API law, article 15 of the KIPA, article 3 of the RDB law, article 6 of the TIA and article 6 of the UIC. However, articles 3(3o) and (7o) of the RDB law respectively stipulate the responsibility of the RDB to 'to promote exports to regional and international markets of goods and services as well as adding value' and ' to carry out privatization programmes, monitor them and advise the government accordingly'. This seems to suggest that the RDB is a multi-mandate institution, which is true when we look at this institution as a whole. However, the RDB was created by merging various government agencies, including the former RIEPA (see article 30 of RDB law). However, within the RDB there is a specific department which is exclusively dedicated to investment.
[368] J. Morrisset and K. Andrews-Johnson, *op. cit.*, p. 50.
[369] *Idem*, p. 45.

of civil servants. This means that, except for exceptional contractual cases, the staff of IPAs are paid following the salary scale applied in each Partner State. However, their wages may be higher if bonuses and other incentives are paid.

This having been explored, studies suggest that among all these criteria those that matter most are the institutional affiliation and linkages with the government, the reporting arrangement, and linkages with the private sector.[370] It can be summarized that the 'most effective IPAs benefit from the visibility and from participation by the private sector through their boards or through institutional relations'.[371] According to this emphasis on the institutional framework concerning investment in the EAC Partner States, it noticeable that despite the variety in the institutions established by the Partner States, from a formal point of view these institutions meet the minimum international standards. At the same time, the fact that there is no initiative at the regional level that would take the lead in harmonizing Partner States' IPAs in order to strengthen the EAC as a single and unique investment area should be deplored.

3.3.2. Admission of FDIs in the EAC

Each EAC Partner State is sovereign in determining the conditions for the admission of FDIs in its territory. Partner States' sovereignty is reaffirmed by diverse provisions of the MIC which actually grants carte blanche to regulate investments in a way that could accommodate the best economic development needs of the state concerned and that acknowledges the real investment environment in the host state. Neither the MIC nor national investment laws have dared to consider, even to the slightest degree, the ongoing regional integration process, at least between the three founding members, in order to harmonize certain vital provisions. Consequently, the divergences between their legal provisions related to the conditions for the admission of FDI and the way in which they are treated are striking.

Being a foreign investor as defined above is not enough to commence business in a Partner State's territory. It only presupposes that the company concerned might be eligible for special treatment. But before enjoying those mirrored benefits, foreign investors need to go through a certain process. This process is carried out in each EAC Partner State by the above-mentioned IPAs. Therefore, any person or company interested in doing business in any EAC country should first apply for an investment authorization from this competent institution. Among the common conditions to be fulfilled for an investment application to be qualified as FDI, the

[370] *Idem*, p. 49.
[371] *Ibidem.*

minimum capital requirement, the application processing time, and the issuing of an investment certificate are worth mentioning.

3.3.2.1. Minimum capital requirement

In order to be admitted as FDI, companies or persons need to prove their financial capacity to carry out the project. This capacity is presumed by the presentation of a certain amount of money that the prospective investor intends to inject into the host country's economy. There is no uniform minimum capital which is common to all EAC countries, and therefore – as said above – each country has adopted its own standards.

While Kenya has adopted the highest minimum capital requirement, which is equivalent to $US 500,000[372], Uganda seems to have the lowest threshold in requiring only $US 100,000 from foreign investors.[373] In Rwanda a foreign investor should be able to inject at least $US 250,000 into the economy in order to qualify as FDI[374] whereas in Tanzania a business wholly owned by foreigners or a joint venture must have $US 300,000 available in order to enjoy the benefits provided by the Tanzanian Investment Act.[375]

In contrast, no minimum capital is mentioned in the Burundian law. This could mean that the Burundian legislator has chosen to dispense with the minimum capital requirement so as to encourage and promote FDI inflows in Burundi.

To some extent, except for Uganda, it could be concluded that the variation in the amount of the minimum capital depends on these countries' economic power in the region.

3.3.2.2. Application processing time

It is conventional wisdom in business that time costs money. Investors, just like any other businessmen, are very sensitive as far as time is concerned. That is why the period of time that could be used to assess the admissibility of an investment project is very relevant for investors, especially for the planning of their investment proposal.

[372] Sect. 4.1. (b) of the KIPA.
[373] Sect. 10 (5)(b) of the UIC.
[374] Art. 2 (5°) of the RIC.
[375] Sect. 2 (2) (a) of the TIC.

As much as EAC Partner States' laws provide for different amounts of money as minimum capital for foreign investments, they also substantially differentiate in terms of the timeframe for FDI project applications to be processed.

In Uganda, it may take up to 120 days before a decision on the admissibility of an investment can be reached. This specifically occurs when the investor has had no reaction from the investment authority within 90 days after the submission of the complete application package.[376] In this case the investor is entitled to appeal to the minister in charge of investments. The latter then carries out an investigation and informs the investor concerned within 30 days.[377] Ugandan law is silent as to an alternative course that should be used by the foreign investor if, for instance, the minister, in his turn, does not render a decision within this 30-day appeal timeframe. Nevertheless, within a maximum period of 51 days the investment authority should provide the foreign investor with feedback concerning the admission of its investment.[378]

The Kenya Investment Authority (KIA) has set a maximum period of 25 days for a decision to be taken regarding the acceptance of a foreign investment project. If, 25 days after the submission of the complete application, investors have not received any feedback from the KIA, they are entitled to lodge an appeal with the minister who then has 15 days to determine the investors' fate.[379] Therefore, it is correct to assert that, according to a worst-case scenario, it may take up to 40 days to reach a final decision on the admission of an investment in Kenya. However, if all goes well and the investment project is admitted, it may only take 20 days for the investor to receive a positive written notice from the KIA.[380]

When making such an application in Rwanda, an investor should legitimately expect a response within 10 days after it has submitted a complete application procedure. Otherwise the applicant has the right to appeal to the minister in charge of investments. The minister has, in principle, 5 working days from receiving the complaint to conduct investigations and to inform the applicant about the result of these investigations.[381] In theory, this provision is revolutionary. While it is feasible that an investment project can be admitted within ten working days, it is difficult to believe that the minister could be able to conduct investigations and to com-

[376] Sect. 14(5) the UIC.
[377] Idem (sect. 14, 5 of the UIC).
[378] The total number of days to be legally spent pursuant to the provision of section 14(1-4).
[379] Sect. 6.1 of the First Schedule of the KIPA.
[380] Sect. 2.1 to 4.1 of the First Schedule of the KIPA.
[381] Article 16 of the RIC.

municate the results thereof within 5 days. This is particularly true when one considers the bureaucracy that such an appeal may entail.

Tanzanian and Burundian laws do not mention the admission procedure. While the Burundian Code of Investment is totally silent on the subject, the Tanzanian legislator has authorised the board of the Tanzania Investment Centre (TIC) to determine the procedure for such an application.[382] However, by analogy, it could be said that no less than fourteen days could be required in Tanzania for an admission decision, according to section 16 (5-6) relating to cooperation between the TIC and other public authorities.

3.3.2.3. Issuance of the investment certificate

When the application is successful, foreign investors are issued with a certificate that identifies the business they intend to engage in. The certificate also spells out the terms and conditions under which the business should be carried out, and contains any other information which is deemed important by the competent authority.

In principle, the certificate relates to the business and shareholders that were made known to the investment authority. Therefore, it should not be transferred or amended without the approval of the issuing authority[383]. This means that in principle the investment certificate could be transferred or amended. Allowing a transfer or an amendment to an investment certificate is simply a pragmatic position that reflects the consideration of the realities of the business world. In fact, shares constantly fluctuate and may change hands at any time depending on the dynamics of the business. Furthermore, some operational aspects might require an investor to add new activities in the registered business without affecting the certificate itself. Therefore providing room for investors to adjust their certificate is simply practical.

It is interesting to note that the interests of third parties which could be damaged by a modification of an investment certificate are protected as they may directly inform the investment authority about any change or variation that could affect them if investors do not inform the authority of these changes[384].

[382] Sect. 17(5) of the TIA.
[383] See for instance sect. 8.1 and 9.1 of the KIPA; articles 12 and 15 of the RIC; sect. 17(1) & (3) and 17(7) of the TIA.
[384] Sect. 17(12) of the TIA; article 14 of the RIC; sect. 17(2) of the UIC.

Just as the investment certificate can be transferred or amended to mirror new changes, the investment authority is entitled to revoke a certificate when it has been issued as a result of fraud, an error or false information.[385] In Kenya, Rwanda and Uganda, investors who fail to fulfil the activities as agreed also face the risk of the revocation of their investment certificates.[386]

However, before any revocation, the investors concerned should be given written notice so that they can prepare their grounds of defence. If they do not provide any convincing argument in due time,[387] the certificate will be revoked. The decision to revoke an investment certificate may be appealed in Rwanda and Kenya and this appeal is made to the minister in charge of investments, whereas there is no such provision in Ugandan law. The position of Ugandan law is understandable as the UIA can revoke an investment certificate only "with the approval of the Minister".[388] This means that in Uganda the minister in charge of investments is part of the revocation decision-making system in contrast to what happens in Rwanda and Kenya where the investment authority is competent to take the decision without referring the case to the minister. Therefore it would be nonsense in Uganda to appeal before the same minister.

3.3.3. Treatment of FDI in the EAC

Foreign investors enjoy a double advantage in their host country. First, they enjoy the general regime of protection provided by the international trade regulations such as the National Treatment (NT) and the Most Favoured Nation (MFN) principles as recognized by the World Trade Organization (WTO). Second, they benefit from special regimes provided for by their host states' investment laws. In this section, the focus will only be on the latter.

3.3.3.1. Available incentives

Investors are expected to include in their application for a certificate any incentives they would like to benefit from if they are accepted. Incentives are crucial in attracting FDI, especially in a common market where all countries are supposed to offer similar basic opportunities. In the EAC, each Partner State's sovereignly de-

[385] Sect. 10.1 of the KIPA; article 11 of the RIC; sect. 20 of the UIC.
[386] Sect. 10.1(c) of the KIPA; article 11(3°) of the RIC; and sect. 20 (3) & (4) of the UIC
[387] While in Uganda the investor should provide an explanation to the UIA within a reasonable period of time, the time limit is 10 days and 30 days, respectively, in Rwanda and Kenya. The Tanzanian and Burundian laws do not say anything about the possibility to revoke an investment certificate.
[388] Sect 20(4) UIC.

termines the incentives it intends to allocate to foreign investors. Those incentives are generally of two kinds, namely fiscal and non-fiscal.

Fiscal incentives are regulated by each Partner State's taxation system. Generally speaking, foreign investors obtain tax relief for a given period of time. This tax relief often applies to value added tax on goods or services to be produced or provided by the investor, income tax, and importation tax or duties.[389] As far as import duties are concerned, they are withdrawn for the importation of materials that should be used in the implementation of the investment project such as machinery, plants, equipment, vehicles or construction materials. Sometimes, import duties may be withdrawn for all imported goods provided that the investor can demonstrate that those goods will be used in the production of other products that will be exported.[390] The impact of fiscal incentives in attracting FDI is very controversial.[391] But some empirical research has revealed that, from an investor's perspective, "Tax exemption is like dessert; it is good to have, but it does not help very much if the meal is not there".[392]

Non-fiscal incentives are manifold. Immigration quotas and the removal of some restrictions are the most frequent in the EAC Partner States. Indeed, one of the expectations of the host state is that the foreign investor will create jobs for its nationals. Therefore, foreign investors should not bring foreign employees into the host state. Besides, foreign investors are not citizens of the country where they decide to do business. Hence, they and other foreign employees are legally under an obligation to comply with the host state's immigration laws. This implies that, in principle, they need to pay for visas and residence permits, if no visa and/or residence permit waiver agreement has been signed between the host state and their respective country of origin. But exceptions are usually provided under the investment laws to exonerate foreign investors from all or part of the visa and residence permit requirements.

---

[389] See for instance article 16-18 of the RIC, sect. 21-22 of the UIC, sect. 19 of the TIA.

[390] Sect. 25 of the UIC, article 25 of the RIC. In Rwanda, it applies to the Free Investment Zone (FTZ) which is defined as a "geographically demarcated area into which goods and services are imported free of duties and taxes with at least eighty percent (80%) of those goods and services sold for re-export while twenty (20%) are sold locally after paying necessary duties and taxes". See article 2(7°) of the RIC.

[391] For details on the impact of tax incentives for attracting FDI, see E. Cleeve, 'How Effective Are Fiscal Incentives to Attract FDI to Sub-Saharan Africa?', *The Journal of Developing Areas*, Vol. 42, No. 1, 2008, pp. 135-153.

[392] See Y. Aharoni, *The Foreign Investment Process*, Harvard Business School, Boston, 1966 cited by J. Morisset and N. Pirnia, *How Tax Policy and Incentives Affect Foreign Direct Investment: A Review*, Policy Research Working Paper 2509 (The World Bank and International Finance Corporation), 2000, p. 5.

While Ugandan law is silent on immigration incentives, all the other EAC Partner States grant them, although subject to different conditions. Burundi is the only country in the EAC where there is no fixed immigration quota for foreign investors.[393] While this is a real incentive in attracting FDI, it could be a serious threat to local employment, although the general trend is to move towards a minimum restriction zone.

The concern of preserving employment for nationals clearly appears in the Tanzanian law which allows foreign investors to bring only five (foreign) persons into the country during the start-up phase. However, the law does not inform us whether these people are entitled to free visas and/or resident permits. According to the Tanzanian law, the TIA may allow additional persons over and above the investor's immigration quota to enter the country provided that there are no "qualified Tanzanians" or if the "complexity of the technology employed" so requires.[394]

In Rwanda, a foreign investor has an automatic right to employ three expatriates.[395] Both the foreign investor and its expatriates "are entitled to a free initial work permit and a free residence visa valid for a period of one (1) year".[396]

In Kenya, three free permits are provided to the company's owners, shareholders or partners,[397] and three additional permits are available for management or technical staff.[398]

Another kind of non-fiscal incentive is the possibility for foreign investors to obtain a loan from domestic banks and financial institutions in their host country. This incentive applies expressly to Tanzania and Uganda where their legislation grants authority, in similar provisions, to respectively the Bank of Tanzania and the

[393] The investment code refers in its article 8 to the immigration law to regulate visa and residence permit issues for expatriates working for a foreign investor.
[394] Article 8 of the BIC.
[395] According to article 20 of the RIC, this right is recognized concerning any investment capital amounting to at least $US100,000. It should be reiterated that according to the RIC, to qualify as a foreign investment a company should invest at least $US 250,000.
[396] See article 21 of the RIC. The right to a temporary residence permit is transformed, according to article 21 section 2, into the right to acquire permanent residence status when the investor deposits a sum equivalent to $US 500,000 with a commercial bank in Rwanda for a period of six months or more. However, the law is not precise as to whether an investor means the company or its shareholders. This is so confusing that one may wonder whether each shareholder of a company that deposits $US 500,000 is entitled to permanent residence or whether this right belongs to the company. But as residence permits and visas rather apply to individuals, it would be tempting to believe that the legislator meant to grant that right to a company's shareholders.
[397] Sect. 13.1(b) and 13.9 of the KIPA.
[398] Sect. 13.1(a) of the KIPA.

Bank of Uganda to determine the limit of any credit that may be granted to foreign investors which might need such an incentive[399]. Of course, the credit obtained must only be used to carry out the activities specified in the loan application, and those activities should be closely linked with the ongoing investment in the host country. To ensure that the foreign investor does not use that credit for other purposes the bank that granted the loan or the investment authority is entirely free to appoint an agent in order to monitor the use of the credit funds.

Access to funds from domestic banks and financial institutions in the host country by the foreign investor seems to question the doctrine according to which foreign investments should only consist of the injection of foreign capital into the host country's economy. While this remains true as a precondition for the admission of a project as foreign investment in almost all EAC Partner States, it is obvious that a new trend is developing in the international investment world. From a purely foreign capital attraction perspective, investors' host countries are now increasingly focusing on other benefits of foreign investments such as the transfer of new technologies, the exploitation of new economic areas (the government's priority areas), job creation, innovations, etc. This kind of input could have long-lasting effects on the host country's economy compared to the mere injection of foreign capital. And consequently, they should be given more consideration when assessing an investment project. Obviously, as competition in attracting FDI increases, the minimum capital requirement is being abandoned.[400] Therefore one could expect a generalization of foreign investors' access to local capital – even in creating their enterprises – provided that they can demonstrate how profitable their intervention would be for the national development of the host country.

3.3.3.2. Protection of Foreign investments

The protection of foreign investments is the main rationale underlying the elaboration and proliferation of all international investment agreements, including BITs. It is the backbone of the whole international investment system. The protection provided by the EAC Partner States' legislation may be grouped in two categories. The first category of protection is provided through guarantees against expropriation, and the second concerns the plurality of dispute-resolution mechanisms that are available for the foreign investor to choose.

[399] Sect. 25 and 26 of the TIA and the UIC, respectively.
[400] The BIC could be taken as an illustration. Turkey also abolished the minimum capital requirement in its New Foreign Investment Law in 2003. See Angualia Daniel, "Foreign Direct Investment in East African. A comparative analysis of its investment laws", p. 19 online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593731 (last accessed on 23 October 2012).

Apart from the KIPA, all EAC Partner States' investment codes expressly renounce either expropriation or nationalization, or both, except in cases where specific laws so require[401]. In case there should be compulsory expropriation, the government of the host state should make sure that foreign investors are fairly compensated beforehand[402]. The amount of such compensation should be freely transferable from the host country to the final destination following the expropriated investors' choice. The free transfer of this compensation is an extra protection for foreign investors as some governments would be tempted to confiscate part of the compensation due through taxes or currency exchange controls.

In this regard, Rwanda and Uganda seem to be very liberal as any repatriation of the foreign investors' compensation cannot be subject to "any form of tax whatsoever" or to "exchange control restrictions", respectively.[403] In Tanzania, the law urges decision-makers to issue an authorization for the repatriation of the foreign investor's compensation in convertible currency,[404] but whether the foreign investor should first pay related taxes or comply with exchange control regulations before the repatriation of the compensation is not as clear as it appears in the Burundian law. Indeed, articles 11 and 12 of the BIC guarantee the free transfer of foreign capital to any country chosen by the foreign investor but in compliance with exchange control regulations and after the payment of any taxes due.

Rwanda and Uganda once again diverge from the other Partner States in fixing a compensation time limit. While the Rwandan and the Ugandan codes set 12 months as the limit within which foreign investors who could be victims of expropriation or nationalization should receive their compensation,[405] the Tanzania Investment Act simply states that such compensation should be paid "promptly".[406]

The interpretation of a term such as "promptly" and other issues, especially related to expropriation and nationalization, may create a major dispute between the host state and the foreign investor. That is why laws regulating foreign investments

[401] See sect. 27(1) of the UIC, sect. 22(1) of the TIA, article 30 of the RIC, and article 13 of the BIC. In Kenya, despite the silence of the KIPA, section 8 of the Foreign Investment Protection Act (FIPA) of 1990 as revised in 2012 refers to article 75 of the Kenyan Constitution that prohibits the expropriation of any private property unless this is done on the ground of public benefit. In this case, there must be a prompt payment of full compensation.
[402] Sect. 27(2) of the UIC, sect. 22(2), article 30 of the RIC, and article 13 of the BIC.
[403] Article 30 sect. 1 of the RIC and sect. 27(3) in fine of the UIC.
[404] Sect. 22(3) of the TIA.
[405] Article 30 sect. 1 of the RIC and sect. 27(2) of the UIC.
[406] Sect. 22(3) of the TIA. In Kenya, article 75(1)(c) of the Constitution - to which the FIPA refers - provides for "prompt payment of full compensation" while the Burundian law is completely silent about the time limit for the compensation.

always provide for certain mechanisms to be used to settle such disputes.[407] In this regard, there is consensus between the laws of Burundi, Tanzania, Rwanda and Uganda that any dispute should first of all be settled amicably through negotiations. When negotiations fail, there is unanimity within the EAC Partner States in acknowledging international arbitration under the jurisdiction of ICSID as an option that could be explored by the foreign investor. In addition to these mechanisms, foreign investors may also resort to the EACJ pursuant to article 32(c) of the EAC Treaty provided that the investment agreement confers that jurisdiction on this court.[408]

Besides, foreign investors also have at their disposal the choice to claim the protection mechanism provided for in the BIT signed between the host country and the foreign investor's home country. Last but not least, foreign investors may have recourse to the host country's arbitration rules or to its ordinary courts to achieve redress. In most cases this option is not used because foreign investors tend to doubt the independence and impartiality of local arbitral tribunals or the ordinary courts constituted under the authority of the host country.

All in all, it is obvious that foreign investors have a wide range of choices at their disposal to settle any investment dispute that they could be faced with in their host country. However, it should be mentioned that in Rwanda and Uganda foreign investors may be subtly dissuaded from referring to the host country's national courts when the Rwandan or the Ugandan government does not agree with the foreign investor's choice of forum for arbitration.[409] To avoid this kind of inconvenience, foreign investors should always make sure that a clear method of dispute settlement other than negotiations is inserted in the document for the registration of their enterprise since the latter is deemed to constitute the government's consent to respect such a method and the decision taken by the forum for settling disputes.[410]

3.4. CONCLUDING REMARKS

The investment legal framework of the EAC Partner States appears to be complex and non-uniform. Each Partner State has its own investment laws and policies,

[407] See sect. 28 of the UIC, sect. 23 of the TIA, articles 31 and 32 of the RIC, and article 17 of the BIC.
[408] This article reads: "The Court shall have jurisdiction to hear and determine any matter: … (c) arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court".
[409] See article 34 of the RIC, and Sect. 28(4) of the UIC.
[410] Article 33 of the RIC, and sect. 28 (3) of the UIC.

which do not take the regional integration dimension into account. As a result, the investment legal framework appears to lack any cohesion. This is evidenced by the lack of harmony in the definition of a concept which is as basic and important as investment itself, in addition to the fact that none of the Partner States' investment codes provide a definition of the concept 'foreign direct investment'. To bridge this gap, the IMF and OECD literature where FDI is defined as "the category of cross-border investment associated with a resident in one economy having control or significant degree of influence in another economy" should be considered.

While Partner States generally use two benchmarks – the company's incorporation and/or the shareholders' nationality – to determine the foreignness of a company, the nationality of the majority shareholders should be seen as the leading criterion. This trend is even corroborated by the MIC, which is an attempt by the EAC to suggest a regional instrument with a declared ambition to foster harmonization between the Partner States' investment laws and policies. However, it is astonishing how the harmonizing ambition of the MIC blatantly contrasts with its non-binding character. Consequently, the MIC has gone unheeded.

The lack of a regional regulatory framework and an ad hoc institution makes the attraction of FDI in the EAC a playground with five separate IPAs. And each IPA is allowed – if not encouraged - to play by its own rules. Those rules are as various as they are as they apply not only to admission requirements such as the amount of the minimum capital and the timeframe for the examination of an investment application, but also to some key aspects like the range of fiscal and non-fiscal incentives, and the procedure and guarantees of protection in case of a conflict between the host Partner State and the foreign investor. However, as far as FDI protection is concerned it is important to note that all EAC Partner States guarantee protection for investors against privatization or nationalization. Privatization may only be allowed subject to the conditions strictly provided by the law, and only then after the investor has been promptly and completely compensated. In the case of a dispute, investors have an option between amicable settlement or filing a case either before the host Partner State's courts, an arbitral tribunal, the ICSID, or the EACJ. The latter would only be competent if an arbitration clause contained in a commercial contract or agreement has clearly conferred such jurisdiction upon it.

The overall lack of harmonization between Partner States' investment regulations makes the EAC common market an opaque investment area with uncertain regulations, which is one of the characteristics of an area which is non-compliant with good governance principles.

Chapter IV

Movement of foreign direct investment in the EAC

4.1. INTRODUCTION

In principle, any economic regional integration process evolves through various stages, including a free trade area, a customs union, a common market, an economic union, and complete economic integration.[411] This substantially means that by merely joining a regional integration scheme, a country commits itself to renounce part of its national sovereignty. The further the integration process progresses, the more the participating countries surrender parts of their sovereignty into the hands of a supranational body or arrangement. In practice, this implies that, as far as the East African Community (EAC) is concerned, Partner States renounce the application of their respective laws whenever such application would contravene the common agreement.

In other words, regional integration creates a set of obligations for Partner States, the execution of these obligations by each Partner State being the right of the others. Each regional integration stage gives rise to its own procession of obligations. In 2010, the East African Community Common Market Protocol (EAC-CMP) entered into force to apply the provisions of the Treaty of Arusha.[412] According to article 76 of the Treaty of Arusha, the common market should be implemented progressively in order to create an area where goods,[413] persons, services and capital would circulate freely. Direct investment, including Foreign Direct Iinvestment (FDI), appears on the list of types of capital that Partner States have committed to progressively liberalise.[414] But the interaction between the free movement of capital and other freedoms (free movement of goods, services, and persons) is so strong that the restriction imposed on the free movement of capital would affect other freedoms, and vice versa.[415] For this reason, it would be insufficient to analyse the free movement of FDI in the EAC without examining, at the same time, the status of other freedoms. The EAC-CMP imposes two main kinds of obligations on the Partner States. The first is the negative obligation not to introduce any new restrictions on the movement of goods, persons, services and capital from other Partner States. The second kind, the positive obligation, consists of taking action in progressively removing all the existing restrictions on trade. As of the time of writ-

[411] B. Balassa, *Theory of Economic Integration*, New York, Routledge Revivals, 1961, p. 2.
[412] See inter alia, articles 2(2), 5(2) and 76 of the Treaty of Arusha. Of course, the entry into force of the Protocol on the establishment of the East African Customs Union (hereinafter EAC-CUP) already established the liberalization of the trade in goods in the EAC.
[413] The liberalization of the trade in goods started earlier in 2005 with the entry into force of EAC-CUP.
[414] See the explanatory notes of Annex VI to the EAC-CMP.
[415] A. Landsmeer, 'Movement of Capital and Other Freedoms', *Legal Issues of Economic Integration*, Vol. 28, Issue 1, 2001, pp. 57-69.

ing, Partner States have given themselves until 31 December 2015 to have a fully-fledged common market in the EAC.

Such a fully-fledged common market would substantially affect Partner States' national, regional and international trade. The liberalization of trade within a regional economic community generally affects the location of FDI.[416] For this reason it is very important to examine the extent to which free movement rights are expected to be implemented in the EAC. In this sense, this chapter addresses questions such as: which goods should enjoy the right to free movement within the EAC? What are the persistent barriers to the free movement of goods in the EAC and what are Partner States doing to remove them? What are the restrictions imposed by EAC instruments on the free movement of goods? Which factors make it difficult for the EAC's free movement of goods to be implemented and what can be done to overcome this challenge? Which persons are entitled to enjoy the free movement rights within the EAC-CMP? What does the free movement of persons imply and how should it be implemented? Are any limitations accepted by the EAC Treaty and the EAC-CMP as far as the free movement of persons is concerned? Which kinds of services are concerned with the free movement of services in the EAC? How could Partner States restrict the free movement of services in their respective territories? What is the free movement of capital and how different is this from other freedoms?

These questions are addressed against the background of the EAC's progressive common market bearing in mind that a fully-fledged common market comparable to the EU single market is the final target of the EAC market integration, especially when one takes into consideration that a political federation is the ultimate goal of the EAC integration process.

4.2. FREE MOVEMENT OF GOODS

In 2005 the Protocol on the establishment of the East African Customs Union entered into force pursuant to the will expressed by the Partner States in article 75 of the Treaty of 2000[417]. According to article 75 (1)(b) and (c) of the Treaty of Arusha and article 2(5)(b) and (c) of the EAC-CUP, one of the customs union's objectives is "the elimination of internal tariffs and other charges of equivalent effect" and "the elimination of non-tariff barriers" between partner states to allow the free movement of goods within the EAC territories. The elimination of tariffs

[416] See for instance D. Puga, *op. cit.*, p. 334.
[417] Article 75(7) of the Treaty of 2000 urged the partner states to conclude the EAC-CUP within a period of four years after the signature of the Treaty.

and quantitative restrictions between countries in a specific geographical area is the main feature of a Free Trade Area (FTA).

4.2.1. Combined Free Trade Area and Customs union

In a FTA, goods originating from one member country to another are supposed to move freely. This means that the member countries refrain from levying any customs duty on goods imported or exported across their mutual boarders. They also commit to refrain from imposing any kind of import quotas on goods manufactured in one of the member countries upon the entry of these goods into their respective territories.

Countries usually sign free trade agreements establishing FTAs with the hope that the free movement of goods will increase competition between producers of similar products in the anticipation that an increase in competition would lead to better quality products at cheaper prices that would benefit consumers.

In economic theories, FTAs are a prerequisite to further economic integration including a customs union and a common market.[418] However, the EAC integration process challenged this view in launching, at the same time, a customs union and a FTA. Though, formally, a FTA did not exist prior to the EAC customs union, the requirements were fulfilled by the provision of "the elimination of internal tariffs and other charges of equivalent effect" in both the Treaty and the East African Community Customs Union Protocol (EAC-CUP). Further, the application of the Rules of Origin under the EAC customs union is additional evidence that instead of skipping the FTA stage in its integration process, the EAC rather chose to combine it with the customs union.[419] Rules of Origin are generally applied in FTA to avoid trade deflections which happen when some FTA members incur losses in customs revenue due to the fact that products from third parties enjoy free movement within the FTA after their entry through a FTA country with the lowest external tariff.[420]

4.2.2. From tariffs to non-tariff barriers

According to article 11 of the EAC-CUP Partner States agreed to progressively remove all internal tariffs by 2009. But as things now stand, four years after this

[418] See B. Balassa, *op. cit.*, p. 2.
[419] This can be easily understood when one looks at the general fast-track attitude that predominates most EAC integration process.
[420] H.K. Mutai, 'Regional Trade Integration Strategies Under SADC and the EAC: A Comparative Analysis' in *SADC Law Journal*, vol. 1, 2011, pp. 81-97 at 86.

deadline, tariffs have not yet been completely eliminated between Partner States. At the same time, while tariffs are being removed they are being substituted by Non-Tariff Barriers (NTBs).

NTBs are defined in the EAC as "quantitative restrictions and specific limitations that act as obstacles to trade, and which appear in the form of rules, regulations and laws that have a negative impact to trade".[421] NTBs are more daunting obstacles to trade than tariffs.[422] They are multiform and are constantly changing like amoebas' pseudopodia, especially as their form and shape widely depend on the "inventiveness of the minds of bureaucrats".[423] This makes it impossible to list exhaustively all forms of NTBs.

The East African Business Council (EABC) has identified the following six categories of NTBs in the EAC: customs documentation and administrative procedures, immigration procedures, quality inspection procedures, transiting procedures, police roadblocks, and business licensing and registration.[424]

In a FTA or customs union, most of time NTBs are put in place to implement genuine local or national policies such as policies regarding public health, environmental protection, national security or revenues.[425] This can be called genuine NTBs. But in other circumstances NTBs are used by national authorities to protect local producers against rival competitors from other member states. These are spurious NTBs. While, in the end, both kinds of NTBs do encroach on the free movement of goods within the FTA or customs union, it is obvious that they may not be eliminated with the same ease. It appears that genuine NTBs can be easily removed within the framework of the alignment and harmonization of national regulations, policies and institutions with those of the FTA or customs union structures. The goodwill and the commitment of national authorities may be sufficient. But to remove spurious NTBs could be tricky. In a 'crony capitalism' where the State's 'Big Men' hold business either directly or through their relatives or 'friends', there are always strong "protectionist incentives to work hard to ensure that trade liberalization does not happen no matter what the agreement signed".[426]

---

[421] EABC, *Monitoring Mechanism for Elimination of Non-Trade Barriers in EAC*, Arusha, 2009, p. 3.
[422] K. Kimbugwe et al., *op. cit.*, p. 7.
[423] W.A. Kerr and N. Perdikis, *A Guide to the Global Commercial Environment: The Economics of International Business*, Saskatoon, Estey Centre for Law and Economics in International Trade, 2014, p. 104.
[424] EABC, *op. cit.*, p. 8.
[425] K. Kimbungwe et al., *op. cit.*, p. 92.
[426] Kato Kimbugwe et al., *op. cit.*, p. 2.

In a study conducted in 2009 in the three original EAC Partner States, "government participation in trade or restrictive practices tolerated by governments" were among the major NTBs obstructing trade within the EAC.[427] Yet, article 15 of the EAC-CUP urges Partner States not to "enact legislation or apply administrative measures which directly or indirectly discriminate against the same or like products of another Partner States".[428]

Without the total elimination of tariffs and the substantial removal of NTBs, the EAC Common Market would remain a dream since intra-EAC trade would be seriously undermined. In this perspective, even FDIs targeting the EAC as a common market could be discouraged.

The impact of NTBs has been recently demonstrated. Formal intra-EAC trade is being overshadowed by the business in foodstuffs and livestock.[429] Research carried out to show the impact of NTBs on the trade in maize and beef highlighted that the trade in staple grains such as maize, rice and beans represents approximately 60 percent of all exchanges between EAC partner states while that of live animals covers more than 95 percent.[430] The results of this research revealed that within the studied countries (Kenya, Tanzania and Uganda) the local purchasing and sale of maize and beef cattle were as high as 80 percent of their domestic trade, whereas the import/export of these products with other EAC countries represented less than 10 percent of the trade in maize and less than 5 percent concerning beef cattle. The discrepancy between the rates of trade in these two vital products in the local market and in the intra-EAC business was justified by the numerous NTBs. Roadblocks and operations at customs posts when crossing the border were identified as serious NTBs to the cross-border trade in maize and beef cattle in the EAC.[431] The main concern of traders in maize and beef cattle was

[427] Joseph Karugia et al., 'The Impact of Non-tariff Barriers on Maize and Beef Trade in East Africa', *Alliance for a Green Revolution in Africa and International Livestock Research Institute*, 2011, p. 357.
[428] See specifically article 15(a) dealing with the interdiction of National Treatment within the customs union.
[429] M.A. Hangi, *The Non-Tariff Barriers in Trading Within the East African Community*, Research Paper, 2010, p. 15.
[430] C. Ackello-Ogutu and P. Echessah, *Unrecorded Cross-border trade between Kenya and Uganda: Implications for Food Security*, Technical Paper N° 59, July 1997 cited by J. Karugia et al., *op. cit.*, 361. See also C. Ackello-Ogutu and P. Eshessah, *Unrecorded Cross-Border Trade Between Tanzania and Her Neighbors: Implications for Food Security*, Technical Paper n° 89, September 1998.
[431] Authors have also identified administrative requirements such as licences and permits, taxes/duties, weighbridges, and corruption as major NTBs which are similarly applicable in these countries. Joseph Karugia et al., *op. cit.*, p. 362. While NTBs play a role in discouraging intra-EAC trade, it must be said that the discrepancy between the quantity of maize and beef traded domestically and in the community market might also be justified by the fact that all the partner states produce similar

more about the time they had to spend at roadblocks and at the border. Especially at the border, traders deplored long queues and the "unnecessary unloading of commodities" due to "inadequate staff at customs offices, discrimination by customs officials, and failure by customs officials to clarify the rules and regulations of trade".[432] These NTBs in discouraging traders in vital commodities like maize and beef immediately impact, in a negative way, the lives of East African people. It is generally agreed that the removal of NTBs improves the welfare of the people, consumers or producers, in the FTA or the customs union.[433]

The impact of a customs union on net welfare has been debated for years.[434] It depends on several factors. But as far as the trade in maize and beef cattle is concerned in the EAC, research has shown that upon the total removal of NTBs the producers of both commodities in Uganda would be better off than their counterparts in Kenya and Tanzania. Vice versa consumers in Kenya and Tanzania would benefit tremendously.[435] Another similar research reached the same conclusion regarding the intra-EAC trade in maize. According to the latter 'the main reason why Uganda gains most from the elimination of NTBs on maize is because it has a comparative advantage in the production and trade in maize compared to Kenya and Tanzania'.[436] In a broader perspective, another research that included Rwanda and Burundi confirmed that a customs union would not have the same effects on EAC Partner States' imports and exports.[437] The difference in impact on imports and exports implies *ipso facto* a difference in the benefits that each country could

commodities which substantially decreases opportunities to export to others. See Kato Kimbugwe et al., *op. cit.*, p. 46.

[432] J. Karugia et al., *op. cit.*, p. 364. Two main factors are considered as encouraging the proliferation of NTBs in the EAC: the variation in trade-related laws, policies and institutions on the one hand, and membership of EAC partner states in more than one economic integration organizations, on the other.

[433] According to Kimbungwe et al., "The consumer gain associated with barrier removal is sourced from declining prices, a fall in producer surplus as well as the expansion of consumption possibilities. Producer gains result from a fall in input costs or an improvement in the level of efficiency as well as better exploitation of economies of scale". See K. Kimbugwe et al., *op. cit.*, p. 95.

[434] K. Kimbungwe et al. trace this debate back to the 1950s with Viner. For a literature review of this debate on the impact of a customs union on welfare, see K. Kimbugwe et al., *op. cit.*, pp. 24-27.

[435] Joseph Karugia et al., *op. cit.*, p. 365.

[436] L. Okumu and J.C. Nyankori, *Non-Tariff Barriers in EAC Customs Union: Implications for Trade Between Uganda and Other EAC Countries*, Research Series N°75, Economic Policy Research Centre, December 2010, p. 41

[437] For Buigut, since the implementation of the customs union in the EAC, "Kenya, Uganda and Rwanda have seen a significant increase in intra EAC exports. But only Kenya and Tanzania have seen a significant increase in their intra EAC imports". S. Buigut, 'Assessment of the Trade Effects of the East African Community Customs Union on Member Countries', *International Journal of Economics and Finance*, Vol. 4, N°10, 2012, p. 52.

gain from the elimination of trade barriers. Of course, a customs union or a common market is not an economy equalizer between member states.

4.2.3. Overview of the EAC Rules of origin and the good governance nexus

When fully implemented, a FTA and a customs union result in their members states losing a significant amount of money which they used to collect through customs duties and other taxes which they charged on goods exported or imported from one another. This is the sacrifice which has to be made for the free movement of goods. But this sacrifice should not profit FTA or customs union non-members to the detriment of its members. Especially in a FTA, third parties' products may be put into circulation through the member state that has the lowest tariff. As said above, in a FTA each member state maintains its own external tariff for goods from third countries. Therefore, the chance is high that goods from third countries would preferably be cleared through the customs of the FTA member state where the tariff is the lowest. Once the goods are already within the FTA they can freely move to all other member state territories without paying further import duties. So, this represents a certain loss of income for these member states.

It is for this reason that the application of the rules of origin principle is very vital for FTAs. Accordingly, only goods originating in the Partner States are eligible to EAC tariff treatment.[438] In order to be considered as originating in the EAC, goods should be wholly produced in any of the Partner States.[439] Goods produced from materials imported from other sources are only considered by Partner States to originate in the community if they are substantially transformed in one of the Partner States, provided that some conditions are satisfied.[440] These conditions underscore the amount of local materials used in the production of the goods concerned,[441] the value added to the goods by local processing,[442] and the significant change that imported materials need to undergo.[443]

[438] Article 14 (1) of EAC-CUP.
[439] Rule 4 (a) of the East African Community Customs Union (Rules of Origin) Rules [hereinafter EAC-RoO]
[440] Rule 4(b) of EAC-RoO.
[441] Rule 4 1(b)(i) of EAC-RoO reads "the c.i.f. value of those materials does not exceed sixty per centrum of the total cost of the materials used in the production of the goods".
[442] Rule 4 1(b)(ii) of EAC Rules of Origin states "the value added resulting from the process of production accounts for at least thirty five per centrum of the ex-factory cost of the goods as specified in the First Schedule to these Rules".
[443] Rule 4 1(b)(iii) of EAC Rules of Origin reads "the goods are classified or become classified under a tariff heading other than the tariff heading under which they (imported) were imported as specified in the Second Schedule to these Rules".

When a product is worked or processed in more than one Partner State, the finished product is supposed to originate in "the Partner State where the final processing or manufacturing takes place".[444]

However, it should be noted that not every 'processing or manufacturing' operation realized in the territories of the Partner States gives the goods concerned an EAC origin. Some operations such as packaging, bottling, simple mixing, preservation, marking, labeling, the removal of dust, classifying, screening, painting, or the slaughtering of animals, to name but a few, are not considered to be sufficient to confer EAC origin to the goods or products dealt with.[445]

The East African Community Certificate of Origin (EACCO) is delivered to testify the origin of a product which satisfies the necessary conditions.[446] It is the responsibility of the producer to furnish the exporter with an EACCO for products intended to be exported.[447]

Tracing the origin of a product could be a very complex operation for at least two reasons. First, each single product must be codified following the Harmonized Commodity Description and Coding System. Second, it could be very difficult to find out exactly how many different materials were used to make a given product. That is why, exceptionally, customs authorities are given the power to request further verification from national officials of the Partner State where the goods or products are declared to originate from.[448] However, customs authorities are not

[444] Rule 4 2(b) of EAC-RoO. It is important to note that while the EAC Rules of Origin have many substantial similarities with the European Union (EU) Rules, at this specific point the difference is striking. According to article 24 of Council Regulation (EEC) n° 2913/92 establishing the Community Customs Code, the place where the final processing or working was done is not enough but rather the place where the "last, substantial, economically justified processing or working in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture" took place.
[445] Rule 7 (Processes not Conferring Origin) of EAC-RoO.
[446] Rule 12 EAC-RoO.
[447] Rule 12(2) of EAC-RoO.
[448] Rule 12(3) of EAC-RoO. Sometimes the cost of proving origin could be so high that "an importer may prefer to pay the tariff rather than bother with the documentary needed." K. Krishna, *Understanding Rules of Origin*, Pennsylvania State University and NBER, February 2004, p. 6 where the author gives as an example EU textile firms doing business with Central and Eastern European countries which prefer Outward Processing Trade (OPT) provisions when reimporting their products into the EU instead of taking advantage of duty free access which is available between the EU and these countries. The reason why OPT are preferred is that in order to benefit from the duty free access agreement firms need to prove the origin of their products, which they consider more difficult.

allowed to seize the goods in question on the ground of ongoing verification. Instead, they may only request security.[449]

Even though the principle of rules of origin is regularly abused for protectionist ends, they are meant to be neutral as far as trade policies are concerned. This is because, depending on whether or not a product is from a FTA or customs union member state, different tariffs as well as other quantitative or restrictive measures could be applicable to it. Therefore the "manipulation of origin rules can substantially affect direct investment".[450] The slightest modification of the rules may have dramatic consequences.[451] For instance, the EU's changes concerning the criteria conferring origin to semiconductors raised serious concerns in Japan. In principle two processes, diffusion and assembly, are needed for the manufacture of semiconductors. In the EU rules of origin, semiconductors were considered to originate in the country where they were assembled. But in February 1989, alleging that diffusion was the 'more sophisticated of the two processes', the EU decided to rather consider the latter (diffusion) as the criterion to determine the origin of semiconductors. Since most of the Japanese subsidiaries in the EU were only engaged in assembly operations, this slight change in the component of the rules of origin obliged Japanese companies in the EU to make some additional investments to meet the diffusion criteria.[452] Otherwise, Japanese semiconductors assembled in the EU after having undergone diffusion in Japan would be treated as foreign products in the EU market.

This example shows to which extent clear, transparent and predictable Rules of Origin are indispensable for foreign direct investors, especially those involved in the trade in goods in the EAC. The EAC applies preferential Rules of Origin that are not primarily intended to be used for commercial policy measures but rather to offer zero tariff access to Partner States' goods. This gives a competitive advantage to producers within the EAC. For this reason multinational companies (foreign investors) having a subsidiary in one of the EAC Partner States would be very much interested in the applicable criteria that confer origin to their products or

[449] Rule 12(5) of EAC-RoO. This provision avoids the establishment of NTB that could make many businessmen waste time awaiting for verification. It exemplifies the strong concern of the EAC lawmaker to maintain the smooth flow of business in the community.
[450] Ministry of Economy, Trade and Industry (METI), 'Rules of Origin' online at http://www.meti.go.jp/english/report/data/gCT9909e.html, last accessed on 30 September 2013. If the rules of origin are used to implement Import Substitution policy to protect local businesses, it could lead to a poor impact of FDI on the economy of the host country. For details, see cf. infra Chapter 5.
[451] K. Krishna, *op.cit.*, p. 17.
[452] *Idem,* p. 2; METI, *op. cit.;*A.O. Krueger, *Free Trade Agreements as Protectionist Devices: Rules of Origin*, Working Paper n° 4352, National Bureau of Economic Research, April 1993, p. 6.

goods in the EAC. In this respect, firms or companies interested in the EAC common market would do their best to wholly produce in the EAC or at least to make sure that their semi-products made abroad undergo a "substantial transformation" in the EAC to enjoy the free movement guaranteed by the EAC customs union and common market protocols.

This demonstrates that a strict application of the Rules of Origin equally by all Partner States could be a real springboard for an increase in FDI in the manufacturing sector in the EAC. A harmonized application of East African Community Rules of Origin (EAC-RoO) can only be achieved if good governance principles are strictly observed by all Partner States. It implies, for instance, that corruption and other forms of maladministration should be combated from within the EAC, especially at the level of customs officers. Besides, when reading Rule 2 of the EAC-RoO it is striking to notice that good governance principles such as transparency, accountability and properness lie at the heart of the reason why those rules were enacted.[453] But, as said above, in order to produce optimal results the Rules of Origin must be applied in a good governance-oriented environment. Therefore, good governance appears to be not only the purpose of the EAC Rules of Origin but also it becomes the prerequisite for its full operationalization.

4.2.4. Moving towards a single customs territory

The Rules of Origin do not play the same role in both FTAs and Customs Unions. In a FTA Rules of Origin are mainly used to avoid trade deflection that would occur if third party products are introduced in the common trade area through the member state with the lowest external tariff.[454] In a customs union, the threat of trade deflection is discarded by the application of the common external tariff (CET).[455] With the entry into force of the EAC customs union, a three-band CET was established. Accordingly all products from third party countries entering into the EAC face import duties ranging from zero to twenty five percent.[456]

[453] Rule 2 reads "The purpose of these Rules is to implement the provisions of Article 14 of the Protocol and to ensure that there is uniformity among Partner States in the application of the Rules of Origin and that to the extent possible the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol". While transparency and accountability are namely cited, properness is present through some of its components like fairness, predictability, consistency and uniformity (equality).

[454] K. Kimbugwe et al., *op. cit.*, p. 26; A.O. Kueger, *op. cit.*, p. 6.

[455] The establishment of the CET is provided by article 75(1)(d) of the EAC Treaty of Arusha and article 12 of the EAC-CUP.

[456] Article 12 (1) of the EAC-CUP. Some countries like Rwanda have incurred some loss of revenue from the adoption of EAC tariffs. For instance, the duty rate for intermediate and finished products

However, unlike what it may suggest, the application of CET does not imply the existence of a single customs territory as the customs posts are not abolished at national borders. In other words, it means that after imported products have entered the EAC through the port of Mombasa, for instance, they will still need to be cleared by the customs authorities at the place of final destination. This implies a significant loss of time and money both at the port of Mombasa or Dar-es-salaam and at the borders of the country of final destination due to administrative procedures.

Yet with a single customs territory customs duties would be collected at the first point of entry in the EAC. In the EU, a single customs territory is materialized by the suppression of customs control for any goods that have entered the EU. Customs duties are levied once at the entry point in the EU and thereafter the goods are free to move within the European single market. Without the implementation of a single customs territory, the EAC common market would remain an illusion since the expression of the most fundamental community freedom, the free movement of goods, would be jeopardized.[457] Attempts to establish the EAC single customs territory (EAC-SCT) have suffered from many postponements due to the reluctance of Partner States. Several reasons have been given for the delay in the EAC-SCT's establishment. But the lack of a strong institutional and legal framework and the overlapping membership of EAC countries in other regional organizations have been regularly pointed out as the major ones.[458] While overlapping membership really is a serious impediment to the implementation and monitoring of CET, it should be noted that the lack of an institutional framework rather constitutes the most important obstacle to a single customs territory.[459]

However, the problem lies more in the lack of trust between EAC Partner States. Indeed the establishment of a single customs territory does not require sophisticated institutions to operate; in Europe member states' customs authorities impose

dropped respectively from 15 percent to 10 percent and from 30 percent to 25 percent. A rough calculation of what Rwanda would have lost in 2005 if it were already an EAC Partner State shows an overall loss of 9 billion Rwanda Francs (equivalent to 18 million US dollars at the exchange rate at that time) representing a substantial loss of 2.6 percent of the 2005 national budget income. S. Nsengiyumva, *Etude des budgets de la République du Rwanda: Période d'étude 2000-2008*, Mémoire, Université Nationale du Rwanda, 2009.

[457] L.W. Gormley, *EU Law of Free Movement of Goods and Customs Union*, New York, Oxford University Press, 2009, p. 2.

[458] Trade Mark East Africa, *Single Customs Territory Delayed*, available on http://www.trademarkea.com/single-customs-territory-delayed/ accessed on 25 November 2013.

[459] On the impact of multiple membership and the lack of an adequate institutional framework on the implementation of regional integration commitments by member states in Africa, see R.F. Oppong, *Legal Aspects of Economic Integration in Africa*, Cambridge, Cambridge University Press, 2011.

customs duties on imports. The perceived duties are redistributed following the scheme developed in the EU customs code. But in the EAC the Partner States are not convinced that the country through which specific goods enter the single market will make genuine declarations, which may cause a loss of revenue for other countries. The greatest concern in relation to the single customs territory is high corruption levels among customs officials in all EAC countries.[460]

Corruption plays a double role against the implementation of the single customs territory. First, it undermines trust among EAC Partner States. Trust is important for the implementation of the single customs territory since three out of the five EAC Partner States are landlocked.[461] Yet the majority of EAC import and export operations take place through the ports of Mombasa and Dar-es-salaam. This implies that with the establishment of a single customs territory intra-EAC customs offices would be suppressed in Burundi, Uganda and Rwanda. In contrast, activities at the ports of Mombasa and Dar-es-salaam would increase. In other words, Kenyan and Tanzanian customs officers would have much more work, which could involve high corruption opportunities. This is a threat to other EAC Partner States since once goods are cleared at Mombasa or Dar-es-salaam, they would be released for free circulation within the whole community market. In this scenario, corruption behaviour by customs officials at the point of entry would cause serious financial losses to other Partner States. This threat is magnified when there is a suspicion that the country of entry might hide some of the customs duties it could collect since simple computer software would assist other Partner States in being informed of all operations carried out when goods enter the common market, but so far it has been difficult to find software which is capable of detecting and reporting corrupt behaviour.

Second, customs officers in landlocked countries could do their utmost to influence national decision-makers not to allow the establishment of a single customs territory. As said above, a single customs territory might be the death-knell of intra-EAC customs offices. This means much less work for many customs offi-

[460] Even in Rwanda which is reported to be the least corrupt country in the EAC, customs authorities are among the most corrupt institutions. In a report published on the corruption index in the EAC, the Rwanda Revenue Authority (RRA), which has customs under its responsibility, was among the 10 most corrupt sectors in Rwanda. Transparency International – Kenya, *The East African Bribery Index 2013*, October 2013, p. 28.

[461] Guardian on Sunday, 'Landlocked countries fear single customs territory', 7th October 2012 at http://www.tralac.org/2012/10/09/landlocked-eac-countries-fear-single-customs-territory/ accessed on 28 October 2013.

cials.[462] The establishment of a single customs territory would imply the end of not only their jobs but more the dismantlement of their settled corruption network. For this reason, it is foreseeable that customs officers in these countries would campaign against the single customs territory. Both corruption trends could be manifested in country-level reluctance to implement regional provisions related to a single customs territory. Coincidence or not, Rwanda, being the least corrupt country in the community, has been at the forefront of the campaign for the fast-track implementation of the single customs territory.[463]

After a tripartite meeting held in Entebbe in June 2013, Kenya, Rwanda and Uganda decided to fast-track some regional projects, including building a railway linking the port of Mombasa to Kigali via Kampala, using the national identity card as a travel document for their citizens across the borders of these countries, the institution of a single tourist visa, and the establishment of the single customs union[464]. Following this meeting, Kenya, Rwanda and Uganda have decided to implement a single customs territory among themselves, leaving Burundi and Tanzania with time to think about whether they should rejoin[465].

[462] Note that not only customs officers would lose their jobs but also all other persons who are involved in the clearance of goods at the customs posts. For instance, the Uganda Chairman for NTBs made this clear in stating that "some people will lose jobs when a single clearance of goods is implemented…How do we address [this] unemployment", see Trade Mark East Africa, Single Customs Territory Delayed, op. cit.

[463] At least this is what has been declared by the deputy commissioner of RRA, Drocelle Mukashyaka, to the Rwandan daily the New Times while Ugandan Traders were requesting extra time before the implementation of the single customs territory alleging that they needed more time to understand its dynamics. Paterson Tumwebaze, 'Rwanda ready to roll out single tax policy', *The New Times*, 25 September 2013 online at http://www.newtimes.co.rw/news/index.php?a=70696&i=15491, accessed on 28 October 2013.

[464] G. Muramira, 'Kenya, Rwanda and Uganda to construct joint railway line', *The New Times*, 26 June 2013 online at http://www.newtimes.co.rw/news/index.php?a=68146&i=15400, accessed on 28 October 2013. This decision was taken to move the EAC from inertia since the entry into force of the common market protocol in 2010. Accordingly, specific tasks were given to each of the countries. Kenya was entrusted with the task of working on the oil pipeline and electricity project, while Uganda was to spearhead the oil refinery, the political federation and the railway. Rwanda was chosen to lead the project that should lead to the establishment of the East Africa Identity card, the single tourism visa and the single customs territory.

[465] The tripartite decision to go ahead without Burundi and Tanzania attracted fierce criticism. Some even predicted that this decision could be the first step towards the collapse of the EAC. However, the decision by the Head of States of these three countries could be criticized only in ignorance of the principle of variable geometry contained in the article 7 (1)(e) of the EAC Treaty of Arusha. Variable geometry is one of the core principles governing the practical achievement of the EAC integration. This principle "allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds". In the early 2000s, the variable geometry principle was even suggested as a remedy for the recurrent failure of economic integration in Africa as it was considered to be a pragmatic strategy that permits smooth integration in progres-

The establishment of a single customs territory between Kenya, Rwanda and Uganda has created two customs areas in the community. The first is made up of these three countries where goods would enjoy, at least in theory, the freedom of circulation without any further barriers once they are cleared at Mombasa Port. The second is made up of Burundi and Tanzania where customs checks would still be made on goods that enter the community through any of the countries in the single customs territory. Similarly, goods cleared in Burundi or Tanzania would also have to be cleared by any of the countries in the single customs territory agreement. However, logically, once goods from Burundi or Tanzania have been cleared by one of the countries in the single customs territory, they would enjoy free movement in the whole single customs territory. Vis-à-vis EAC-SCT, Burundian and Tanzanian goods could be treated exactly as products from EAC third countries except that they would not pay customs duties (CET). But they could still need to pass the rules of origin test at the first point of entry in the single customs territory.

It is however important to mention that the functioning of the EAC-SCT established between Kenya, Rwanda and Uganda is different from the one of the EU. The EAC-SCT has adopted the destination model for the clearance of goods, which means that the assessment and the collection of customs duties is to be made at the first point of entry. But the fear of corruption, politely expressed through the alleged risk of unemployment that the implementation of the EAC-SCT would create, forced EAC authorities to adopt a unique revenue collection strategy at the main point of entry, the port of Mombasa. Instead of entrusting the Kenya Revenue Authority with that task, it was advised that Uganda and Rwanda should rather open their respective customs offices at the port of Mombasa. The Mombasa-based office of the Uganda Revenue Authority (URA) and that of the Rwanda Revenue Authority (RRA) would assess and collect customs duties for goods entering the EAC-SCT of which the final destination is Uganda or Rwanda, respectively. In practice, it appears that the Ugandan and Rwandan borders have been moved to Mombasa as far as customs clearance is concerned[466]. In addition

sive steps, therefore allowing a group of countries in an economic integration community to move faster than others and "decisions to be made by majority rather than by consensus" (T.A. Oyejide, *Policies for Regional Integration in Africa*, Economic Research Paper, N° 62, African Development Bank, 2000, p. 15). This principle is also used in the European Union. In accordance with the variable geometry principle, for instance, although the UK is a member state of the EU it opted out of the Schengen space and the Eurozone arrangements.

[466] It should be said that this strategy does not pose any problem *per se* as long as it helps to avoid duplicated customs checks within the EAC-SCT. Maybe with time, an adequate infrastructure will be put in place and trust will be built between partner states to the extent that customs services of the country at the first point of entry will be entrusted with the task of assessing, collecting and redistributing customs revenues to the other members concerned.

to this, trucks would be equipped with an electronic device to track their itinerary in order to avoid goods being declared to have their final destination in Rwanda, for instance, but finally ending up in Kenya or Uganda. The traceability of the declared goods within the EAC-SCT after being cleared at the first point of entry has the potential of erecting NTBs and, probably, it would be too optimistic (if not naïve) to think that national customs posts on the Kenyan, Rwandan and Ugandan borders would come to an end by the mere fact of the entry into force of the EAC-SCT. Tracking the itinerary of goods leaves room for customs authorities to check, at least with the truck driver, the accuracy of the actual itinerary in comparison with the declared one.[467]

Because of this kind of scenario, one should be cautious and see how it would finally work out. Even the EU single customs territory certainly took long time to be what it is.[468] In the meantime, the EAC leaders should be praised for this extra step taken in the right direction. With the implementation of the EAC-SCT, the EAC is the first African regional economic community to take a step towards a real materialization of a common market.

It should be understood that although the EAC-SCT is considered to be a milestone in the implementation of the EAC common market, it is a necessary step that needed to be taken sooner or later. The final aim is to have only one EAC-SCT including all partner states. A fully-fledged customs union necessitates the existence of a single customs territory in which goods enjoy total freedom of movement between member states. In economic integration the free movement of goods is considered to be a key element of success. The implementation of a fully-fledged customs union in the EAC would definitely have a paramount impact on business, especially on FDIs. In addition to the fact that the application of the rule of origin would constrain foreign companies in upgrading or installing factories that could make their products gain from their EAC origin, a fully-fledged customs union would really enlarge the market for EAC goods. This has an advantage for both foreign investors and Partner States. For foreign investors which are already

[467] In the current situation, internet shortage and the failure of electronic devices are very common in the EAC despite the great efforts of leaders to invest in the ICT domain. See Frank Kanyesigye, 'Heads of States Push for Strong ICT Growth', *The New Times*, 30 October 2013, online at http://www.newtimes.co.rw/news/index.php? i=15526&a=71676 accessed on 30 October 2013. Therefore it should be expected that at some point human checks would be required to track the itinerary of declared goods, which could certainly cause the same problems that customs at national borders were blamed for.

[468] The EU took about 30 years to establish a fully-fledged single customs union. Against this information, the EAC seems to be too ambitious in trying to realize a similar situation in less than ten years since the entry into force of the EAC-CUP.

doing business in one of the EAC Partner States, there would no longer be concerns with regard to extra customs duties and the time that they used to lose when exporting their products to other EAC Partner States. Consequently, those who have resorted to the installation of subsidiaries in other EAC Partner States to avoid customs harassment could be relieved. Thus, instead of scattering their human, financial and material resources in creating new production units in each EAC country for the purpose of escaping customs hindrances, it would be easy for foreign investors to only establish their production company in one of the countries and to freely distribute their products all over the EAC market. Of course, this could be possible only if communication and transport infrastructures are given due consideration by EAC Partner States. That is why the development of roads and railways between the main business centres of the EAC is very crucial for the success of the EAC single customs territory.[469]

The enlargement of the EAC market through the EAC-SCT also serves partner states, especially small countries like Rwanda and Burundi. As said above, the size of the market is a strong determinant for the attraction of FDIs.[470] The single customs territory waives this handicap for these countries since investors are ensured that establishing a business in Rwanda or Burundi is not just for the benefit of the small Rwandan or Burundian market but rather for 135 million East Africans. This is at least one of the upsides of regional integration where the market of each individual member state is potentially broadened. Therefore, regarding the ability to attract foreign investments, the market size becomes a common denominator for all Partner States within the single customs territory. In other words, should EAC Partner States compete between themselves for the attraction of FDIs, at least one of the most important determinants of FDI attraction (market size) would not be

[469] The EAC Partner States have understood this. A railway project linking Mombasa to Kigali via Kampala is among the top priorities that the tripartite Heads of States meeting between Kenya, Burundi and Rwanda agreed upon as accompanying measures for the implementation of the EAC-SCT. G. Muramira, 'Kenya, Rwanda and Uganda to construct joint railway line', *The New Times*, 26 June 2013 online at http://www.newtimes.co.rw/news/index.php?a=68146&i=15400, accessed on 1 November 2013. However, even without the development of new infrastructures in the region, the launch of the EAC-SCT is already a big step for foreign investors because before the EAC-SCT they were not only spending time at the border of any Partner State but they were also using the same transport infrastructure. But, of course, a better infrastructure would be more helpful since a lack of infrastructure in moving goods could be worse than customs duties and all other NTBs. T.A. Oyejide, *op. cit.*, p. 16-20.
[470] See infra section 5.3.

at stake[471]. A foreign investor located in any of the Partner States within the EAC-SCT would have full access to the markets of all other Partner States.

4.3. FREE MOVEMENT OF PERSONS

4.3.1. Principle and general considerations

Another key feature of the EAC that is closely related to FDI is the free movement of persons. It is certainly incomplete to allow goods to move freely in a single market while restricting the movement of their owners. The latter may be either natural or legal persons. The free movement of persons is probably the most tangible benefit for the community's people.[472] Beyond this aspect, the free movement of persons is the cornerstone of the whole integration principle.[473]

As far as the EAC is concerned, the recognition and the implementation of this freedom are a necessary step not only for the achievement of a fully-fledged common market but also for the attainment of the declared final objective of the EAC integration process: a political federation.[474] And yet there is no specific provision in the EAC Treaty that clearly mentions this freedom. Even article 76 that provides for the establishment of the common market does not expressly refer to 'persons' when it lists the fundamental characteristics of this common market.[475] Paragraph 1 of this article reads:

There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this article, there shall be free movement of labour, goods, services, capital, and the right of establishment.

But does it imply that Partner States did not consider the free movement of persons as being paramount for the EAC common market? The response must be negative. Indeed, one may understand that the free movement of persons is implied in the free movement of *labour* and *services*. Labour involves workers as much

[471] In this case, other economic determinants like the manpower qualification, the availability of adequate infrastructures, and the existence of enough raw materials would rather be crucial as well as the observance of good governance principles.
[472] A. Fortescue, 'Abolition of Border Controls: Some Comments on Mr Donner's Paper', in H.G. Schemers et al., *Free Movement of Persons in Europe. Legal Problems and Experiences*, The Hague, Kluwer Academic Publishers, 1993, p. 28.
[473] N. Rogers and R. Scannell, *Free Movement of Persons in the Enlarged European* Union, London, Sweet and Maxwell, 2005, p. vii.
[474] Article 5 paragraph 2 of the Treaty of Arusha states that a political federation is the ultimate destination of EAC integration.
[475] However, a reference to 'persons' is further made in article 104 (Scope of Co-operation) of the Treaty of Arusha.

as the delivery of services applies to service providers and/or service beneficiaries, who are generally persons.

However, this interpretation raises another question as article 76 rightly infers that Partner States intended to make this provision enjoyable only to a specific category of persons: workers and service providers/beneficiaries. Then the question could be what about the free movement of persons other than workers and service providers/beneficiaries? In other words, the question could consist of knowing whether people who are neither workers nor service providers/beneficiaries would also be entitled to the right to move freely.

As far as article 76 of the EAC Treaty is concerned, the response to this question should be negative. In this regard, there is a gap in the EAC Treaty as it seems to grant the right of free movement only to economically active persons[476]. This gap

[476] This provision highlights how the EAC integration process is, first of all, economically driven, at least at the time of the adoption of the Treaty. However, this is not a peculiar shortcoming of the EAC. It rather appears to be an unfortunate legacy from the Treaty establishing the European Economic Community (EEC) signed in Rome on 25 March 1957 which confined the enjoyment of free movement rights to nationals of EEC members who actually perform or intend to perform an economic activity in the territories of other Member States. This economic activity could be performed as either an employee, a self-employed person or a service provider (N. Rogers and R. Scannell, *op. cit.*, p. 46). In this perspective, "persons *tout court*" were set aside because individuals were basically conceived as "economic actors" since free movement rights were conferred on them in consideration of their "participation in the productive process". (E. Baldoni, *The Free Movement of Persons in the European Union: A Legal-historical Overview*, State of the Art Report, Pioneur Working Paper N°2, July 2003, p. 6). One had to wait many long years to see the free movement right being extended to some non-economically active persons. The extension applied firstly to workers' family members (Regulation 1612/68) in 1968 then to self-sufficient (Directive 90/364) and retired persons (Directive 90/365) in 1990, and finally to students (Directive 93/96) in 1993. Nevertheless, even though the right to free movement was given to these non-economically active persons, its real enjoyment was still subject to evidence of sufficient economic resources. The rationale behind this limitation was to avoid these persons 'becoming a burden on the social assistance system of the host Member State' (article 1 paragraph 1 of Directive 90/364, for instance). Despite this progress, the economic link remained preponderant in the effective exercise of the free movement of persons until the advent of the Maastricht Treaty on the European Union of 29 July 1992. This Treaty introduced EU citizenship. Its article 8a theoretically confers on *every* citizen of the Union the 'right to move and reside freely within the territory of the Member States' of the European Union. However, the same article subjects the enjoyment and exercise of this right to limitations and conditions. David O'Keeffe suggested that *inter alia* evidence of sufficient economic resources as stated in the Directives mentioned above could still apply to the right brought about by the article 8a of the Treaty of Maastricht. He further observed that as much as the European Commission acknowledged that article 8a has raised the free movement of persons to the level of a fundamental and personal right that "may be exercised outside the context of an economic activity", the same Commission admitted the challenge faced by the implementation of this right in the EU context due to the complexity of the legislation. (D. O'Keeffe, 'Freedom of Movement for the Workers in Community Law' in Jean-Yves Carlier and Michel Verwilghen, *Thirty Years of Free Movement of Workers in Europe*, Proceedings of the Conference Brussels, 17 to 19 December 1998, European Commission and Université Catholique de Louvain, pp. 24-25).

was bridged by the EAC-CMP, which namely mentions the 'free movement of persons' in the same title with the 'free movement of labour'.[477]

At the current stage, in comparison with the free movement of goods the free movement of persons has not yet benefited from the substantial implementation in the EAC due to many reasons that are occasionally pointed out in the following paragraphs. Despite this fact, the current analysis concerns the provisions of the EAC instruments regarding this freedom to the extent it has been implemented so far. For the sake of being proactive as to the future development of EAC laws and practices in relation to the free movement of persons, the EU integration in this matter is used for comparison.

According to the EAC-CMP the free movement of persons should be understood, in principle, as the freedom for the citizens of any Partner State to enter, to move, to stay and to leave the territory of other EAC partner states without any discrimination.[478] Understandably the free movement of persons in the EAC may be construed as bearing four rights for the nationals of Partner States: the right to enter, the right to move, the right to stay and the right to leave the territory any Partner State. But the enjoyment of these rights is different depending on the quality of their holder. A distinction is drawn between persons *tout court*, workers, and self-employed persons or legal persons.[479]

[477] The title of article 7 of the EAC-CMP is 'Free Movement of Persons' under part D entitled 'Free Movement of Persons and Labour' which also includes article 10 dealing with the 'Free Movement of Workers'. It is also worth mentioning that the 'Right of Residence' not mentioned in the Treaty, also appears in the Common Market Protocol next to the 'Right of Establishment' under Part E. The EAC Common Market (Free Movement of Persons) Regulations are referred to hereinafter as the EAC-FMP.

[478] Article 7 paragraph 2 of the EAC-CMP.

[479] Part D of the EAC-CMP is entitled 'Free Movement of Persons and Labour'. Without explanation, this part of the EAC-CMP makes a difference between persons and workers, although workers are the first to be mentioned. This difference is confirmed by three different sets of regulations: the East African Community Common Market (Free Movement of Persons) Regulations [hereinafter CMP-FMP], the East African Community Common Market (Free Movement of Workers) Regulations [hereinafter CMP-FMW], and the East African Community Common Market (Right of Establishment) Regulations [hereinafter CMP-RoE]. Besides this, before the liberalization of the extension of the free movement right to persons *tout court* as discussed in detail below, the ECJ has held that the free movement of persons encompasses the movement of workers and the freedom of establishment within the territories of EU Member States. See Joined Cases C-286/82 & 26/82, *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro* [1984] ECR 377, para 10 (hereinafter *Luisi and Carbone* Case) as cited by N. Rogers and R. Scannell, *op. cit.*, p. 128.

4.3.2. Free movement of persons tout court

According to regulation 4 of the East African Community Common Market (Free Movement of Persons) Regulations (CMP-FMP), these regulations apply to EAC Partner States' citizens who want to exercise their free movement in another Partner State's territory for a simple visit, transit, for the purpose of receiving a service such as medical treatment, training as a student or for any other lawful purpose. In other words, the EAC-FMP is the default regime for the free movement of persons in the EAC as it applies to any person other than a worker or self-employed person. These persons are considered in this work as persons *tout court*.[480] Accordingly the EAC-CMP guarantees the free movement right to any citizen of the EAC Partner States.

The provision of Regulation 4(e) of the EAC-FMP is of great importance as it removes the economic dimension in the free movement of persons in the EAC.[481] It gives nationals of Partner States the right to enter and move freely in the territory of any other Partner State by the simple fact of being citizens of EAC countries. One of the consequences of this regulation could be that EAC Partner States' nationals are in principle discharged of their obligation to provide a reason for

[480] This terminology has already been used in the context of EU law when the free movement right was extended by article 8a of the Treaty of Maastricht to any EU citizens regardless of whether or not they are economically active or self-sufficient. Details on the historical background of this freedom in the EU are given below. See for instance F. Weiss and F. Wooldridge, *Free Movement of Persons within the European Community*, 2nd edition, Alphen aan den Rijn, Kluwer Law International, 2007, p. 163 seq. The difference between persons *tout court* and workers or self-employed persons is that the former enter the territory of another Partner State on a temporary basis while the latter intend to remain in that territory permanently.

[481] This is obviously a lesson which has been drawn from the EU integration process where it took many years for the recognition of the right to free movement to persons tout court. In the EU, in line with what is discussed above, the free movement of persons *tout court* became real almost fifty years after the adoption of the Treaty of Rome (1957) on 29 April 2004 with Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (hereinafter Directive 2004/38). In repealing, among other things, the three texts on the free movement of non-economically active persons, paragraph 11 of the preamble to this Directive 2004/38 reaffirms that Union citizens are directly given by the Treaty (article 8a of the Treaty of Maastricht) a fundamental and personal right of residence in the territory of another member state. This preamble emphasizes that this right is 'not dependent upon their having fulfilled administrative procedures'. Accordingly Directive 2004/38 grants EU citizens an unconditional freedom to leave, enter, move and reside in the territory of member states: "Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport, without prejudice to a more favourable treatment applicable to job-seekers as recognized by the case-law of the Court of Justice" (paragraph 9 of the Preamble; see also article 6 of the Directive 2004/38). It is only the unambiguous provisions of this Directive that have settled the right to free movement for EU citizens as persons *tout court*. It should be noted, however, that for a stay of more than three months EU citizens must pass the 'sufficient resources' test (article 7 of Directive 2004/38).

their entry into the territory of any Partner State. Immigration officers are not supposed to make that entry conditional upon the statement provided by the traveller stating his or her reasons as long as this entry is 'lawful'.

In practice this means that any national of EAC Partner States is entitled to have the right of free movement unless there are reasons, beyond reasonable doubt, showing that the purpose of his or her movement is unlawful. However, the threshold set by the EAC-FMP is too high to be discretionarily decided by a border immigration officer.[482] Obviously one should expect immigration officers to deny EAC nationals the right to enjoy free movement if they have been included on a terrorist list or have engaged in any other illicit activity. But even in this scenario, the decision could be challenged if it is not established that the denied person was intending to commit an unlawful act during that very movement.

This freedom should be enjoyed within the territory of Partner States without any discrimination based on nationality. In this regard, citizens of EAC Partner States should be allowed to enter the territory of any Partner State "without visa"[483] and to remain there for a period of up to six months.[484]

Technically, 'without visa' means that no stamp or sticker should be appended to the passport or any other travel document of any national of any EAC partner states when crossing the border of another Partner State. Instead, a pass should be issued upon the presentation of "a valid common standard travel document or a national identity card".[485] To date, this provision has not been applied although it should be noted that the visa fee has for a long time been dispensed with among EAC Partner States. Visas are still appended to passports, however.

To give effect to this provision three EAC Partner States - Kenya, Rwanda and Uganda - have recently agreed on the use of national identity cards as travel documents starting from the 1st of January 2014.[486] While this decision will help frequent travellers, especially those living next to borders, to save money which they used to spend when buying travel documents, it should nevertheless be said that

[482] The EACJ held that a decision taken by Ugandan immigration officers to deny entry to a national of Kenya on the ground of Uganda's sovereignty was a violation of the latter's freedom of movement. See *Mukira* case, para 112.
[483] Article 7 paragraph 2 (a) of the EAC-CMP.
[484] Regulation 3 of EAC-FMP
[485] Regulation 5 paragraph 2 (a) of EAC-FMP.
[486] E. Ojulu, 'Indangamuntu to cross the border but not passport for everything', *The New Times*, 25 August 2013 online at http://www.newtimes.co.rw/news/index.php?a=14027&i=15460, last accessed 28 November 2013.

not much will have changed in terms of the amount of time spent at the border before crossing as the procedure has remained almost the same except that, instead of a stamp or a sticker in the passport, it is rather a pass that is issued. Border controls have not been removed.[487]

As, under the EAC law, it appears that Partner States do not intend to remove border controls in the EAC, they are rather requested to "keep the posts opened and manned for twenty four hours".[488] This provision shows that unlike the EU where borders have been simply removed to foster the free movement of persons in a single European space, the EAC has opted to maintain the borders. It should however be noted that border controls did not disappear in Europe overnight.[489] It is a complex process that involves several technical and political aspects closely linked with the State's sovereignty, such as immigration, the protection of personal data, and police and judicial cooperation especially in criminal matters.[490] As mentioned by Donner controls at countries' borders fulfil a

[…] more general function with regard to the protection of internal order and the enforcement of national law, not just by insuring compliance, but as an expression of the power of the State,

[487] An observer from Kenya noted in a comment that the use of national IDs to cross the border only created an 'alternative for those without passports' as he rightly deplored that it did not address the long bureaucracy which travellers face before crossing the border. K. Agutamba, "Railway will test tenacity of 'Coalition of the willing'", *The New Times*, 12 January 2014 online at http://www.newtimes.co.rw/news/index.php?i=15600&a=14395 last accessed 14 January 2014.

[488] Article 104 paragraph 3 (c) Treaty of Arusha; article 7(7) of EAC-CMP; and Regulation 8(d) of EAC-FMP

[489] In Europe the first attempt at the free movement of persons goes back to 1960 with the Benelux Convention of 11 April 1960 that came onto force in July of the same year suppressing any control on persons crossing common borders between Belgium, the Netherlands and Luxembourg and instituting a single entry visa for foreigners. The Benelux Convention was thereafter broadened by the Schengen Agreement of 1985 between the Benelux countries, plus France and Germany. In both cases, the situation was not perfect before the effective abolition of internal borders between these countries. They agreed to start implementation while negotiations on other related issues were still in progress. This is testimony to the fact that in regional integration political willingness matters more than anything else. Also it is important to note that the process of abolishing internal borders was not a steady flowing river. Intensive immigration through some countries sometimes questioned the reliability of the common external border. For instance, the Netherlands almost re-established its internal border under article 12 of the Benelux Convention as a large number of people from Surinam took advantage of lenient border controls between France and Belgium to rejoin the Netherlands (E.D.J. Kruijtbosch, 'Benelux Experiences in the Abolition of Border Control', in H.G. Schemers et al., *op. cit.*, p. 36). This case, among others, made the Netherlands one of the most reluctant countries to ratify the Schengen Agreement. The Dutch Council of State firmly dissuaded the Netherlands from ratifying this convention (J.P.H. Donner, 'Abolition of Border Controls' in H.G. Schemers et al., *op. cit.*, p. 9).

[490] J.P.H. Donner, *op. cit.*, p. 6.

preventing some persons from entering the national territory and apprehending others who are about to leave.[491]

For this reason European countries were reluctant to abolish internal borders at the early stages of the EU as much as EAC Partner States are today. But after a long period of hesitation during which the legislation and policies needed to be either made uniform or harmonized, the Europeans finally came up with a reliable common external border policy. Looking back at the European patience one can only be optimistic that an internally borderless EAC may still be possible despite the fact it is not envisaged anywhere in the Treaty.

Nevertheless, the hope of seeing an internally borderless EAC in the near future is put in doubt when one considers that according to the wording of different EAC regulations, it appears that only nationals of Partner States are entitled to enjoy the free movement of persons within the community.[492] Non-EAC nationals are simply to be sidelined. At least they cannot claim any equal rights with EAC nationals regarding the free movement of persons as recognized by the EAC-CMP and EAC-FMP. Among other things, this raises the concern about the treatment of non-EAC nationals holding residence permits from one of the Partner States. For instance, this could be the case for a non-EAC national married to an EAC national. In this situation, it appears that the non-EAC spouse would have to apply for a visa to enter the territory of another EAC Partner State and to comply with all other relevant immigration laws of that state. This discrimination against non-EAC nationals could a serious strain for the whole idea of the common market that Partner States are striving for. As the European experience has shown, there cannot be a fully operational free movement of persons when nationals from third countries, who legally reside in the territory of any member state, are denied or are given less movement rights than member states' nationals.

As far as foreign investments are concerned the current status of EAC law is not encouraging since foreign employees residing in one EAC Partner State may not be free to move within the EAC common market, which could be burdensome for foreign investors doing business in more than one EAC Partner States. In the case, for instance, a foreign company working in Rwanda and Kenya employing one non-EAC expert residing in Rwanda it would be tiresome for that company to always have to apply for a Kenyan visa whenever this expert would be needed at

[491] *Idem*, p. 6.
[492] The heading of the EAC-FMP Regulation 4 (Scope of application) reads "These Regulations shall apply to the following categories of *citizens of partner states* who move to, stay in and exit another Partner States" (emphasis added).

the Kenya-based factory. To avoid this situation, the foreign investor would be constrained from appointing another expert residing in Kenya for the Kenya-based factory simply to avoid immigration annoyances related to visa applications. For this reason and others it is obvious that the free movement of persons is a paramount component of a well-functioning common market. Therefore it should not be exclusive to EAC nationals.

Any such discrimination against non-EAC nationals, especially regarding border controls, may necessarily hamper even the free movement of member states' nationals.[493] It is with this disturbing observation that EU law finally opened up free movement right to non-EU nationals. One could expect EAC legislators to anticipate this kind of inconvenience by borrowing a leaf from the legislation of the EU.[494]

Persons *tout court* are not entitled to work in the territory of the Partner State where they have been admitted unless they are students on an internship or in industrial training.[495] If they are intending to change their status from persons *tout court* to the category of workers they must file an application with the competent authority in their host country following the provisions of the East African Community Common Market (Free Movement of Workers) Regulations (EAC-FMW) or that of the East African Community Common Market (the Right of Establishment) Regulations (EAC-RoE) in case they want to undertake any self-employment.

4.2.2. Free movement of workers

A worker is "a person who performs services for and under the direction of another person in return for remuneration".[496] The free movement of workers is provided for in articles 10 to 12 of the EAC-CMP. In this regard, nationals from any EAC Partner States are allowed to undertake any kind of employment in the private sector of another Partner State without discrimination based on their nationalities.[497] Partner States are urged to make sure that no discrimination whatso-

[493] J.P.H. Donner, *op. cit.*, p. 20.
[494] Following the 8th Northern Corridor Integration Summit held in Nairobi in December 2014, the Heads of State of Kenya, Rwanda and Uganda decided to waive visa requirements for non-EAC nationals residing in their respective territories. This is indeed a step forward in the enhancement of the free movement of persons in the EAC. See RDB, 'East African States Waive Tourism Visa Fee For Foreign Residents', online at http://www.rdb.rw/home/newsdetails/article/east-african-states-waive-tourism-visa-fee-for-foreign-residents-1.html, accessed on 22 February 2015.
[495] Regulation 7 of EAC-FMP
[496] Article 1 last paragraph of the EAC-CMP.
[497] Employment in public service is in principle excluded from the scope of the application of the free movement of workers' provisions within the EAC common market. However, Partner States

ever regarding access to employment, remuneration, and other job conditions exists against other EAC Partner States' nationals on their territory.

Workers' free movement rights include the right to apply for and accept job offers made in another partner State, to conclude a contract and to take up employment, to join workers' organizations and participate in collective bargaining for better working conditions, and have equal enjoyment of social security benefits as nationals of the host Partner State.[498] The free movement rights of workers also entitles them to stay and/or move freely in the territory of any other Partner State for the purpose of employment.[499]

The question is whether the right to "move freely within the territories of the Partner States for the purpose of employment" applies to both actual workers and job seekers. It is obvious that no restrictions should be imposed on workers who are actually performing their employment contracts in another Partner State's territory. They should be free to move anywhere that their employment duties take them within the territory of the Partner State where they are employed. However, the EAC-CMP is not clear as to whether a national from one Partner State should be allowed to move freely to the territory of another Partner State to seek for a job. While the movement of a job seeker to submit a job application can be easily understood as being 'for the purpose of employment', the picture becomes blurred when consideration is given to regulation 5 (2)(c) of the EAC-FMW which reads "A citizen of a partner State who seeks to enter the territory of another Partner State as a worker shall (…) present a contract of employment to the immigration officer".

Besides, this provision somehow also paralyses article 10 (3)(a) of the CMP that allows job seekers to apply for job opportunities or accept offers made from the territory of any Partner State. When reading the EAC-FMW's regulation 5(2)(c) it seems to suggest that job seekers are admitted in order to make their employment applications or to accept employment offers made in another Partner State only when they are still in their home country. The presentation of a newspaper extract in which an employment position is advertised or a document containing an employment offer is not sufficient for an immigration officer to allow entry to a job

could even, if they so wish, open access to public service to nationals of other EAC Partner States [article 10(10) of EAC-CMP]. It is noteworthy that article 1 paragraph 20 defines public service as "government ministries, government departments and government agencies providing services to the public in a Partner State".

[498] Article 10 (3)(a), (c), (e) and (f) of EAC-CMP

[499] Article 10 (3)(b) and (d) of EAC-CMP.

seeker. An employment contract is a requirement. It means, in principle, that no job seeker is allowed to cross the border into another Partner State's territory for the mere purpose of a job application. Therefore the provision of regulation 5(2)(c) of the EAC-FMW implicitly reinforces the non-existence of the right to enter the territory of another Partner State for job seekers as such. This denial of entry consequently implies that job seekers from a Partner State are not allowed to move within the territories of other Partner States for the purpose of job seeking, either.

However, what would be the situation of nationals from a Partner State who have been employed in another Partner State but whose contracts have come to an end? Could they be allowed to enjoy the right of free movement *stricto sensu* within the territory of the same Partner State to seek a job? In principle, the answer should be in the negative since the work permit is cancelled when the employment in respect of which it was issued comes to an end.[500] Yet the cancellation of work permits makes former workers eligible for expulsion[501] or later deportation[502] if they do not regularize their status or leave the host country within thirty days after their contract has come to an end.[503] Therefore a former worker is placed in an illegal position if he or she starts seeking employment during the period of time given to him or her to prepare leaving the country where he or she has been working.

It should be noted that unlike persons *tout court* who can change their status to a worker or self-employed person by applying to the competent authority in the host country, workers are not given that possibility. It seems that the EAC lawmakers decided to rule out the option for a former worker to change his or her status to a person *tout court*.[504]

However, when looking further, it is important to remember that workers are entitled to be accompanied by their spouses and children when they are appointed to a position of employment in the territory of another Partner State. The worker's spouse and children also have the right to work and undertake any economic activity in the territory of that Partner State. As far as the rights of spouses and children are concerned, two things must be remembered. First, to enjoy the free movement

[500] Regulation 8(1)(b) of EAC-FMW
[501] Regulation 10 of EAC-FMW
[502] Regulation 11 of EAC-FMW
[503] Regulation 8(2) of EAC-FMW
[504] The reading of regulation 8(2)(a) may be misleading if one understands "to regularize his or her status" as implying the regularization of the changed status, such as from a worker to a person *tout court*. This provision should be read as being rather applicable to a worker who has changed employment pursuant to regulation 6(12) of the EAC-FMW.

right as provided by the EAC-CMP and EAC-FMW the worker's spouse and children must be nationals of at least one of the EAC Partner States[505]. When the worker's spouse or children are not nationals of EAC Partner States, they are subject to the general employment regime of the host country[506]. This means that they would be dealt with under the provisions regulating the employment of foreigners in that Partner State. Second, the free movement right of a worker's spouse and children is closely attached to the worker him/herself. Indeed, although a worker's spouse and children have the right to undertake employment in the host country on a personal basis, the provisions of the EAC-FMW are not clear as to whether they should remain in the territory of the host Partner State on the basis of their own work after the contract of the worker has come to an end.

Paragraph 1 of regulation 10 of the EAC-FMW gives the competent authority of the host country the power to expel the worker *and* his or her spouse and children if the worker does not regularize or leave the Partner State's territory. No reservation or exception appears in these regulations against this expulsion principle.

However, one may rightly suggest that when the worker's spouse and children are also employed in the same country there is no reason to expel them since the status of these persons may have become inverted. The former worker's spouse becomes the worker in terms of EAC law while the former worker starts benefiting from the provisions protecting workers' spouses.[507]

The situation is different if it is rather the worker's child who is either a student or an employed person when his of her parent's contract comes to an end. When the child is admitted as a student in the host Partner State, there is no provision in EAC law that gives a residence right to his or her parents. This means that if the worker's contract comes to an end while his or her children are students in the host Partner State, both the worker and his or her children should be expelled. Workers' children would be obliged to stop going to classes. This is in fact a serious violation of the right to education of these children as enshrined in various international instruments ratified by all EAC Partner States.[508] This was the position of the ECJ when it ruled that the right to education of a migrant worker's child

[505] Regulation 4 of EAC-FMW and
[506] Regulation 9(2) of EAC-FMW
[507] Obviously in this scenario the former worker should be entitled to seek a job in the host country not as a jobless former worker but as a worker's spouse, provided that they are both nationals of EAC Partner States.
[508] The right to education is enshrined in the following international instruments: article 26 of the Universal Declaration of Human Rights; article 13 of the International Covenant on Economic Social

"implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies. To refuse to grant permission to remain to a parent who is the primary carer of the child exercising his rights to pursue his studies in the host Member State infringes that right".[509]

In this spirit a worker whose contract has come to an end should not automatically face expulsion from a Partner State's territory if his or her children are pursuing education in that country.[510]

If the child is employed when the worker's contract comes to an end, expulsion may not be ordered. The EAC-CMP recognizes the right of a worker's child to be employed in the host Partner State.[511] At the same time the EAC-FMW subjects the worker's child who succeeds in securing employment in the worker's host country to the same rights and duties as the worker.[512] Therefore vis-à-vis their

and Cultural Rights; articles 28 and 29 of the Convention on the Rights of the Child; article 10 of the Convention on the Elimination of all forms of Discrimination Against Women; articles 1, 2 and 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; and articles 1, 3, and 4 of the UNESCO Convention Against Discrimination in Education.

[509] Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department* [2002], ECR I-7091, para. 73 (hereinafter the *Baumbast Case*). Mr. Baumbast, a German national, had moved to the United Kingdom as a worker. He was married to a Colombian woman. They had two children. After the failure of Mr. Baumbast to continue working in the UK he went to work for a German company in China. His wife and children remained in the UK. A few years later Mrs. Baumbast applied for indefinite permission for herself and other members of her family to remain in the UK. But the UK authorities not only denied them the requested indefinite permission but also refused to renew Mr. Baumbast's residence permit on the ground that he (Baumbast) was no longer a worker pursuant to EU law. Therefore both Mrs. Baumbast and her children had to face expulsion from the UK.

[510] Besides, the ECJ's ruling in this same case suggested that at least one of the parents was entitled to have a right of residence pursuant to their child's mere admission in educational training in another EU Member State. The court held: "…that where children have the right to reside in a host Member State in order to attend general educational courses (…), that provision must be interpreted as entitling the parent who is the primary carer of those children, irrespective of his nationality, to reside with them in order to facilitate the exercise of that right". Although this does not appear in the EAC-FMP provisions relating to the stay of students (regulation 6) one may rightly argue that at least one of the parents of a child admitted as a student in another Partner State should be entitled to reside in the territory of that Partner State with the possibility of employment.

[511] Article 10(5)(b) reads: "a child who accompanies the worker shall be entitled to be employed as a worker or to engage in any economic activity as a self-employed person in the territory of that Partner State subject to the age limits under the national laws of that Partner State".

[512] Regulation 9(1) reads "The provisions of regulations 6, 7 and 8 shall apply to the spouse or child of a worker who is employed in the territory of the Partner State where the worker is employed". These provisions are related respectively to procedure for acquiring a work permit, a denial of a work permit, and the cancellation of a work permit.

child who is employed in the host country former workers may be treated as dependents[513] and obtain the right to residence accordingly.[514]

Hence, whether workers should leave the territory of a Partner State at the end of their contract depends on whether or not their spouse or child have succeeded in gaining employment or being admitted as a student in the host Partner State as well as on the ability of that worker to start taking up an economic activity as a self-employed person. This last condition stems from the provision of paragraph 11(c) of article 13 of the EAC-CMP that obliges Partner States to ensure that workers who are citizens of a Partner State and who are employed in their territory are "allowed to remain in that territory for the purpose of taking up economic activities as self-employed persons" provided that "they satisfy the conditions which they would be required to satisfy if they were entering that Partner State at the time when they intended to take up such activities". In this perspective, it is noticeable that the EAC Treaty has established strong safety measures to ensure that workers can settle down in their host country.

4.2.3. Free movement of self-employed persons and legal persons

The EAC-CMP also grants the right of free movement to self-employed persons and to legal persons such as companies or firms within the territory of EAC Partner States. In this regard, nationals of an EAC Partner State are entitled not only to "take up and pursue economic activities as a self-employed person and to set up and manage an economic undertaking" in the territory of another Partner State but also "to join a social security scheme of that Partner State in accordance with the laws of that Partner State".[515] In other words this provision gives this category of persons a full right of establishment in the Partner State of which they are not nationals as long as they aim to participate in the economic life of that Partner State in a stable and continuous way.

However, neither the EAC-CMP nor the EAC-RoE list the kind of economic activities that a person needs to take up and pursue to enjoy the right of establishment. As the EAC-CMP solely defines an economic activity as "any legitimate

[513] A dependent is defined by the EAC-CMP as "a son or daughter of a worker or a self-employed person who has attained the age of eighteen years, the mother, the father, a sister or a brother of a worker or self-employed person who is wholly dependent on the worker or self-employed person, who is a citizen" (article 1 paragraph 10). It should be underlined that the EAC-FMW does not list dependents among the persons entitled to work in the territory of a Partner State where their principal is working. This right is limited to the worker's spouse and child.
[514] Regulation 8 of the East African Community Common Market (Right of Residence) regulations [hereinafter EAC-RoR]
[515] Article 13(3)(a) and (b) of EAC-CMP

income generating activity",[516] one could expect any genuine and effective activity including the provision of services in return for some form of remuneration[517] to qualify its performer as enjoying the right of establishment.

The EAC-RoE does not seem to make a distinction between the procedural rules which are applicable to self-employed persons and legal persons for their respective establishment in the host country. However, a close look reveals that most of the rules therein only seem to be applicable to self-employed persons.[518] Yet, it is obvious that some rules, like those relating to work permits, cannot apply to a legal person, for instance.[519] For reasons of clarity, it is judicious to deal with these two categories separately.

4.2.3.1. Right of establishment for self-employed persons

A national of a Partner State who intends to set up and pursue any economic activity as a self-employed person in the territory of any other Partner State should basically fulfil the immigration requirements as stated in the section related to the free movement of persons *tout court* to enter the territory of that Partner State. These persons should apply for a work permit in the host Partner State within thirty days upon entry into the territory of the latter.[520] Before the completion of the formalities for establishment, the self-employed person should be issued with a special pass to allow him or her to engage in that economic activity in the meantime so that they do not have to sit around and wait.[521]

At the end of the application process, which should not last for more than thirty days, a work permit should be issued for an initial period of not more than two years provided that the applying self-employed person submits all the required documents including, among others, any licence or registration needed to carry out the expected activity, any evidence of the availability of sufficient resources for the

[516] Article 1 EAC-CMP
[517] Case C-268/99, *Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie* [2001] ECR I-8615, para 33 cited by N. Rogers and R. Scannell, *op.cit.*, p. 122.
[518] Out of the 13 regulations contained in the EAC-RoE only one (Regulation 9) seems to consistently apply to legal persons.
[519] In the same vein, the distinction between primary and secondary establishment could be easily regulated between a company and its branches, while it would be quite difficult to make such a distinction if this concerns a natural person who chooses to operate as a professional in two different countries. P. Craig and G. de Burca, *EU Law Text, Cases and Materials*, 4th edition, New York, Oxford University Press, 2008, p. 806.
[520] Regulation 6(1) of EAC-RoE
[521] Regulation 6(2) and (3) EAC-RoE

business, and proof of engagement in "an activity for which he or she was licensed or given authority for, by the competent authority of the host Partner State".

This last requirement is a little strange as the applying self-employed persons have to prove that they are engaged in a still to be commenced activity.[522] There is no easy way to imagine proof of engagement in a business activity before it has actually started. In this specific case one may wonder how self-employed persons could start that very activity before obtaining the necessary work permit for this. It follows from this provision that in order to obtain a work permit self-employed persons need to prove that they have already started to perform the economic activity for which they are applying for the work permit. Yet to start that very activity they need to have a work permit. This is nothing less than a vicious circle that needs to be addressed by the EAC legislators otherwise it will constitute a good excuse for national authorities to delay or even discourage the free movement of self-employed persons.

Anyway, an application for a work permit is not just a simple formality as it may be rejected at the discretion of the competent authority in the host Partner State provided that the reasons for this rejection are given.[523] Of course, self-employed persons whose application for a work permit has been rejected have to leave the territory of the host Partner State within a reasonable period of time.[524] Furthermore, obtaining the work permit is not *per se* a guarantee that self-employed persons would quietly take up and pursue the intended economic activity since the issued work permit may always be cancelled. A cancellation may occur if it was obtained fraudulently, or if self-employed persons cease to carry out the economic activity for which the permit was issued or even when the holder of that work permit is expelled or deported from the territory of the host Partner State for any reason.[525]

The institution of a work permit as a condition for nationals of Partner States to take up and pursue an economic activity as self-employed persons in the territory of another Partner State is in certain way in contradiction with one of the EAC common market's core principle of non-discrimination.[526] Indeed according to this principle, which is qualified as one of the "fundamental and operational principles of the community", Partner States undertook to accord to nationals of other Partner States formally identical treatment to that which they accord to their own na-

[522] Regulation 6(4)(d) of EAC-RoE
[523] Regulation 7(1) and (2) EAC-RoE
[524] Regulation 7(4) of EAC-RoE
[525] Regulation 8(1) of EAC-RoE
[526] Article 3(2)(a) EAC-CMP

tionals as provided by the NT principle.[527] This commitment is confirmed in paragraph 2 of article 13 EAC-CMP under the right of establishment. This article reads: "For the purposes of paragraph 1, the Partner States shall ensure non-discrimination of the nationals of the Partner States based on their nationalities". Basically a strict application of the non-discrimination principle would mean, for instance, that nationals from Partner States should be allowed to take up and pursue economic activities as self-employed persons in another Partner State according to the same conditions as the nationals of that Partner State. It follows from this that if nationals of the host Partner State do not need a work permit to start up a business or a profession, those from other Partner States should not have to do so neither.

It rightly appears from an explanation of paragraph 2 of article 49 of the TFEU (the former article 43 TEC) that the right of establishment means for self-employed persons the right to pursue economic activities "*on an equal footing* with the nationals of the Member State of establishment".[528] Accordingly, as a principle, the requirement of a work permit among EU Member States' nationals does not exist. EU nationals are free to go and take up an economic activity or work in another Member State simply by presenting a valid ID card or a passport from their home country.[529] In cases like *Vicoplus* where the ECJ condoned the work permit requirement by an EU Member State with regard to nationals of other Member

[527] Note, for instance, that Regulation 9(5) explicitly makes reference to the NT principle with the following wording: "The registration, licensing, and *other requirements for establishment* required under this regulation shall be in accordance with the provisions on national treatment provided for in the Protocol" (emphasis added).

[528] P. Craig and G. de Burca, *op. cit.*, p. 797.

[529] The question of a work permit as a requirement for the employment of EU nationals in the territory of other Member States was recently raised before the ICJ in relation to the free movement of services (posted workers) in Joined Cases C-307/09 to C-309/09, *Vicoplus SC PUH and Others v. Minister van Sociale Zaken en Werkgelegenheid* [2011] ECR I-453 (hereinafter *Vicoplus* Case). In this case, upon the accession of Poland to the EU, the Netherlands submitted Polish nationals to the requirement of obtaining a work permit prior to their employment in its territory. According to the Dutch government such a measure was allowed by Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession to be applied during the transitional period. Indeed Chapter 2, paragraph 2, of Annex XII to the 2003 Act of Accession provides that, for a period of two years from 1 May 2004 – the date of the Republic of Poland's accession to the European Union – the Member States are to apply national measures, or those resulting from bilateral agreements, regulating access to their labour markets by Polish nationals. That provision also provides that the Member States may continue to apply such measures until the end of the five-year period following the date of the accession of the Republic of Poland to the European Union (*Vicoplus case* para 26). The ECJ ruled against Vicoplus as it found that the work permit requirement for Polish nationals during that transitional period was in compliance with the 2003 Accession Act and the TFEU to prevent "disturbances on the labour market of the existing Member States due to the immediate arrival of a large number of workers who are nationals of those new States" (*Vicoplus case*, para 32-34; the Court also cited Case 9-88 *Mario Lopes da Veiga v. Staatsecretaris van Justitie* [1989] ECR 2989 to that effect.

States before taking up any employment, it was obviously an exceptional and temporary basis to protect the stability of the internal labour market of existing Member States after the accession of new members.

Furthermore, this exceptional situation should not overlook the well-established case law of the ECJ on the right of establishment where the court insisted on the non-discrimination character of any national measures tending to hinder or make less attractive the exercise of common market fundamental rights. In the *Gebhard case*,[530] the ECJ acknowledged that EU Member States were free to introduce conditions to be fulfilled by the nationals of other Member States before they could take up a certain kind of activity or profession. Such conditions could be related to the completion of a certain level of training (diploma, degree, etc.), or to "rules relating to organization, qualifications, professional ethics, supervision and liability" that nationals from other Member States should comply with.[531]

However, the court also took care to lay down four conditions to be fulfilled by such a legislative, administrative or regulatory measure justified by a general good:

…that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it…[532]

It is clear from this extract that the non-discriminatory character is paramount. In this sense it could be arguable that although the work permit requirement is enshrined in the EAC-CMP for both workers and self-employed persons, it really constitutes a restriction that weakens the effectiveness of the right to establishment within the EAC.[533]

---

[530] Case C-55/94, *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 (hereinafter the *Gebhard* Case).
[531] *Gebhard* Case, para 35.
[532] *Gebhard case*, para 37.
[533] While some countries like Uganda still issue work permits to nationals of other EAC Partner States upon payment of a fee contrary to the provisions of the EAC-FMW and EAC-RoE, in Burundi, for instance, the issuing of a special pass or work permit is not regulated. The lack of harmonization and the alignment of national legislation with the EAC-CMP poses a serious threat to the implementation of most EAC provisions. Eric Kabeera, 'EAC Integration Hurt by Lack of Harmonized Laws', *The New Times*, 13 March 2014, online at http://www.newtimes.co.rw/news/index.php?a=75265&i=15660 last accessed on 23 April 2014.

Of course, as rightly supported by the ECJ case law above, EAC Partner States are obliged to introduce legislation or administrative measures with conditions to be fulfilled to allow persons to exercise some professions or to take up business activities in their territories provided that they pass the test laid down in the *Gebhard* case discussed above. Within the legal profession, for instance, such conditions could include the requirement of holding a first degree in law or the successful completion of post-graduate training in legal practice. But as far as self-employed persons are concerned the most challenging issue in relation to the right of establishment is the recognition by the host country of qualifications acquired in the home country or in another Partner State. Despite the fact that this issue has resulted in a lot of ink being used in the development of EU law,[534] none of the EAC-CMP and the EAC-RoE provisions expressly address this issue.[535]

[534] See for instance the following landmark cases Case 2/74, *Jean Reyners v. Belgian State* [1974] ECR 631 (hereinafter the *Reyners* case); Case 71/76, *Jean Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris* [1977] ECR 765 (hereinafter the *Thieffry* case); Case C-340/89, *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR I-02357 (hereinafter the *Vlassopoulou* case). In the *Reyners* case, it concerned a Dutch citizen (Reyners) who had obtained a Law degree from a Belgian University but was thereafter denied admission to the Belgian bar simply because he did not have Belgian citizenship. The ECJ ruled that such a denial by the Belgian authorities was an infringement of the right of establishment. In the *Thieffry* case, the Bar of Paris refused admission to a Belgian national, Thieffry, who held a PhD in law and had practised law as an advocate in Belgium. Furthermore, a French university recognized Thieffry's degree as being equivalent to a French degree in law and he had passed the certificate of aptitude for the profession of *avocat*. But Thieffry was denied the opportunity to start the training stage at the Paris Bar allegedly because he did not have a French degree in Law. Finally, Ms. Vlassopoulou, a Greek national holding a Greek degree in law and who for many years had practised German law in Germany, was denied the authorization to practice allegedly due to a lack of sufficient qualifications since she had not passed specific German examinations. The *Vlassoupoulou* Case created a precedent in that, despite the diversity of national conditions before practising a specific profession in the territory of a Member State, national authorities from EU member States had to diligently examine the qualification basis of any applicant from other Member States. In case they do not meet the qualification requirements, applicants should be informed of the real reasons why their applications have been rejected. (See P. Craig and G. de Burca, *op. cit.*, p. 800). It is also very interesting to anticipate that situation where nationals of a Partner State return home from another Partner State after undergoing training there and then face difficulties in reintegrating into the professional world of their own country due to the their diplomas or degrees not being recognised by their home country. This was the case in Case 115/78, *J. Knoors v. Secretary of State for Economic Affairs* [1979] ECR 399 (hereinafter the *Knoors* Case) and Case C-61/89, *Marc Gaston Bouchoucha* [1990] ECR I-3551 (hereinafter the *Bouchoucha* case). In the first case, Knoors, a Dutch national who returned home after receiving training and experience as a plumber in Belgium, was refused the opportunity to practise his profession by the Dutch authorities in his country (the Netherlands) on the ground that nationals could not invoke provisions on the right of establishment against their own country. The court held that the Community's fundamental rights "could not be fully realized if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and establishment and who have acquired, by virtue of such facilities, the trade qualifications referred to by the directive in a Member State other than that whose nationality they possess" (*Knoors* case, para 20). In *Bouchoucha*, however, the court held a contrary

Another crucial issue for the effective implementation of the right of establishment of self-employed persons in the EAC is the possibility for them to join the social security scheme of their host Partner State. The EAC-CMP took a step ahead in this direction but no reference whatsoever is made to this in the EAC-RoE. It must be anticipated that much still has to be done for nationals of a Partner State to be able to register and obtain benefits from a social security scheme of another Partner State.[536] One of the most urgent matters that may need to be addressed in the short term is the acceptance of self-employed persons in the social security scheme of their own countries in Partner States like Rwanda and Burundi. Then the harmonization of social security legislation and systems needs to follow just before the setting up of a strong information-sharing mechanism between Partner States' social security authorities. In the same perspective, it is worth noting the provision of paragraph 1 of regulation 13 of the EAC-RoE that grants nationals of Partner States who carry out economic activities in another Partner State as self-employed persons the right to "join professional or trade organizations under the same conditions and with the same rights and obligations as the nationals of that Partner State" with an open opportunity to be elected or appointed to a high office

position where it denied Mr. Bouchoucha the right to practise osteopathy in France, his home country, after the successful completion of a diploma in this field in the UK. Indeed, contrary to the UK, in France being a medical doctor was a prerequisite to practising as an osteopath. But this ruling remains isolated. Authors are critical of this decision and agree that the court rather ruled on the request of France regarding an abuse of EU rights. In this regard, see among others Paul Craig and Grainne de Burca, *op. cit.*, p. 804 and F. Weiss and F. Wooldridge, *op. cit.*, p. 113.

[535] Regulation 13(1) of EAC-RoE reads: "Where a Partner State requires the nationals of that Partner State who intend to take up economic activities to fulfil certain requirements as good repute and proof that the requirements are satisfied, the competent authority of the Partner State shall accept a certificate issued by a competent authority of another Partner State as sufficient evidence in respect of nationals of another Partner State indicating that the requirements have been met." The phrasing of this paragraph is broad enough to include even academic qualifications but it could be challenged as it is not sufficiently clear to refer to specific issues such as a degree or diploma requirement for specific professionals like lawyers or architects. Despite the fact that the recognition of degrees has given rise to extensive cases before the ECJ and the issue of an ad hoc Directive of the EU Council, the EAC opted to deal with this situation through sectoral harmonization.

[536] For instance, it took years for Rwandans who were living in Burundi and DRC to get their social security allowances from these countries after their return to Rwanda after 1994. The difficulty included, among other things, the convertibility of the allowances from the currency of the host country to Rwandan Francs bearing in mind that a large number of returnees had started to make their contributions to their host country's social security system during the colonial period. During that epoch, the common currency in these three countries was the Belgian Congo Franc, which in the meantime had lost its legal tender. The difference in the currencies between the Partner States could pose a similar practical problem for the openness of Partner States' social security schemes. Nevertheless, the task would be easier if in the meantime Partner States would adopt a common currency.

in that organization as long as such an organization is not connected with the exercise of public authority.[537]

4.2.3.2. Right of establishment of legal persons

In relation to legal persons, the EAC law provides for the freedom of establishment for companies or firms. This freedom is materialized in the commitment of all Partner States to remove administrative procedures and practices that restrict the setting up of agencies, branches or subsidiaries in the territory of a Partner State for companies or firms of another Partner State.[538] Accordingly, the personnel of such companies or firms registered in one Partner State are also allowed to occupy managerial or supervisory positions in the agencies, branches or subsidiaries of those companies or forms in the territory of other Partner States.[539]

The success of the implementation of the right to establishment in the EAC will have a sound impact on investments in the community. Unlike the free movement of services that is exercised for a short period of time (see the details below), service providers from one Partner State which would like to settle themselves for long-lasting business in another Partner State rely on the freedom of establishment

[537] In case such a professional or trade organization is connected to the exercise of public authority, the EAC-RoE provides the Partner State with the possibility to open access to its high offices to only nationals of the host Partner State. But the ECJ has always applied a very narrow definition of the exercise of public authority. In case C-42/92, *Adrianus Thijssen v. Controledienst voor de verzekeringen* [1993] ECR I-04047 (hereinafter the *Thijssen* case) the court denied the character of the exercise of "official authority" concerning the position of the insurance commissioner. Thijssen was a Dutch national who responded to a call for applications for the position of the insurance commissioner in Belgium. His application was rejected, as he allegedly did not fulfil the nationality criterion. According to the appointing authority, the Insurance Inspectorate, the position of insurance commissioner was connected to the exercise of official (public) authority. The court ruled against the Insurance Inspectorate on the ground that the attributions of an insurance commissioner were not that important as they were "auxiliary and preparatory" without a direct and specific connection with the exercise of official authority (Thijssen case, para 22). In the *Reyners* case, it was alleged by the *Ordre des Avocats de Belgique* and the Luxembourg government that the profession of *avocat* "is connected organically with the functioning of the public service of the administration of justice" which should exclude non-nationals from practising law (*Reyners* case, para. 35). The court rejected this argument pointing out that "Professional activities involving contacts, even regular and organic, with the courts, including even compulsory cooperation in their functioning, do not constitute, as such, a connection with the exercise of official authority" (*Reyners* case, para. 51). It follows from the court's case law that an organization or a position must have a direct and specific connection with the exercise of public authority to be excluded from the scope of the freedom of establishment.

[538] Article 13(11)(b)(i) of EAC-CMP. Accordingly, some Kenyan Banks and Insurance companies are now installed in Rwanda by virtue of this right of establishment. One can name Kenya Commercial Bank (KCB), Equity Bank, Guaranty Trust Bank (GTBank), Union des Assureurs de Paris (UAP) among others. Similarly, Banque of Kigali (BK) has also opened in Kenya. The trend is being expanded within the community.

[539] Article 13(11)(b)(ii) of EAC-CMP

to expand their businesses. But it should be reminded that not all companies or firms located on the territory of Partner States are entitled to enjoy the right of establishment as prescribed by the EAC-CMP. This privilege is reserved for companies that hold the nationality of one of the Partner States.

Three criteria have been widely accepted as determining the nationality of a company. The first is the place where the company is incorporated. The second is the place where the company has its central administration (siege social). The third criterion is the nationality of the majority of the shareholders.[540] As discussed in the previous chapter[541], EAC Partner States generally consider the place of incorporation notwithstanding the nationality of the shareholders. In other words, it could be said that EAC Partner States have adopted a mixed criterion since a company holds the nationality of a Partner State when it is incorporated under the law of that Partner State provided that the majority of the shareholders are nationals of that Partner State.[542] The unanimous choice of this mixed criterion by the EAC Partner States is at least a positive point that could facilitate the implementation of companies' freedom of establishment within the EAC as the adoption of different benchmarks could lead to conflicts should a company need to move from one Partner State to another.[543]

Unlike this criterion to determine companies' nationality, EAC Partner States' legislation and policies on matters related to companies are very different.[544] Requirements such as the procedures for and the number of days to start up a business as well as the minimum capital required, for instance, could prove very determinative for the choice of a foreign investor. Expectably the popularization of the right of establishment among businesspeople in the EAC would incite companies or firms to start dodging countries with difficult and tiresome conditions in order to start their businesses in the Partner State with the softest regulations. Beyond being hypothetical in the EAC, such a situation already occurred in the EU.[545]

---

[540] R.L. Astorga, 'The Nationality of Juridical Persons on the ICSID Convention in Light of Its Jurisprudence', *Max Plank UNYB,* Vol. 11, 2007, p. 429.
[541] Cf. supra section 3.2.2.1..
[542] Following the EAC-CMP spirit, it can be rightly extrapolated that a company or firm holds the nationality of a Partner State when it is incorporated in that Partner State and if the majority of the shareholders are nationals of EAC Partner States.
[543] F. Weiss and F. Wooldridge, *op. cit.*, p. 114. See for this kind of potential issue the discussion below on the *Urberseering* case.
[544] See in this regard, World Bank, *Doing Business in the East African Community. Smarter Regulations for Small and Medium Enterprises*, 2013 online at http://www.doingbusiness.org/~/media/GIAWB/Doingpercent20Business/Documents/Special-Reports/DB13-EAC.pdf last accessed 20 April 2014.
[545] Reference can be made to the following leading cases: Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459 (hereinafter *Centros* case); Case C-208/00, *Überseering BV v. Nordic*

Countries strongly displayed their protectionist character in trying to allege an abuse of EU rights by such companies but the ECJ's predominant position has been that freedom of establishment entitles companies to choose a EU Member State with soft regulations regarding incorporation for a better enjoyment of their right to secondary establishment.[546] Likewise the court does not condone discrimination in taxation where a EU host Member State could tax a branch of a company

Construction Company Baumanagement GmbH (NCC) [2001] I-09919 (hereinafter the *Uberseering* Case) and Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.* [2003] I-10155 (hereinafter the *Inspire Art* case). In the *Centros* case, with the purpose of taking advantage of the British law that did not require any minimum share capital for the setting up of limited liability (Ltd) companies Centros Ltd became registered in the UK. It had its first establishment in the UK but with a clear target of conducting business rather in Denmark. The latter had a stringent regulation on the minimum capital requirement. Without carrying out any single trading activity in the UK, Centros Ltd moved to start business in Denmark through the opening of a branch. The Danish authorities refused to register the Branch of Centros Ltd on the ground that it had abused the EU provision related to the right of establishment. The ECJ ruled against Denmark. In the second case, Urberseering was a Dutch registered company that moved its central administration to Germany and its shares had been totally acquired by German citizens. Upon a dispute concerning the non-execution of a contract, Urberseering filed a case before a German court that rejected the case due to a lack of legal capacity. According to the Defendant, NCC, since Urberseering had transferred its central administration to Germany without reincorporation under German law it had lost its legal personality acquired in the Netherlands. The latter applies the incorporation criterion for companies' nationality while Germany applies the criterion of central administration (siège social). Therefore, since Urberseering had transferred its central administration to Germany, it had to be reincorporated under German law to reacquire civil personality in order to be able to file a case before a court of law. This position was also supported by Germany. The ECJ ruled that the very existence of Urberseering is inseparable from its status as a company incorporated under Dutch law since "a company exists only by virtue of the national legislation which determines its incorporation and functioning (…). The requirement of reincorporation of the same company in Germany is therefore tantamount to outright negation of freedom of establishment." (*Urberseering* case, para. 81). Earlier in the same decision, the court clarified one of its rulings in paragraph 23 of Case 81/87, *The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc.* [1988] ECR 5483 (hereinafter the *Daily Mail* Case), that a Member State does not have the "power, vis-à-vis companies validly incorporated in other Member States and found it to have transferred their seat to its territory, to subject those companies' effective exercise in its territory of freedom of establishment to compliance with its domestic company law" (*Urberseering* case, para. 72). However the court acknowledged that companies' right of establishment could be restricted for the private international company law to "enhance legal certainty and creditor protection", to protect the rights of minority shareholders and employees, and for taxation supervision purposes (*Urberseering* case, para. 92). But all this is not enough to deny legal personality to a company, the court concluded. In the third case, Inspire Art, a company incorporated under UK law, was doing business exclusively in the Netherlands. The Dutch Chamber of Commerce (KvK) enjoined the branch of Inspire Art in the Netherlands to register as a "formerly foreign company", which is a category of commercial companies pursuant to Dutch law. Registration as a formerly foreign company had, among other consequences, the consequence of submitting the concerned company to the paying of a minimum amount of capital and more drastic directors' liability. Inspire Art contended that the provisions of the Dutch law on formerly foreign companies were contrary to the Community law provisions related to the right of establishment. For the Dutch law, such measures were necessary to avoid an abuse of EU law, to protect creditors and to ensure proper tax inspection. As in the *Centros* case, the ECJ dismissed this claim on basically the same grounds.

[546] P. Craig and G. de Burca, *op. cit.*, p. 809.

on its territory on the same basis as locally incorporated companies while not granting to the former the same tax advantages as it does to the latter.

The implementation of companies' freedom of establishment is a complex operation that touches upon a very sensitive area of the national life of Partner States. As said above, this situation is worsened by the existence of diverse company legislations in Partner States. The process of harmonization could be very long, especially because the EAC Council does not seem to intend to introduce any Directive to help solve any issue in this regard. Fortunately no case has so far been brought to the attention of the EACJ in relation to the enforcement of the right of establishment. This is probably because EAC lawmakers anticipated this by providing that "Partner States shall mutually recognize the relevant experience obtained, requirements met, licences and certificates granted to a company or firm in the other Partner States".[547]

Unlike other regulations related to the free movement of persons, the EAC-RoE has established a kind of implementation monitoring scheme.[548] This scheme starts with the commitment of each Partner State to identify and remove all administrative restrictions on the freedom of establishment on its territory. The second step is the voluntary identification and submission of existing restrictions in national laws by the all Partner States to the Council. The latter was supposed to issue a directive on the elimination of all identified restrictions. As one would expect, Partner States have not been able to fully identify all of those restrictions since - as insiders - their own nationals could only be faced with a few of them, especially when returning home after having exercised their community freedom on the territory of other Partner States. But, as such, nationals of other Partner States are well placed to identify restrictions on the right of establishment, if any. That is why the possibility was given to any Partner State that could become aware of the existence of restrictions of the freedom of establishment in another Partner State to notify the Council and the Partner State concerned through the Secretary General of the EAC. Accordingly, the Council would enjoin that Partner State to remove the reported restrictions within a given period of time.

Despite the provision of a specific timeframe to identify and remove the said administrative and legal restrictions, nothing has so far been done in this respect.[549]

[547] Article 13(7) of the EAC-CMP from which it could be induced that Partner States have agreed to recognize companies regularly incorporated under the laws of each other.
[548] Regulation 10 of EAC-RoE
[549] Regulation 10(2) and (3) of RoE provided, respectively, that administrative restrictions should be identified and removed upon the entry into force of the EAC-CMP and restrictions in the laws were

Furthermore, provisions prescribing competent authorities in Partner States to share information in order to allow for the smooth operationalization of the right of establishment of self-employed persons and legal persons have remained a plain declaration of intent.[550] The EAC framework does not provide any single basic system in this regard. Thus there is enough reason to doubt whether the expected cooperation for further steps like the simplification of processes and procedures to obtain relevant documents (work permits, trading licences, etc.) and the harmonization of fees to obtain such documents may occur in the near future, especially as this initiative is totally left to the goodwill of the Partner States.[551]

4.2.4. Limitations on the free movement of persons

The right of free movement for persons is sacred under the provisions of the EAC Treaty. But the enjoyment of this right is not absolute as Partner States may limit this enjoyment for reasons related to public policy, public security or public health.[552]

Apart from public security, which is defined as "the function of governments which ensures the protection of citizens and other nationals, organizations and institutions against threat to their well-being and to the prosperity of their communities"[553], the two other expressions are not defined by the EAC-CMP. Yet these concepts are so broad that if their respective scopes are not clearly drawn they would be a daunting threat to the exercise of the free movement of persons.[554]

supposed to be removed one year later. No country has reported any restrictions in its laws and none of them has reported the existence of such restrictions in the legal arsenal of another. But it does not mean that restrictions do not exist. A Kanyan national currently established in Kigali told a local newspaper that he could not afford to remain in Uganda due to work permit requirements. See the quote in E. Kabeera, 'EAC Integration Hurt by Lack of Harmonized Laws', *The New Times*, 13 March 2014, online at http://www.newtimes.co.rw/news/index.php? a=75265&i=15660 last accessed on 23 April 2014. Yet even though a work permit is required for a national of a Partner State to carry out any economic activity in the territory of another Partner State both the EAC-FMW and the EAC-RoE stipulate that the fees for such a permit should be harmonized [Regulation 11(c) of RoE].

[550] See for instance Regulation 11(a) of EAC-RoE

[551] Regulation 11(b) and (c) of EAC-RoE

[552] Articles 7(5), 10(11), 13(8), and 14(4) of EAC-CMP

[553] Article 1 of EAC-CMP under the definition of "public security"

[554] In the EU, public policy was frequently invoked by Member States to justify restrictions they imposed on the free movement of other Member States' nationals [N. Rogers and R. Scannell, *op. cit.*, p. 236 (14-12)]. If it had not been for the ECJ, the free movement of persons would not have been enforced in Europe as it is today. This court has consistently applied a very narrow definition of public policy. It has held that in order to be denied the exercise of any free movement right on the ground of public policy, the concerned individual should constitute a "genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society" (Case C-503/03, *Commission of the European Communities vs. Kingdom of Spain* [2006] ECR I-1097, para 53). The criminal record of an individual is not enough to limit his or her free movement rights within the EU as the

This is especially true as Partner States feel that it is within their residual sovereignty to enforce national laws and regulations within their territory as appears in the *Mukira* case.

In this case, Samuel Mukira, a Kenyan national, was part of a fourteen-person Kenyan delegation who had an appointment with the Chief Justice of Uganda. Upon their arrival in Uganda at Entebbe International Airport, Mr. Mukira was singled out by the immigration officer on duty and was not allowed to enter the territory of Uganda. Rather he was handed back to the airline company that had carried him to Uganda in order to be returned to his home country, Kenya. No specific reason was given to Mr. Mukira as to why he was denied entry into Uganda as the immigration officer alleged that pursuant to Ugandan immigration law a "prohibited immigrant" is not owed such a right. Mr. Mukira filed a case before the East African Court of Justice (EACJ) for a violation of, among others, article 7 of the EAC-CMP providing for the free movement of persons. In its defence, the Ugandan government alleged that "neither the Treaty nor the Protocol takes away the Sovereignty of the Republic of Uganda to deny entry to unwanted persons who are citizens of the EAC" and that Uganda's "Sovereignty was not submerged in the creation of the EAC"[555] in pointing out article 7(5) of the EAC-CMP as the basis of its decision to refuse entry to Mr. Mukira. But all through the judgment there is no clear indication whether Uganda was justifying its action on the ground of public security, public policy or public health since only a blanket reference to paragraph 5 of article 7 of the EAC-CMP was made. Although Uganda asserted that denying Mr Mukira entry into its territory was "lawful, bona fide, justifiable and in the security interest of the East African People", nothing could lead to the conclusion that the denial decision was made on the ground of public security especially as nothing was disclosed during the hearing about the specific acts that Mr. Mukira was accused of. In its ruling, the EACJ did not dissociate public security, public

court rather stressed that not only the actual personal conduct of the person concerned has to be taken into consideration but also his or her "propensity to act in the same way in the future" (Case 67/74, *Carmelo Angelo Bonsingore vs. Oberstadtdirektor der Stadt Koln* [1975] ECR 297, para. 5; Case 30/77, *Régina v. Pierre Bouchereau* [1977] ECR 1999, para. 28). Public policy is a dynamic and diverse concept whose content varies depending upon time, space, and the circumstances, which leaves national authorities with enough room for discretion (F. Weiss and F. Wooldridge, *op. cit.,* p. 165). As for public health reasons, the right of free movement can only be limited in Europe if the individual in question is suffering from a disease which is listed in the International Health Regulation of the World Health Organization (see, for instance, Annex of Directive 64/221) along with tuberculosis and syphilis. This list contains the names of contagious diseases. While HIV/AIDS cannot justify a limitation on the free movement of a person who is HIV positive, drug-addicted individuals and persons with a profound mental disability may see their rights restricted on the ground of public health [N. Rogers and R. Scannell, *op. cit.*, p. 238 (14-20)].

[555] *Mukira* case, para. 39.

policy and public health from the global defence means of Uganda, either. It only held that:

With Specific regard to the Republic of Uganda, her sovereignty regarding the movement of the citizens of partner states in and out of the Partner States started to be defined and governed by the Treaty, the Protocol and the Citizenship and Immigration Control Act, provisions of the former taking precedence in case of conflict.[556]

Before acknowledging that:

… in the exercise of her sovereignty, the Republic of Uganda has power to admit persons on, or deny them entry into, her territory, in accordance with the country's law. The law of Uganda, however, includes the Treaty and the Protocol which, also in the exercise of her sovereign power, the Republic of Uganda accepted not only to be bound by, as Community law, but equally as national law.[557]

It follows from this EACJ holding that Partner States' decisions, even sovereignly, made either on public security, public policy or public health grounds should be made in compliance with the community law. In this regard, the community law obliges a Partner State to notify other Partner States in case it has taken decision to limit the free movement of persons on the ground of public security, public policy or public health.[558]

However, whether the notification has been sent or not, there is a huge vacuum in the EAC law about the procedure to be followed when a Partner State decides to deny access to its territory to or to deport a national of another Partner State. The lack of minimum procedural safeguards in the Treaty and the EAC-CMP presupposes that each Partner State is entitled to apply its own immigration law. As becomes evident from the *Mukira* case, national laws may be very abusive, patchy or simply non-existent.[559] Therefore, it is important to have harmonized provisions at

[556] *Mukira* case, para. 48.
[557] *Mukira* case, para. 49.
[558] Article 7(6) of the EAC-CMP. In the Mukira Case, Uganda did not make such a notification. As far as the submission of such notification to other Partner States is concerned, the EACJ ruled that the burden of proof lies upon the Partner State whose notification submission is challenged (*Mukira* case, para. 114)
[559] In this case, Mr. Mukira was denied entry into the territory of Uganda without any single information as to the reason for that decision. Before the EACJ, Uganda averred that the decision and the treatment given to Mr Mukira were in accordance with the Ugandan Citizenship and Immigration Act (UCIA). Allegedly, this act does not require an immigration officer to provide reasons for any denial decision to a person considered to be a prohibited immigrant. Furthermore, the law of Uganda does not have specific provisions on how to deal with a case of a person who has been refused entry.

the regional level on the procedure and the treatment to be given to the nationals of a Partner State who are denied access or are deported from the territory of another Partner State. Although the EACJ rightly qualified as a violation of the principle of due process the refusal to provide Mr. Mukira with information about the refusal to allow him to enter Uganda and his detention for several hours in an office at Entebbe International Airport, this is not of any great assistance to Partner States' immigration officers who may not read this judgment.[560] What could be more useful for the people working on the ground to enforce EAC laws and regulations is the issue of a directive by the council detailing clear safeguarding procedures which are applicable in the implementation of some critical provisions like articles 7(5), 10(11), 13(8) an 14(4) of the EAC-CMP. In this regard, we could point to the holding of the EACJ according to which provisions on the limitations of the free movement of persons had to be strictly applied by Partner States' immigration officials due to the importance of this freedom for EAC integration in general[561].

4.3. FREE MOVEMENT OF SERVICES

4.3.3. The Principle

Trade in services, together with the trade in goods, are key components of both national and international commerce. In Rwanda, for instance, more than 60 percent of registered foreign investments in 2013 were in the area of the trade in services.[562] This exemplifies the importance of the trade in services in Partner States'

Section 60 of the UCIA that deals with deportation seems rather to apply to persons who have already been accepted in the territory of Uganda. But even there, paragraph 1 of section 60 of the UCIA reads "The Minister *may*, in writing signed by him or her, order any prohibited immigrant or person whose presence in Uganda is unlawful to be deported out of Uganda" (emphasis added). This illustrates how immigration officers may be given too much discretionary power to deal with persons intending to enter to their territories. Where the law refers to custody in relation to prohibited immigrants waiting for deportation, it does not describe or set minimum requirements to be met by such a custody area (room). The treatment to be given to such a person is not described, either. Obviously this kind of vacuum in an area dealing with peoples' freedoms and liberties is very disappointing as it leaves an open space for any kind of abuse.

[560] It should be reminded that the principle of due process also does not appear in any of the EAC instruments. The court rather upheld the applicant's reasoning to infer the requirement to follow due process from the principle of good governance contained in articles 6(d) and 7(2) of the EAC Treaty.

[561] *Mukira* case, para 76.

[562] Interview with Vivian Kayitesi and Innocent Muyumbu, respectively Head of the Investment Promotion and Implementation Department and Research and Statistics officer at the Rwanda Development Board (RDB) on 25 February 2014.

economies.[563] It is therefore in recognition of this that they also agreed to free the movement of services between them.[564]

According to article 16 (7), the services concerned are those "normally provided for remuneration" as long as they do not fall under the provisions related to other basic community freedoms.

Remuneration is a key element in determining whether or not an activity is a service according to the provisions of the EAC-CMP.[565] However, services supplied in the exercise of governmental authority are excluded.[566] In a landmark decision, the ECJ held that education services provided by the state should not qualify as a service within the meaning of the Common market.[567] Following this case law, even services offered by state-owned or state-funded health facilities should be excluded from the scope of the EAC-CMP as suggested by some authors.[568] According to the proponents of this thesis such services should not fall within the scope of the common market free movement as they are supplied by the state not to seek any direct economic gain - "even if parents do make some financial contribution to the school" - but rather to fulfil its social and cultural obligations.[569]

However the provisions of the EAC-CMP departed from ECJ law in stipulating that services supplied in the exercise of governmental authority could fall within the ambit of the EAC-CMP with two conditions: either they are provided on a commercial basis or they are in competition with similar services supplied by other (private) providers.[570] In other words, in order to be excluded from the scope of the EAC-CMP, services provided in the exercise of governmental authority should

[563] Trade in services represented an average of ⅔ of Gross Domestic Product (GDP) of both developing and developed countries by 2011 while global exports of services was reported to have had an annual increase of about 8 percent between 1980 and 2012. World Bank and East African Community Secretariat, *EAC Common Market Scorecard 2014: Tracking EAC Compliance in Movement of Capital, Services and Goods*, Washington DC and Arusha, 2014, p. 18 (hereinafter EAC Common Market Scorecard 2014).
[564] Articles 76 (1) and 104 (2) of the Treaty of Arusha, and articles 2(4)(f), 5(2)(e), 16 to 23 of the EAC-CMP.
[565] N. Rogers and R. Scannell, *op. cit.*, p. 130 (8-38).
[566] Article 16(7)(a) of EAC-CMP
[567] Case 263/86, *Belgian State v. René Humbel and Marie-Thérèse Edel* [1988] ECR 5365 where the ECJ ruled that educational, social and cultural services that are funded by the State do not qualify as services as defined by article 49 of the Treaty of the European Community (now article 56 of the TFEU).
[568] N. Rogers and R. Scannell, *op. cit.*, p. 130.
[569] N. Rogers and R. Scannell, *op. cit.*, p. 130 and 135; see also C. Turner, *EU Law Key Facts Key Case*, New York, Routledge, 2014, p. 305 where the author highlights that this consideration stands for secondary education.
[570] Article 16(7)(a) of EAC-CMP

not aim at making a profit. If they do aim to make a profit, the provision of such services should be done in a monopolistic situation.

Undoubtedly this provision of the EAC-CMP seems to be able to cope much more with the current reality. Excluding purely and solely services provided by state-owned or state-funded institutions from the scope of free movement - as suggested by the ECJ - could be a serious hindrance to the functioning of the common market in this era where most public institutions (including schools and hospitals) are driven so much by the generation of income that they become real competitors of private companies in similar domains.

Apart from this exclusion, any other service legally provided in any Partner State is allowed to be supplied and received anywhere in the community as long as it is temporarily[571] supplied according to one of the following four methods.

A cross-border supply is the first method agreed upon by Partner States in the implementation of the free movement of services. This mode implies that service providers from one Partner State are allowed to provide their services to consumers located in the territory of another Partner State without either of them leaving their location.[572] This could be the case, for instance, when a software engineer from Kenya provides online maintenance to a customer living in Rwanda.

The second method of supply is 'consumption abroad' that allows consumers from one Partner State to freely enjoy services provided in another Partner State during their stay in the territory of that Partner State.[573] This mode could encompass, for

[571] This adverb is reproduced in article 16(6) of the EAC-CMP and is very crucial as different provisions can be applied to a service supply depending on whether it is done in a temporary or in a permanent way in the territory of a Partner State. The ECJ decided that provisions related to the freedom of establishment should be applied when the issue involves activities that are carried out on a stable and permanent basis in the host country. The court also held that the temporary character of an activity should be assessed against its duration, regularity, periodicity or continuity while the fact of acquiring some infrastructure which is necessary for carrying out that activity does not imply the application of a provision related to the freedom of establishment. See *Gebhard* case, para. 39. It should be also noted that an activity should be treated as a service within the terms of article 16 EAC-CMP as long as it cannot be governed by any other provision of the EAC-CMP governing the free movement of goods, capital and persons [article 16(7)(b)]. This is also the approach of the ECJ that held that free movement provisions are exclusive as the application of provisions related to one freedom to an activity or situation automatically excludes recourse to the provisions governing all other freedoms (See *Gebhard* Case, paras 20 and 21).

[572] Article 16(2)(a) of EAC-CMP

[573] Article 16(2)(b) of EAC-CPM. This provision clearly crystallizes the application of the right to enjoy the free movement of services by service recipients. In the EU the right to the free movement of services only seemed to be applicable to service providers until the ruling of the ECJ that clarified that the free movement of service recipients is "the necessary corollary" of the free movement of

instance, the freedom of nationals of a Partner State to travel to another Partner State to receive a service which is normally prohibited in their own country as long as that service is legal and remunerated that other Partner State.[574]

The third method, a commercial presence, involves the freedom of service providers from a Partner State to be admitted to establish their business on the territory of another Partner State.[575] Understandably, the service provider in question in this mode must be a company which has been temporarily incorporated under the law of one of the Partner States. Therefore the supply of services in accordance with this mode is done on a temporary basis and the service provider should not have a subsidiary or branch in the host Partner States.[576] Most Foreign Direct Investments (FDIs) are made following this method of supply.[577]

service providers as stipulated by article 50 TEC (current article 57 TFEU) in order to provide for the full liberalization of lucrative activities excluded from the application of provisions related to other fundamental freedoms (see *Luisi and Carbone* Case, para. 10). According to the case law of the ECJ, the concept of a service recipient is very broad as it includes not only tourists, persons receiving medical treatment or persons travelling for business or education purposes but also any national of an EU Member State who travels to another Member State where "they intend or are likely to receive services". (See Case C-274/96, *Horst Otto Bickel v. Ulrich Franz* [1998] ECR I-7637, para. 15 and *Luisi and Carbone Case*, *passim*).

[574] In this regard, in an *obiter dictum* in *Society for the Protection of the Unborn Child v. Grogan* the ECJ acknowledged that the medical termination of pregnancy for remuneration was a service within EU law. In this case, the court found that although abortion was prohibited under Irish law, advertising the availability of abortion services in the UK where medical abortion is legal should be accepted as long as the advertisers (Irish student bodies) have a close link with clinics practising those abortions in the UK. The court conceded that it did not have to overrule the assessment of those Member States where abortion was legally practised and to replace it with that of its own as far as the morality of abortion was concerned. Case C-159/90, *Society for the Protection of the Unborn Child (SPUC) v. Grogan*, [1991] ECR I-4685 cited by F. Weiss and F. Wooldridge, *op. cit.*, p. 144. This implies that should the Irish government refuse permission for one of its nationals to leave the country to travel to the UK for a medical abortion, this would be considered as an impediment to the free movement of services (freedom to receive a service) under the "consumption abroad" method of supplying services.

[575] Article 16(2)(c) of EAC-CMP

[576] If services are provided through a subsidiary or a branch of a company incorporated in another Partner State, there is obviously a transfer of the EAC-CMP provisions. In this case, as said above, the rules on the freedom of establishment should rather apply (see above on *the free movement of legal persons*).

[577] EAC Common Market Scorecard 2014, p. 22. See also J. Karl, 'The Competence for Foreign Direct Investment: New Powers for the European Union?' in 5 *J. World Investment & Trade*, 2004, p. 428. While most FDIs would use a commercial presence to carry out their business activities, it is arguable whether service supply in terms of the EAC-CMP, which is temporary by nature, could satisfy the foreign investment test set by the ICSID in the *Salini* case, especially the duration condition (see supra section 3.2.1.3.) So far FDIs have resorted to the right of establishment to set up subsidiaries or branches to deliver services in Partner States other than the Partner State where they are incorporated.

Finally, the fourth means of supply is the presence of natural persons.[578] This mode implies that a national of one Partner State moves to the territory of another Partner State to provide a specific service. The fourth method should not be confused with the third method. While in mode three it is a company that comes to another Partner State to trade in business services, in mode four it is a physical person who is involved either as an independent supplier or as an employee of a service provider. Let us consider the example of a tourist guide company located in Tanzania. This company could provide tourist guide services in Rwanda following mode three by setting up a branch in Rwanda, but instead of registering a branch in Rwanda, it decides to send tourists with a guide directly from Tanzania (where its headquarters are located) to Rwanda. In the latter case, the service provided by this tourist guide is supplied under mode four.

To allow for the smooth movement of services, Partner States are subjected to two binding obligations. First, upon the signature of the common market protocol, Partner States have pledged not to introduce any new restrictions on the provision of services. This is a standstill obligation, which presupposes that there should not be any less advantageous situations as far as restrictions on the free movement of services in the community is concerned than those which prevailed at the time of the entry into force of the EAC-CMP. Second, Partner States have accepted to be bound by a rollback obligation according to which they committed themselves to progressively remove all the existing restrictions. Accordingly they agreed to progressively liberalize the trade in services in their territories between 2010 and 2015.[579] The driving force behind this commitment was that citizens or companies

[578] Article 16(2)(d) of EAC-CMP

[579] Annex V of the EAC-CMP on the Schedule of Commitments on Progressive Liberalization of Services, 2009 (hereinafter Annex V). However, it is noteworthy that countries' commitments differ depending on both the type of service, the mode of supply and the targeted discriminatory practice. For instance, Burundi committed to remove Market Access discrimination by 2015 while it pledged to remove all National Treatment obstacles by 2010. Whereas Burundi ensured that no obstacle relating to these two kinds of discrimination as far as mode one (cross-border supply) and mode two (consumption abroad) would remain by these respective dates, it subscribed to be "unbound" by the removal of obstacles to the provision of legal services through mode three (a commercial presence). According to Annex V, "unbound" means "no commitment to fully liberalize the subsector until the mentioned date when there will be a full commitment or the commitment undertaken does not take effect until the mentioned date". Annex V, p. 80. It means that law firms from other Partner States would not be allowed to open offices in Burundi until 2015. As for the supply of legal services through mode four (the presence of a natural person), its liberalization is subjected to the schedule on the free movement of workers. According to this schedule, however, the free movement of legal professionals, including lawyers and judges, was supposed to have been fully achieved by 2010 (Regulation 15 of EAC-FMW). In line with this, it can be submitted that, legally speaking, lawyers from other Partner States are already allowed to practice in Burundi through mode four. It is obvious that the liberalization of the trade in services is challenging and it requires a careful follow-up with a great deal of political will for its implementation.

from any Partner State should be free to supply services in other Partner States under the "same conditions as (those which) are applicable to nationals" of that Partner State.[580]

Despite this commitment, almost a year before the agreed deadline for full implementation, the existing restrictions are still too many in every Partner State. Based on the contributions of professional services, road transport, distribution services and telecommunications to the national GDP of the Partner States, the World Bank has recently carried out research to assess the compliance of EAC Partner States' national legal frameworks with the EAC-CMP regarding the liberalization of the trade in services.[581] The key finding of this research revealed the existence of at least 63 measures affecting the free movement of services within the EAC.[582] Those measures were identified within national laws and regulations. The report showed that not only did Partner States not fully respect their rollback obligation, but, more seriously, they had introduced new measures without even informing the Council as required by article 19(4) of EAC-CMP.[583]

As mentioned earlier the aim of establishing a common market is to combat discrimination based on the nationality of persons, goods or services by allowing for the free movement of persons, goods, services and capital. In the EAC-CMP two discriminatory practices are namely referred to against which Partner States have promised to combat. They are National Treatment (NT) and the Most Favored Nation (MFN).[584] Surprisingly it is reported that 28 percent and 72 percent of the

[580] Article 16(6) of EAC-CMP
[581] EAC Common Market Scorecard 2014, p. 19.
[582] EAC Common Market Scorecard 2014, p. 20.
[583] This section reads: "Each Partner State shall, promptly and at least annually, inform the Council of the introduction of any new national laws or administrative guidelines, or any changes to existing laws or administrative guidelines which affect trade in services provided for in this Protocol". The reading of this section sounds contradictory when considered in combination with article 16(5) that reads "For the purposes of paragraph 1, the Partner States shall progressively remove existing restrictions and shall not introduce any new restrictions on the provision of services in the Partner States, by nationals of other Partner States except as otherwise provided in this Protocol". The contradiction consists of the fact that when the latter provision prohibits Partner States from introducing any new restrictions, the former provision seems to allow this provided that they inform the Council. But this is not in fact true. Article 19(4) should rather be read in combination with article 21 dealing with general exceptions to the free movement of services. This seems to be more in conformity with article 16(5) *in fine* where it is stipulated, "…except where otherwise provided in this protocol".
[584] Articles 17 and 18 EAC-CMP. According to these articles, the NT principle prohibits Partner States from providing less favourable treatment to services or service providers from other Partner States, which basically means that service providers or services from other Partner States should be given "either formally identical or formally different treatment" to what is given to like services and service providers of that Partner State. On the other hand, MFN involves that no service or service supplier from one of the Partner States, a third party or a customs territory should be treated better

identified obstacles to the free movement of services in the EAC relate to MFN and NT, respectively.[585] The prevalence of NT over MFN explains the protectionist obsession of Partner States concerning their national market. Besides, beyond the obstacles that could be found in the laws, regulations and guidelines as pinpointed by the 2014 EAC Common Market Scorecard there are others that are very subtle.

These subtle obstacles are for instance established in informal meetings or through internal letters where certain types of consumers are given instructions on which service provider they should give priority to. This is for instance the case in a letter written by the Prime Minister of Rwanda instructing all ministers to use the national airline, Rwandair, whenever a public servant is going on an official mission abroad.[586] This is noteworthy because almost all routes served by Rwandair are also served by Kenya Airways, which is a Kenyan air transport company with offices in Kigali. Such a letter obviously constitutes a breach of the NT principle to the detriment of Kenya Airways. Therefore the observance of this letter's instructions automatically results in Kenya Airways losing a very big share of the Rwandan market.[587]

While such an instruction is obviously discriminatory against Kenya Airways, it should be remembered that direct discrimination is not the only criterion in assessing the occurrence of a breach of the NT principle.[588] The EAC-CMP introduced a more objective test in the assessment of NT breach. According to this test a country must provide formerly identical treatment to other Partner States' ser-

than the like service or service providers from other Partner States. It means that if one Partner State had a better deal in the domain of trade in services with another Partner State, a third party or a customs territory that advantage should be "unconditionally" extended to all other Partner States. It is useful to pinpoint the reference to a "customs territory". Since all EAC Partner States belong at least to two other regional integration communities, which are at different levels of integration, it was very important to extend MFN to even customs territories so that any conceded advantage by one of the Partner States should apply to all EAC Partner States. This extension has the benefit of not making the EAC worse off than other regional organizations to which some of its members could be affiliated.

585 EAC Common Market Protocol Scorecard 2014, p. 23.

586 Letter nº 1116/03.0 of 26 October 2010 written by the Prime Minister to all Ministers and State Secretaries on public servants going on official missions abroad.

587 The third paragraph of this letter instructs that public servants from all ministries, public institutions and all projects implemented within their ministries should abide by these instructions. The fact that the letter is written in Kinyarwanda and is intended for high-ranking officials could make it inaccessible for research like the one carried out by the World Bank. Moreover, these kinds of instructions are strongly implemented, sometimes even more so than some laws since the beneficiary (Rwandair) could engage in a draconian follow-up by reporting violators. It should be reiterated that air transport has been liberalized by all the Partner States since 2010 (see Annex V of EAC-CMP).

588 F. Weiss and F. Wooldridge, *op. cit.*, p. 131.

vices or service suppliers compared to what it accords to its nationals. But if that 'formerly identical' treatment modifies the conditions of competition in favour of domestic services or services suppliers of that Partner State then the treatment concerned will be considered to infringe the principle of NT.[589] This has also been the consistent opinion of the ECJ in various cases.[590] Although the rulings of the

[589] Article 17 (3) of EAC-CMP.

[590] See for instance Case 33/74, Johannes Henricus Maria Van Binsbergen v. Bestuur Van De Bedrijfsvereniging Voor De Metaalnijverheid [1974] ECR 1299 (hereinafter the Van Binsbegen Case), Case 427/85, Commission v. Genmany [1988] ECR 1123 (hereinafter Lawyers' Services Case) and Case C-76/90, Manfred Sager v. Dennemeyer & Co. Ltd [1991] ECR I-421(hereinafter the Sager case). In all of these cases they concerned national legislation imposing a residence condition before a person could be allowed to provide some services on the territory of that EU member state. This condition applied, without distinction, to both nationals and non-nationals. But the Court held that such a condition, though not being per se discriminatory, was against the free movement of services as enshrined in article 59 of the Treaty of the European Community (now article 56 of the Treaty on the Functioning of the European Union - TFEU). The existence of this kind of legislation is widespread in the EAC despite the recognized right of EAC service providers to engage in cross-border supply (mode 1). The EAC Common Market Scorecard 2014 has pinpointed various provisions in the EAC Partner States' legislation where service providers from other Partner States are required to prove that they do reside in the Partner State where they intend to start providing services or that they are in a partnership with nationals of that Partner State before they are be allowed to supply their services (EAC Common Market Scorecard 2014, pp. 56-76). In Van Binsbegen, the court submitted that "In particular, a requirement that the person providing the service must be habitually resident within the territory of the state where the service is to be provided may, according to the circumstances, have the result of depriving article 59 of all useful effect, in view of the fact that the precise object of that article is to abolish restrictions on freedom to provide services imposed on persons who are not established in the state where the service is to be provided" (Van Binsbegen Case, para. 11). However, it should be noted that the NT principle does not appear expressis verbis in the TFEU in relation to the free movement of services. But it is implicit in the broad phrasing of article 56. The reading of the EAC-CMP in this regard sounds as if it has been inspired by EACJ case law. But, more precisely, article 17 EAC-CMP is a faithful reproduction of its counterpart article XVII of the General Agreement on Trade in Services (GATS) which has been in force since 1995 within the framework of the World Trade Organization (WTO). Besides, most EAC-CMP provisions are likewise the emanation of WTO texts mutatis mutandis. Regarding the trade in services, it is however important to note that while GATS (article XIII) excludes government public procurement from the ambit of the NT principle, the EAC-CMP clearly stresses in its article 35 that "The Partner States shall not discriminate against suppliers, products or services originating from other Partner States, for the purposes of achieving the benefits of free competition in the field of public procurement". This reflects the opinion that governments are very big consumers of both goods and services in developing countries. Hence allowing NT discrimination in governmental public procurement would seriously undermine the free movement of goods and services within the bourgeoning EAC common market. That is why the instructions from Rwanda's Prime Minister enjoining all public institutions to either use Rwandair flights for official missions within the routes of the national carrier or to exclusively consider mineral water and milk produced by Inyange Industries in their procurement should be repealed as they are contrary to both EAC-CMP articles 17 and 35. In 2010 the Prime Minister of Rwanda asked all ministers to support this national industry in his letter N°1242/03.5 of 23 November 2010 by buying only milk processed by Inyange Industries. This instruction was later reiterated by letter No. 1608/15.03.01/INT/2011 of 26 July 2011 from the Minister of Trade and Industry that reads "Following the Prime Minister's Instruction on the consumption of local products, as a way of promoting local industries, we would like to remind you to enforce this. A case in point is Inyange

ECJ on this matter did not expressly refer to the modification of the conditions of competition in the internal market as a benchmark, it has obviously been preponderant in the undertone of the judges' reasoning.[591]

4.3.2. Limitations on the free movement of services

Partner States have the competence to regulate service sectors in their territories according to their national policy objectives. But measures taken in accordance with those national policy objectives should not constitute a barrier to the trade in services and should remain consistent with the provisions of the EAC-CMP.[592] Nevertheless, despite the fact that Partner States are required to administer such measures in a way which is reasonable, objective and impartial[593], it will be up to the EACJ to decide, on a case-by-case basis, whether or not a specific measure infringes EAC law.[594]

The free movement of services may only be limited on the ground of public morals and public order, consumer protection and safety, public health (human, animal or plant) or public security.[595] Although, unlike the case of the free movement of

Industry which has a surplus of milk which has no market. We would like to recommend that all Public Institutions begin to consume Inyange Industry's milk". While such an instruction could be acceptable under WTO law in order to promote infant national industries, it is totally not the case vis-à-vis EAC-CMP.

[591] For instance, in paragraph 12 of *Sager* Case, the Court held that non-discriminatory measures in law and in fact could still constitute a breach of the provision related to the free movement of services if those measures "prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services". The implicit reference to competition is more than clear in this quote.

[592] Article 20(1) of EAC-CMP

[593] Article 20(2) of EAC-CMP

[594] But when one closely examines the ECJ's case law related to the free movement of services, it is highly foreseeable that the work ahead for the EACJ will be enormous and difficult. For years, it was almost impossible for the ECJ to find a consistent position regarding EU Member States' regulations or policies in the domain of services. For instance, the intensity of the ECJ's review varies according to the sensitivity of the subject matter in the sense that this court's scrutiny seems less intrusive when the issue raised was politically difficult (for more details, see C. Barnard, *The Substantive Law of the EU. The Four Freedoms*, 4th edition, Oxford, Oxford University Press, 2013, p. 392). For instance, the author contrasts the changing firmness of this court in two similar cases, Case C-275/92, *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039 (hereinafter the *Schindler* case) and Case C-67/98, *Questore di Verona v. Diego Zenatti* [1999] ECR I-7289 (hereinafter the *Zenatti* Case).

[595] Article 21(1)(a), (b) and (c) and article 22 of EAC-CMP. None of these concepts is defined by the EAC-CMP except public security as said above. It is noticeable that the EAC-CMP borrowed a significant leaf from the book of this case-law by referring to concepts that are still subject to multiple interpretations. In an earlier case, the ECJ held that measures in violation of the free movement of services could be justified by "imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State

persons, public policy does not appear *expressis verbis* to be a ground to limit the enjoyment of the free movement of services in the EAC, it is worth noting that the limits between public policy, public order and public morals are not easy to draw.[596]

As far as consumer protection is concerned, Partner States are entitled to take necessary measures to prevent deceptive or fraudulent practices that consumers would be faced with.[597] In this sense, national legislation prohibiting large-scale lottery operations from other Partner States could be justified on the ground of consumer protection, provided that the limitation is genuinely objective from the outset in the sense that it does not intend to fulfil an economic aim.[598] In the same vein, the protection of peoples' privacy in the processing and dissemination of personal data and the protection of the confidentiality of individual records and accounts would also be a justification for a limitation on the free movement of services.[599]

It is obvious that a service provider or service recipient who poses a threat to the life or health of animals, plants or human beings should not enjoy the right of free movement, especially if such persons are carrying a contagious disease.[600] But as said earlier, such a disease must be listed and known to avoid arbitrary decisions.[601] As such the personal health of a service provider or recipient cannot result in a problem when the service is delivered following mode one (cross-border supply). In this situation, a limitation on the ground of public health will only be possible when it is declared by a Partner Sate that it is the service itself which endangers the health or lives of people, animals or plants.

in which he is established" (the *Sager* case, para. 15). In Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media* [1991] ECR I-4007, para. 14 (hereinafter the *Gouda* Case) the ECJ already provided a non-exhaustive list of acts that could justify limitations on the free movement of services under the guise of "public interest". Those concepts include those provided by the EAC-CMP.

[596] Accordingly the understanding of public policy as explained previously (free movement of persons) should roughly apply *mutatis mutandis* to the free movement of services.

[597] Article 21(1)(c)(i) of EAC-CMP; see also the *Schindler* case, para. 60.

[598] *Zenatti* case, para. 36.

[599] Article 21(1)(c)(ii) of EAC-CMP.

[600] Such a limitation surely meets the requirement set by the ECJ that the free movement of services should be restricted or limited only if the limitation in question is "essential for the public health, and even for the survival, of the population". See Case C-158/96, *Raymond Kohll v. Union des Caisses de Maladie* [1998] ECR I-1931, para 51 (hereinafter *Kohll* case).

[601] Case C-205/99, *Asociacion Profesional de Empresas Navieras de Lineas Regulares (Analir) and Others v. Administracion General del Estado* [2001] ECR I-1271, para. 38 (hereinafter the *Alanir* case).

Anyway it should not be concluded that a limitation on the free movement of services on the ground of public health necessarily involves the case of a disease which can be passed on to others. On the contrary, the predominant case law of the ECJ on this matter makes it transparent that issues related to access to medical care in health facilities in other EU member States have rather occupied the court during the last two decades.[602] The bone of contention has been the required authorization by national regulation before nationals from one Member State can go to the territory of another Member State in order to receive treatment. The majority of EU Member States contended before the court that such authorization was essential for a balanced hospital and medical service access for all. They argued that a failure to acknowledge this would lead to serious disorganization in the national health systems concerned.

The court disagreed, however, and ruled that the requirement for the nationals of a Partner State to obtain authorization prior to going to receive health care services in another Partner State had the "effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State".[603] Therefore, this requirement was inconsistent with the provisions on the free movement of services.

It can be anticipated that this ruling by the ECJ will be challenged in the EAC in the future. All EAC Partner States have a social security scheme covering the cost of employees' health care.[604] The treatment is mainly provided by public hospitals or by selected private health centres within the country. If patients need to obtain treatment in a foreign country, they have to either pay for this themselves without any possibility of reimbursement or to request special authorization from the competent authorities. With this perspective, it is highly predictable that members of national social security funds will want to travel to other Partner State territories for medical treatment when they become aware of the existence of such a right under the free movement of services as enshrined in the EAC-CMP. But the situation in the EAC is very different from that in the EU in terms of the availability of adequate health care facilities. At least in Rwanda and Burundi, those who can

[602] See for instance the *Kohll* case; Case C-157/99, *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473 (hereinafter the *Simts and Peerbooms* case); Case C-385/99, *V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA* [2003] ECR I-4509 (hereinafter the *Muller-Fauré* Case).
[603] *Kohll* case, para. 33 where the ECJ reiterated its previous findings in case C-381/93, *Commission v. France* [1994] ECR I-5145, para. 17; see also the similar reasoning in the *Smits and Peerbooms* case, para. 69.
[604] While social security services are mainly managed by public institutions in all EAC Partner States, it is important to note that adhesion to heath care schemes was exclusively reserved for public servants. But nowadays, the growing trend is also to include workers from the private sector.

afford the costs of travelling to Kenya would prefer to go there for treatment for some diseases requiring advanced medical care. This means that if people become aware of the fact that they can undergo better health care in Kenya at the expense of their home social security funds, it is likely that a large number of people will go there for any treatment provided that the disease in question is covered.

In the long run this situation would lead to Kenyan health facilities becoming overloaded while other Partner States' social security funds would face high bills for the treatment of their affiliates abroad.[605] In this scenario and considering the social, cultural and economic settings of East Africa, the EACJ judges would have the immense task of assessing, on a case-by-case basis, whether or not the free movement of services could be restricted on the ground of the "maintenance of an essential facility or medical service on national territory" or the necessity "to provide a balanced medical and hospital service accessible to all".[606]

In addition to the limitations mentioned above, a Partner State may also apply discriminatory measures so as to favour either its own nationals when such measures are taken to ensure "equitable or effective imposition or collection of direct taxes" or nationals of a third country when such measures are adopted pursuant to "an agreement on the avoidance of double taxation or visions on the

[605] Despite the fact that "linguistic barriers, geographic distance, the cost of staying abroad and lack of information about the kind of care" provided in the territory of another Partner State could deter health care seekers from going abroad as insinuated by the ECJ (*Muller-Fauré*, para 95), the likelihood of this health care 'migration' is higher in Africa than in Europe based on the configuration of African society (some countries having much better health facilities than others).

[606] *Kohll* case, para. 52. An authorization may also be accepted as a limitation on the free movement of health services when the Partner State concerned proves that treatment abroad is not necessary, meaning that "equally effective treatment can be obtained without undue delay from an establishment having contractual arrangements with the insured person's funds" (*Smits and Peerbooms*, para. 108). Although receiving health services in another Partner State might be subject to prior authorization from the competent national authorities of the patient, it must be based on "objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily" and is a "procedural system which is easily accessible and capable of ensuring that a request of authorization will be dealt with objectively and impartially within a reasonable time and refusals to grant authorization must also be capable of being challenged in judicial or quasi-judicial proceedings" (*Smits and Peerbooms*, para. 90). When persons affiliated in a public insurance scheme in a Partner State go – without the required authorization - to receive necessary and normal treatment in the territory of another Partner State, they should be allowed to have the incurred costs reimbursed. However, it does not mean that the reimbursement must consist of the actual amount they might have spent for health care, but rather that reimbursement should be done within the limits of the coverage provided by the sickness insurance scheme of their country of affiliation. Even when the payment of health care is paid in kind, the ECJ suggests that national authorities should fix the amounts of reimbursement based on objective, non-discriminatory and transparent criteria (*Smits and Peerbooms*, para 106 and 107).

avoidance of double taxation in any other international agreement or arrangement by which the Partner State is bound".[607]

Maybe the limitation on the ground of public security is the biggest threat to the free movement of services in the EAC as Partner States do not have to disclose any information as to why they consider the limitation to be essential for their security interests. This is especially threatening as the concept of public security remains broad despite the definition provided by the EAC-CMP.[608] Based on this provision, a Partner State could adopt, at its own discretion, a measure which impedes the trade in services and use public security as an excuse. It follows from a careful reading of article 22(1)(a) of the EAC-CMP that when a Partner State relies on the public security exception to limit the free movement of services, nothing should constrain that Partner State from providing even the most basic explanation for such a limitation. This is particularly alarming since the obligation to inform the Council to the fullest extent possible is only binding either when a Partner State takes a measure which it deems to be necessary for the protection of its essential security interests - such as the supply of services carried out for the provisioning of a military establishment, services related to fissionable and fusionable materials or when such a measure is taken in time of war or other emergency in international relations – or when the measure in question is in accordance with the Partner

[607] Article 21(1)(d) and (e) of EAC-CMP. To avoid an improper interpretation of point (d) providing for a limitation on the ground of direct tax collection, paragraph 2 of article 21 of the EAC-CMP provides a list of operations that are eligible. This provision reads: "Pursuant to subparagraph (d) of paragraph 1, measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Partner State under its taxation system which: (a) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the territory of the Partner States; (b) apply to non-residents in order to ensure the imposition or collection of taxes in the territory of the Partner States; (c) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; (d) apply to consumers of services supplied in or from the territory of another Partner state in order to ensure the imposition or collection of taxes on such consumers derived from sources in the territory of the Partner States; (e) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or (f) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident citizens, companies or firms or the branches of the companies or firms, or between related companies or firms or their branches, in order to safeguard the tax base of the Partner State".

[608] This is somewhat striking as there exist no similar provisions in EU law allowing EU Member States to restrict the free movement of services on the ground of public security as detailed in article 22 of the EAC-CMP. One may recognize in the undertone of this provision the prevailing instability in the region where even Partner States cannot trust each other. So this article could be a comfort zone which has been left for each Partner State to deal with its essential security issues should there be any escalation of a political crisis opposing one Partner State against another.

State's obligations under the United Nations Charter for the maintenance of international peace and security.[609]

4.4. FREE MOVEMENT OF CAPITAL

4.4.3. The Principle

The free movement of capital is paramount for the success of a fully-fledged market. But its importance is even greater for the attraction of FDI. This is in line with the fact that the EAC-CMP could not afford to ignore it. Rather than providing a definition of capital, the EAC-CMP only provides a list of operations that should be understood as meaning "capital and related payments and transfers". The list cites: direct investment, equity and portfolio investments, bank and credit transactions, the payment of interest on loans and amortization, dividends and other income on investments, repatriation of proceeds from the sale of assets, and other transfers and payments relating to investment flows.[610]

It should be noted at the outset that this list is merely indicative.[611] It should be read in conjunction with annex VI to the EAC-CMP that names specific operations that Partner States decided to liberalize to free the flow of capital. Those operations may be categorised in four groups.[612]

The first group is related to securities operations that include securities transactions which are controlled by regulations, the prices for which are regularly published, either by official stock exchanges (quoted securities) or by any other facilities (unquoted securities), some collective investment schemes, money market instruments, and derivatives.[613]

The second group is composed of credit operations meaning "financing of every kind granted by financial institutions, including financing related to commercial transactions or to the provision of services in which non-residents participate".[614] Mortgage loans, consumer credit and financial leasing, as well as back-up facilities and other note issuance facilities are part of this group.

---

[609] Article 22(2)(2) of EAC-CMP.
[610] Article 28 of EAC-CMP.
[611] The EACJ could extend this list depending on the specific matter brought before it as the ECJ has done. In the Case C-222/97, *Manfred Trummer and Peter Mayer* [1999] ECR I-1661 (hereinafter the *Trummer and Mayer* case), para. 21 the ECJ ruled that the list in Annex 1 of Directive 88/361 for the implementation of article 67 on the free movement of capital in Europe had an 'indicative value'.
[612] EAC Common Market Scorecard 2014, p. 8.
[613] Explanatory notes of Annex VI to the EAC-CMP.
[614] *Ibidem.*

The third group is made up of direct investments which are investments of all kinds by natural or legal persons that serve to establish or maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity.[615] Roughly direct investment involves participation in a new or existing undertaking, the establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition, in full, of existing undertakings, and finally the reinvestment of profits.[616] All the three alternatives should take place so that the person making them can establish or maintain lasting economic links with the undertaking.[617]

The last group concerns personal capital operations that include, among others, loans, gifts and endowments, inheritances and legacies, death dues, damages, authors' royalties, etc.[618] The free movement of capital implies that Partner States have to progressively remove all restrictions and discrimination that could impede the above-mentioned operations between each other. But to these operations should be added the "current payments that are done in connection with the free movement of goods, persons, services or capital between Partner States".[619] Thus it is clear whether, in EAC law, the free movement of capital encompasses the free movement of payments, current payments included.[620]

615 *Ibidem.*
616 *Ibidem.*
617 The guidance provided by the IMF and OECD should be taken into consideration to understand the scope of "lasting" and "direct" links referred to in this explanatory note. Cf. supra section 3.2.3.
618 *Ibidem.*
619 Article 24(1)(d) of EAC-CMP. This paragraph also highlights the interpenetration between capital movement and other freedoms. The European experience has shown that, most of the time, the free movement of capital may overlap with the free movement of services and the freedom of establishment. Faced with the competition between freedom of establishment and free movement of capital rules, the ECJ case law has not been consistent. Its approach in this matter has evolved from a preference for establishment rules over the ones related to capital to a cumulative application (Case C-200/98, *X and Y* [1999] ECR I-8261], para. 30; Case C-414/06, *Lidl Belgium GmbH & Co.KG v. Finanzamt Heilbronn* [2008] ECR I-3601, para. 16; Case-503/99 *Commission v. Belgium* [2002] ECR I-4809, para. 59 cited by C. Barnard, *op. cit.*, p. 587). But in recent case law, when provisions on capital were overlapping with those of freedom of establishment, the ECJ sought to identify the purpose of the competing rules before it applied appropriate EU Treaty provision. The same trend can be observed when capital provisions overlap with those in relation to the free movement of services (C. Barnard, *op. cit.*, p. 587-588). See also A. Landsmeer, 'Movement of Capital and Other Freedoms', *Legal Issues of Economic Integration* 28(1): 57-69, 2001.
620 Within a common market framework, the difference between current payments and capital is that that the former are "transfers of foreign exchange which constitute the consideration within the context of an underlying transaction" whereas the later amounts to "financial operations essentially concerned with the investment of the funds in question rather than remuneration for service". Case 308/86, *Ministère Public v. R. Lambert* [1986], ECR 4369, para. 10. Accordingly, Partner States have

While waiting for the development of EACJ case law in the domain of the free movement of capital, it could be useful to reiterate that property purchases and investment, currency and other financial interactions, loans, investments in companies, and 'golden share' cases are the five areas of predilection where national rules usually fall short concerning provisions on the free movement of capital as observed from the growing ECJ case law.[621]

agreed that residents in their territories should be allowed to acquire and transfer foreign exchange to obtain goods or services in other Partner States. The distinction between capital and current payments is very crucial since not all capital movements have so far been liberalized in the EAC. Therefore during this transitional period, an operation may suffer restrictions depending on whether or not it is classified as capital movement or simply a current payment made to exercise other freedoms, namely the free movement of goods, services and persons. The *Luisi and Carbone* case gives a good example of such a scenario.

[621] C. Barnard, *op. cit.*, pp. 594-596. The author provides the following key case law to illustrate this conclusion. For instance, in Case C-302/97, *Klaus Konle v. Republic of Austria* [1999] ECR I-3099, para. 39 where the ECJ held that an Austrian national regulation to require prior authorization for the acquisition of land was, based on its very purpose, a restriction on the free movement of capital. This is the same with indirect discrimination found in a rule requiring residence in the territory of a country to be able to acquire agricultural property (Case C-370/05, *Uwe Kay Festersen*, [2007] ECR I-1129, para. 22). As far as land is concerned this kind of issue is likely to occur in the EAC as article 15(1) of the EAC-CMP leaves it to the Partner States' national policies and laws to govern access to and the use of land and premises. Regarding cross-border currency and financial transactions, the ECJ has ruled that the national requirement of a prior administrative authorization to export coins, banknotes, or bearer cheques would render the free movement of capital illusionary (Joined Cases C-358/93 and C-416/93 *Aldo Bordessa and Vicente Marí Mellado and Concepción Barbero Maestre* [1995] ECR-I361 para. 25). In the *Trummer and Mayer* case (para. 26) the court held that the prohibition of the registration of a mortgage in the currency of another EU Member State was 'liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of the right which constitutes a component element of the free movement of capital and payments'. In the area of loans, the ECJ considered as an obstacle to the free movement of capital (bank loans) the requirement for a bank to be located in its territory in order to grant the State's interest subsidy to the recipients of a loan residing in the territory of that very country. The court held that such a requirement would dissuade the person concerned from approaching banks established in another Member State (Case C-484/93, *Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955, para. 10). The case C-531/06, *Commission v. Italy (Pharmacists)* [2009] ECR I-4103 provides an eloquent example of how national rules may restrict the free movement of capital in the area of investments in companies and shares. Here it concerned national rules requiring members of companies and firms operating pharmacies to be pharmacists which were declared to be an impediment to the free movement of capital as they prevented investors from other EU Member States who are not pharmacists from acquiring stakes in companies and firms of that kind. Finally, regarding the 'Golden Share' cases, the obligation to seek authorization from the State prior to holding more than a certain number of shares constituted a restriction on the free movement of capital (Case C-367/98, *Commission v. Portugal* [2020] ECR I-4731; case C-483/99, *Commission v. France* [2002] ECR-4781; etc.). Also the rule giving public shareholders the right to participate on the board of directors in a more significant way than their status as shareholders would normally allow was considered as a restriction on the free movement of capital (Joined Cases C-463/04 and 464/04, *Federconsumatori v. Commne di Milano* [2007] ECR I-10419). Golden share cases usually involve "newly privatized companies in sensitive sectors such as energy where the state's golden share enables it to retain a degree of influence over the activities of the company" (C. Barnard, *op. cit.*, p. 589)

However, it is striking that unlike other community freedoms that are enjoyable only by the nationals of Partner States, the free movement of capital applies to every person who resides in the territory of a Partner State.[622] This includes, of course, a state's own nationals, and any other legal or natural person legally living in the territory of a Partner State.

In this regard, the EAC-CMP prohibits any form of discrimination based on nationality, the place of residence or the place where the capital is invested.[623] While discrimination based on nationality and the place of residence means that any person of any nationality residing in the territory of the EAC is allowed to move capital within the community, it is not clear what the discrimination based on "the place the capital is invested" could entail. Of course, in the light of the above, it is obvious that this provision advocates the movement of capital from the territory of a Partner State to the territory of any other Partner State without discrimination. But what is not clear is to ascertain whether this provision could be construed as compelling Partner States not to hinder the movement of capital when their residents want to invest even in a third country (a case of EAC outward FDI). At first sight the response seems to be negative as one could correctly wonder why the EAC could allow such a situation that appears to be contrary to the common market's aim of creating wealth within the community.

However, the reading of paragraphs (f) and (g) of article 28 of the EAC-CMP could provide a possibility to think otherwise. In allowing, among others, foreign residents in the community to repatriate the proceeds from the sale of assets or to make other transfers and payments related to investment flows, it makes sense to infer that the free movement of capital - within the terms of the EAC-CMP – entails that capital is also free to leave the community. The confinement of the free movement of capital only to intra-EAC operations would affect both inward and outward investment flows in the region. Obviously such a provision would be contrary to the general expectation of EAC Partner States which all depend on the attraction of FDI to sustain their national economic development agendas. The free movement of capital between EAC Partner States and third countries would be beneficial in some respects. It strengthens the control of capital towards third countries as investors would not attempt to enter or exit the community market via the most liberal jurisdiction to access their target Partner State[624]. Simply because

[622] Article 24(1)(a) of EAC-CMP.
[623] Article 24(1)(b) of EAC-CMP.
[624] J. Snell, 'Free Movement of Capital: Evolution as a Non-linear Process' in Paul Craig and Grainne de Burca (eds), *The Evolution of the EU*, Oxford, Oxford University Press, 2011 cited by C. Barnard, *op. cit.*, p. 584.

capital would enter or exit the EAC common market freely from any third country, it could discourage any attempt at fraud by investors as they would know that they may enter or exit the market at any time. But if this free movement is not allowed, then investors from third countries would be tempted to bypass this obstacle by entering the market of the most protected Partner State through the most liberalized Partner State, especially as there is so far no harmonizing directive on capital operations in the EAC. With help of the common market, the investor who enters the territory of one Partner State does have access to the whole EAC market, including the market of the Partner State that those investors wanted to reach. In doing so, they may reach the same result despite the existence of provisions limiting the free movement of capital between Partner States only.

Therefore, it sounds logical to interpret the fact that the EAC legislator decided to open the capital market to third countries.[625] Furthermore, the drafting of article 25(d) seems to promote the view that the free movement of capital is also applicable to third countries.[626] It follows that since the free movement of capital is allowed between EAC Partner States and third countries, the former would restrict this free movement if they decide to take financial sanctions against such third countries. The free movement of capital between EAC Partner States and third countries would certainly foster the possibility of business expansion for EAC companies or firms to non-EAC countries. In other words, it could be asserted that this freedom encourages FDI outflow from the EAC. When EAC companies and firms invest abroad, it increases the bloc's competitiveness.[627]

In any event, States agreed to progressively remove all restrictions on the free movement of capital that existed upon the entry into force of the EAC-CMP and not to introduce new ones according to the schedule on the removal of restrictions on the free movement of capital.[628]

---

[625] Let us note that in the EU the free movement of capital is also open to third countries but its implementation is closely regulated with strong safeguard measures. C. Hjalmroth and S. Westerberg, 'The Contribution of trade to a new EU growth strategy: Ideas for a more open European Economy (Part 1 A Common investment policy for the EU), Report, National Board of Trade, p. 11(29) online at http://www.kommers.se/upload/ Analysarkiv/Arbetsomr percentE5den/WTO/Handel percent20och percent20investeringar/A percent20common percent20investment percent20policy percent20for percent20the percent20EU.pdf accessed on 19 June 2014.
[626] Article 25(1)(d) reads "The free movement of capital may be restricted upon justified reasons related to …(d) financial sanctions agreed to by the Partner States".
[627] C. Hjalmroth and S. Westerberg, *op. cit.*, p. 8(29).
[628] Article 24(2) of EAC-CMP. According to the agreed schedule, the very last restriction on the free movement of capital should be removed by 31 December 2015.

So far, however, not only are restrictions which existed prior to the signature of the EAC-CMP still in place, but new restrictions have been introduced by Partner States without even respecting the required notification when such a new restriction is introduced.[629]

4.4.4. Safeguard measures and exceptions to the free movement of capital

While EAC lawmakers supported the free movement of capital, they did not ignore the volatility of this sector and the dramatic impact that a very slight disfunctioning could have on the Partner States' national macro-economy. That is why a Partner State is allowed to take the necessary steps when the free movement of capital disturbs the functioning of its financial markets or when its balance of payments is seriously threatened with difficulties.[630]

Furthermore, when an intervention in the foreign exchange market by a Member State seriously distorts the conditions for competition among Partner States, other Partner States are entitled to take any necessary measures to counter the consequences of such an intervention. But a measure taken in this context should be temporary, proportional, reasonable and should not discriminate among Partner States in favour of third parties.[631]

[629] The EAC Common Market Scorecard 2014 identified a number of new restrictions which have been introduced, for instance, by Rwanda, Tanzania and Uganda on the free movement of capital after the entry into force of the EAC-CMP. It is also reported that out of 20 operations pinpointed by the EAC-CMP to be liberalized according to the free movement of capital, no EAC Partner State has succeeded in fully liberalizing all of them. Kenya, the best performer in this domain, has liberalized 17 operations out of 20. The three remaining operations are restricted by all EAC Partner States. Those restrictions are related to the free movement of inward investments consisting, among other things, of the requirement of minimum capital for investors from other Partner States or the shareholding of nationals in some businesses before they start operating in their territories, as well as the lack of a legal framework for the sale or issuing of derivative products locally by non-residents and abroad by residents. Tanzania and Burundi are the countries where restrictions are still preponderant on the free movement of capital as only four operations are free out of the twenty (EAC Common Market Scorecard 2014, pp. 8-15). This is understandable because Burundi and Tanzania subscribed for the longest period of time to fully comply with the provisions related to the free movement of capital. Burundi's compliance period runs until the end of 2014 while Tanzania's is until 31 December 2015. Before this date, Tanzania is still allowed to retain some restrictions in areas where the time for the compliance process is still running. But other Partner States whose compliance time-limit has elapsed or which reported that no restriction existed in their legal framework against the free movement of capital should now be obliged to comply with the EAC-CMP provisions.

[630] Article 26(1) and (3) of EAC-CMP.

[631] Article 27(1) of EAC-CMP. This provision does not however provide for a specific timeframe. The lack of such specification may tempt Partner States to apply a broad interpretation of a provision like that of Article 26(2) where a 'strictly limited period' could be understood as meaning as long as the consequences of such intervention might last. The reading of paragraphs 5 and 6 of article 27 seems to indicate that the temporariness of safeguard measures has been discussed during the draft-

There are no clear indications as to the nature of the safeguard measures that a Partner State may take pursuant to article 26 EAC-CMP except that in doing so the Partner State in question might 'accord priorities to activities which are essential to its economic stability' and that those measures should not be 'adopted or maintained for the purpose of protecting a particular sector' in violation of the EAC-CMP.[632] However, once a Partner State takes a measure to safeguard its economy from any disturbance or distortion in the balance of payments that the free movement of capital would cause, it has the obligation to send a notification to both the EAC Secretariat and to other Partner States.

In addition to safeguard measures that could impede the free movement of capital, a Partner State is also permitted, due to justified reasons, to restrict this freedom on the ground of prudential supervision, public policy considerations, money laundering, and financial sanctions agreed among them provided that the Secretariat and the other Partner States are informed[633]. But the EAC-CMP has raised the bar for the use of restrictions based on any such exception as the Partner State concerned has to 'furnish proof that the action taken was appropriate, reasonable and justified'.[634] As indicated above, a Partner State that takes a measure pursuant to article 25(1) of the EAC-CMP only has an obligation to inform.[635]

Then some questions arise about the relevance of the requirement of the appropriateness and reasonableness of that measure. One may wonder who is entitled to assess whether or not a Partner State's measure impeding the free movement of capital was really justified, appropriate and reasonable. Thereafter, a legitimate question which follows is what would be the sanction should such a measure be found not to fulfil these characteristics. One thing is certain: there is no clear regulation on this as the EAC law stands now. Unless a case is filed before the EACJ,

ing phase of the EAC-CMP but Partner States finally decided to entrust the Council with the task of monitoring the necessity of their enforcement. However, the record of the Council in following up the implementation of other freedoms does not give room to believe that it would behave better in relation to the free movement of capital. This is so because the free movement of capital seems to be such a delicate issue as, even in the context of the EU, the ECJ has sometimes chosen to be silent and the EU Commission, on occasions, has opposed liberalization (Snell, *op. cit.* cited by C. Barnard, *op. cit.*, p. 581).

[632] Article 27(2) and (3) of EAC-CMP.

[633] Article 25(1) of EAC-CMP

[634] Article 25(2) of EAC-CMP.

[635] It appears, however, that except for Burundi, all other Partner States have taken measures in the past to restrict the free movement of capital either on the ground of prudential supervision, public policy or anti-money laundering without taking care of informing either the Secretariat or the other Partner States (EAC Common Market Scorecard 2014, p. 44-54). It is worth noting that no Partner State has taken a restrictive measure against the free movement of capital on the ground of financial sanctions.

the full implementation of the free movement of capital would depend, like other community freedoms, on the goodwill of the Partner States.

4.5. CONCLUDING REMARKS

The analysis of the EAC-CMP shows that the free movement of goods, persons, services and capital is well enshrined in the EAC. The legal framework is robust and most of the provisions are relevant for the attainment of the goals assigned to this organization. However, the biggest issue remains the non-compliance of Partner States with the regional commitments. This creates a cacophonic situation in which each Partner State implements only the provisions that appear appropriate for it. This situation is encouraged by the lack of a strong institutional framework at the regional level to follow up the implementation of the EAC-CMP.

Of course, the absence of an adequate regional institutional framework should also be seen as additional evidence of the Partner States not implementing both the Treaty and the EAC-CMP as the establishment of any regional institution rests upon the discretionary powers of the Summit.[636] In this regard, Partner States' reluctance to fully operationalize the EAC-CMP reflects a profound governance deficit at the national level. Indeed, the EAC being a juridical person, an international organization, in which Partner States play a preponderant role in its functioning, it is likely that the attitude of the latter toward good governance would definitely impact the governance of its institutions.

Yet good governance is crucial for the smooth implementation of the freedoms promoted by the EAC-CMP. This can be seen with the role given to good governance principles for the harmonization of the application of common market freedoms among Partner States. Indeed, the EAC-RoO, EAC-FMP, and EAC-FMW, inter alia, clearly express how the observation of good governance principles such as transparency, accountability, and properness are paramount for a well-functioning common market.

Legally speaking, nothing could explain the reluctance of Partner States to fully and directly implement the provisions of the Treaty of Arusha and its common market protocol. It would be tempting to think that as some EAC Partner States have a dualist legal system, this could be a reason why the implementation of the EAC-CMP is problematic. But this argument cannot hold true when faced with article 8(4) of the Treaty of Arusha that lays down the precedence of EAC laws over

[636] Article 9(2) of the Treaty of Arusha.

national ones. This provision permanently discards any excuse or conflict that would exist between the EAC and national laws. In reality this article consecrates the codification of the principles of the supremacy and direct effect of EAC law. In this regard, it has shut the door to any potential conflict that would take place in a purely dualist system (common law) where the supremacy of an incorporated treaty provision is only applicable vis-à-vis prior national laws, and does not concern any subsequent legislation.[637] Hence, according to article 8(4) of the Treaty of Arusha, EAC law would remain supreme "whether it pre-dates or post-dates a contrary domestic law".[638]

It is certainly in consideration of this reality that some Partner States are making more efforts in order to drive the EAC law from the books into practice. Fast-tracking projects initiated by Kenya, Rwanda and Uganda under the Northern Corridor layer are good examples of the dynamism needed to take the EAC to the next level in the direction of a fully-fledged common market. The enhancement and enlargement of initiatives such as the EAC-SCT, the single tourist visa and the travel pass, together with a further relaxation of the regulations on the enforcement of the right to establishment and the full liberalization of the movement of capital should be the priority on the EAC integration agenda for the attraction of FDI into the region. Of course, as suggested above, good governance should be the core component of the operating system of the entire EAC legal and institutional framework.

[637] R.F. Oppong, 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa', *Fordham International Law Journal*, Vol. 30, 2006-2007, p. 303-304.
[638] *Idem*, p. 304.

Chapter V

FDI inflow in the EAC common market and its incidence on the economic development

5.1. INTRODUCTION

The East African Community (EAC) has an affirmed goal of promoting a balanced and sustainable economic development for all Partner States.[639] The common goal to attain regional economic development can be understood as a commitment by the EAC to work towards the economic development of each Partner State, since logically regional development must be seen as the sum of each Partner State's economic development. In this perspective, the development needs of each Partner State have to be adequately assessed and effectively addressed by regional policies and regulations. Among these policies and regulations, those related to Foreign Direct Investment (FDI) inflow are very important since attracting FDI lies at the heart of Partner States' strategies for generating revenues to finance their development projects.

After the previous chapters where attention was given to regulations on FDI both at the national and regional level in the EAC, this chapter intends to address the key question of why FDI matters as a source of financing. What is the impact of FDI attraction on Partner States' economic development? Are there any conditions to be met for a more impactful FDI? What are the key determinants of FDI in the EAC and what is the stance of each EAC Partner State vis-à-vis each of these determinants? Are EAC Partner States economically equal in the intra-EAC competition for the inflow of FDI? What would happen when one or two Partner States attract disproportionately more FDI than others?

The responses to these questions will shed light on the reason why Partner States are constantly reviewing their own laws and institutions in order to become more competitive and fit for their fratricidal competition over the inflow of FDI. This chapter highlights the persisting threat of collapse that faces the EAC due to the inadequate regulation of FDI inflow.

5.2. PIVOTAL ROLE OF FDI IN THE ECONOMIC DEVELOPMENT OF EAC PARTNER STATES

5.2.1. Changing paradigm: from foreign aid to FDI for external financing

Generally, developing countries are characterized by a lack of sufficient resources to finance their development projects.[640] To fill the gap between available domestic

[639] See Treaty of Arusha, para. 15 of the preamble and article 5 (2).
[640] S. Kosack and J. Tobin, 'Funding Self-Sustaining Development: The Role of Aid, FDI and Government in Economic Success', *International Organization 60*, Winter 2006, p. 205.

resources and development needs, these countries – including all the EAC Partner States – heavily depend on the goodwill of external partners. Since the end of World War II, Official Development Assistance (ODA) has been the most important channel through which high-income countries contribute to the financing of developing countries in order to combat poverty.[641] But, far from being a mere philanthropist enterprise, ODA has been used for a very long time as a foreign and commercial policy instrument by donor countries.[642] In this regard, it is often tied up with some conditions that the recipient countries need to fulfil beforehand. The conditions are manifold and mainly depend on the donor's expectations and priorities.

Theoretically, two criteria should be used for the distribution of ODA among developing countries: the depth of poverty and the effectiveness of the recipient country's policy to reduce poverty.[643] But the fact remains that donors have always had complete discretion in providing and withdrawing their ODA to/from any recipient country. This discretion explains the uneven distribution of the amount of ODA from a given donor to different recipient countries.[644]

An assessment of the effectiveness of aid in developing countries has revealed a lukewarm result.[645] Neither the donors nor the recipients are completely satisfied.

---

[641] Traditionally, ODA is delivered in three ways. The first way is through grants that are given to developing countries. Grants do not need to be repaid. The second means consists of concessional loans, which have to be repaid but at lower interest rates and over longer periods than commercial bank loans. The third way is made up of contributions by high-income countries to multilateral institutions that promote development such as the United Nations, the International Monetary Fund, the World Bank, and regional development banks. Grants represent more than 95 percent of ODA from most donor countries. See T.P. Soubbotina and K.A. Sheram, *Beyond Economic Growth: Meeting the Challenges of Global Development*, Washington DC, The World Bank, 2000, p. 79.

[642] Analysts say that aid from big countries like the US, France, or Germany is always politically motivated while smaller countries like the Netherlands, Denmark or Sweden do provide their aid on a humanitarian basis. See S.J. Tisch and M.B. Wallace, *Dilemmas of Development Assistance: The What, Why, and Who of Foreign Aid*, Oxford, Westview Press, 1994, pp. 53-54; V. Vitalis, 'Official Development Assistance and Foreign Direct Investment: Improving the Synergies', *Round Table on Sustainable Development*, 2001, p. 4. See also P. Hjertholm and H. White, 'Foreign Aid in historical perspective: Background and trends', in F. Tarp (Ed.), *Foreign Aid and Development: Lessons learnt and directions for the future*, London, Routledge, 2000, p. 69-70.

[643] UN General Assembly, *Report of the High-level Panel on Financing for Development (2001)*, A/55/1000, p. 8 (hereinafter UN General Assembly 2001).

[644] For instance in 1999, ⅓ of all US assistance went to only three countries: Israel, Russia and Egypt. See V. Vitalis, *op. cit.*, p. 3.

[645] On the ambiguous impact of foreign aid on a recipient country's economy, see *inter alia* B. Fayissa and M.I. El-Kaissy, 'Foreign aid and the economic growth of developing countries (LDCs): Further evidence', *Studies in Comparative International Development*, Vol. 34, Issue 3, Fall 1999, pp. 37-50; L. Gong and Heng-fu Zou, 'Foreign Aid Reduces Labour Supply and Capital Accumulation', *Review of Develop-*

On the one hand, donors usually complain about the inability of recipients to deliver expected outcomes.[646] On the other hand, recipient countries justify their poor performance by the fact that ODA is tied up with conditions that do not necessarily address the recipient country's needs and priorities.[647] In fact, ODA is rarely about the recipient country's priorities, but more often about the interests of the donors.[648]

This shared dissatisfaction motivated both donors and recipients to extensively rethink and explore avenues for a new approach to development financing.[649] Naturally, the potential for a private flow of capital had to be seriously explored. In this regard, FDI turned out to be the best alternative compared to portfolio investment, especially because of the extreme volatility of the latter.[650]

As a source of financing, a number of reasons advocate in favour of FDI. From the donor countries' perspective, a greater part of FDI inflow in developing countries originates from high-income countries, just like ODA, which gives FDI

ment Economics, Vol. 3, N° 1, 2001, pp. 105-118 and H. Hansen and F. Tarp, 'Aid Effectiveness disputed' in F. Tarp (Ed.), *op. cit.*, pp. 78-99.

646 See for instance P. Hjertholm and H. White, 'Survey of Foreign Aid: History, Trends and Allocation', *Foreign Aid and Development: Lessons of Experience and Directions for the Future*, Discussion Papers, 1998, p. 11.

647 T.P. Soubbotina and K.A. Sheram, *op. cit.*, p. 80. See also D. Ehrenfeld, 'Foreign Aid Effectiveness, Political Rights and Bilateral Distribution', *Journal of Humanitarian Assistance*, 1 February 2004, online at http://sites.tufts.edu/jha/archives/75 accessed on 26 August 2014.

648 Especially bilateral aid is more motivated by the donor's economic and strategic interests. In general, donor countries require, request or expect some gains in return for the funds that they provide. D. Ehrenfeld, *op. cit.* In the EAC, foreign aid has been used as a punishment stick to obtain some countries' compliance with donors' foreign policy. For instance, certain donors, including the Netherlands, suspended Rwanda's foreign aid due to a UN report accusing Rwanda of supporting a rebel group in eastern DRC. See BBC, 'UK and the Netherlands withhold Rwanda budget aid', online at http://www.bbc.com/news/world-africa-19010495 accessed on 26 July 2014. Also the US, Norway and Denmark cut their aid to Uganda when the president of this country promulgated an anti-gay bill. See M. Plaut, 'Uganda donors cut aid after president passes anti-gay law", *The Guardian*, online at http://www.theguardian.com/global-development/2014/feb/25/uganda-donors-cut-aid-anti-gay-law accessed on 26 August 2014.

649 Some donors substantially cut their ODA especially to 'ineffective' recipients while others simply chang their delivery options. Consequently many ODA recipient countries have experienced serious cuts in their ODA flows. See Executive Committee on Economic and Social Affairs of the United Nations Secretariat, 'Towards a New Aid Compact (ECESA/01/1), United Nations, New York, 20 June 2001, table 3 cited by V. Vitalis, *op. cit.*, p. 11. For more details about foreign aid, see G. Mavrotas (Ed.), *Foreign aid for development: Issues, challenges and the new agenda*, New York, Oxford university Press, 2010.

650 FDI was already mentioned as one of the most preferred sources of development financing by the UN High-level Panel on Financing for Development (HPFD) in 2001. Referring to portfolio investment, the panel members deplored the fact that "countries with large foreign debts, particularly short-term debts and private sector debts denominated in foreign currencies, proved vulnerable to crises, as herds of investors fled in panic". UN General Assembly 2001, p. 47.

providing countries a certain margin of control. But their discretionary power is substantially eroded as they do not allocate FDI to developing countries as they do with ODA. FDI is economically motivated, which confines the investor's home country to a purely advisory role as the decision whether or not to invest in a developing country rests with the investor, and this decision is generally based on economic calculations. Foreign investment is a private business which is managed accordingly without a possibility for the host country to misappropriate the funds. In this way, the host country might divert taxes paid by the foreign investor but could hardly impede the positive effects expected from FDI, especially regarding human capital development, technological spillover and large-scale production. Thus, unlike ODA whose effectiveness is compromised by corruption and embezzlement, the results of FDI would not be equally affected. But this requires the host country not to hinder the execution of FDI projects. The most dramatic tools that the host country might use in interfering with the spillover effects of FDI could be the enactment of laws, rules and policies which are hostile to FDI. But, the possibilities of this occurring are very slight since most developing countries are strongly committed to be as less dependent on ODA as possible.[651]

From the recipient countries' perspective, FDI offers the most affordable alternative to ODA as the FDI host country would enjoy a very big margin in exercising its sovereignty in erecting an adequate framework for FDI and in channelling FDI in its national priority areas. Unlike ODA whose provision or withdrawal depends on the sole discretion of the donor country, the attraction of FDI depends to a large extent on the host country's economic and regulatory potential.[652]

The emergence of FDI as a substitute, an alternative or a complement to ODA was even strengthened by figures that demonstrated that while ODA remained almost unchanged in the 1990s, the flow of foreign private capital from high-income countries to developing countries had quadrupled to the extent that it overtook the amount of ODA between 1990 and 1994.[653]

[651] This is even evidenced by the widespread reforms in which countries all over the world have initiated in order to improve their FDI regulatory and institutional frameworks. See the various Doing Business reports at http://www.doingbusiness.org/reports.
[652] A country with strong economic factor endowment coupled with an effective regulatory framework is likely to attract a higher amount of FDI without increasing its foreign debt. T.P. Soubbotina and K.A. Sheram, *op. cit.*, p. 82. In addition, the "flows of FDI are less susceptible to sudden reversal than flows of short-term portfolio capital" and foreign aid. See UN General Assembly 2001, p. 45.
[653] T.P. Soubbotina and K.A. Sheram, *op. cit.*, p. 81.

However, this revolution did not occur in Africa. Nevertheless, the flow of FDI in Africa is increasing so dramatically that there are strong reasons to believe that foreign aid to Africa will soon be surpassed by foreign investment in Africa.[654]

The progressive shift from ODA to FDI as the main source of external financing for African countries, and for EAC partner States in particular, is profoundly transforming the landscape of international relations. Although, technically speaking, FDI and ODA may not be perfect "substitutes in the development of the world's poorer countries",[655] one thing appears to be undisputed: FDI inflow is increasingly becoming "the single biggest source of capital for developing countries and a critical input for technology transfer in developing country firms".[656] It is no wonder that a striking majority of development partners are interested in this doctrine, recipient countries being at the forefront. The vast majority of developing countries are trying to ensure that their national framework is ready and competitive enough to grasp as many benefits from this new Eldorado as possible. Therefore, there is no doubt that whatever the results, attracting FDI is set to form the epi-

[654] This was acknowledged by the US President, Barack Obama, in his remarks at the Business Leaders Forum in Tanzania on 1 July 2013 where he highlighted the increasing role of foreign investments in Africa. See The With House, 'Remarks by President Obama at Business Leaders' online at http://www.whitehouse.gov/the-press-office/2013/07/01/remarks-president-obama-business-leaders-forum last accessed 13 June 2014. However, it should be noted that in the meantime ODA increased in 2013 to reach its highest level in history with the United Kingdom being the first ever G7 member to reach the UN target of 0.7percent ODA/GNI. See OECD, 'Aid to developing countries rebounds in 2013 to reach an all-in time high', online at http://www.oecd.org/newsroom/ aid-to-developing-countries-rebounds-in-2013-to-reach-an-all-time-high.htm, accessed on 26 August 2014. In 1969 the Pearson Commission recommended that high-income countries should allocate 0.7 percent of their Gross National Product (GNP) to ODA, which was endorsed in the Millennium Development Goals (MDGs). But despite this endorsement, only Denmark, Luxembourg, Norway, Sweden and the Netherlands have succeeded in meeting this target although the Netherlands fell below this level for the first time ever in 2013. Yet it is suggested that if all high-income countries could meet this 0.7 percent ODA/GNP target, it would allow developing countries to effectively develop. UN General Assembly 2001, p. 21.

[655] See Kosack and Tobin who state that "the conventional wisdom that aid and FDI are substitutes is wrong". They even emphasize that aid and FDI cannot even "be thought as complements". S. Kosack and J. Tobin, *op. cit.*, p. 237. While this opinion does not plainly appear in the HPFD report, in their appeal for more ODA, members of the panel have acknowledged that although the bulk of financial flows to developing countries are virtually certain to come from private sector sources in the future, international public finance would still be needed to initiate development in lower-income countries as "most of these countries cannot expect to attract much private sector finance". UN General Assembly 2001, p. 49.

[656] Robert Zoellick, the former World Bank Group's President, in a speech on 'Democratizing Development Economics' where he addressed members of the Georgetown community and in which he described the new open data initiatives at the World Bank and their implications for future research in development in 2010. The speech can be found at http://www.georgetown.edu/video/1242666717989.html accessed on 26 August 2014.

centre of national and international development policy-making for the coming decades.

5.2.2. Impact of FDI on the host country's economy

The impact of FDI on the host country's economic development is one of the most controversial discussions in the existing literature.[657] As far as developing countries like the EAC Partner States are concerned, two main trends need to be acknowledged in this debate.

The first lauds the conditionally positive impact of FDI on the host country's economic development, whereas the second warns against an overstatement of this impact.[658]

5.2.2.1. Benefits of FDI inflow for the host country's economy

A very large majority of the research is conclusive in that FDI inflow certainly has a positive impact on the economy of the host country. Using various samples and variables, several studies have tested, during different periods of time, the assumption that an inflow of FDI really impacts on the economic development of the host country. However, FDI proponents unanimously agree that the positive impact of FDI on the host country's economic development is not straightforward.[659] They have established that two main cumulative factors drastically decide the impact of FDI inflow on the host country's economic growth. One is the host country's trade orientation. The other is the "absorption capacity" of the host country to take advantage of the potential benefits of FDI.[660]

---

[657] As also acknowledged by many other authors, see *inter alia* R.E. Lipsey, 'Home- and Host-Country Effects of Foreign Direct Investment', in R.E. Baldwin and L.A. Winters (Eds), *Challenges to Globalization: Analyzing the Economics*, University of Chicago Press, 2004, p. 369 and F. Fortanier, 'Foreign direct investment and host country economic growth: Does the investor's country of origin play a role?', *Transnational Corporations*, Vol. 16, N°2, August 2007, p. 41.

[658] See inter alia M. Haddad and A. Harrison, 'Are There Positive Spillovers from Direct Foreign Investment? Evidence from Panel Data for Morocco' in *Journal of Development Economics*, Vol. 42, 1993, pp. 51-74; B.J. Aitken and A.E. Harrison, 'Do Domestic Firms Benefit from Direct Foreign Investment? Evidence from Venezuela', *The American Economic Review*, 1999, pp. 605-618; D. Rodrik, *The New Global Economy and Developing Countries: Making Openness Work*, Washington, John Hopkins University Press for the Oversees Development Council, 1999; and E.M. Truman, *How Far Have We/They Come? Performance Scorecard for Major Emerging Market Economics*, The Bretton Woods Committee, Scorecard Symposium, Washington, 19 April 2002.

[659] For instance Kurtishi-Kastrati recently stated in clear concluding remarks that: "The net benefits of FDI do not accrue automatically, and their importance differs according to host country and condition" (S. Kurtishi-Kastrati, *op. cit.*, p. 37)

[660] F. Fortanier, *op. cit.*, p. 47.

a) Host country's trade orientation

Two main trade strategies are generally compared when the impact of FDI on the host country's economic growth is addressed.[661] A country may use either an Import Substitution (IS) strategy or Export Promotion (EP).

IS is a strategy which is commonly used by countries with a protectionist mindset. Following this strategy, imports of foreign products are discouraged through trade restrictions including tariff and non-tariff barriers with the purpose of promoting the consumption of domestic products. Its implementation generally involves supporting the production or consumption of goods that do not require advanced technology,[662] such as basic food processing, textiles, etc.

In international trade, IS is used as a strategy for infant industries in a country to gain some level of maturity before they can be in a position to compete with foreign companies.[663] As such, in a modern economy IS should be understood as a transitory and temporary strategy towards trade openness.[664] However, some countries may still resort to IS for their expected short-term results. Since IS-oriented trade is closed to the external world, foreign investors circumvent trade barriers by incorporating their companies under the domestic law of the host country so that their products may enjoy equal treatment in that market.[665] But, as is generally

[661] See for instance V. N. Balasubramanyam, M. Salisu and D. Sapsford, 'Foreign Direct Investment and Growth in EP and IS Countries', *The Economic Journal*, Vol. 106, N° 434, January 1996, pp. 92-105; and see also S. Edwards, 'Openness, Trade Liberalization, and Growth in Developing Countries', *Journal of Economic Literature*, Vol. XXXI, September 1993, pp. 1358-1393. Yilmazkuday reminds us that three sources influence a country's economic growth. They are import substitution, exports and the increase in internal demand. In line with this it seems logical to consider the impact of FDI on the host country's economic growth within the framework of these two elements. While the increase in internal demand concerns the country's internal expenditures, import substitution and exports are related to international trade. H. Yilmazkuday, 'Export Promotion vs. Import Substitution', p. 3 online at https://www.academia.edu/1104964/EXPORT_PROMOTION_VS._IMPORT_SUBSTITUTION accessed on 26 June 2014.

[662] H. Yilmazkuday, *op. cit.*, p. 3.

[663] H. Yilmazkuday, *op. cit.*, p. 2.

[664] Between 1950 and 1982, however, the IS strategy was strongly advocated and globally supported by economists as a remedy for the lack of industrialization in developing countries and the growing gap between the rich and the poor. This theory held sway until the advent of the 1982 Latin American debt crisis that alerted decision-makers to the fact that inward-oriented policies were not conducive to economic growth. See S. Edwards, *op. cit.*, pp. 1358-1359.

[665] This kind of investment is called 'tariff jumping' FDI. But it is submitted that 'tariff jumping' FDI, commonly widespread among IS-oriented economies, could not have the same large magnitude as EP-oriented FDI "for the simple reason that it would be limited by the host-country market which induces it in the first place" especially because "the IS strategy, on both domestic investments and FDI, has been cut from the same cloth: protect your market and attract home-based investments to

known, the unavoidable corollary of protectionism is interventionism. The latter could be translated by some requirements that foreign investments need to meet before they can operate on the domestic market. The most well known could be the local component requirement in the investment project or entering into joint ventures with local companies or the host State itself on a compulsory basis. Empirical studies have shown that this kind of environment is not conducive enough for FDI to produce an added value to the host country's economic growth.[666]

serve that market". See V. N. Balasubramanyam and M. A. Salisu, 'Export promotion, import substitution and direct foreign investment in less developed countries' in A. Koekkoek and L.B.M. Mennes (Eds), *International Trade and Global Development*, London, Routledge, 1991, p. 192.

[666] According to Moran, previous studies that did not notice the positive impact of FDI on the host country's economic growth erred by not taking into account this country's trade orientation regime. For instance, he refers to the most critical of Harrison's studies published in 1993 and 1999 respectively on Morocco and Venezuela and from which Dani Rodrik drew the conclusion that FDI does not bring any special benefits for the host country's development. Moran asserts that these two studies covered a timeframe during which the concerned countries' trade was drastically closed. Had Harrison integrated the trade orientation variable in her equation, the result would have remained the same but the explanation would have made a big difference.. See T.H. Moran, 'How Does FDI Affect Host Country Development? Using Industry Case Studies to Make Reliable Generalization', in T.H. Moran, E.M. Graham and M. Blomstrom (Eds), *Does Foreign Direct Investment Promote Development?*, Washington DC, Peterson Institute for International Economics, 2005, p. 294-297. It should also be noted that although Harrison mentions the change in trade policy in Morocco starting in 1983, nothing is said about the impact that the trade policy orientation could have on the profitability of FDI for the host country's economy (M. Haddad and A. Harrison, *op. cit.*, p. 55-56). Referenced studies are those mentioned in footnotes under section 5.2.2.2. Moran's argument is a materialization, in concrete FDI projects, of the findings obtained a decade earlier by Balasubramanyam. But Moran's clarification now helps us to understand the enigmatic results obtained by Pan-Long Tsai in 1994 and Xiaoying Li and Xiaming Liu in 2005 (see P-L. Tsai, 'Determinants of Foreign Direct Investment and Its Impact on Economic Growth', *Journal of Economic Development*, Vol. 19, N° 1, June 1994, pp. 137-163; and X. Li and X. Liu, 'Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship', *World Development*, Vol. 33, N° 3, 2005, pp. 393-407). These two pieces of research, although carried out 10 years apart, aimed at addressing the enigmatic issue of the impact of FDI on the host country's economic growth. They basically used the same methods and techniques. They both covered the 1970s and 1980s and examined a relatively large number of countries. While Li and Liu investigated this impact on both developed and developing countries, Tsai only researched the latter. Tsai concluded his research by saying that:

…the experience of African countries in the seventies confirms the assertion of the dependency theorists. By contrast, in the eighties the African experience is more in agreement with the prediction of the modernization proponents. To sum, the findings of this paper suggest that the impact of FDI on economic growth might be overstated. (P-L. Tsai, *op. cit.*, p. 152)

For this author 'dependency theorists' (FDI sceptics) support the notion that FDI does not have a positive impact on the host country's economic growth, while concerning 'modernization theorists' (FDI proponents), Li and Liu made a similar observation with the following words:

"The test results suggest that endogeneity between FDI and economic growth does not exist for the whole sample period. Only from the mid-1980s, do FDI and economic growth become significantly complementary to each other and form an increasingly endogenous relationship." (X. Li and X. Liu, *op. cit.*, p. 404)

On the contrary, it has been demonstrated that countries with an EP-oriented trade policy benefit most from FDI inflow in their territories. This is an outward orientation where the country stimulates exports. Industries or companies are not primarily producing for the domestic market, but are rather targeting the global market. In this context, the market is self-regulating and, therefore, the host State does not need to intervene.[667] In order to be successful, fair competition is one of the key aspects since "exporters, facing the increasing competition, have to improve their technologies, their quality continuously".[668] As they are oriented towards a broader external market, EP economies are the preferred place for foreign investors. Therefore, such a trade environment not only attracts a high volume of FDI,[669] but it also allows FDI to flourish.[670] As a consequence, empirical research has endorsed the quasi-unanimity that FDI inflow in an EP-oriented host country positively impacts on the latter's economic growth.[671]

Both research projects observed the positive impact of FDI on the host country's economic growth only in the 1980s. In the 1970s, no interplay between the two elements was detected. The striking aspect concerning the results of these studies is not that they reached similar results (which is logical since they used basically the same methods concerning similar countries in almost the same period of time), but that they strongly confirm Moran's conclusion: trade orientation matters. This is so true that the similarity between these two studies goes further to the point in that both did not take into consideration the trade orientation variable. None of the research projects succeeded in finding a convincing explanation for the sudden impact noticed in the mid-1980s. Tsai thought it was a random non-objective observation, while Liu and Li seem elusive. Is it a coincidence that the authors of these two separate research projects report a visible positive impact of FDI on the host country's economic growth in the 1980s? This puzzle would be easily resolved if one would have borrowed a leaf from Edwards' paper. Edwards' paper informs us that the change from IS trade policy to a more open trade started globally sometime in 1982 (S. Edwards, *op. cit.*, p. 1352; see also M. Haddad and A. Harrison, *op. cit.*, p. 55). Obviously this is the period when most of the examined countries started to implement open trade (EP) policies. Therefore, it is quite clear that the impact of FDI on economic growth as observed in the mid-1980s by Tsai and Liu was not a coincidence. It was rather the result of the catalyst role of open trade (EP) introduced by the sampled countries in the same period of time. Of course, this connection does not question the validity of the results obtained in the studies conducted by these authors. On the contrary, it consolidates their results by providing a substantial explanation. Had Tsai, and Liu and Li integrated the 'trade orientation' variable in the equations of their respective research projects, their results would have been explained somewhat differently. While Li and Liu acknowledge the "increasingly endogenous relationship" between FDI and economic growth, the explanation thereof remains elusive, if not unrelated; Tsai would not have plainly concluded that: "… the debate between modernization and dependency theorists seems to be unnecessary, or it might be more ideological than practical".

[667] V. N. Balasubramanyam, M. Salisu and D. Sapsford, *op. cit.*, p. 93.

[668] H. Yilmazkuday, *op. cit.*, p. 9.

[669] V. N. Balasubramanyam and M. A. Salisu, *op.cit.*, p. 195.

[670] V. N. Balasubramanyam, M. Salisu and D. Sapsford, *op. cit.*, passim.

[671] In one of the leading research projects in this area, Balasubramanyam and Salisu concluded that:
…EP policy with its emphasis on neutrality of policy, the free play of market forces and competition provides an ideal climate for the exploitation of the potential of FDI to promote growth. The absence of artificial policy imposed barrier to trade promotes the efficient allocation of both imported

Like IS, EP is not just a slogan. A country does not proclaim that it is EP or IS-oriented. This is seen through its trade policies and regulations. Based on this, it is quite easy to affirm that all EAC Partner States are EP-oriented, at least between themselves. The East African Community Common Market Protocol (EAC-CMP) introduced an internal market free of restrictions. As extensively demonstrated earlier, EAC Partner States are working towards a fully-fledged market where the free movement of persons, goods, services and capital is the reigning principle. Partner States' investment codes are to some extent FDI-friendly.[672] Therefore, one could correctly state that - as far as trade orientation policy is concerned – EAC Partner States fulfil the basic condition for an FDI inflow to have a significant impact on their respective economic growth. But this assertion should be mitigated because although EAC Partner States have liberalized trade between themselves, it remains an economic area which is greatly protected from external (non-EAC member) market players.[673] In other words, like any other regional integration community, the Partner States have moved restrictions to their common borders. Furthermore, as analyzed in the previous chapter, the EAC-CMP seems to promote an IS trade policy. This can be evidenced by the core provisions of the EAC-CMP that only grant advantages and freedoms to EAC nationals or incorporated companies. Of course, this is a characteristic of all regional integration communities. But, the case of the EAC should be considered differently since it is a community of five developing countries without strong trade ties between them. Statistics show that all five members are still highly dependent on imports from non-EAC countries, which does not help their negative trade balance.[674]

In light of this, one may wonder whether trade restrictions applied at the EAC level against non-EAC investments might not bear the same consequences as those warned against by economists, i.e., an IS-orientated trade policy at the level of individual countries. It appears at first sight that this danger would be drastically mitigated by the bigger market and the various business potentials that the EAC

and domestic resources and the competition it engenders provides a powerful stimulus for investment in technology and human skills. [V.N. Balasubramanyam and M. Salisu (1996), *op. cit.*, p. 96]. See also M. Blomstrom and F. Sjoholm, 'Technology transfer and spillovers: Does local participation with multinationals matter?', *European Economic Review* 43 (1999), p. 922.

[672] This is evidenced by the increasingly growing FDI inflow in the quasi-total of EAC Partner States during the last few years.

[673] It should be reminded that "A trade regime could be fully liberalized and yet employ exceedingly high tariffs in order to encourage import substitution". See A.O. Krueger, *Foreign trade regimes and economic development: Liberalization attempts and consequences*, Cambridge, Ballinger Publishing Company, 1978, p. 89 cited by S. Edwards, *op. cit.*, p. 1364.

[674] Intra-EAC trade is ten times lower than the overall EAC trade with the rest of the world while the amount of EAC imports is slightly more than double the exports (2010). See EAC, *Investment Guidebook*, October 2013, p. 12 (hereinafter EAC Investment Guidebook 2013).

can offer as a whole.[675] Also the fact that each EAC Partner State is basically EP-oriented lessens the occurrence of a predominant IS policy at the regional level. The fact that there is so far no EAC common trade policy that could be analyzed to determine the type of trade regime that Partner States have agreed to follow at the regional level may support this postulate.

As much as FDI inflow would positively impact on the economic growth of an EP-oriented country, FDI proponents warn against that trade policy strategy and the fact that FDI would only positively interact in a conducive economic climate especially when the host country's economy has the required FDI-absorption capacity.

b) Absorption capacity of the FDI host country

For an FDI inflow to produce the expected positive impact on economic development, the host country has to meet a certain level of readiness in order to enable the absorption of all the wonders traditionally attributed to FDI inflow. For instance, it is widely acknowledged that FDI inflow is generally accompanied by the introduction of new technologies that foster large-scale production in the host country.[676] Therefore, some minimum conditions are required for a beneficial operationalization of FDI. Those minimum thresholds are badly needed in certain areas such as technology, human capital, financial markets, and the institutions in the host country.

As far as technology is concerned, the gap between the technology used in the host country and that brought by the FDI company should not be too great. Otherwise, FDI cannot have a significant impact on the host country's economy in terms of a technological spillover effect. A technological gap matters concerning some important aspects including *inter alia* the existing facilities or infrastructures in the host country.

[675] In the early days of EU enlargement the size of the market and the growth potential were the main factors that attracted FDI. A.E. Scaperlanda, 'The EEC and US foreign investment: some empirical evidence', *Economic Journal*, Vol. 77, N° 305, March 1967, pp. 22-26 and G. Hufbauer, 'The multinational corporation and determinants of foreign direct investment', in P.B. Kenen (Ed.), *International Trade and Finance: Frontiers of Research*, London, Cambridge University Press, 1975 cited by V.N. Balasubramanyam and M. Salisu (1991), *op. cit.*, p. 192.

[676] See for instance M. Blomstrom and F. Sjoholm, *op. cit.*, p. 916; A. Kokko, 'Technology, market characteristics, and spillovers', *Journal of Development Economics,* Vol. 43, 1994, p. 279; A. Kokko, R. Tansini and M.C. Zejan, 'Local Technological Capability and Productivity Spillovers from FDI in the Uruguayan Manufacturing Sector', *The Journal of Development Studies*, Vol. 32, n° 4, April 1996, p. 604; and M. Haddad and A. Harrison, *op. cit.*, p. 52.

The global use of the internet could be considered as a good illustration. While access to the internet is increasing worldwide, it is noteworthy that access to a reliable high-speed internet is still not possible in some areas, especially in developing countries including some of the EAC Partner States. Thus, a company whose business relies mainly on a 3G mobile internet connection to produce its optimum results would hardly operate in a country where this technology has not yet been deployed. However, despite not having the appropriate technology, if this prospective FDI host country really appears to present a potential for attractive net profits for the foreign investor, the latter could either try to adapt its operations to the existing infrastructure or to build a suitable infrastructure for its functioning. But it is quite clear that a foreign investor's choice would be easier if there were two host countries: one with 3G internet deployment and the other without such technology.

The readiness of the host country to absorb FDI technology is critical regardless of the type of the intended investment. Except for brownfield investments, not only an appropriate existing technological infrastructure would be needed but also domestic companies in the host country should already be using technologies similar to the ones used by the FDI's parent company. This presents the advantage that an FDI enterprise would find that prospective employees in the host country are already somehow accustomed to the kind of technology that it brings. The availability of already qualified manpower in the host country would definitely facilitate the settlement of an FDI enterprise as instead of starting everything from scratch, the latter would simply upgrade the knowledge and skills of the local manpower through in-house or any other cost-effective training. For the host country, the fact that domestic companies are already using or are accustomed to technologies similar to those brought by FDI could be very positive as it would foster competition between domestic and foreign companies. This competition would lead to a constant improvement of the technological capital of each of the competitors, which would definitely resonate in the host country's economy. Also a small or non-existent technological gap between domestic and foreign investors in the host country could lead to a quality supply relationship between the two.[677]

[677] This applies especially when FDI does not compete but rather complements domestic investments in the sense that, for instance, what a local investor produces is needed by the foreign investor to produce the final goods. Or vice versa. But when the technological gap coincides with the fact that foreign companies have big shares of the market, it leads to the crowding out of domestic companies (A. Kokko, *op. cit.*, p. 290). However, as correctly pointed out by Haddad and Harisson, "foreign investment may transmit few benefits to domestic firms" if the technological gap is too small; it should be reminded that this small gap would trigger high competition between the two categories of firms, which would benefit the market. M. Haddad and A. Harrison, *op. cit.*, 67.

Regarding human capital, literacy is very crucial for the impact of FDI on the host country's economic growth.[678] As said above, FDI is usually accompanied by new technologies. Yet, the use of new technologies requires a basic literacy level in order to fully benefit from them.[679] Literacy is not only required to operate complex technological machinery or software,[680] it is also needed to carry out some fundamental tasks such as communication within the firm. Without a sufficient "threshold stock of human capital" able to be effectively employed by the foreign investor, the latter might not be attracted. If they are still attracted, it is obvious that the host country's economy would suffer as the foreign investors would want to import qualified human capital from abroad. Or if they are constrained in one way or another in working with unready domestic manpower in the host country, the quality of the service or product concerned would be poor. But since foreign investors may want to put competitive quality products on the market, they would need to train the available domestic workforce at an extra cost, which ultimately increases the cost of doing business in that particular host country. In the end, it is the economic growth of such a host country that would be negatively affected.[681]

Another element in relation to the FDI absorption capacity of the host country is the development of its financial market. The immediate link between FDI inflow and the host country's financial market cannot be seen at first sight, especially when it relates to investment in the production of goods or service supply.[682] But it has been successfully established that, as far as the impact of FDI inflow on the host country's economic growth is concerned, the level of financial market devel-

[678] E. Borensztein, J. De Gregorio and J-W. Lee, *op. cit.*, p. 123.

[679] In their research Borensztein and De Gregorio used secondary school education as the measure of human capital. They found for instance that:
Countries in the group with the highest levels of FDI and human capital grew, on average, by 4.3 percent a year during sample period 1970-89. In contrast, countries at the other end of the spectrum, those with the lowest levels of FDI and human capital grew only by 0.64 percent on average. The figure also shows that, for a given level of human capital, an increase in FDI raises the growth rates of per capita income, except for economies with the lowest level of schooling. (E. Borensztein, J. De Gregorio and J-W. Lee, *op. cit.*, p. 127).

[680] The interplay between enrolment in a secondary school and imports of machinery was found to have a positive impact on the economic growth of the countries concerned. P. Romer, 'Idea gaps and object gaps in economic development', *Journal of Monetary Economics,* Vol. 32, 1993, pp. 543-573.

[681] For further details on the role of human capital in the determination of an FDI impact on the host country's economic growth, see X. Li and X. Liu, *op. cit.*, 393-407; J.R. Markusen and A.J. Venables, *op. cit.*, pp. 335-356;

[682] Most of time, this kind of investment involves international bank transfers from the foreign investor's home country to the host country. And bank transfers do not necessarily need the existence of a financial market in the host country to be completed. But, on the contrary, equity foreign portfolio investment usually necessitates a well-functioning capital market to have a good flow [On this see J.B. Durham, 'Absorptive capacity and the effects of foreign direct investment and equity foreign portfolio investment on economic growth', *European Economic Review,* Vol. 48, 2004, p. 289]

opment in that country really matters.[683] It is argued that a well-functioning financial system "increases the volume of resources available to finance investment" and "screens and monitors investment projects".[684] In other words, the financial market is considered to be a decisive tools to boost the effect of FDI in the host country.[685] For instance, Laura Alfaro et al. submit that two countries similar in all other FDI-related aspects may have totally different outcomes in terms of income levels depending on the level of their respective domestic financial market. To illustrate how the financial market could influence the impact of FDI inflow on the economic growth of the host country, they give the example of Bangladesh and India in the 1980s. In both countries, the spillover effect of FDI to domestic companies would not have been successful without the existence of a reliable and conducive financial system that provided cash (loans) to some domestic companies in order to boost their own competitiveness from the technological knowledge and managerial skills they had obtained from their interaction with foreign companies. Without the intervention of their respective financial systems, some of the Indian and Bangladeshi domestic companies would not have been able to expand to become perfect competitors or effective suppliers of bigger foreign-owned companies. This interaction between the financial market and domestic investors has played a role in drastically increasing Bangladesh's exports, which, of course, has impacted the country's economic growth.[686]

Last but not least, the host country's legal and institutional framework has also been considered to be an important component for FDI inflow to have a positive impact on economic growth. The standing of any country depends on the solidity of its legal and institutional framework. Legislation, regulations and policies determine the rights and obligations which residents are entitled to. Good laws and policies are of no use without robust implementing institutions.[687] Therefore, the

[683] See among others J.B. Durham, *op. cit.*, pp. 285-306; L. Alfaro et al., 'FDI and economic growth: the role of local financial markets', *Journal of International Economics,* Vol. 64, 2004, pp. 89-112; and N. Hermes and R. Lensink, 'Foreign Direct Investment, Financial Development and Economic Growth', *The Journal of Development Studies*, Vol. 40, N°1, October 2003, pp. 142-163.
[684] In doing this, the financial system plays a big role in increasing the efficiency of the investment projects carried out. See N. Hermes and R. Lensink, *op. cit.*, p. 146.
[685] J.B. Durham, *op. cit.*, p. 289.
[686] L. Alfaro et al., *op. cit.*, p. 91-93. For Hermes and Lensink, the financial system does not only help domestic investors but it is also very important for foreign projects in determining the extent to which foreign investors could "be able to borrow in order to extend their innovative activities in the host country" (N. Hermes and R. Lensink, *op. cit.*, p. 147). Regarding the ability of foreign companies to borrow in the host country, it should be reminded that the Tanzanian and Ugandan investment codes allow foreign investors to have access to loans from local banks and financial institutions (see Sect 25 of the Tanzania Investment Act and sect 26 of the Uganda Iinvestment Code).
[687] This applies especially to law enforcement institutions such as the courts, the police and some administrative institutions.

institutional structure and the organization of the host country matters for FDI inflow.[688] Again empirical research has come to the conclusion that legal certainty, corruption, the protection of civil rights including intellectual property rights, bureaucracy, and political instability are, among other things, crucial aspects of the host country's legal and institutional framework that radically influence the impact of FDI inflow.[689] The quality of the host country's legal and institutional framework does not only attract FDI but it also sustains FDI's spillover effect all over the host country's economy,[690] which in turn impacts on economic growth. This point will be explained in further detail below.

c) Spillover effects of FDI on the host country's economy

In theory, one dollar brought in by a foreign investor should equal one dollar invested by a local investor. But, if this is true, then why do countries tend to expend so much efforts in attracting FDI? Why, in some cases, is investment made easier for foreign companies compared to their domestic counterparts? These questions reveal that FDI is certainly different from local investment. The difference lies mostly in the fact that FDI involves huge amounts of money used either to create a new production unit or to increase the productivity of an existing enterprise. This implies, in turn, an increase in the productivity of the host country thanks to new technologies that commonly accompany each FDI inflow.[691] Logically, higher

[688] A. Bevan, S. Estrin and K. Meyer, 'Foreign investment location and institutional development in transition economies', *International Business Review*, Vol. 13, 2004, p. 61. Asiedu's findings prompt specifically small countries without natural endowments (natural resources), like Rwanda, to rather improve their investment legal and institutional framework in order to be the preferred destination of FDI (E. Asiedu, 'Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability', *The World Economy*, Vol. 23, Issue N° 1, 2006, p. 66 and 74).

[689] J.B.Durham, *op. cit.*, p. 286; C. Daude and E. Stein, 'The quality of institutions and foreign direct investment', *Economics & Politics*, Vol. 19, n° 3, November 2007, pp. 317-344 and A. Bénassy-Quéré, M. Coupet and T. Mayer, 'Institutional Determinants of Foreign Direct Investment', *The World Economy*, 2007, 764-782.

[690] F. Fortanier, *op. cit.*, p. 47. For instance, Asiedu measured institutional quality through the level of corruption and the extent of the enforcement of the rule of law from a comparative perspective, and found that "a decline in corruption from the level of Nigeria to that of South Africa has the same positive effect on FDI as increasing the share of fuels and minerals in total exports (NATEXP) by about 34.84 percent. Also, an improvement in the host country's FDI policy from that of Nigeria to that of South Africa has the same positive effect on FDI as increasing NATEXP 23.01 percent. A similar change in corruption and FDI policy would have the same effect as increasing GDP by 0.37 percent and 0.25 percent, respectively." (E. Asiedu, *op. cit.*, 2006, p. 65.)

[691] It is goes without saying that when a country's productivity increases, its economic growth is also positively affected. This is based on the assumption that it is a EP-oriented country which has fulfilled the minimum condition of absorption capacity as stated above.

productivity generally implies greater job creation. Thus FDI has the merit of increasing the volume of capital and generating more jobs than domestic companies.

While several studies have confirmed this assertion, restricting FDI attractiveness for the host country to these two aspects would be a blatant underestimation of the host country's evaluation competence, since the same results would also be attained by adopting protective measures to promote domestic companies. But the charm of FDI goes beyond mere capital accumulation and job creation. The potential of FDI for spillover benefits to domestic companies in the host country's economy is also a critical asset. FDI spillovers take place when the arrival of a foreign company, generally the affiliate of a multinational company, "disturbs the existing equilibrium in the market and forces local firms to take action to protect their market shares or profits".[692] Such action is generally related to wage levels and the level of productivity.

i) Spillover effect on overall wages in the host country

It is well established that international firms always pay higher wages to their employees compared to the salaries that domestic companies offer to their employees. While this is certainly interesting for improving the welfare of foreign-owned firms or companies in the host country, it has been proved that higher wages that FDI enterprises pay to both their expatriate and local staff do influence the level of wages in domestic firms or companies in the same industrial or geographical areas.[693] This is easy to understand. The arrival of FDI in the host country's territory triggers competition between foreign-owned and domestic companies producing similar goods or supplying similar services. As foreign-owned companies are known for their higher wages, local employees previously working for domestic companies would be tempted to apply for the new well-paid jobs brought about by FDI. Because the pay scale in principle depends on the employee's educational level, skills and experience, it is obvious that domestic companies would very likely face the threat of losing their best employees to well-paying foreign-owned companies. In order to retain their staff in general, and the most qualified ones in particular, so as to confidently face the invading competition with foreign-owned

[692] M. Blomstrom and A. Kokko, 'Multinational Corporations and Spillovers', *Journal of Economic Surveys*, Vol. 12, N° 2, 1998, p. 3.

[693] This is equally demonstrated in both developed and developing countries regardless of whether FDI companies have taken over high-wage domestic firms in the host country or not and whether it concerned blue-collar or white-collar employees. R.E. Lipsy and F. Sjoholm, 'The Impact of Inward FDI in Host Countries: Why Such Different Answers?', in T.H. Moran, E.M. Graham and M. Blomstrom (Eds), *Does Foreign Direct Investment Promote Development?*, Washington DC, Peterson Institute for International Economics, 2005, p. 26.

companies, domestic companies in the host country are likely to increase the wages paid to their own staff.[694] Therefore, higher wages in FDI firms or companies combined with their spillovers to domestic firms or companies imply overall higher wages in the FDI-affected domain in the host country.[695] Logically, overall higher wages imply not only an increase in the host country's income tax basis but also the augmentation of people's purchasing power, thereby contributing to the country's economic development. However, as mentioned earlier, for this wage spillover effect of FDI to operate, there must first be an economic environment which is conducive to perfect competition between market protagonists.[696]

ii) Spillover effect on the overall productivity of the host country

It is conventional wisdom that foreign companies have higher productivity compared to their domestic counterparts.[697] This assertion is true as far as FDI inflow is presumed to be always accompanied by new technologies that boost the amount of goods and services in the host country.[698] Accordingly, the increase in the productivity of foreign-owned companies also leads to an increase in domestic companies' productivity.[699] Indeed, FDI inflow creating competition between foreign-owned companies and domestic ones could persuade the latter to upgrade their production methods to remain competitive.[700]

However, the spillover effect of FDI on the productivity of the host country depends principally on the interaction between foreign-owned and domestic compa-

[694] Vice versa, it is believed that higher wages paid by foreign companies are somehow related to their intention to discourage any "brain drain" of their most capable managers to domestic companies, which would probably lead to a leakage of their protected technology. G. Blalock and P.J. Gertler, 'Welfare gains from Foreign Direct Investment through technology transfer to local suppliers', *Journal of International Economics*, Vol. 74, 2008, p. 404 and M. Blomstrom and A. Kokko, *op. cit.*, p. 14.
[695] R.E. Lipsy and F. Sjoholm, *op. cit.*, p. 27.
[696] In this regard, the productivity gap between foreign and domestic companies should not be too big. As stated by Lipsey and Sjoholm, the smaller the productivity gap the higher the spillover effect. R.E. Lipsy and F. Sjoholm, *op. cit.*, p. 27.
[697] This higher productivity is generally explained by foreign companies' greater capital intensity, larger size and a greater use of purchased inputs. See R.E. Lipsey, *op. cit.*, p. 363.
[698] New technology should be understood broadly to include "product, process, and distribution technology, as well as management and marketing skills". M. Blomstrom and A. Kokko, *op. cit.*, p. 1.
[699] A rich literature review on this is provided by R.E. Lipsey, *op. cit.*, p. 358-359.
[700] M. Blomstrom and A. Kokko, *op. cit.*, p. 24. For instance, in the 1950s and 1960s it was observed in the soap and shoe-making industries in Kenya that the arrival of foreign companies pressed local firms to improve their production system in order to compete with better-packaged soap and better footwear produced by foreign firms. See R. Jenkins, 'Comparing Foreign Subsidiaries and Land Firms in LDCs: Theoretical Issues and Empirical Evidence', *The Journal of Development Studies*, Vol. 26, Issue 2, January 1990, p. 210.

nies in the market.[701] In general, the entry of a foreign investor in the host country's market is usually perceived by domestic companies either as competition or as a partnership (a customer-supplier relationship).[702] The competition aspect is more visible when a new foreign company commences business in an economic area that is already covered by local companies.[703] In this scenario, depending on the technological gap between foreign and domestic companies, this competition may have two different outcomes.

Firstly, if the technological gap is too big, there is no way domestic companies would really compete as the market would be easily submerged by the products or services of the foreign investors.[704] In this case, it is technically said that FDI inflow has crowded out domestic companies. While this is often deplored, it may not be that dramatic. For the host country's economy, it could be nothing more than a mere elimination of small or inefficient domestic companies from the market, which could be understood as a "healthy redeployment of capital" in other economic sectors.[705]

Secondly, however, if the technological gap is small, domestic companies will strive to strengthen their own production or supply strategies to systematically share the market with foreign investors. As local investors have the advantage of knowing the market, consumers' preferences and local business practices,[706] this competition could lead to the long-term elimination of the foreign investor.[707] But the practice is that foreign companies usually enter into joint ventures with this category of competitors in order to attain a win-win situation.

When foreign and domestic companies opt for a joint venture, the spillover effect of FDI is likely to be stronger because of the proximity of domestic companies with the foreign additional know-how that comes along with FDI.[708] As part of a

[701] B.S. Javorcik, 'Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages', *The American economic Review*, Vol. 94, N° 3, 2004, p. 625.
[702] J.R. Markusen and A.J. Venables, *op. cit.*, p. 337.
[703] This is horizontal linkage. It is said that horizontal linkage generally produces weak spillover effects as foreign-owned companies would be reluctant to share their technological information with their direct competitors, i.e., domestic companies. In this case, the FDI spillover effect is not based on the sharing of new technologies with local investors but rather in persuading, through competition, the latter to upgrade. See for instance, B.S. Javorcik, *op. cit.*, p. 606.
[704] R.E. Lipsy and F. Sjoholm, *op. cit.*, p. 36.
[705] R.E. Lipsey, *op. cit.*, p. 371. See also M. Blomstrom and A. Kokko, *op. cit.*, p. 5.
[706] M. Blomstrom and A. Kokko, *op. cit.*, p. 3.
[707] J.R. Markusen and A.J. Venables, *op. cit.*, p. 352.
[708] However, an impactful FDI spillover on local companies is not automatically gained through joint ventures or mergers and acquisition operations. It has been demonstrated that to allow a smooth

FDI company or firm, local staff are exposed to high-level training in new technological knowledge and managerial skills.[709] There are also enough data indicating that most local staff who would be exposed to such training could end up leaving the foreign enterprise to create their own companies that might use the new knowledge and skills gained to compete with their former employer on a smaller scale.[710]

However, there is also another way in which poached domestic employees can use the knowledge and skills that they have acquired when working with the foreign company. Since they have been within either the management or production unit of the foreign company, domestic staff necessarily know the needs of that company. So they are well placed to start a new business in order not to compete with their former employer but rather to supply them with the required services or products. Similarly, other domestic companies that have simply observed the operations of the foreign company within the host country's market, without having worked for the latter, may also anticipate and make themselves the preferred supply choices for the foreign company. In both cases, there is a technological transfer from foreign to domestic companies.

Technically this is called backward linkages as a consequence of the FDI spillover effect.[711] Backward linkages augment the host country's productivity by adding the

technological transfer from the parent company to its affiliate (FDI) in the host country, there is a need for the affiliate to be wholly owned by foreign investors. For instance, Mansfield and Romeo found that technology introduced into joint ventures across a variety of industries in developing countries was 3 to 4 years older than technology introduced into wholly owned subsidiaries. See E. Mansfield and A. Romeo, 'Technology Transfer to Overseas Subsidiaries by US-based Firms', *Quarterly Journal of Economics*, Vol. 95, N° 4, 1980, pp. 737-750. For more examples see T.H. Moran, *op. cit.*, 2005, p. 292. It should be noted, however, that Blomstrom and Sjoholm did not notice any impact of the degree of foreign ownership on the degree of FDI spillover. See M. Blomstrom and F. Sjoholm, *op. cit.*, p. 922.

[709] M. Blomstrom and A. Kokko, *op. cit.*, p. 13.

[710] For instance, it was reported that 130 Bangladeshis were sent to Korea for training in order to familiarize them with the textile technology that was introduced by the Daewoo plant after its establishment in Bangladesh in 1979. 115 of them left Daewoo a few years later to set up their own garment plants. This explains, to some extent, the emergence of the textile industry in Bangladesh in the early 1980s. See L. Alfaro et al., *op. cit.*, p. 91. Blomstrom and Kokko refer to a previous study conducted on the Kenyan manufacturing industry. According to that study multinational companies offered more training of various sorts to their managers than private local firms did. M. Blomstrom and A. Kokko, *op. cit.*, p. 14.

[711] Backward linkages happen when domestic companies become the suppliers of intermediary materials to foreign-owned enterprises. Instead of competition, domestic and foreign companies build a customer-supply partnership. Backward linkages bear the most effective FDI spillover effect on productivity. They usually work through: "(i) direct knowledge transfer from foreign customers to local suppliers; (ii) higher requirements for product quality and on-time delivery introduced by multinationals, which provide incentives to domestic suppliers to upgrade their production management or

large-scale production of foreign companies to that of their domestic competitors. If a supply relationship is created between a foreign and a domestic company, it is obvious that the imports of the host country would diminish as the foreign company would turn from obtaining its required production inputs from foreign countries to locally-owned companies. Thus, there is no doubt that FDI inflow would not only contribute to increasing internal productivity, but it would also facilitate the reduction of the host country's dependency on imports.

Moreover, foreign investors, especially affiliates of multinationals, are export-oriented.[712] In other words, although they also target the host country's market, they look beyond the latter's borders to expand their business.[713] Obviously, the interaction between foreign and domestic companies would also have an influence on increasing the propensity of domestic companies to export either by imitation or simply due to the necessity of finding another market for their increasing production.[714]

The final beneficiaries of fierce competition or backward linkages between foreign investors and domestic companies are local consumers. The interaction between these two actors in the domestic market not only increases the general output (products) on the market, but also – consequently – it decreases the prices of higher quality products.[715] Therefore, it makes sense to roughly conclude that FDI inflow in the market of an export-oriented country, which has fulfilled adequate

technology; and (iii) multinational entry increasing demand for intermediate products, which allows local suppliers to reap the benefits of scale economies". See B.S. Javorcik, *op. cit.*, p. 608. Backward linkages are opposed to Forward linkages. The latter happen when domestic companies reversely become customers of foreign ones as distributors or sale organizers. But the positive impact of forward linkages is not very much reported. See M. Blomstrom and A. Kokko, *op. cit.*, p. 13.

[712] This is especially true regarding vertical FDI in which a multinational company opens an affiliate in another country to produce parts or components that would be used by another affiliate or the parent company to produce final goods in another country.

[713] There exist a number of studies supporting this statement. For instance, citing a study on manufacturing companies in Mexico in the second half of the 1980s by Aitken, Hanson, and Harrison, Lepsey paraphrased that "higher production by foreign-owned firms in a sector, as well as greater export activity by those firms, increased the likelihood that domestic firms would export". See B.J. Aitken, G.H. Hanson and A.E. Harrison, 'Spillovers, foreign investment, and export behavior', *Journal of International Economics*, Vol. 43, 1997, pp. 103-132 cited by R.E. Lipsey, *op. cit.*, p. 367.

[714] R.E. Lipsey, *op. cit.*, p. 367. See also M. Blomstrom and A. Kokko, *op. cit.*, p. 8. According to Blomstrom and Kokko, several ways can be used to achieve this propensity. It could start by local companies simply copying the best export practices that foreign companies employ, but that could extend from taking advantage of trade liberalization that foreign companies might lobby for with other countries, using distribution and marketing facilities that foreign companies might create in the host country's territory, to hiring former employees of foreign companies who have been trained in export management. In this way, foreign companies are said to facilitate access to the international market for domestic companies.

[715] G. Blalock and P.J. Gertler, *op. cit.*, p. 403.

absorptive capacity, positively enhances final consumers' welfare as well as fosters the competitiveness of the host country both on the national and international markets.[716]

5.2.2.2. Adverse impact of FDI inflow on the host country's economy

Next to FDI proponents, there are the FDI sceptics. According to the latter, the attraction of FDI brings large foreign companies into the national market, and most of them are multinational companies. These companies are much better organized and familiar with large-scale production than domestic companies. Therefore, if foreign companies invest in the same area as domestic companies, the latter would be ousted from the market since they are not equally equipped to compete with the former on an equal footing. As a result, FDI creates *de facto* foreign monopolies in the long run.[717]

Such monopolies would lead to a dependence on foreign investors, which might later be seen as an indirect economic dependence of the FDI host country on the foreign investor's home country. The proponents of this theory therefore submit that extended openness to FDI would lead to the suffocation of local entrepreneurship, a significant erosion of national sovereignty and the distortion of the domestic market of the FDI host country.[718] In addition, some of the benefits expected from FDI inflow might be illusory. This could be the case with benefits such as job creation and the improvement of the host country's balance of payments.

[716] R.E. Lipsey, *op. cit.*, p. 371-372.

[717] Multinational companies may sometimes combat trade liberalization in sectors where they are already enjoying a certain monopoly in the host country. This is for instance the case with Chrysler's Mexican affiliate, an auto manufacturer, which fought against the liberalization of the Mexican automotive sector in order to preserve its high profit-making monopolistic position in Mexico before 1985. See B.C. Samuels, *Managing Risk in Developing Countries: National Demands and Multinational Response*, Princeton, Princeton University Press, 1990, p. 148 cited by T.H. Moran, 'How Does FDI Affect Host Country Development? Using Industry Case Studies to Make Reliable Generalization', in T.H. Moran, E.M. Graham and M. Blomstrom (Eds), *Does Foreign Direct Investment Promote Development?*, Washington DC, Peterson Institute for International Economics, 2005, p. 285.

[718] This could be a direct consequence of multinational companies (foreign investors) willing to wholly own the enterprise. One of the reasons to justify why mixed foreign investments should be wholly owned by the FDI parent company would be to prevent the "leakage of technology" and to minimize management procedures. See for instance, T.H. Moran, *op. cit.*, p. 283. It is in line with this that Lipsey, although advocating FDI, reminded us that "Trade links reduce the freedom of action of a country's government domestically, if not that of its people" (R.E. Lipsey, *op. cit.*, p. 272).

As far as job creation and the balance of payments are concerned, authors who tend to be FDI sceptics warn against 'substitution effects'.[719] A substitution effect in job creation occurs when the number or the quality of jobs supposedly created by foreign companies are proportionately equal or lesser than jobs shut down by domestic companies as a consequence of the FDI invasion. In this scenario, the acclaimed number of jobs to be created by foreign investors might not have an impact which is as great in the host country's overall economy as was anticipated during the signature of the investment agreement.

Similarly, regarding the host country's balance of payments, FDI sceptics admonish the adverse effect that FDI inflow could have. This effect is twofold. Firstly, the balance of payments of the FDI host country would be negatively affected by the fact that foreign investors have won the right to freely repatriate their proceeds.[720] The repatriation of proceeds either by foreign individual investors to the their home country or by foreign subsidiaries to their parent company's country constitutes a debit on the capital account which may drastically withhold the expected benefit on the host country's balance of payments.[721] Secondly, FDI may negatively impact the balance of payments of the host country when the foreign investor imports a significant number of materials from abroad for its production.[722] Such an operation would definitely increase the import shares of the country's economy, which in the end would impact on the performance of its balance of payments.

To these economic shortcomings of FDI on the host country's economy, one should also mention the long deplored detrimental consequence, associated with foreign investment, on environmental protection and labour standards. Indeed, FDI inflow has for a long time been associated with the lowering of environmental and labour standards in the host country. It is argued that in the deal to settle a foreign investment, the host country - especially in the developing world - is often in the weaker party vis-à-vis the foreign investor. This may be justified by the conventional wisdom that sees foreign investors rather as development financiers.

[719] C. Hill, *International Business – Competing in the Global Marketplace*, University of Washington, Irwin McGraw-Hill, 2000 cited by S. Kurtishi-Kastrati, 'The effects of Foreign Direct Investments for Host Country's Economy', *European Journal of Interdisciplinary Studies*, Vol. 5, Issue 1, 2013, p. 32.
[720] This is one of the key elements of foreign investment protection as enshrined in BITs and other investment agreements.
[721] S. Kurtishi-Kastrati, *op. cit.*, p. 33.
[722] This occurs, for instance, when the subsidiary company (foreign investment) is too dependent on inputs made in the parent's country (FDI country of origin). This was the case with General Motors'(GM) subsidiary in Brazil that had to import other auto parts from the New York plant or other GM subsidiaries in the world. GM designed the parts in such a way that the interdependence of its subsidiaries was guaranteed, which increased Brazil's imports. See T.H. Moran, op. cit., 2005, p. 283.

Since the activities of most multinational companies involve the use, production or manipulation of environmentally unfriendly materials, during the negotiations they tend to obtain from the host country the commitment that less stringent rules and regulations will be applicable to the treatment of their environmentally threatening materials to be disposed of.

As for labour standards, it is alleged that foreign investors, being driven by the maximization of profits, will do everything within their power to decrease their production costs. Employees' salaries and working conditions are some of the elements that are taken into account when a company evaluates its profit margins. Although large foreign companies usually provide better salaries for their employees, sometimes the latter are subjected to harsh working conditions. Following the stronger-weaker party analysis developed above, a foreign investor might impose a lenient application of labour laws and regulations in the host country as a precondition for their investments.

From a purely FDI-sceptic viewpoint, it is obvious that lowering environmental and labour standards would definitely have a lasting adverse impact on the economy of the host country as it constitutes a potential threat to the most valuable development asset of that country, its human capital.

5.2.2.3. FDI inflow and economic growth in the EAC Partner States

Against the general background provided in the sections above, it seems to be correct to infer that FDI inflow does have a positive impact on the economic growth of the host country mainly through the overall increase in wages and productivity, at least in the economic sector where that investment is made. While several studies have succeeded in demonstrating that such a positive impact depends on the internal characteristics of the host country, it should be remembered that difficulties in data collection and the analytical complexity therein have constrained the vast majority of researchers who have tried to address this issue and, as a result, they have confined their studies to specific economic areas such as the textile, manufacturing, or automotive industry, to name just a few, and within a specific timespan. No single research could be found which attempts to provide a general overview of all FDI that flowed into a specific country during a specific timeframe so as to draw the conclusion that FDI inflow really impacts the economic development of the host country. Constraints related to data collection lead to partial and sometimes contradictory results that were extrapolated to reflect the overall situation. But that is exactly the purpose of statistical results. In addition to this challenge, one should also mention that when it comes to the EAC even those

partial studies are not readily available, which makes it almost impossible to have a reliable overview of the situation.[723]

An attempt to draw a conclusion on the impact of FDI inflow on the economic growth of the EAC Partner States from the analysis of EAC Partner States' annual Gross Domestic Product (GDP) and the share that an annual FDI net inflow could occupy in the each country's annual GDP proved inconclusive as well. While one could notice a symmetrical evolution between the annual GDP and FDI share curves for Burundi, Kenya and Tanzania, the figures presented by Rwanda and Uganda suggests caution in drawing any general conclusion.

For instance, in Burundi the increase or decrease in the FDI share in the country's GDP in 2007, 2008, 2009, 2010 and 2011 was reflected in the GDP growth for the same period, although the shapes of the curves are not identical. In 2007, Burundi's GDP growth was 4.8 percent while its net FDI inflow amounted to roughly 0.037 percent.[724] In 2008, the country's net FDI inflow increased to represent 0.238 percent of its GDP. But at the same time, Burundi's GDP witnessed an increased rate of 5 percent. In 2009, when FDI inflow fell to represent only an equivalent of 0.02 percent of GDP, the GDP growth rate also decreased to 3.5 percent. The same trend was observed when the FDI share successively increased in 2010 and 2011. A similar spiral could be observed in Kenya and Tanzania.

In contrast, in Rwanda, for instance, when the FDI share slightly decreased from 2.219 percent in 2007 to 2.211 percent in 2008, it is striking to see that the country's annual growth rate sharply increased from 7.6 percent in 2007 to 11.2 percent in 2008, whereas the annual GDP rate dramatically dropped from 11.2 percent in 2008 to 6.2 percent in 2009 when the FDI share slightly increased from 2.211 percent to 2.278 percent respectively in 2008 and 2009.

Generally speaking, whenever the growth rate increased in the EAC Partner States between 2007 and 2011, it coincided with a correlative increase in the FDI net

[723] As rightly deplored by Asiedu, Africa as a whole is very under-researched as far as FDI is concerned, mainly because of data unavailability. E. Asiedu, 'On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?', *World Development*, Vol. 30, N° 1, 2002, pp. 108 and 110.

[724] The net GDP was 1,356,078,300.1 USD and the net FDI inflow was 500,245 USD. See World Bank, 'World Databank' online at http://databank.worldbank.org/data/home.aspx accessed on 10 July 2014. This method, consisting of comparing FDI inflow to the host country's GDP, is widely accepted as a measurement of the weight of FDI inflow in the host country's economy. An alternative could be to divide FDI inflow by the host country's population size. See for instance I. Kolstad and E. Villanger, 'Determinants of foreign direct investment in services', *European Journal of Political Economy,* Vol. 24, 2008, p. 522.

inflow, though at a different rate level, except in Uganda and Rwanda. In Uganda, the annual GDP growth increased from 8.4 percent in 2007 to 8.7 percent in 2008 but the FDI share inversely dropped during the same period to represent, respectively, 6.4 percent and 5.1 percent of the country's annual GDP. In Rwanda, a similar scenario could be observed between 2009 and 2010.[725]

Reserving judgment as to its economic accuracy, this analysis backs up previous studies that concluded that the impact of FDI inflow on the economic growth of the host country depends on other characteristics of this country. Besides, two other arguments can support this view. First, FDI inflow is simply a small portion of other elements that affect the host country's growth. In terms of generating revenue, the host country certainly has many other sources of revenue. Therefore the impact of FDI inflow could be significant depending on the volume of the share of FDI-generated income within the total amount of revenues generated by the host country. The bigger this share the more FDI inflow is likely to impact on the host country's economic growth, *ceteris paribus*. Second, it may be unfair to assess the impact of FDI inflow in the very year when the investment is made, especially when it is a long-term green-field investment. This kind of investment could take longer to really start having a discernible effect on the host country's economy. Most of the time, the real benefits of such investments may take a long time before they can have any real effect both for the investor and the host country.

To bridge this gap of having inconclusive data, there is not much choice but to rally around the majority opinion that FDI inflow does contribute to the economic growth of the host country, including the EAC Partner States as long as they fulfil the basic conditions, namely an EP-oriented trade policy and a minimum threshold of human capital, a technological level, a functioning capital market and institutional capacity.

As has been seen, however, the impact of FDI inflow on development is usually debated on the ground of its interaction with the host country's economic growth. In this sense, almost all of the available literature on this topic tackle the issue using various econometric research methods which do not necessarily scan all important aspects of the question. Although economic growth is an indispensable tool in attaining economic development,[726] development itself is a multidimensional concept that cannot be adequately apprehended by only measuring economic

[725] World Bank Databank, *op. cit.* Data were isolated and analyzed separately.
[726] S. Kurtishi-Kastrati, *op. cit.*, p. 26.

growth.[727] Economic growth is measured through a set of economic indicators such as the exchange rate, inflation, balance of payments, etc., whereas some non-economic factors like people's attitudes and beliefs towards the family, friendship and the community, and some other special values could be determinants for their happiness. Econometric indicators may not grasp these kinds of parameters when measuring a country's economic growth. Yet, they really matter in determining the real development of a people, hence that of the country where they live.[728]

Besides, considering economic growth as an indicator of economic development has proved to be misleading.[729] In recent years, even at the peak of the international crisis, developing countries, especially in Africa, displayed envious positive growth rates when most developed countries were facing a recession. But this constantly increasing economic growth has rarely been translated into tangible dividends in the daily lives of the peoples of these countries. There is no development where a " poor country with a growing economy may still develop little if the growth merely enriches a small élite, leaving the majority of the population without additional income".[730] To put it simply, economic growth would be meaningless if poverty, unemployment, and inequalities are not declining.[731] Economic growth must be accompanied by effective income redistribution policies in a country in order to be reflected on the economic development scorecard. An equitable redistribution of income is probably one of the issues that most developing countries have failed to address in order to equilibrate the equation made of FDI inflow, economic growth and economic development. Nevertheless, economic growth

[727] M.P. Todaro and S.C. Smith, *Economic Development*, 11th edition, New York, Pearson Education Limited, 2011, p. 15. These authors further submit that "Growth is generally necessary, though not sufficient, for achieving development" (M.P. Todaro and S.C. Smith, *op. cit.*, p. 29). This position is also supported by Sen who reminds us that: "It is as important to recognize the crucial role of wealth in determining living conditions and quality of life as it is to understand the qualified and contingent nature of this relationship. An adequate conception of development must go much beyond the accumulation of wealth and the growth of gross national product and other income related variables" (A. Sen, *Development as Freedom*, New York, Knopf, 1999, cited by S. Kosack and J. Tobin, *op. cit.*, p. 207). For an opposite opinion see, for instance, J. Bhagwati and A. Panagariya, *Why Growth Matters: How Economic Growth in India Reduced Poverty and Lessons for Other Developing Countries*, New York, Public Affairs, 2013, 280p.
[728] M.P. Todaro and S.C. Smith, *op. cit.*, p. 13.
[729] For instance, see the case study of Brazil discussed by M.P. Todaro and S.C. Smith, *op. cit.*, pp. 28-33.
[730] S. Kosack and J. Tobin, *op. cit.*, p. 207.
[731] M.P. Todaro and S.C. Smith, *op. cit.*, p. 15.

cannot be omitted from the debate on FDI in the host country as it is indispensable in the discussion on economic development.[732]

5.3. COMMON MARKET: A PROSPECTIVE BATTLEFIELD FOR INTRA-EAC FRATRICIDAL COMPETITION

5.3.1. Striking asymmetry between EAC Partner States' location-specific advantages

Foreign investors are not philanthropists. Their choice to invest in a given country is first of all driven by the capital return that can be generated. In principle, the higher the capital return the more likely it is that a foreign investor will be interested in investing. Yet, economically speaking, a higher return involves an extensive minimization of production costs. Therefore, some factors such as the host country's macro-economic situation, market size, human capital stock, the quality of its infrastructure, fiscal system and institutional stability as well as the availability of natural resources are very crucial for the attraction of FDI.

5.3.1.1. Asymmetry in Partner States' potential in economic productivity

From the perspective of international law, the relationship between states is dominated by the sacrosanct principle of sovereignty according to which all countries are equal. But this equality is theoretical as several factors have come to rank countries with some being more powerful than others. Among those factors, the most important is economic power which is usually measured through the gross domestic product (GDP) of the country. A country's GDP represents the market value of all officially recognized final goods and services produced within a country in a year or a given period of time.[733] As such, GDP gives an indication of the ability of a country to produce tradable goods and services and therefore reflects the conduciveness of a country's economic environment for foreign investments. No wonder, then, that the general trend has so far been that countries with a high GDP attract more FDI than countries with a low GDP.[734] It is common knowledge that

[732] In academic and empirical debates on FDI inflow, economic growth is considered to be a key determinant of FDI inflow or the overall beneficiary of foreign investments as far as the host state is concerned. See for instance: Pan-Long Tsai, *op. cit.*, pp. 137-163.

[733] http://en.wikipedia.org/wiki/Gross_domestic_product accessed on 17 July 2014. A Country's GDP is sometimes used as a proxy of that country's market size (F. Noorbakhsh, A. Paloni and A. Youssef, 'Human Capital and FDI Inflows to Developing Countries: New Empirical Evidence', *World Development*, Vol. 29, N° 9, 2001, p. 1597). But for this study, market size should not really matter as EAC Partner States have been in a common market since 2010, which extends the market size of each Partner State to the fullest extent of all Partner States' combined territories.

[734] This is reflected through the quasi-universal divide between developed-developing countries where the former, though they roughly represent 15 percent of the total number of countries in the

developed countries have a higher GDP than developing countries. But, although more than 100 countries in the world are indistinctly placed in the 'developing' country basket, they do not carry equal economic weight. There are always a kind of *primus inter pares*, even among developing countries. That is for example the case concerning South Africa and Nigeria in Africa. But this logic also prevails on a smaller scale, i.e. within economic sub-regions in the developing world. In the EAC for instance, economic indicators point in favour of Kenya as shown in the figure below.

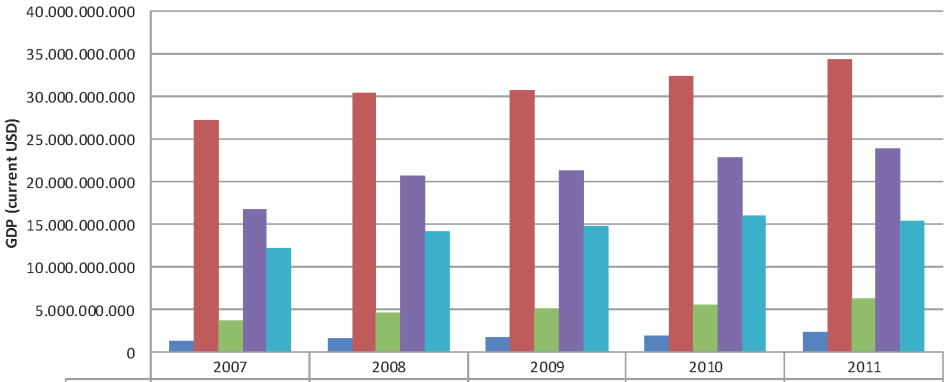
Following this chart, Kenya's leadership in the production of goods and services in the EAC is incontestable. The discrepancy between Kenya and Burundi is striking. Kenya's average GDP is almost twenty times that of Burundi. Tanzania comes second, but even then the gap between the two leaders is so great that the combined average GDP of Burundi and Rwanda cannot fill it.[735] These numbers alone are enough to demonstrate the overwhelming asymmetry in the EAC countries' economies. This asymmetry is especially alarming since the gap remained almost constant during the observed period despite the proportional growth of the Partner States' economies.[736] As mentioned earlier, the host country's economy (growth) plays a double role as far as FDI inflow is concerned. On the one hand, FDI inflow contributes to the economic growth of the host country. On the other hand, the host country's economic performance contributes in attracting FDI. According to this last assumption, countries with better economic performance, i.e. a higher GDP, are likely to attract more foreign investments than others. At the global level this assumption does not need to be demonstrated as it has become common knowledge that developed countries attract a higher amount of FDI than their counterparts in the developing world.

world, produce about 50 percent of the world's GDP and attracted a little more than 50 percent of the global FDI inflow in 2011. According to the UNCTAD classification, developed countries consist of 28 EU Member States plus two North American countries, i.e. the United States of America and Canada. Even if the FDI inflow share of developed countries has fallen below the historical average of 40 percent in 2012 and 2013, it is still high compared to the average among the world's countries. UNCTAD, *World Investment Report 2014 Investing in the SDGs: An Action Plan*, New York and Geneva, United Nations, 2014, p. xiv (hereinafter UNCTAD 2014).

[735] Between 2007 and 2011, the average balance between Kenya's and Tanzania's GDP was 10 billion American dollars which is greater than the combined GDP of Burundi and Rwanda.

[736] It should be reiterated that the Treaty of Arusha recognizes in its article 7(1)(h) the principle of asymmetry as one of the operational principles of the community without providing much information on its application, except that in article 75(1)(a) it is stated that it should be considered in the implementation of the customs union.

Table 1: Overview of EAC Partner States' GDP (2007--2011)



	2007	2008	2009	2010	2011
Burundi	1.356.078.300	1.611.634.286	1.739.781.536	2.026.864.415	2.355.652.064
Kenya	27.236.739.896	30.465.489.796	30.716.343.757	32.440.133.261	34.313.315.840
Rwanda	3.707.800.459	4.674.053.754	5.208.687.775	5.624.809.049	6.406.727.020
Tanzania	16.825.547.176	20.715.086.119	21.368.165.400	22.915.004.297	23.874.165.047
Uganda	12.292.813.801	14.239.026.768	14.824.492.062	16.030.996.179	15.493.320.082

Source: World Bank, World Bank DataBank (World Development Indicators)

Chapter 5

Applied to the EAC level, the implication of this assertion would mean that, *ceteri paribus*, Kenya and Tanzania attract increasingly higher amounts of FDI than the other EAC countries, namely Burundi, Rwanda and Uganda. A look at their respective performance in attracting FDI confirms this trend. Between 2007 and 2011, Tanzania took the lead above Uganda and Kenya concerning the inflow of FDI.[737] While there is nothing to be said about Tanzania's performance, at first sight one would think that Kenya, despite its strikingly high GDP, could not attract a proportional amount of FDI, which could prove that the above assumption is incorrect. The same applies, in reverse, to Uganda that comes second in FDI inflow, yet it occupies third place in terms of GDP. This challenged prognostic does have an explanation, however. In 2008, Kenya organized presidential elections that led the country into an almost civil war.[738] The post-electoral political instability

[737] Tanzania attracted an average of 5,986,589,904 USD while Uganda and Kenya registered FDI inflow amounting to respectively 3,800,904,070 USD and 1,454,207,922 USD [World Bank, Foreign Direct Investment Net Inflow (BoP, current in US$)]

[738] The aftermath of this post-electoral conflict was the reason for the indictment of Kenya's President, Uhuru Kenyatta, by the International Criminal Court (ICC). See Case ICC-01/09-02/11, *The Prosecutor v. Uhuru Muigai Kenyatta*, online at http://www.icc-cpi.int/en_menus/icc/situations-percent20andpercent20cases/situations/situationpercent20iccpercent200109/relatedpercent20cases/icc01090211/Pages/icc01090111.aspx accessed on 17 July 2014.

following the presidential elections seriously undermined foreign investors' confidence in Kenya, which was translated into a sharp decrease in FDI inflow.[739]

As far as Uganda is concerned, its outstanding performance is explained by the discovery and extraction of oil on the shores of Lake Albert in 2006.[740] The Ugandan and Kenyan exceptions only confirm the rule that countries with a higher GDP are able to attract more FDI than others, *ceteris paribus*. The host country's economy is attractive for foreign investors because increasing economic growth implies increasing incomes which, in turn, impacts on the purchasing power of consumers. Such an economy gives a guarantee to foreign investors that their products or services will not only be in demand but also affordable for consumers.[741]

5.3.1.2. Partner States' differences regarding the availability of qualified human capital

In the previous section, human capital was discussed as one of the elements which determines the FDI absorption capacity of the host country in order to bring economic growth.[742] It was also demonstrated that FDI inflow has an immediate impact on the enhancement of skills and knowledge among the host country's work-

[739] Kenya's FDI inflow dropped to 95,585,680 USD in 2008 from 729,044,146 USD in the previous year. It should also be noted that in 2008 Kenya attracted less FDI than all other EAC Partner States except Burundi. However, since the end of the ethnic conflict that shook Kenya in 2008 the country is progressively regaining the confidence of foreign investors. UNCTAD 2014, p. 39.

[740] This can be easily seen in the country FDI inflow history. Before 2006, FDI inflow had never known any dramatic change. But it almost doubled from 379,808,341 USD in 2005 to 644,262,500 USD in 2006 which is the date of the first commercial discovery of oil in Uganda. See Republic of Uganda, Ministry of Energy and Mineral Development, 'Departments in Uganda's Oil and Gas Sector', September 2011 online at http://www.petroleum.go.ug/page.php?k=curnews&id=12 accessed on 17 July 2014. Although natural resources and market size are among the key determinants of FDI inflow, they cannot be usefully considered in a comparative study, especially in an African regional integration perspective. With the entry into force of a common market deal between regional integration members like the EAC, the market size of the host country ceases to be a concern for foreign investors. Natural resources, on the other hand, are not only an incontrollable factor but also FDI in the extractive industry does not create many spillovers. Therefore, its impact on the productivity of domestic companies in the host country can be questionable. See on this issue E. Asiedu, *op. cit.*, 2006, p. 64; and UNCTAD 2014, p. 43.

[741] F. Noorbakhsh, A. Paloni and A. Youssef, *op. cit.*, p. 1597.

[742] For more details, see for instance E. Borensztein, J. De Gregorio and J-W. Lee, *op. cit.*, 1998, pp. 115-135. Human capital can be defined as "the knowledge, skills, competencies and attributes in individuals that facilitate the creation of personal, social and economic well-being". P.J. Rodriguez and R.S. Loomis, 'A new view of Institutions, Human Capital, and Market Standardization', *Education, Knowledge & Economy*, 1(1), 2007, pp. 99-105 cited by Dae-Bong Kwon, 'Human capital and its measurement', *The 3rd OECD World Forum on "Statistics, Knowledge and Policy" Charting Progress, Building Visions, Improving Life*, Busan, Korea, 27-30 October 2009, p. 4.

force through spillovers.[743] While these findings still hold true, it is interesting to note that the quality of the host country's human capital is a very crucial factor that foreign investors thoroughly examine before making the decision to invest in a given country.[744]

As such the purpose of foreign investors is to penetrate the local market in order to produce, as soon as possible, a large quantity of quality products at a lower cost. In order to do so, it would not make sense for foreign investors to export employees from their home country or from other sources as this would imply higher costs. It is specifically for this reason that foreign investors prefer a host country where they can find enough well-trained human resources to operate their modern machinery or to understand the functioning of their new technologies.[745]

However, the key question is how to measure the level of skills or knowledge that the local workforce possesses before the start of an investment project. In principle, skills and knowledge are gained through either formal school attendance or learn-by-doing experience. Hence, measuring the human capital stock implies an assessment of access to education or the degree of exposure to the acquisition of practical skills. Several conventional methods have been used to address this question.[746]

In empirical research, the output approach is generally used by measuring proxies like school enrolment rates, the number of years of schooling, or the adult literacy rate. While these conventional measurements could provide a significant insight

[743] For more details see M. Blomstrom and A. Kokko, *op. cit.*, p. 13-14; S. Kurtishi-Kastrati, *op. cit.*, pp. 26-38 and B.S. Javorick, *op. cit.*, pp. 605-630.

[744] In developing countries, a qualified workforce has gained a great deal of importance as a key determinant of FDI inflow since the 1980s with the shift of FDI inflow from the primary sector (the direct use of natural resources such as agriculture, fishing, mining, oil extraction, etc.) to technology-intensive manufacturing and services. F. Noorbakhsh, A. Paloni and A. Youssef, *op. cit.*, p. 1594-95.

[745] Although profit maximization through low-cost labour is the leitmotiv of the movement of foreign investors in developing countries, it should be reminded that they are as careful as possible when it comes to both the quality and the cost of labour. Multinational companies, for instance, are unlikely to engage in affiliate activities in countries with very scarce supplies of skilled labour which are also the countries with the lowest average labour costs. See G.B. Navaretti and A.J. Venables, *Multinational Firms in the World Economy*, Princeton and Oxford, Princeton University Press, 2004, p. 140. In the end, in order to be attractive, the host country should offer a well-balanced environment as far as the quality of labour and costs are concerned.

[746] Conventionally, three main methods are used: output-, cost-, and Income-based approaches. But the output-based approach seems to be the one which is most commonly used in empirical research. Dae-Bong Kwon, *op. cit.*, pp. 6-7.

into the issue, they fall short in addressing some intrinsic aspects of human capital such as family health, fertility and child mortality.[747]

To bridge this gap, a new approach was developed by the United Nations Development Programme (UNDP) under its Human Development Index (HDI). Unlike conventional measurements of human capital which are mainly quantitative, HDI incorporates some qualitative components. In relation to education, HDI actually provides information about three crucial indicators in the FDI host country. The first indicator is education attainment which is measured through 'adult literacy' and the 'population with at least secondary education' proxies where the former refers to the "percentage of the population aged 15 and older who can, with understanding, both read and write a short simple statement on their everyday life" while the "percentage of the population aged 25 and older that reached at least secondary education" is represented by the latter[748]. The second indicator is the ratio of gross enrolment in primary, secondary and tertiary education.[749] This shows the percentage of people who have enrolled in a given level of education (primary, secondary or tertiary) regardless of their age within the total number of the school-age population for the same level of education.[750] The third indicator is the quality of education in the host country which is assessed through the proportion of primary school teachers who actually received the minimum organized training (pre-service or in-service) in order to teach primary education, the performance of 15-year-old students in reading, mathematics and science, and the level of satisfaction with the quality of education.[751]

---

[747] Dae-Bong Kwon, *op. cit.*, p. 9.

[748] UNDP, *Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World*, New York, United Nations, 2013, p. 173 (hereinafter UNDP 2013).

[749] The enrolment rate in primary education is further balanced by the school drop-out rate at the same level. The primary school drop-out rate is the "percentage of students from a given cohort that have enrolled in primary school but that drop out before reaching the last grade of primary education. It is calculated as 100 minus the survival rate to the grade of primary education and assumes that observed flow rates remain unchanged throughout the cohort life and that dropouts do not re-enter school" (UNDP 2013, p. 173).

[750] UNDP 2013, p. 173.

[751] On the one hand, the report indicates that the average score is 493 in reading, 495 in mathematics, and 501 in science for the OECD countries (UNDP 2013, p. 173). On the other hand, satisfaction with the quality of education is simply assessed through the percentage of respondents who answered "satisfied" to the Gallup World Poll question, "Are you satisfied or dissatisfied with the education system?" The reliability of this Gallup result is greatly mitigated by its nature. This is a public poll. Based on people's opinion, there is not much indication of any criteria according to which the investigated persons should refer in order to say whether they are satisfied or not with the quality of education. In case these people have never experienced a different educational system, they are likely to be 'satisfied' with the system they went through. This poll would be more interesting if it targeted employers or foreign investors and a portion of former students in the assessed country's education

The figure below does not provide a ranking based on the human capital stock available in each country[752]. But its components do provide some useful insights into the trends in educational levels in the EAC. As some valuable information about the quality of education is lacking (such as how the acquired knowledge and skills at school are put into practice in real life), there is no option but to analyze the available information in relation to the manufacturing industry in the EAC.[753]

Table 2: Assessment of the education level in EAC Partner States

		EDUCATION ATTAINMENT		GROSS ENROLLMENT RATIO			EDUCATION QUALITY								
		Adult literacy rate	Population with at least secondary education	Primary	Secondary	Tertiary	Primary School teachers trained to teach	Performance of 15-year-old students						Satisfaction with education quality	Primary school dropout rate
								Mean score			Deviation from mean				
		(% ages 15 and older)	(% ages 25 and older)	(%)			(%)	Reading	Maths	Science	Reading	Maths	Science	(% satisfied)	(% of primary school cohort)
HDI rank		2005-2010	2010	2002-2011	2002-2011	2002-2011	2005-2011	2009	2009	2009	2009	2009	2009	2011	2002-2011
145	Kenya	87,4	41,9	113,0	60,0	4,0	96,8	..	..	..	..	..	..	59,6	27,2
152	Tanzania, United Republic of	73,2	7,4	102,0	..	2,1	94,5	..	..	..	..	..	..	44,8	18,6
161	Uganda	73,2	23,4	121,0	28,0	4,2	89,4	..	..	..	..	..	..	48,8	68,2
167	Rwanda	71,1	7,7	143,0	32,0	5,5	91,5	..	..	..	..	..	..	83,9	63,0
178	Burundi	67,2	7,1	156,0	25,0	3,2	91,2	..	..	..	..	..	..	70,9	43,8

Source: UND P , Human Development Report 2013

Empirical research on this issue has often considered the attainment of secondary school education as the minimum human capital threshold for the manufacturing industry.[754] The assumption is that countries with higher secondary school enrol-

system but who have been exposed to some international components. These categories of people could be well placed to provide a more adequate satisfaction judgment on a country's educational quality.

[752] The HDI ranking reflects the overall performance of countries worldwide based on the average points scored upon the combination of all measured indicators, i.e. command over resources, health, education, social integration, international trade flows of goods and services, international capital flows and migration, innovation and technology, the environment, and population trends. UNDP 2013, pp. 162-197.

[753] Manufactured products constitute the main intra-EAC exports. Besides, it is noteworthy that the manufacturing sector is still to attract much more FDI in the EAC since this sector is still underdeveloped despite a growing demand. See EAC Investment Guidebook 2013, pp. 7-9. Although some countries like Rwanda, based on their factor endowments, are putting more stress on attracting FDI in the services sector, it should be reminded that there is a strong correlation between FDI in manufacturing and FDI in producers' services such as transport and finance. See I. Kolstad and E. Villanger, *op. cit.*, p. 531.

[754] See among other authors E. Borensztein, J. De Gregorio, J-W. Lee, *op. cit.*, pp. 115-153; P. Romer, *op. cit.*, pp. 543-573; F. Noorbakhsh, A. Paloni and A. Youssef, *op. cit.*, p. 1597; and X. Li and X. Liu, *op. cit.*, p. 402.

ment are "likely to have the complementary skills to work with imported foreign capital".[755]

Based on the 'secondary education' indicator, the discrepancy between the EAC Partner States is astonishing. While all five EAC Partner States are in the category of countries with 'low human development', only Kenya could beat the sub-Saharan average.[756] Some 41.9 percent of Kenya's population aged twenty-five or older attained at least secondary education in 2010. The Kenyan performance is contrasted by less than 8 percent of the population from each of Rwanda, Tanzania and Burundi who could reach at least the same education level.

Anyway, the figures concerning secondary school attainment are somehow a continuation of the gross enrolment in secondary education in the EAC. Between 2002 and 2011, an average of 60 percent of the population were enrolled at secondary school level in Kenya against 25 percent in Burundi. Kenya's leading position regarding human capital stock is likely to continue in the future as the statistics at the primary school level do not seem to suggest otherwise. One can only hope that other countries, namely Uganda, Rwanda and Burundi, can reverse this trend as they scored higher gross enrolment ratios in primary school than the usual favourites (Kenya and Tanzania) but that achievement is immediately nullified by correlative higher primary school drop-out rates. In other words, Kenya and Tanzania enrol fewer students in primary school than the other three Partner States but their retention rate is higher. This implies that the net number of students who are likely to attain secondary school education is higher in Kenya.

One criticism that may be formulated against HDI indicators analyzed above is that they focus too much on formal education while there are other ways by which a person can gain knowledge or skills that could be useful for foreign investment, especially in manufacturing.[757] Someone who has acquired certain skills by working in a sibling's domestic textile factory, for instance, might over the years have acquired enough skills to competently work in a similar position in a foreign compa-

[755] G.T. Abed and H.R. Davoodi, 'Corruption, Structural Reforms, and Economic Performance in the Transition Economies' in G.T. Abed and S. Gupta (Eds), *Governance, Corruption, & Economic Performance*, Washington DC, International Monetary Fund, 2002, p. 522. Romer also found that the importation of investment machinery has a correlation with enrolment in secondary school (P. Romer, *op. cit.*, 1993, p. 568).
[756] The sub-Saharan average for secondary school attainment was 29.7 percent in 2010 while that of gross enrolment at the same educational level between 2002 and 2011 was 40.3percent (UNDP, *op. cit.*, 2013, p. 173).
[757] Dae-Bong Kwon, *op. cit.*, p. 9.

ny regardless of whether this person has had a formal education or not.[758] This kind of learn-by-doing knowledge and skills is seemingly overlooked by HDI indicators.[759] Nevertheless, it may be argued that even those who possess learn-by-doing knowledge or skills need to meet a minimum literacy level in order to be able to work for a foreign company. This minimum literacy level could consist of the ability of those persons to read and write, with understanding, a short simple statement on their everyday life.

This is exactly what HDI's 'adult literacy rate' indicator measures. According to this measurement, all EAC Partner States are above the sub-Saharan average. Although the gap between the first and the last country based on this indicator is not as striking as it appears concerning the previous indicators, it is noteworthy that only Kenya has succeeded in reaching the world average with 87.4 percent of its population aged fifteen or older being able to read, write and understand a short simple statement on their day-to-day life.[760] At the opposite end of the spectrum, Rwanda and Burundi are ranked at the bottom of the list at the EAC level concerning this indicator.[761]

Not much can be speculated in explaining why Burundi once more has one of the poorest performance as this country has occupied the bottom ranking concerning

[758] This scenario could be widespread in the African context where entrepreneurs usually start recruiting staff from their own families or entourage, sometimes without caring too much about their educational background. Young entrepreneurs tend to recruit their siblings or friends not only because they desire to fight poverty in their surroundings but also because it presents both an economic and social deal in terms of salary negotiations and employment dispute resolution, which are crucial in starting a business.

[759] Even if learn-by-doing knowledge and skills should be considered as an indicator to measure human capital, its robustness would be assessed against the number of companies or businesses offering such an opportunity in the economic area where a foreign company is about to be set up. A simple observation suggests that Kenya is still likely to contain the highest percentage of the population with this kind of knowledge or skills. If a country's GDP reflects its capacity to produce goods and services, it may be assumed that the higher the GDP the higher is the number of factories, companies, or people (employees) involved in production. Accordingly, since Kenya has the highest GDP in the EAC, it may be deduced that Kenyans are likely to be more exposed to gaining learn-by-doing knowledge or skills than the population of other EAC Partner states.

[760] On this indicator, the world's average was 81.3 percent while that of sub-Saharan Africa was 63.0 percent between 2005 and 2010 (UNDP, 2013, p. 173).

[761] It is however surprising that these two countries reach paradoxically the highest percentage in terms of people's satisfaction with the quality of education. It is even more surprising for Burundi, that has been literally at the bottom in all indicators, to claim second position on satisfaction with the quality of education. For both countries, the low adult literacy rate may be explained by linguistic issues.

almost all other indicators.[762] For Rwanda, however, this poor performance could be explained by language issues that face the country's education system. HDI does not provide information on the language in which the investigated persons were asked to write their short statement. This is important because, unlike in the other EAC countries where English is taught from primary school upwards, Burundi and Rwanda have a French background. Their entry into the EAC has been very decisive for the adoption of English as a means of education. But these two countries offer two different stories behind the scenes when it comes to the adoption of English.

In Rwanda, the use of English was one of the measures to foster reconciliation after the 1994 genocide against the Tutsi. Indeed, in 1959 a huge group of Rwandans from the Tutsi ethnic group were forced to leave their country following massacres and the persecution they faced. They were then spread among neighbouring countries, including Uganda, Kenya and Tanzania which are basically English-speaking countries. Those Rwandans stayed, lived and worked there. Their children went to school there. In the end, after almost three decades, the refugees became 'Anglophone' by cooptation. In 1994, the high command of the Rwandan Patriotic Front (RPF) was mainly composed of Anglophones.[763] After the genocide, most Rwandan refugees decided to come back to Rwanda. But as a former Belgian protectorate, English was not one of the official languages of Rwanda. This meant that Rwandans who used to live in English-speaking countries could neither pursue their schooling or find a job in Rwanda upon their return because of the language barrier. It was then indispensable to integrate English as the third official language, next to Kinyarwanda and French.

Until recently French and English were equally used in public administration and public education. At the university level, bilingualism was the rule until late 2008 when the Cabinet decided to give priority to English, which resulted in the tacit sidelining of French.[764] English has hence become the only medium of instruction in the whole education system. But there was no prior preparation for this turn

[762] Except for the 'Satisfaction with education quality' indicator where Burundi surprisingly claims second place after Rwanda. But a consideration of the source of data used makes this easier to understand.

[763] Some analysts think that this could be the reason behind Rwanda's shift from French to English. See for instance C. McGreal, 'Why Rwanda said adieu to French', *The Guardian Weekly*, Friday 16 January 2009 online at http://www.theguardian.com/education/2009/jan/16/rwanda-english-genocide accessed on 24 July 2014.

[764] This can be evidenced by the fact that the current national ID card does not have any French inscription although French is still, according to article 5 of the Constitution, an official language in Rwanda. French is used less and less in official meetings and most, if not all, official correspondence is in English. The most recent national bank notes are in English and Kinyarwanda only.

around.[765] The consequences are dramatic, especially in the field of education.[766] The change in the medium of instruction has seriously undermined the quality of education as a logical consequence of the fact that both teachers and students are using a language that they have not yet properly mastered.[767] But more importantly, most students graduate when they do not have a good command of either English or French. Because of this, Rwandans' comparative advantage could be very low for their competitiveness in the EAC job market. This does not help much when it comes to rekindling foreign investors' perception of Rwanda's human capital stock.

In Burundi, the situation is different. English as a language was brought in as a consequence of joining the EAC.[768] Apart from that compliance element, there was no internal motivation to adopt English as a language. Therefore, the implementation has proved so difficult that Burundians have requested the use of trans-

[765] For many reasons, the change to or the strengthening of English as a medium of instruction was in the interest of Rwandans. More about the advantages of adopting English as a medium of instruction in Rwanda can be found in E. Ndabaga, 'English language issue in Rwanda: An Educational, globalization and economic development trend', *The New Times*, October 2008 online at http://www.newtimes.co.rw/news/views/article_print.php? i=15027&a=10655&icon=Print accessed on 24 July 2014. From an investment point of view, it has been demonstrated that foreign investors would rather choose to establish their business in a country that shares the same official language as their home country. See for instance B.A. Bloningen and J. Piger, *Determinants of foreign direct investment*, NBER working paper 16704, January 2011, p. 24; P. Pi-ying, Lai and D. Fischer, *The determinant of foreign property investment in Islands nations – the case of Taiwan*, NR051, p. 9; A. Benassy-Quéré, M. Coupet and T. Mayer, *Institutional Determinants of Foreign Direct Investment*, CEPII, Working paper N°2005-05, p. 13; and G.B. Navaretti and A.J. Venables, *op. cit.*, p. 134. But the change from one language to another is not a single event. It is rather a process that needs to take place progressively. It can take a generation. In Rwanda, teachers and students were abruptly informed that courses would be taught exclusively in English starting from the beginning of the academic year when they were on their end-of-year holiday.

[766] The majority of teachers at all levels have received their education in French. When they were asked to start teaching in English, not much was done to provide them with enough training in English. Sporadic training programmes were provided but without being systematized and generalized. At the start of the implementation of this new language policy only 15 percent of primary school teachers and 5 percent of secondary school teachers had received training in English (C. McGreal, *op. cit.*, 2009). The number of Ugandans and Kenyans who were appointed in primary and secondary schools to support this change proved insufficient and the result was so dramatic that the government had to review its language policy at the primary level. But it continued in tertiary education. For an extensive understanding of the impact of this policy change, see P. Pearson, 'Policy without a plan: English as a medium of instruction in Rwanda', *Current Issues in Language Planning*, Vol. 15, N° 1, 2014, pp. 39-56.

[767] P. Pearson, *op. cit.*, p. 52.

[768] It should be noted that English is the official language of the EAC under Article 137(1) of the Treaty. However, in November 2011, at the insisting request of Burundi the Summit instructed the Council to study how French could be adopted as a second official language. But the road is still very long for such an adoption. See L.J. Manishatse, 'French will be adopted as an official language in EAC', *Iwacu English News*, 22 November 2013, online at http://www.iwacu-burundi.org/blogs/english/french-will-be-adopted-as-an-official-language-in-eac/ accessed on 11 September 2014.

lators at EAC meetings. If language can be considered as an indicator of human capital stock, Burundi and Rwanda are worse off compared to the original EAC Partner States as far as English is concerned, while Burundi could have a monopolistic position concerning FDI flowing from French-speaking countries.

5.3.1.3. Differences in the adequacy of infrastructure

Regardless of an FDI project's nature or stage of development, the availability of proper infrastructure related to transport, electricity and telecommunication networks plays an important role in foreign investors' decision-making to invest in a specific country. Foreign investors, in their quest for cost minimization, prefer to go to countries where the public authorities have already paved the way in establishing appropriate infrastructure. For instance, in the manufacturing industry a stable supply of electricity is indispensable for large-scale production, a reliable telecommunication network is necessary for efficient management, and means of good transport are needed for effective distribution.

From a global standpoint, these factors tend to be lacking in the EAC. Indeed based on infrastructure indicators, such as 'Energy production', 'surface transportation costs associated with logistics' or 'access to ICT services', the EAC lags far behind in the world ranking.[769] But more noticeable is the discrepancy between EAC Partner States that suggests that even when it is already very difficult to attract foreign investors in East Africa, it could be much more difficult for countries with a worse or non-existent infrastructure.

a) Energy infrastructure

The role of energy in companies' production or service delivery does not need any demonstration. It implies that, *ceteris paribus*, the extent to which a Partner State produces energy determines that Partner State's comparative advantage in being likely to attract a larger amount of FDI compared to its fellow Partner States.

Generally speaking, EAC Partner States are in energy deficit, but some more than others. In 2012, Kenya generated up to 1,916 megawatts (MW), while Burundi could only generate 49 MW, equivalent to about 2.5 percent of the Kenyan pro-

[769] First, the EAC has the highest costs associated with surface transportation in the world. Second, the sub-region has the smallest per capita energy production rate in the whole of Africa just after the Economic and Monetary Community of Central Africa (CEMAC). Finally, East Africa's ICT sector is characterized by high costs and low penetration. See African Development Bank(AfDB), *State of Infrastructure in East Africa*, Statistics Department Africa Infrastructure Knowledge Program, April 2013, pp. 3-4 (hereinafter AfDB 2013).

duction in the same year.[770] Despite Kenya's relatively higher energy generation compared to the other EAC Partner States, none of the Partner States has been able to provide access to electricity to more than 20 percent of its population.[771] Such a low electricity supply is faced with higher demand. Consequently, not only energy prices increase but also power cuts and energy shortages are so frequent that at some point the rationing of electricity appears to be the most rational option.[772] In turn, energy rationing nurtures uncertainty and a lack of reliability on the electricity supply that, in the end, costs a great deal of money for investors as they are forced to acquire alternative energy generation outlets like power generators.[773] Obviously this kind of situation seriously affects the EAC's industrial competitiveness in general,[774] but positions Kenya as the best FDI destination option as far as access to electricity in the sub-region is concerned.

b) ICT infrastructures

Regarding access to information and communications technology (ICT), their impact on FDI inflow has been extensively researched. Research findings almost unanimously agree that ICT is a strong location factor in attracting FDI especially

[770] AfDB 2013, p. 13. According to this same source Tanzania, Uganda and Rwanda respectively generate 1,205MW, 822MW and 103MW. While it could be argued that the amount of MW produced should be assessed in proportion to either the size of the country or the size of the population, Kenya still continues to lead the way in the sub-region and Burundi lags behind.

[771] In 2011, access to electricity in Kenya, Tanzania and Uganda was respectively 19.2 percent, 15 percent and 14.5 percent of the population (World Bank, 'Access to electricity (percent of the population)', online at http://data.worldbank.org/indicator/EG.ELC.ACCS.ZS/countries/KE?display=default accessed on 29 July 2014. There was no available data for Burundi and Rwanda. However, a different link from the World Bank indicates that only 4 percent of Burundians have access to electricity (World Bank, 'The World Bank to Finance New Hydro Power Generation in Burundi' online at http://www.worldbank.org/en/news/feature/2014/04/22/world-bank-to-finance-new-hydro power-development-in-burundi accessed 29 July 2014). On the website of the Rwandan government it is mentioned that in 2012 about 16 percent of Rwandans had access to electricity though the government's target is to expand access to 70 percent by 2017 (Republic of Rwanda, '70 percent of Rwandans to have access to electricity in 2017', available at http://www.gov.rw/70-of-Rwandans-to-have-access-to-electricity-by-2017-1175 accessed on 29 July 2014).

[772] C. Mungai, 'Sub-Saharan Africa Power Production way below' online at http://www.theeast african.co.ke/news/Sub+Saharan+Africa+power+production+way+below+potential/-/2558/1210866/-/aap9p3/-/index. html accessed on 25 July 2014. However, the EAC Partner States have proved to be good managers of the small electricity quantity that they produce in terms of cost recovery, maybe because the sub-region has the highest electricity tariff. Indeed 1 Kilowatt-hour (KWH) costs about 0.20 American dollar (USD) compared to an average of 0.02 USD in other African countries. See AfDB 2013, p. 10; and K. Kimbungwe et al., *op. cit.*, p. 53.

[773] In the EAC, 56 percent of firms own a generator, which is the highest compared to other regional economic communities in Africa. It is also in the EAC that firms experience the highest loss in Africa due to electricity cuts. See AfDB 2013, p. 9.

[774] AfDB 2013, p. 9.

by reducing the amount of time and cost spent in conducting research or by increasing the efficiency and productivity of businesses.[775]

Among many available illustrations, one may cite the role that ICT can play in reducing the distance between the investor's home and host countries. Foreign investment, especially by multinational companies, very much depends on the parent company located in the home country. The distance between the investor's home country and host country has been proven to be one of the elements that discourage FDI inflow as it increases the costs related to, for instance, travel, monitoring, and information.[776] Yet an effective use of an ICT network can drastically diminish this challenge.[777]

Usual indicators to measure the degree of access to ICT in a country include, among other things, the percentage of the population who have access to the internet and to a mobile phone.[778] But beyond the number of people having access to the internet and a mobile phone, it is much more the quality of ICT infrastructure in the host country that interests the foreign investor. Therefore, an appropriate assessment of the ICT infrastructure in a country should combine both quantitative and qualitative data.[779]

---

[775] P. Economou, 'Harnessing ICT for FDI and development', *OECD Global Forum on International Investment VII*, 27-28 March 2008, p. 5. Inn detail on how the Internet can improve productivity, see C. Choi, 'Does the Internet stimulate inward foreign direct investment?', *Journal of Policy Modeling,* Vol. 25, 2003, p. 320.

[776] K. wai Ko, 'Internet externalities and location of foreign direct investment: A comparison between developed and developing countries', *Information Economics and Policy,* Vol. 19, 2007, p. 3.

[777] Many applications and software have been developed to reduce this distance effect. For more details, see P.M. Rao, 'The ICT revolution, internationalization of technological activity, and the emerging economies: implications for global marketing', *International Business Review,* Vol. 10, 2001, pp. 571-596. For instance, Choi finds that "increasing the Internet measure by 10 percent is roughly equivalent to reducing the geographical distance by 5 percent". See C. Choi, *op. cit.*, p. 325.

[778] Some researchers even use the 'number of telephones per 1000 population' as a proxy to measure the overall availability of infrastructure, including roads and railways. See for instance E. Asiedu, *op. cit.*, 2002, p. 111. Although this kind of proxy can be criticized, it however highlights the importance of access to a telephone as an indicator of infrastructure availability, at least in empirical research.

[779] This approach was considered by the Africa Infrastructure Country Diagnostic in 2011. See R. Ranganathan and V. Foster, *East Africa's Infrastructure: A Continental Perspective*, World Bank Policy Research Working Paper, 5844, September 2011 (hereinafter AICD Report 2011). It has been used ever since in various reports including 'State of Infrastructure in East Africa' produced by the Statistics Department Africa Infrastructure Knowledge Program of the African Development Bank in April 2013. However, it must be noted that for unexplained reasons some figures were not accurately re-transcribed in the AfDB's State of Infrastructure in East Africa from AICD although it referred to the latter as the source of those figures. For instance, in table 17, the AfDB reports that the monthly basket price of a prepaid mobile is 11.5USD in Burundi mentioning that this information was found at page 49 of the AICD report 2011 (AfDB 2013, p. 25). But on the mentioned page of the AICD

Table 3: Access and Pricing of ICT in EAC Partner States

	Burundi	Kenya	Rwanda	Tanzania	Uganda	Average
ACCESS IN THE ICT SECTOR						
Coverage of mobile network (% of population)	60,00	92,00	81,00	69,00	97,00	79,80
Mobile telephone subscribers (per 100 inhabitants)	5,30	48,50	12,70	32,70	23,30	24,50
Internet subscribers (per 100 inhabitants)	0,01	0,04	0,03	0,09	0,03	0,04
Broadband subscribers (per 100 inhabitants)	0,00	0,05	0,03	0,00	0,01	0,02
International Internet bandwidth (Mbps)	4,00	885,00	31,00	200,00	344,00	292,80
Landline penetration	0,40	0,70	0,20	0,40	0,50	0,44
PRICING IN THE ICT SECTOR						
Prepaid mobile monthly price basket	N/A	7,36	6,16	9,50	9,32	8,09
Price of fixed telephone monthly price basket	2,50	19,40	7,80	11,30	13,20	10,84
Price of a three-minutes call to USA	2,40	1,80	1,30	0,70	1,40	1,52
Price of a 20-hour Internet basket	52,00	82,00	85,00	148,00	58,00	85,00

Source: Ampah et al. 2009 cited by R. Ranganathan and V. Foster (2011)

The table above responds to this expectation and highlights the EAC Partner States' performance according to different indicators. It should be mentioned at the outset that, as a sub-region, East Africa, including all the EAC Partner States, displays "the highest costs and lowest penetration of internet services among all African sub-regions, while the density of fixed-line telephone users and mobile users is among the lowest in Africa".[780] But as was underscored regarding the other factors analyzed above, the EAC does not offer a monolithic landscape. This is again confirmed by the analysis of access to and the pricing of ICT services in the sub-region. As far as foreign investment is concerned, three indicators could play a key role in relation to access to ICT services.[781]

Report 2011, it is indicated 'N/A' for the same indicator in Burundi. Other transcription errors were found in the AfDB report where several numbers were not accurately copied.

[780] AfDB 2013, p. 24.

[781] While the number of people who have subscribed to mobile telephone, internet, and broadband services is important as indicators of access to ICT, they are not very determinative, as conditions currently stand, for FDI inflow in manufacturing, for instance, in the EAC. These indicators could be more determinative when the EAC moves to intense online or on-phone sales. However, in the financial and banking sectors, the internet and mobile telephones are playing a revolutionary role in the EAC concerning services like mobile and online banking. In each Partner State, mobile telephone operators have launched services allowing customers to make financial transactions directly from their mobile phones. Millions of USD are transacted yearly using mobile telephones in the EAC (see for instance Z. Kubwani, 'M-Pesa hits $1bn mark transfer in EA states', online at http://mobilemoneyafrica.com/details.php?post_id=462, accessed on 30 July 2014). In February

One is mobile network coverage in the host country. Depending on where the business is located or the place where employees could be sent on a job mission, it could be problematic for management if, at some point, contact could be lost due to a lack of network coverage. For this reason, depending on the intensity of mobile network usage by foreign investors' activities, preference could be given to a country with the largest network coverage. In the EAC, Uganda offers the widest mobile network coverage with 97 percent of its population being covered. The community's average stands at 79.8 percent but it is noticeable that Tanzania and Burundi are below this average with the latter being the least covered Partner State.

Two and three are indicators related to internet accessibility that can be assessed through subscriptions to broadband and the availability of a high-speed internet. It is needless to repeat that the Internet has nowadays become an indispensable living tool, and even much more that this for businesses. Accordingly, the higher the internet penetration the higher are the possibilities for that country to attract FDI. But this very much depends on the availability of a high-speed internet connection. Most internet-related software and applications that foreign investors would like to use in the host country to keep in touch with the parent company in their home country necessitates high-speed internet bandwidth. In this regard, Kenya stands out with an internet connection of 885 megabytes per second (Mbps). The gap between Kenya and Burundi is huge. From the sub-regional average of 292.8Mbps, only Uganda offers a better alternative to Kenya with a speed of 344Mbps which is, by the way, less than half of Kenya's speed.

Out of the six indicators used to measure access to ICT services in the EAC Burundi is clearly the worst performer concerning five indicators, which blatantly contrasts with Kenya that leads the way with regard to four indicators.[782] Most of the time, the gap between Kenya and Burundi is so vast that one may rightly wonder whether these two countries are members of the same regional economic integration community.

2014 Tigo, a subsidiary of Millicom – an international telecommunications and media company – operating in many countries in Africa, launched the world's first-ever international money transfer between mobile phone subscribers. This service was made available between Tigo subscribers in Rwanda and Tanzania. See F. Ng'wanakilala, 'Tanzania's Tigo starts cross-border mobile money transfer service' online at http://www.reuters.com/article/2014/ 02/24/tanzania-tigo-idUSL6N0LT2W120140224, accessed on 30 July 2014.

[782] Concerning indicators where Kenya is not in the lead, it is second. This is the case for 'coverage of mobile network' and 'internet subscribers'. Noteworthy is that, even in these cases, the gap between Kenya and the leader is not that big. Had the most recent data been available, it would have been interesting to see how the trend has evolved over time.

Conversely, Burundi has the best prices in the ICT market.[783] But this seems to be logical as few people would be willing to pay expensive prices for relatively poor services. The pricing of ICT services in Kenya and Rwanda is generally within the sub-regional average while Tanzania could be regarded as being the most expensive Partner State in this regard.[784] Nevertheless, prices, though determinative, may only come second (after network reliability) in foreign investors' criteria when assessing the best country to do business in. Of course, prohibitive prices could be a barrier for FDI inflow despite a network's good quality when, from the perspective of a cost-benefit analysis, the business return does not appear to be conclusive. But, comparatively, foreign investors do not start or take over a business in a host country simply because ICT prices are the lowest, regardless of the quality of the services provided.

c) Transport infrastructure

Either on land, on the sea or other waterways, or in the air, transport infrastructure is vital for any economy. For the manufacturing industry a proper transport infrastructure allows for the rapid, easy and cost-effective importation of raw materials and the export of final products. A good transport infrastructure is also the key to effective and timely distribution. There is no doubt that transportation plays a crucial role "in making the countries attractive to foreign direct investors in both

[783] Except for calls made to the United States, probably the proxy representing all outgoing international calls, which are the most expensive in the region, Burundi offers cheaper tariffs on fixed telephone calls and a 20-hour internet basket. It should be reminded that intra-EAC calls are mostly charged as international calls. Consequently intra-EAC calls are very expensive. Sometimes, making a call to the United States is cheaper than calling other EAC Partner States. The price of outgoing and incoming international calls in the EAC are also conditioned by increasing taxes that governments charge. Higher intra-EAC call rates could be tantamount NTB for foreign investors, especially those doing business in more than one Partner States. For EAC people, potential services consumers, it is difficult to move from one country to another using their home number since roaming fees are also too high for both incoming and outgoing calls. However, operators like MTN and Airtel allow their subscribers to receive incoming calls free of charge on their own network in another EAC country and try to keep outgoing calls as cheap as their local subscribers pay. At the 'Transform Africa Summit 2013', the EAC Heads of State (excluding Tanzania and Burundi) promised to fight high calling rates in the sub-region. But this seems to take a long time. See for instance M. Mutuma, 'East African Community (EAC) fights for low calling rates in the region', *Duwaa*, 9 July 2014, online at http://www.duwaa.co.ke/news/consumer-tech/606-east-african-community-eac-fights-for-low-calling-rates-in-the-region accessed on 30 July 2014; M. Mumo, 'EAC to discuss calling costs', *Daily Nation*, 24 October 2013 online at http://www.trademarkea.com/eac-to-discuss-calling-costs/ accessed on 30 July 2014 ; F. Kanyesigye, 'Heads of State push for strong ICT strong', *The New Times*, 30 October 2013, online at http://www.newtimes.co.rw/news/index.php?a=71676&i=15526 accessed on 30 July 2014.

[784] As seen in Table 2, in Tanzania one needs to spend 148USD for a twenty-hour internet basket and up to 9.5USD for a prepaid mobile phone. These prices are well beyond the EAC average which is 85USD and 8.09USD respectively.

the short and long run".[785] It can be deduced from this conclusion that, *ceteris paribus*, the better the transport infrastructure, the greater the country's potential to attract FDI.

Like in other African sub-regions, business in the EAC depends, to a large extent, on interaction with global actors. Foreign investors who want to start or acquire, for instance, a manufacturing business in the EAC will need at some point either to import equipment or production inputs, to export their products or to simply travel to their investment site. This involves a high dependency on international entry or exit points in the region. These points are usually international airports and ports where goods transit to reach their final destination. Therefore, it is quite foreseeable that in their assessment of their investment's host country in the EAC foreign investors would pay particular attention to the availability and the quality of these transport infrastructures.

As far as air transport is concerned, each EAC Partner State has at least one international airport. But the international traffic and connectivity to these airports widely diverge from one country to another.[786] As things now stand, Kenya could be considered the regional hub of air traffic in the EAC. There are at least three simple reasons to support this assertion. First, all EAC Partner States are connected to Nairobi,[787] the capital of Kenya, through at least one bi-weekly direct flight. Second, Kenya Airways, in addition to being the sub-region's dominant air carrier, offers much more routes to passengers compared to its main rival in the EAC, RwandAir.[788] This makes Kenya the main connecting point for people who would like to travel out of Africa. Third, Kenya is one of the big three countries in Africa that handle the bulk of Africa's air cargo.[789] Consequently, Kenya incontestably

[785] B. Seetanah and J. Khadaroo, 'The Role of Transport Infrastructure in Attracting FDI in Africa', *Proceedings of African Economic Conference(UNECA),* 2007, p. 366.
[786] For details on their respective connectivity, see AICD Report 2011, p. 29.
[787] AICD Report 2011, p. 27.
[788] Kenya Airways is reported to hold 60 percent of the market share of international travel within the EAC, while RwandAir's share increased by 3percent between 2004 and 2007. See AICD Report 2011, p. 27 and 32. The emergence of RwandAir as an alternative and credible rival to Kenya Airways is confirmed by the recent grant of the fifth freedom of the air by the Uganda Civil Aviation Authority to RwandAir and Ethiopian Airlines to operate commercial flights on routes previously served by Air Uganda from Entebbe International Airport following the suspension of the latter. See I. Khisa, 'Ethiopian, Rwandair to fly from Entebbe', *The East African*, 26 July 2014, online at http://www.theeastafrican.co.ke/business/Ethiopian--RwandAir-to-fly-from-Entebbe/-/2560/2398392/-/un9is3z/-/index.html, accessed on 31 July 2014.
[789] Kenya is second in Africa, after South Africa, in terms of handling bulk air cargo. It is reported to handle 15 percent of bulk air cargo, while South Africa and Egypt handle respectively 20 percent and 15 percent. Uganda, which comes second in the EAC, handles 3 percent, which is equivalent to 5 times less than Kenya. AICD Report 2011, p. 33.

leads the way in the region in terms of international connectivity. Tanzania, which comes second, does not have an effective national carrier to strengthen this position.[790] However, at the regional level, Rwanda could be considered a good alternative to Kenya in terms of air traffic. Its national carrier, RwandAir, is constantly increasing its fleet without mentioning the increasing number of international carriers such as the Dutch KLM that have started to operate a daily direct flight from Kigali International Airport.[791]

It is a fact that having effective national air carriers contributes a great deal in increasing a country's connectivity. Therefore, the suspension of the moribund Air Uganda does not help much, except to decrease Uganda's regional connectivity even though other carriers have taken over.[792] Tanzania's national carrier is not very well known by consumers in the air transport industry in the EAC. It seems to serve predominantly Tanzania's domestic market, which is quite large, however.[793] Burundi rather provides a very different picture. The low air traffic in Burundi could imply poor accessibility. It is very rare to find a direct flight from or to Bujumbura. Most of the flights operating there have to fly through Kigali or Nairobi.

From an FDI perspective, time and costs are two key elements in making a choice. Yet, less air traffic into a country usually means long waiting times for connecting flights, which may also entail higher costs. But anyway, air transport is not really

[790] Available data suggest that Kenya is connected with 77 city pairings internationally, while Tanzania, Uganda, Rwanda and Burundi have 38, 19, 7, and 5 respectively. See AICD Report 2011, p. 29.
[791] This is coupled with the ambition of Rwanda to build a state of the art international airport in Bugesera, a few minutes drive from Kigali, in order to boost Rwanda as a Meetings, Incentives, Conventions and Exhibitions (MICE) tourism destination. See W.H. Thome, 'Chinese company wins tender for new Bugesera Airport in Rwanda', 14 April 2013, online at http://www.eturbonews.com/34311/chinese-company-wins-tender-new-bugesera-airport-rwanda, accessed on 31 July 2014.
[792] I. Khisa, *op. cit.*
[793] Despite the fact that its national carrier is not well known, Tanzania still has higher connectivity and it should be noted that Tanzania is the largest EAC country. This makes it necessary to have some frequent domestic flights to connect one city to another. No wonder Tanzania is reported to have the highest number of domestic city pairings in the EAC followed by Kenya (AICD Report 2011, p. 29). In 2009 and 2011, RwandAir launched two domestic connections respectively from Kigali to Rubavu (formerly Gisenyi) and from Kigali to Kamembe (formerly Cyangugu). The Kigali – Rubavu route was later cancelled (New Times Reporter, 'Top story: Rwandair launches Kigali – Gisenyi flights', *The New Times*, 17 March 2009, online at http://www.newtimes.co.rw/news/index.php?i=13837&a=14229 accessed on 31 July 2014 and L. Nakayima, 'Rwandair launches second Kigali-Kamembe flight', The New Times, 15 May 2011, online at http://www.newtimes.co.rw/news/index.php? i=14626&a=9420 accessed on 31 July 2014). But it should be reminded that Rwanda and Burundi are such small countries with well paved roads that there is no pressing need to fly.

the most used means in EAC business. Air transport is mainly used to move persons and time-sensitive goods like flowers and other perishables.[794] Bulk business goods enter the EAC via the ports of Mombasa and Dar-es-salaam located on the shores of the Indian Ocean. These two ports located respectively in Kenya and Tanzania are the economic heart of the EAC, especially since Burundi, Rwanda and Uganda exclusively depend on these ports for both their imports and exports as they are landlocked countries. The two ports respond to minimum international standards in terms of performance and dwell time.[795] But, compared with one another, the port of Dar-es-salaam performs slightly better than Mombasa. However, the higher port charges levied in Dar-es-salaam drastically outweigh its relative performance advantages.[796] As said above, these are the only two ports serving international cargo to and from all EAC Partner States and some other neighboring countries like South Sudan and the eastern part of the Democratic Republic of Congo. Consequently these ports operate at their maximum capacities without satisfying the demand.[797] This involves long waiting times in going through long import and export procedures.[798] For foreign investors subjected to tight deadlines, it could be a real challenge to meet them.[799]

Of course, except for goods intended for Mombasa and Dar-es-salaams, all others need to travel extra miles before reaching their final destination. This means that in addition to lengthy port clearance procedures and high costs, importers or exporters also have to face the vagaries of transport by road.[800] Goods can be moved to

[794] AICD Report 2011, p. 35.
[795] AICD Report 2011, p. 24.
[796] Crane productivity is assessed at 20 containers per hour in Dar-es-salaam, Mombasa can only handle 10 containers per hour; although container dwell time in Mombasa is shorter (5 days) than in Dar-es-salaam (7 days). In contrast, one twenty-foot equivalent unit (TFU) container is handled against 275USD of charge in Dar-es-salaam; this is four times cheaper (68USD) in Mombasa. See AICD Report 2011, p. 24.
[797] Specifically because the design capacity of these ports is considerably below the volume of general cargo and container traffic. AICD Report 2011, p. 23.
[798] It is reported that "importing goods along the Northern Corridor indicates that waiting times at ports account for a significant portion of the total time associated with transporting goods along the corridor". AICD Report 2011, p. 25.
[799] Goods destined for the Kenyan market are given preferential treatment as they are quickly transferred to Container Freight Services, a privately operated inland container depot while those in transit to other countries (including EAC Partner States) have to wait at the dockside (AICD Report 2011, p. 26). This practice is tantamount to a violation of the National Treatment principle contained in article 3(2)(b) of EAC-CMP. Hopefully the strengthening of EAC-SCT between Kenya, Uganda and Rwanda will put a stop to this kind of practice.
[800] So far, there exists only one railway that connects two EAC Partner States, which is the network connecting Kenya to Uganda (a result of their colonial heritage). In addition, Tanzania is the only country with internal railways. But the overall maintenance and quality of the services provided by railways in the EAC is very poor. For this reason, railways are less used for intra-EAC transport. AICD Report 2011, p. 19-20. Nevertheless, a cost-benefit analysis between road and railway trans-

or from Mombasa and Dar-es-salaam ports through two corridors. The Northern Corridor goes from the port of Mombasa in Kenya to Kigali via Uganda, while the Central Corridor runs from the port of Dar-es-salaam in Tanzania to Burundi.[801] Generally speaking, the roads in the two corridors are in relatively good condition, but the Northern Corridor offers a longer paved road than the Central Corridor.[802] Despite this, the speed of trucks is as slow as a horse with an average speed of 8.1 kilometers per hour[803]. The long waiting time at the ports coupled with the slow movement of goods on roads makes it puzzling to do business in the EAC, especially for foreign investors located in landlocked countries, i.e. Burundi, Rwanda and Uganda[804].

It follows from this analysis of the transport infrastructure in the EAC that landlocked Partner States are in a very weak position compared to Kenya and Tanzania. Foreign investors would prefer to invest immediately in these countries because they host the two international ports in the community. Being located in these two countries would shelter them against lengthy, expensive, and uncertain road transport in the sub-region. However, from a functional point of view, Kenya has a huge comparative advantage because of the intensity of its air transport in-

portation between Kenya and Uganda shows that railways could be more effective in terms of freight tariffs and additional delays. See AICD Report 2011, p. 15. This is probably the reason why Rwanda is pushing for a railway extension to Kigali. See E. Kabeera, 'EAC presidents set timelines for major integration projects', *The New Times*, 30 August 2013, online at http://www.newtimes.co.rw/news/index.php?i=15465&a=69992 accessed on 1 August 2014. Certainly better railways would make goods move quickly and in a high volume from one point to another since one locomotive can easily pull more than ten container wagons at one go. At the same time, trains might not be subject to multiple roadblocks like those that trucks usually face.

[801] A well paved road between Kigali and Bujumbura loops through both corridors, which gives these two countries the option to use either corridor for their import-export purposes.

[802] 94.6 percent of the Northern Corridor is paved against 57,3 percent of the Central Corridor. The longest unpaved road is located in Tanzania where only 60 percent of the road is paved. It should be noted that in terms of roads connecting the national capitals in the EAC, Rwanda and Burundi are leading as far as the length of paved roads is concerned with respectively 100 percent and 80 percent of paved roads. But this does not help much in the circulation of goods in the EAC as these two countries are small and are located at the end of the transportation chain within the community. AICD Report 2011, p. 14 and 18.

[803] The movement of trucks is often delayed by administrative procedures including lengthy customs clearance processes, roadblocks and the compulsory weighing of loads. AICD Report 2011, p. 9 and 11.

[804] It is reported that "costs incurred at ports and high transport costs make up more than 90 percent of the total cost of importing goods" in the EAC. To the delays, the high cost of importing goods into EAC landlocked countries should be added. The choice of the port (between Mombasa or Dar-es-salaam) and that of the corridor (between the Northern or the Central corridor) has a serious impact on the cost of importing goods in Burundi, Rwanda and Uganda. The difference is so big that, despite being 600 kilometers longer and goods having to go through three successive customs checks (Kenya-Uganda, Uganda-Rwanda, and Rwanda-Burundi borders), it is strikingly cost and time-effective for Burundian importers to use the Northern Corridor. AICD Report 2011, p. 16.

dustry coupled with traffic fluidity and cheaper rates to reach consumers in the three other Partner States while sharing an immediate border with Tanzania.

5.3.1.4. Discrepancies in the observance of good governance

The existence of a conducive legal and institutional framework in the host country is paramount for foreign investors. It should be reminded that foreign investors' worst nightmare is the direct or indirect expropriation or nationalization of their investments by the host country. This is even the rationale behind the whole edifice of international investment law. Bearing this in mind, it makes it easier to understand why foreign investors pay particular attention to the legal and institutional framework of their host country. Accordingly, in order to be attractive countries around the world try to do their utmost to improve their investment-related laws and institutions. Of course, EAC Partner States are not an exception to this rule. Investing Across Borders (AIB), a joint project by the World Bank and the IFC, has developed five indicators to measure the adequacy of the host country's regulatory framework regarding FDI.[805]

Those indicators are related to investing across sectors, starting a foreign investment, arbitrating and mediating disputes, employing skilled expatriates, and converting and transferring currency. AIB does not offer a clear and direct comparison between participating countries in terms of ranking, but a careful reading of its data reveals striking differences between the EAC Partner States across all five indicators.[806]

[805] This project was launched in 2010 under the theme Investing Across Borders (IAB) to analyze laws, regulations and policies affecting foreign investments in various countries in the world. In 2012, the scope of the report was enlarged from 87 to 104 countries, Burundi being one of the countries added. Also indicators were reviewed to include 'Employing Skilled Expatriates' and 'Converting and Transferring Currency'. At the same time, 'Accessing Industrial Land' disappeared as a distinct indicator. There are some inconsistencies between the database and some related handouts. For instance, the database was updated to reflect the change introduced in 2012, but the interactive country page still displays the old indicators hence making any good cross-country comparison difficult. Burundi, for instance, appears in the database, but there is no available interactive webpage on this country. Understandably, this is probably due to the updating of this database in 2012. Due to these inconsistencies, it was decided not to base any assertion on this database which is in an ongoing development process.

[806] As far as investing across sectors is concerned, restrictions on new investment projects are reviewed in 33 FDI-prone sectors including mining, oil and gas, agriculture, manufacturing, telecommunications, banking, insurance, transport, construction, media, health and the environment, and electricity to name but a few. Burundi and Rwanda appear to be the most open countries in the EAC as foreign investors are free to invest without any legal or policy restriction in all the economic sectors despite the persistence of a monopolistic market dominated by state-owned enterprises in some sectors such as electricity and water distribution. In contrast, Kenyan laws present more restrictions

In general, Rwanda appears to offer the best legal and policy framework compared to the other EAC Partner States.[807] Of course, this is not surprising since Rwanda has often been acclaimed as one of the world's top reformer of investment regulations by successive Doing Business (DB) reports. But, unlike AIB that assesses a country's regulatory framework concerning foreign investment, DB which is another World Bank project focuses on the impact of laws, regulations and policies on domestic investment. It is however acknowledged that "economies that provide a good regulatory environment for domestic firms tend to also provide a good one for foreign firms".[808] Following this and considering the incompleteness of AIB, reference can be made to DB reports to understand the regulatory framework of EAC Partner States.

According to DB 2013, Rwanda ranks first in the EAC in terms of reforming business laws to make an investment-friendly environment while Burundi occupies the last place in the region. But the gap between the EAC Partner States is intriguing when their ranking is put in a global perspective.

While Rwanda, the regional leader, is 52nd globally, Burundi – the last – is 159th out of 185 countries.[809] Burundi's poor ranking in DB reflects the above analysis of the provisions of its investment code that was found to be less protective towards foreign investors than those of its fellow Partner States.

on foreign ownership and control. On the other hand, it may take only an average of 4 days to establish a foreign-owned limited liability company in Rwanda after the completion of three procedures through an efficient 'one-stop shop' while for the same thing one needs to go through twenty-one procedures in thirty-nine days in Uganda. In Kenya and Tanzania, it also takes more than thirty days and ten procedures to start a foreign business. Regarding the level of protection provided to FDI, while all EAC Partner States provide the possibility for foreign investors to resort to arbitration to solve any investment-related dispute, it should be noted that it may take on average up to sixty-one weeks to enforce a foreign arbitration award in Tanzania against fifteen in Rwanda. Fifty-two and forty-three weeks are respectively needed in Uganda and Kenya for this. See The World Bank Group, 'Investing Across Borders: Indicators of Foreign Direct Investment Regulation', online at http://iab.worldbank.org/ accessed on 20 August 2014.

[807] This is also in line with 'World Economic Forum: Global Competitiveness Report 2010-2011' that ranked Rwanda's institutions 19th worldwide. See International Research by Students Programme (IRSP), *A strategy to enhance Dutch FDI in Rwanda 2010-2011*, University of Groningen, 2011, p. 20.

[808] The World Bank Group, 'FDI Regulations Database: A Joint Project by the World bank and IFC' online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/What-is-FDI-Regulations-Database.pdf accessed on 20 August 2014.

[809] The gap between Rwanda and its runner-up (Uganda) is also noteworthy. Although Burundi is ranked last in the region, it should be reminded that it was listed among the 10 economies that had improved the most across 3 or more areas measured by Doing Business in 2011/2012 and among the 50 economies that have narrowed the distance the most since 2005. In this later list, only Rwanda was co-listed with Burundi in the EAC. See The World Bank, *Doing Business in the East African Community 2013: Smarter Regulations for Small and Medium-Size Enterprises*, Washington, DC, 2013, p. 5 and 7.

Table 4: EAC Partner States' performance in effective FDI regulatory framework

Country	Global Rank	EAC Rank
Rwanda	52	1
Uganda	120	2
Kenya	121	3
Tanzania	134	4
Burundi	139	5

Source: World Bank, Doing Business in the EAC 2013, p. 12

This seems to confirm the finding according to which countries from the common law legal tradition provide better protection to foreign investments than countries from the civil law tradition.[810] Indeed, the EAC Partner States inherited two different legal traditions from their colonial powers. The three founding Partner States, Kenya, Tanzania and Uganda, have the common law legal tradition as the legacy of their colonization by Great Britain while Burundi and Rwanda inherited the French civil law tradition from Belgium. Like many other former colonies in the world, EAC Partner States kept their inherited legal tradition intact which still defines their legal reasoning. Whenever necessary, updates are introduced but still following the linear evolution of the former colonial powers. In other words, this means that despite decolonization, the juridical landscape of the former colonies still reflects the strengths and weaknesses of the colonizers' legal tradition, with very few exceptions.

Among those exceptions, Rwanda is worth mentioning. As a consequence of the 1994 genocide against the Tutsi, Rwanda not only integrated English as its third official language as explained above. It also decided to progressively shift from the Civil Law legal tradition to Common Law for political reasons.[811] This ongoing

[810] R. La Porta et al., 'Legal Determinants of External Finance', *The Journal of Finance*, Vol. LII, n° 3, July 1997, p. 1137. For a challenging opinion, see also K.W. Dam, *The Law-growth Nexus: The Rule of Law and Economic Development*, Chicago, Brookings Institution Press, 2007; M. Roe and J. Siegal, 'Financial and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in the Law-Growth Nexus', *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*, 2009, paper 625; and D. Collison et al., 'Legal Determinants of External Finance Revisited: The Inverse Relationship Between Investor Protection and Societal Well-Being', *Journal Business Ethics*, Vol. 108, Issue 3, July 2012, pp. 393-410. Actually this paper does not disprove La Porta's findings but simply tries to provide an explanation thereof. Roughly, for David Collison et al., the Common Law system provides better protection to foreign investors because it was basically developed in a capitalist environment where much attention is given to shareholders to the detriment of stakeholders and society in general, whereas the Civil Law system is built on the spirit of society's interests outweighing individual shareholders' rights.

[811] R. Mugabe, 'EAC wants Rwanda, Burundi to adopt common law system', *The New Times*, 2 June 2009 available at http://www.newtimes.co.rw/news/views/article_print.php?i=13914&a=16230&icon=Print accessed on 21 August 2014. It is usually argued that the shift from Civil Law to Com-

shift has led Rwanda to extensively review and reform most of its laws, regulations, policies, and institutions including courts of law since the early 2000s. The reform in Rwanda has tried to incorporate the world's best practices within Rwanda's legal

mon Law was motivated by Rwanda's membership of the EAC. But this opinion can be challenged. As mentioned by the then president of Rwanda's High Court, Johnson Busingye, reforms to switch to the Common Law system started in 2001 while Rwanda only joined this organization in 2007. Therefore, it may be submitted that membership of the EAC rather provided an opportunistic justification for this shift. But as is commonly attested by EU experience, there is no imperative need for all Partner States to have the same legal tradition for a successful regional integration. In the EU, two trends can be observed. One is the prevalence of a very dynamic supranational legal system made up of contributions from Member States' laws and practices. And the other is a progressive improvement of national rules as a consequence of the obligation for Member States to comply with EU laws and regulations. But no country was forced to change its legal tradition. Continental countries complied their reasoning with their Civil Law tradition while the UK retained its well-developed Common Law tradition after it joined the EU. For their own convenience, other countries like the Netherlands employ a quasi-hybrid system. Variety delights (varietas delectat). Therefore the coexistence of Common Law and Civil Law traditions within the EAC would be an asset for the community as it would allow the regional legal framework to be enriched with best practices from both traditions. See for instance T. Koopmans, 'The Birth of European Law At the CrossRoads of Legal Traditions', *The American Journal of Comparative Law*, Vol. 39, 1991, pp.493-507. However, although the shift in Rwanda has theoretically led to the enactment of better Common Law model laws, regulations and policies that protect more foreign investments, it should not be overlooked that a legal tradition is a paradigmatic unity made up of a set of complex phenomena like "beliefs, values, assumptions, practices and techniques largely common to the members of a given community". The concept 'tradition' (legal tradition) embodies a very strong element of culture in its anthropological sense. Therefore, a rule seen in the context of a given legal tradition could not be supported, surprisingly, by "impressive ideological formations" that could sometimes be very difficult to track. Beneath what appears on the surface, a legal rule or legal practice may have a deep cultural significance. Therefore shifting from one legal tradition to another is not just a matter of changing laws. It requires in-depth work, which could be even harder than just changing a country's official language. In a country like Rwanda and Burundi, where the majority of lawyers have obtained a Civil Law-oriented legal education, the effective shift from this system to Common Law is not just perplexing but it may simply be impossible. As clearly put by Pierre Legrand: "It is not that a civilian lawyer cannot understand the English legal experience (or that a man cannot understand womanhood). Rather, the point is that a civilian can never understand the English legal experience *like an English lawyer*. Understanding there can be, but a *different* understanding it will *have* to be" (P. Legrand, 'European Legal Systems Are Not Converging', *International and Comparative Law Quarterly*, Vol. 45, January 1996, p. 78, emphasis in the original text). Of course, with time, this understanding may improve. But for countries like Rwanda and Burundi, a successful shift to the Common Law tradition - though not necessary - may require a sharp rupture from the civil law system. This rupture should start with a massive importation of Common Law native lawyers to teach university students in a totally reformed academic curriculum with adequate materials. Newly trained students would then progressively replace judges and other professionals in the legal domain until the whole shift is complete. Such work should be systematic. But pragmatically, this seems unrealistic, at least if consideration is given to how Rwanda started this shift. But since this is the road that Rwanda has taken, it is true that despite training and workshops, a Rwandan lawyer, trained in Rwanda, in the context of a particular cognitive approach to systems, rules, facts, rights and the presence of the past, will simply never be able to appreciate a system, a rule, a fact, a right or the past as his or her Kenyan counterpart understands them (P. Legrand, *op. cit.*, p. 79). This shift would *in fine* automatically put Rwandan lawyers in a weaker position compared to their Kenyan, Ugandan, and Tanzanian counterparts in the lawyering market notwithstanding, for instance, that the official language of the EACJ is English. (art. 46 of EAC treaty).

and institutional framework. In this process, Uganda has played a crucial inspirational role even though Rwanda's unwavering devotion to do better is obvious. The result of this thorough reform speaks for itself: in 2010 Rwanda was acknowledged as the top global reformer by the Doing Business report.[812] Consequently, Rwanda has succeeded not only in moving away from the shadow of its Civil Law background but also (even more so) in overtaking Partner States with a Common Law background in terms of the conduciveness of its legal and institutional framework related to FDI.

Behind Rwanda's success story, the country's recent history has certainly played a crucial motivational role for the conception, drafting and implementation of all the reformed laws. But the situation in Burundi is different. That is why, despite all of Burundi's efforts, drastic changes like those which have taken place in Rwanda are unlikely to occur. Accordingly, Burundi's legal and institutional framework could remain very much affected by its legal tradition heritage.[813] However, there is hope that globalization could lead to a kind of harmonization of business laws and institutions that would possibly improve the existing framework even in the Civil Law countries. But until then, Burundi will still be the embodiment of a pure Civil Law legal tradition within the EAC, thus highlighting the difference between Civil Law and Common Law traditions.

It is however conventional wisdom that it is good to have well drafted legal texts and to create effective institutions to enforce them. However, what really matters is

[812] The World Bank Group, *Doing Business 2010: Reforming through Difficult Times*, Washington DC, Palgrave MacMillan, 2009, p. 2. Rwanda again topped the list of the world's top reformers in 2011 and 2014.

[813] Research on the impact of legal tradition on investment-related legislation and policies have basically explored two avenues with the level of investment protection. There exists abundant literature on the interplay between a country's legal tradition and accessibility to financing by private investors. The access to financing is measured *inter alia* through the development level of the country's capital market. The key conclusion on this is that Civil Law countries tend to provide very limited access to financing and that their capital markets are usually smaller. See for instance T. Beck, A. Demirguç-Kunt, and R. Levine, 'Law, endowments, and finance', *Journal of Financial Economics,* Vol. 70, 2003, p. 175. This is confirmed at the EAC level, where Kenya, Tanzania and Uganda – Common Law countries – have larger and relatively stronger capital markets compared to the Civil Law Partner States Burundi and Rwanda. More formally, EAC Common Law countries established their respective stock exchange in the 1990s whereas the Rwanda Stock Exchange was established in late 2010. Burundi's stock exchange is still to be established. It is obvious that Rwanda's inclination towards Common Law has persuaded it to find means to catch up, while in Burundi there seems to be no pressing need to establish a stock exchange market despite the majority trend observed in the EAC. See for instance M. Yabara, *Capital Market Integration: Progress Ahead of the East African Community Monetary Union*, IMF Working Paper WP/12/18, January 2012, pp. 4-6. For further reading on the impact of legal tradition on investment protection, see R. La Porta, F. Lopez-de-Silanes and A. Shleifer, 'The Economic Consequences of Legal Origin', *Journal of Economic Literature*, Vol. XLVI, June 2008, pp. 285-332.

the reality on the ground. In other words, the enforcement of the laws by competent institutions is the key for any kind of successful policy-making.[814] There is no doubt that the quality of institutions in the host country is the backbone of any effective and efficient legal and institutional framework regarding foreign investment. But it is very challenging to measure institutional quality.[815] Nevertheless, from the spectrum of the indicators used in assessing the quality of institutions, controlling corruption appears to have been agreed upon.[816] Besides, for a purely pragmatic observation, corruption is by far the worst of plagues that have affected the effectiveness of law enforcement in Africa. Rampant corruption explains the big discrepancy between well drafted legal provisions and their chaotic enforcement in practice. This simply confirms that the level of corruption in a given coun-

[814] A. Perry, 'Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence', *International and Comparative Law Quarterly*, Vol. 49, October 2000, p. 781.

[815] A. Borrmann, M. Busse, and S. Neuhaus,'Institutional Quality and the Gains fromTrade', *Kykos*, Vol. 59, N°3, 2006, p. 348.

[816] *Ibidem*; and R. Islam and C.E. Montenegro, 'What Determines the Quality of Institutions?', *World Bank Policy Research Paper* 2764, Washington DC, 2002, p. 14; and B. Anghel, 'Do Institutions Affect Foreign Direct Investment?', *International Doctorate in Economic Analysis*, October 2005, p. 9. Of course, institutions do operate within a wider political system whose stability is paramount especially in the EAC (E. Musonera, B. Nyamulisa, and E. Karuranga, 'FDI Fitness in Sub-Saharan Africa: The case of Eastern African Community (EAC)', *The Journal of International Business Research and Practice*, Vol. 4, 2010, p. 13). From the Kenyan electoral violence in 2010, the EAC has realised the indispensable character of political stability as the pedestal of the whole FDI policy infrastructure as, despite its incredible endowments, Kenya's FDI inflow phenomenally fell below Rwanda's in 2011 to the extent that it is becoming harder to reconquer its leadership seat from Uganda. In general, political stability is precarious in Africa. In the EAC, four of the Partner States face an almost permanent threat to their political stability. Since the involvement of Kenya and Uganda in the peacekeeping mission in Somalia, these countries are facing sporadic but serious attacks from the Al Shabbab terrorist group. This can be witnessed, among many other cases, by the bloody attacks on a FDI business, the Westgate Mall, in Nairobi in September 2013 and in Kampala during the 2010 FIFA World Cup. But Uganda's stability is also threatened by two other rebel groups, the National Army for the Liberation of Uganda (NALU) which is active in the Eastern part of the Democratic republic of Congo (DRC) and the Lord Resistance Army (LRA), which is active in South Sudan. These two groups have been trying to overthrow the regime of President Museveni since the late 1980s. Rwanda's stability cannot be taken for granted, either. A coalition of political parties in exile have been plotting a coup against Paul Kagame for some time in addition to the declared *Forces Démocratiques pour la Libération du Rwanda* (FDLR), active in eastern DRC. In Burundi, les *Forces Nationales pour la Libération* (FNL) constitute a big threat to any constitutional transfer of power in Burundi. This rebel movement is operational in eastern DRC as well. So far, Tanzania is the only country in the EAC to have relative peace, as no serious rebel group has declared its intention to fight the Tanzanian government. But, even though Tanzania has never known any violent transfer of power since its independence, its political stability cannot be taken for granted. At least Tanzania faces one semi-permanent threat to its political stability: the implosion between Tanzania mainland and Zanzibar. But, should this threat materialize, it might not be bloody. These are pending issues which highlight the volatility of the political situation in the EAC at large. However, just like what happened in Kenya, sometimes the most devastating threat may arise abruptly from an unexpected source like the maladroit management of a post-electoral crisis or the mishandling of a riot. Although political stability is a very sensitive element for FDI, it appears not to be impactful for this research as each Partner State has its share that makes all of them almost equally exposed.

try should presume the degree of its institutional strength. The more corrupt a country is, the weaker its institutions could be. There is no need to repeat the fact that, generally, corruption negatively affects FDI inflow in the host country.[817]

As far as corruption is concerned, the EAC Partner States show a multifaceted picture. According to the Corruption Perception Index (CPI) developed by Transparency International, Rwanda emerges as the cleanest Partner State while Burundi performs the worst. Once again, apart from the individual scores obtained by Partner States on CPI, the gap between them is astonishing when they are put in a global perspective.[818] This kind of discrepancy does not induce strong confidence in building up a fully-fledged EAC. As mentioned above, efforts that Partner States may make to harmonize their laws, regulations and policies for a fully integrated EAC would not be effective as their implementation and the implementation of the rights and obligations they bring could be severely compromised by corruption.

This analysis offers a wide picture of EAC Partner States' potential in attracting FDI. The most obvious finding is that EAC Partner States are so different and the discrepancy between their respective potentials in key FDI attraction indictors is so striking that it is easy to anticipate that not only will they never attract an equal amount of FDIs, which is very normal, but also that they are not very likely to benefit equally from the advantage offered by the regional integration. As far as FDI is concerned, the Partner State that offers an adequate combination of the above-discussed locational advantages would definitely attract more FDI than others.[819] This opens an avenue for inevitable competition between the EAC Partner States in order to attract more FDI.

[817] It is no wonder that, despite Rwanda having one of the lowest tax regimes in the region, its tax rates and tax administration is seen by some investors as a challenge to attract FDI. But the truth is that "Rwanda's effectiveness in collecting taxes and its severe penalties for tax evasion have led to higher effective tax burden for companies in Rwanda compared to companies in neighboring countries". This effectiveness is due to firm control over corruption. IRSP, *op. cit.*, p. 24. See also Shang-Jin Wei, 'How Taxing is Corruption on International Investors', *The Review of Economics and Statistics*, Vol. LXXXII, N° 1, February 2000, p. 8. See also S.L. Reiter and H. Kevin Steensma, 'Human Development and Foreign Direct Investment in Developing Countries: The Influence of FDI Policy and Corruption', *World Development*, Vol. 38, N° 12, 2010, pp. 1678-1691.
[818] A comparative outlook on the annual performance of each of these countries can be accessed at http://www.transparency.org/country accessed on 22 August 2014.
[819] F. Noorbakhsh, A. Paloni and A. Youssef, *op. cit.*, p. 1595.

5.3.2. Consequence of asymmetries in an anarchic common market or the reign of the 'law of the jungle'

As described above, the EAC common market appears to be an open space where unequal competitors have to play by the same rules and under the same conditions. It is conventional wisdom that competition between unequal parties leads to the hegemony of the strongest. This is nothing less than a tacit establishment of a safe area where the law of the jungle would reign. But instead of capitulating, there are strong probabilities that the EAC Partner States that might find their interest not well served by the integrated common market will be tempted to quit the regional integration. However, their decision to quit or to remain would also much depend on the attractiveness of the gains they could expect or obtain after defection. In this regard, the impact of extra-EAC actors is very critical. This is what is addressed in this sub-section.

5.3.2.1. Defection as a strategy for frustrated Partner States

Traditionally, foreign investors are attracted by a myriad of factors as analyzed above, which implies that a country that offers an adequate combination of FDI determinants would definitely attract more investors than others.[820] But this traditional rule does not fully play out when FDI host countries are trading within a common market. Indeed, a fully-fledged common market is characterized by the absence of barriers and restrictions on trade, which entails the free movement of goods, persons, services and capital.

The operationalization of these freedoms virtually creates one single market between the member States, that is to say the national borders separating member States fade. Consequently, market size loses its relevance as one of the key determinants of FDI. It is in accordance with this that the EAC Partner States, especially small landlocked countries like Rwanda, mention in their FDI promotion advertisements that investing in Rwanda offers the potential to reach the broader EAC market. Concretely, before Rwanda joined the EAC, foreign investors installed in Rwanda could only have access to some ten million consumers locked within about twenty-seven thousands square kilometers. But with Rwanda's adhesion to the EAC common market, those investors can potentially reach more than 140 million people spread within the territories of five of the Partner States. In other words, no matter which country is chosen by the foreign investor among EAC Partner States, the market size does not change. Thus for a prospective foreign investor, attention should focus on other locational factors such as the host coun-

[820] F. Noorbakhsh, A. Paloni and A. Youssef, *op. cit.*, p. 1595.

try's economic productivity (GDP), human capital, infrastructure, and legal and institutional framework.

The disappearance of market size definitely removes one of the 'natural' factors of inequality between EAC Partner States.[821] Theoretically, they can equally compete on those other factors to attract more FDIs. But this competition seems to be already distorted, at least in the current state of affairs. As demonstrated above, there exist huge discrepancies between EAC Partner States regarding FDI locational factors. Out of the four analyzed factors, i.e. economic productivity, human capital, infrastructure, and regulatory framework, three are unquestionably led by Kenya whose performance is sometimes far better than the runner-up. As much as Kenya is leading the way, it is overwhelming to note that Burundi lags behind literarily on all indicators. This wide gap between Kenya and Burundi suggests that there can be no direct competition between the two of them as far as FDI attraction is concerned. Based on the analyzed data, it is obvious that should investors have to choose between investing in Burundi or in Kenya, they would logically go to Kenya *ceteris paribus*.

The logical deduction from this observation is that the existing imbalance between Partner States, which is not likely to disappear soon, foretells an extremely high likelihood for one or two Partner States to attract drastically more FDI than others.[822] Of course, the multiplicity of FDI determinants coupled with the various

[821] Asymmetries between EAC Partner States are also reflected in their geographical size. Tanzania alone is bigger than all the other four Partner States put together.

[822] While Rwanda, Uganda, and Tanzania may challenge Kenya in some respects, Kenya's attractiveness as the most potentially preferred regional destination for FDI can hardly be questioned in the next few years despite Kenya's relatively weak regulatory framework. Besides, empirical findings indicate that foreign investors, though very sensitive to the conduciveness of the legal and institutional framework of the host country, are first of all interested in their business return. For instance, Kyrgyzstan was the first of the Commonwealth of Independent States (CIS) to join the WTO and it reformed most of its business laws and institutions to make them FDI-friendly. But that was not enough as despite the fact that Kyrgyzstan had better laws and policies than its neighbors, the latter attracted more FDI because of their better economic endowments (See V. Vitalis, *op. cit.*, p. 6). In line with this, Kenya could be the well set Partner State to benefit the most from the regional integration deal and is likely to attract more FDI either because of its strong locational advantages or simply following the agglomeration or herding effect. According to the agglomeration or herding theory, a country that has already attracted a large amount of a certain type of FDI is likely to attract much more similar FDI as foreign investors tend to imitate each other. Navaretti and Venables opine that FDI is first attracted by economic factors, but "proximity to other firms may also play a role in the location of FDI" (G.B. Navaretti and A.J. Venables, *op. cit.*, p. 147). In the same vein, Birmingham goes one step further in submitting that "Given the tendency toward plant agglomeration, it is likely that unregulated development will be characterized by heavy concentration of monopolistic enterprises within one or a small group of member states". (see R. Birmingham, 'Economic Integration in East Africa: Distribution of Gains', *Virginia Journal of International Law*, Vol. 9, Issue 2, 1969, p. 411).

and changing performance of other Partner States may result in the fact that, in time, they will attract a changing amount of FDI. However, the truth is that liberal market rules alone would never evenly distribute FDI among such imbalanced Partner States within a common market.[823]

Yet in a regional integration perspective, the Rambo theory postulates that the increase of FDI inflow in one of the member States implies *ipso facto* a loss for the others, investment and exports shares being "common pool resources with the characteristics of rivalry, but non-excludability of consumption".[824] It is explained that:

…the consumption of the goods' 'FDI inflows' and 'export outflows' by one member state leads to the decreasing utility for all other member states. A specific investment can only be made once and it benefits only the receiving country. Also the advantage of preferential competitors in the regions of the North is reduced if it is shared by all potential competitors in the region. At the same time, the member states of a regional integration project in the South cannot punish free riders because they cannot control the flows of FDI and exports. In contrast, the flows of FDI and exports are dependent on the behavior of economic and political actors in other world regions, most notably in the industrialized countries of the North, and they may increase despite the fact that the recipient of this flow does not cooperate with its neighbors.[825]

According to this theory, in a common market like the EAC, foreign investors would rarely need to duplicate production units in various Partner States as they are free to locate in the territory of any Partner State with equal advantages.[826] According to the agglomeration theory, that freedom leads foreign investors to locate their companies in areas where similar enterprises are already operating. Consequently, two poles would emerge in the regional integration community. The 'core' countries that would attract a disproportionately higher amount of FDI, and

[823] M.S. Wionczek, 'Introduction: Requisites for Viable Integration', in M.S. Wionczek (Ed.), *Latin American Economic Integration: Experience and Prospects,* New York, 1966, pp. 3-9, 1966 cited by Robert Birmingham, *op. cit.*, p. 411.
[824] S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 882. These authors refer to Ostrom's paper hereafter for details on public goods and common-pool resources and how they affect the actions of the group's members. E. Ostrom, 'How types of goods and property rights jointly affect collective action', *Journal of Theoretical Politics*, Vol. 15, Issue 3, 2003, pp. 239-270.
[825] S. Krapohl, 'Asymmetries and Regional Integration: The Problems of Institution-Building and Implementation in ASEAN, MERCUSUR and SADC', University of Bamberg, 2010, p. 12 online at http://www.uni-bam-berg.de/fileadmin/uni/fakultaeten/sowi_professuren/politikwissenschaft_insb_int/Dateien/Mitarbeiter/ Forschungsp._region._Integration/BOPIR4-2010.pdf, accessed on 12 August 2013. See also S. Krapohl and S. Fink, *op. cit.*, p. 473.
[826] R. Birmingham, *op. cit.*, p. 411.

the 'periphery'. Because of the common market, 'core' Partners would reap all major FDI benefits, while Partner States on the 'periphery' would merely offer a market for the products from the country where FDI is located. In the long run, this state of affairs would nurture discontentment among other Partner States. Consequently, discontent Partner States would become "'Rambo' with the dominant strategy of defection".[827] It is submitted that:

If the overall gains of regional integration outweigh the loss of privileges, the member state can improve its welfare by regional co-operation. However, if the distributive losses exceed a member state's share of integration gains, co-operation reduces welfare and the member state becomes a Rambo. Depending on whether such a situation occurs before or after an agreement, defection may result in a blockade of further integration or in non-implementation of existing institutions – that is, unilateral defection.[828]

In the EAC a Rambo situation is not just an hypothesis. This has happened in the recent past. But it was not on the ground of FDI attraction being frustrated.[829] Tanzania and Burundi defected from further integration steps in late 2013. Indeed, after a long stagnation of the implementation of the EAC-CMP, some Partner States suggested that further steps should be taken to improve the enjoyment of the four EAC-CMP freedoms, i.e. free movement of goods, free movement of persons, free movement of services and free movement of capital in order to open further trade between them. The most pressing issue was the implementation of EAC-CMP provisions related to the free movement of goods and persons. Concretely, it was suggested to allow Partner States' nationals to cross their mutual borders using only their respective national ID cards instead of other costly travel documents to set a single tourist visa and to establish an EAC-SCT. This suggestion divided Partner States: Kenya, Rwanda and Uganda supported the proposal while Burundi and Tanzania were against. It can be anticipated that the reluctance on the part of opponents was motivated by the concern over the loss of revenues which the implementation of such policies would cause to their respective economies. The most important loss would originate from the single tourist visa. According to the suggested policy, any tourist would be issued with just one visa to visit all EAC Countries. The visa would cost one hundred American dollars that

[827] S. Krapohl and S. Fink, *op. cit.*, p. 475
[828] *Ibidem*.
[829] This kind of scenario already happened in the former EAC though not in direct relation to the attraction of FDI, but still closely related to the equitable sharing of regional integration benefits. This was the main reason why the Kampala Agreement was entered into in 1964. For more details on the impact of an economic imbalance between partner states of the former EAC on its collapse, see R.L. Birmingham, *op. cit.*, pp. 409-442.

would be equally shared between the Partner States, except the issuing country that would obtain a little more. In the absence of any proper and objective sharing criteria, "the likelihood of Rambo situations increases with economic asymmetries between member states" like in the EAC.[830] Indeed, for Tanzania, claiming to be the most touristic destination in the region with tourism revenues accounting for 17 percent of GDP in 2011, the implementation of a single tourist visa would mean a blind sharing of "the fruits of [its] God-given gifts".[831] Tanzania was not ready to do this. Consequently, Tanzania, followed by Burundi, defected from this arrangement. This kind of defection could seriously undermine the regional integration process, especially when the Rambo is strategically important like Tanzania.[832] Depending on the influence of the defecting country, the defection may lead to the collapse of the whole regional integration community.[833]

However, why did the EAC not collapse after the defection of its two members, including its biggest Partner State? The answer could be because the EAC is not dominated by just one regional power.[834] The fact remains that Kenya, economically the most powerful country in the EAC, offers a quasi-equal opportunity to the remaining Partner States as those suggested by Tanzania. It is worth reminding that access to the sea and the widening of their respective markets are two key incentives for small landlocked countries like Burundi, Rwanda and Uganda to join the EAC. They can attain this double goal only by partnering with one or both of their bigger neighbours, Kenya and Tanzania.[835] It is certainly because Kenya offered an alternative option to Uganda and Rwanda that the three of them moved forward to create the so-called 'Coalition of the willing' that implemented the con-

[830] S. Krapohl and S. Fink, *op. cit.*, p. 475.
[831] A. Tairo, 'Tanzania president calls for competitive East African tourism', *eTN*, online at http://www.eturbonews.com/31337/tanzania-president-calls-competitive-east-african-tourism accessed on 29 August 2014.
[832] From a functional perspective, Tanzania is very important in the EAC integration process. With a territory which is larger than all the other four Partner States put together, Tanzania is the biggest individual market. Besides, its access to the Indian Ocean makes Tanzania strategically important for regional and international trade.
[833] A regional integration process very much depends on the behaviour of the most important members of the community. S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 884.
[834] A regional power could be a member state which is much larger in respect of market size and more developed than its neighbours. See S. Krapohl and S. Fink, op. cit., p. 475.
[835] Kenya and Tanzania are the biggest countries and economies of the EAC. They both host the two biggest ports, respectively in Mombasa and Dar-es-salaam, in the region on the shores of the Indian Ocean. In many respects they can be considered as EAC powers. For more about regional powers, see D. Nolte, 'How to compare regional powers: analytical concepts and research topics', *Review of International Studies*, Vol. 36, 2010, pp. 881-901 and S.A. Schrim, 'Leaders in Need of Followers: Emerging Powers in Global Governance', European Journal of International Relations, Vol. 16, No. 2, 2010, pp. 197-221.

troversial reforms, despite Tanzania's defection.[836] Even Burundi would follow if its decision was merely motivated by regional integration concerns since it has so far been established that it is cost effective for Burundi to trade through the Northern Corridor (Port of Mombasa in Kenya) than through the Central Corridor (Port of Dar-es-salaam located in Tanzania) despite the fact that the latter is closer in terms of distance to Burundi than the former.[837]

The fact that Kenya and Tanzania counterbalance each other is salutary for the EAC regional integration process. It avoids a plutocratic regional integration path being followed. And it substantially diminishes the likelihood of the collapse of the

[836] Moving forward without Tanzania angered the Tanzanian authorities which, portraying themselves as victims of sidelining by other Partner States, envisaged leaving the EAC in order to create another regional economic community with Burundi and the Democratic Republic of Congo (F. Ng'wanikilala, 'Tanzania complains of being sidelined in east African bloc', *Reuters*, 5 November 2013, online at http://www.reuters.com/article/2013/11/05/us-tanzania-eastafrica-idUSBRE9A40SY20131105 accessed on 29 August 2014; O. Obonyo, 'Tanzania threatens to pull out of East Africa Community', *Standard Digital*, 3rd November 2013, online at http://www.standardmedia.co.ke/thecounties/article/2000096753/tanzania-threatens-to-pull-out-of-eac accessed on 29 August 2014; and Xinhua News Agency, 'Tanzania mulls for a new regional economic bloc outside EAC', online at http://coastweek.com/3644-focus-07.htm accessed on 29 August 2014). However, they later calmed down and expressed their commitment to remain in the EAC although they never subscribed to implement the ID card as a travelling document, or a single tourist visa or EAC-SCT policies (S. Ernest, 'Kikwete says Tanzania won't pull out of troubled EAC', *Mail and Guardian*, 8 November 2013, online at http://mg.co.za/article/2013-11-08-president-denies-claims-tanzania-pulling-out-of-east-african-community, accessed on 29 August 2014.). Tanzania is potentially a Rambo-prone country because of its profound attachment to duty revenues. Already in September 2000, Tanzania withdrew from the Common Market of Eastern and Southern Africa (COMESA) when this regional economic community decided to abolish tariffs in order to create a free trade area. At that time, Tanzania alleged that the loss of tariffs would hinder its industrial development (BBC World Service, 'Tanzania quits COMESA trading bloc', Saturday 2 September 2000, online at http://news.bbc.co.uk/2/hi/africa/908008.stm accessed on 29 August 2014.).

[837] While Tanzania's defection can be understood because this country has enough factor endowments to prosper even out of the EAC deal, Burundi's defection or reluctance to implement EAC provisions is quite puzzling. The most plausible explanation for Burundi's reluctance to implement common market rules could be the widespread crony capitalism that sees in regional integration a potential threat to the existence of a system that provides Big Men's cronies with largesse in the form of monopolies. In a systematically corrupt country like Burundi, trade liberalization could be fatal for the established clique and their network that have taken the state apparatus hostage. K. Kimbugwe et al., *op. cit.*, pp. 1-10. Crony capitalism is a very big threat for trade liberalization in Sub-Saharan Africa as a whole. Few countries would be "lucky" to do a *tabula rasa* and restart everything from scratch with a strong and visionary leadership like Rwanda after the 1994 genocide against the Tutsi. Most sub-Saharan efforts are inhibited by settled cliques in different countries. These cliques have strong interest networks within the country that make them thwart any efforts to achieve change. Despite all the proclaimed virtues of democracy, unfortunately elections may not be enough to change this state of affairs since newly elected leaders would be quickly sucked up or asphyxiated by the corrupt system. A total sweeping away of existing systems and institutions as happened after the war of liberation in the former Zaire would probably provide an opportunity for genuine change, provided that the new leadership would be determined and committed to promote good governance for the welfare of the people. Otherwise, combating crony capitalism and its consequences could be a lost cause.

EAC that would follow the defection of any of them as long other Partner States commit themselves to remain with the non-defectors.

However, the coexistence of these two heavyweights does not shelter the EAC from Rambo-like behaviour. FDI being a strategic element for Partner States' individual development agendas, the likelihood of a Rambo situation is very high with the proven assumption according to which the implementation of the common market between asymmetric economies 'reinforces rather than changes economic structures of a region'.[838] Such a radicalization of asymmetries would definitely not reflect the targeted objective of an equitable sharing of the benefits from the anticipated "harmonious and balanced development and sustained expansion of economic activities"[839] that originally advocated the creation of the EAC. Actually, reaching this objective would simply become utopian since the "likelihood of Rambo situations increases with economic asymmetries between member states".[840]

5.3.2.2. Incidence of extra-EAC economic interests

In the example given above, Kenya played a good leadership role in outweighing Tanzania's defection that would, otherwise, compromise the future of the EAC. But looking closely at the EAC arrangement, Kenya could also behave like Tanzania. Indeed, since 2008, Kenya has lost its regional leadership in attracting FDI as, following the bloody post-electoral crisis, foreign investors reacted negatively and most of them fled the country. Ever since, Kenya has been attracting less FDI than Uganda and Tanzania. In principle, such events could decrease Kenya's commitment to regional integration and, at best, a decrease in its FDI inflow - very probably to the benefit of other Partner States - would be an excuse for Kenya to display an attitude of indifference vis-à-vis the regional integration process. But, this has not happened. Beyond being simply indifferent, Kenya openly supported the suggestion of furthering the implementation of common market freedoms.

Of course, the Kenyan authorities are not short-sighted. They know that the fluctuation in FDI following the post-electoral crisis is temporary and that things will soon improve. Besides, in the meantime, Kenya is still the leading intra-EAC business partner. In 2010, when Kenya's FDI inflow had almost gone through the floor, Kenyan exports still represented 60 percent of intra-EAC trade.[841] At the

[838] S. Krapohl and S. Fink, *op. cit.*, p. 485.
[839] Article 5(2) Treaty of Arusha.
[840] S. Krapohl and S. Fink, *op. cit.*, p. 475.
[841] EAC Investment Guidebook 2013, pp. 12-14.

same time, Kenyan investments were among the top five greenfield projects in all other Partner States.[842] These are indicators that Kenya was not acting as a "regional benevolent hegemon" in its intervention to preserve the community after Tanzania's defection.[843] It simply explains that at that very specific time, preserving the community was more beneficial to Kenyan trade than a Rambo-like or indifferent attitude. In other words, Kenya's interests were not threatened by the suggested furthering of EAC-CMP implementation. But more important to note is that this was an intra-EAC issue without any determining extraneous element. Kenya's endorsement after Tanzania's defection could also be seen as a kind of settlement of a constant leadership rivalry between these two countries in the EAC.

The situation would be different, however, if a determining extraneous element were present. Indeed, the global trade with developing countries is conducted in two main ways. One is vertical trade, North-South, between developed countries, on the one hand, and developing countries, including EAC Partner States, on the other. The second is horizontal trade, South-South, between developing countries. EAC Partner States are simultaneously engaged in both kinds of trade. Statistically, for all EAC Partner States the gains from vertical trade outweigh those from horizontal trade, despite sharply increasing intra-EAC trade.[844] Concretely, although Kenya is engaged in a great deal of business with its EAC partners, the volume of trade between Kenya and the EU and the gains therefrom are considerable.[845] Therefore, it is predictable that should Kenya's interests in trading with fellow EAC partners conflict with Kenya's interests in trading with the EU, the latter would prevail. This can be inferred from a close observation of the recent Economic Partnership Agreement (EPA) negotiations between the EAC and the EU

[842] *Idem*, p. 14.

[843] It is classically argued that a "regional benevolent hegemon" must exist for the sustainability of regional integration. That hegemon would benevolently bear the burden of distributive losses that its smaller partners could face due to regional integration. W. Mattli, *The Logic of Regional Integration: Europe and Beyond*, Cambridge, Cambridge University Press, 1999; and W. Mattli, 'Explaining regional integration outcomes', *Journal of European Public Policy*, Vol. 6, 1 March 1999, pp. 1-27 cited by S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 881.

[844] EAC Investment Guidebook 2013, p. 7. See also A. Ihucha, 'Intra-EAC trade rises 22pc, defies barriers and policies', *The East African*, 2 November 2013, online at http://www.theeastafrican.co.ke/news/-/2558/2057510/-/7pt6x4z/-/index.html accessed on 8 September 2014.

[845] The EU is Kenya's biggest foreign trading partner. In 2012, the EU represented 16 percent of Kenya's total foreign trade in goods followed by India and the United Arab Emirates. See European Commission, *European Union, Trade in goods with Kenya*, online at http://trade.ec.europa.eu/doclib/docs/2006/september /tradoc_113407.pdf accessed on 8 September 2014. But taken together, Tanzania and Uganda represent the biggest destination for Kenyan exports. See E.M. Binda, 'Why East Africans Should Have Said No to Economic Partnership Agreement with Europe', online at http://bindael.weebly.com/eac-eu-epa.html accessed on 24 October 2015.

where Kenya would very likely have become a Rambo if other Partner States had not signed that agreement on time.[846] The EPA is a very big deal for Kenya because it grants preferential duty-free access to Kenyan products in the European market.[847] However, negotiations to seal this agreement was slowed down by other EAC Partner States which found that the EPA could impose upon them unnecessary "new obligations, the consequences of which are unknown"[848]. But the truth remains that all other EAC Partner States benefit from the Everything But Arms (EBA) initiative that gives Least Developed Countries (LDCs) duty-free access to the European market for all their products except weapons. So for those Partner States, the EPA was not a priority. In contrast, signing the EPA was so crucial for the Kenyan horticulture industry that, if it had not been signed, Kenyan products would have attracted significant import duties to enter the EU market.[849] This would have meant that Kenyan cut flowers would have lost their competitiveness compared to their Latin America competitors on the EU market. This illustrates the economic importance of signing the EPA for Kenya.

Faced with the reluctance of other Partner States, Kenya would have to solve the dilemma of either confirming its leadership by respecting the EAC legislation or to adopt a Rambo stance and defecting to pursue solo negotiations with the EU. But defecting was not a viable option for Kenya in this specific case because the EU-EAC EPA was set to be signed by regional groupings,[850] which implied that Kenya had to convince other Partner States, especially Burundi and Tanzania, who were

[846] After 7 years of negotiations, the EU-EAC EPA negotiations divided EAC Partner States. They finally found a common position on 23 September 2014, just a week before the expiry of the interim agreement. See K. Agutamba, 'EAC partners harmonize position on EU trade pact', *The New Times*, 23 September 2014 online at http://www.newtimes.co.rw/section/article/2014-09-23/181196/ accessed on 23 September 2014.

[847] Until 30 September 2014, Kenyan exports to the EU were regulated by the Interim EU-EAC EPA that entered into force in 2007.

[848] Agritrade, 'Final stage of EPA negotiations generating tensions between EAC members', 23 March 2014 online at http://agritrade.cta.int/Agriculture/Topics/EPAs/Final-stage-of-EPA-negotiations-generating-tensions-between-EAC-members accessed on 29 August 2014. See also Christabel Ligami, 'Tanzania, Burundi snub EPAs meeting, negotiations postponed', *The East African*, 12 October 2013, online at http://www.theeastafrican.co.ke/business/ Tanzania-and-Burundi-snub-EPAs-meeting-negotiations-postponed-/-/2560/2029128/-/wa2sxu/-/index.html, accessed on 29 August 2014.

[849] Z. Sambu, 'Horticulture farmers stare at harsh reality of EU duties after talks flop', *Daily Nation*, 30 August 2014, online at http://mobile.nation.co.ke/business/Horticulture-farmers-stare-at-harsh-reality-of-EU-duties-/-/1950106/2435638/-/format/xhtml/-/19fu6q/-/index.html, accessed on 8 September 2014.

[850] This is also seen under article 37(5) of the Cotonou Agreement signed on 23 September 2000 between the EU and the ACP Countries. This article pledges to take into account regional integration processes in which ACP countries, including EAC Partner States, are involved.

the most reluctant.[851]In addition, the EAC Trade Negotiations Act compels Partner States "to negotiate as a bloc in all matters relating to regional and multilateral trade" and this constituted an obstacle for Kenya's solitary initiative.[852] Therefore, Kenya was forced to respect regional integration rules.[853]

Besides, even in the scenario where Kenya could have signed the EPA on its own with the EU, that would have certainly been advantageous for Kenya, but such a solitary signing would not have served European interests since the other EAC Partner States would retaliate against Kenya's defection by imposing restrictive measures against goods from Kenya, including EU exports to this country. This would have affected the European FDI in Kenya as they would have lost access to the rest of the EAC common market. Of course, any kind of reaction from other Partner States in the sense of restricting trade between them and Kenya would have been a retrograde step for the EAC integration process, which could have degenerated into the re-establishment of already abolished trade barriers between the EAC Partner States. But it could also be a strong dissuasive weapon against a Rambo situation.

This is a collateral disconfirmation of one of the postulates of the Rambo theory which seemed to overstate the importance of extra-regional actors in regional integration processes between developing countries' member states. According to this theory, "as the rationale of regional integration in developing regions is to attract FDI and access extra-regional export markets, the success of regional integration

[851] The provisions of the EU-EAC EPA have been designed in consideration of the EAC common market arrangement. This is what makes the EPA more advantageous for the EU as European products once imported into the territory of any EAC Partner State would benefit free movement within a wider EAC market. See, for instance, paragraph 2 of the preamble to the interim EPA signed in 2007.
[852] Article 3(2) of East African Trade Negotiations Act, 2008. This act was drafted following the resolution adopted in a Summit meeting held in Kampala on 14 April 2002, where EAC Heads of State – then Kenya, Tanzania and Uganda – decided to negotiate the EPA with the EU and in the World Trade Organization (WTO) as a bloc (See paragraph 10 of the preamble to the interim EPA). Nevertheless, as far as EU-EAC EPA is concerned, it must be noted that negotiations with the EAC Partner States as a bloc were very crucial for the EU since it would have been very difficult to conduct negotiations with individual countries. K. Makafu and Y. Seme, 'Inclusion of geographical indicators in the final EAC-EU economic partnership agreement: a two legged myth', *Open University Law Journal*, Vol. 3, No. 1, 2014, p. 38.
[853] This could only hold true because the EU did not support any free-rider behaviour by any Partner State, especially Kenya whose national priorities would motivate the bypassing of regional integration provisions as other Partner States still needed a better negotiation deal. However, it should be reminded that in the past the EU had signed the EPA with a member of a regional integration community when others opted out. This was the case with the signing of the interim EPA with Cameroon alone while other members rejected it. See European Commission, *Fact Sheet on the Interim Agreements: An Overview of the Interim Agreements*, online at http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142188.pdf accessed on 9 September 2014.

depends on the reaction of extra-regional actors".[854] Indeed, it is contended that as FDI generally originates from extra-EAC developed countries, the reaction of the latter vis-à-vis a Rambo-like Partner State is decisive for the determination of Partner States' future cooperation within their regional integration community. If extra-EAC actors do not punish the defection of a particular Partner State, but reward unilateral action with economic privileges, that Partner State would lose its interest in EAC regional integration.[855] This presumes that the EAC Partner States are not empowered to punish the defector themselves. Consequently the fate of the whole regional integration process depends on the compassion of extra-regional actors.

However, the lesson to be learnt from the EPA negotiations between the EU and the EAC suggests that such a vision could be (partially) short-sighted. In fact, FDI is a business operation which presupposes that foreign investors are not philanthropists. A look at FDI determinants informs us that foreign investors choose a country which represents a high possibility of providing a return for their investments. This means that their decision to invest in a specific developing country is first of all an economic decision, which implies that, in a sense, foreign investors need the host country. In this perspective, the fact that the targeted developing countries are members of an economic regional integration is an asset that should be capitalized to increase the bargaining power of the participating developing countries. In the case of the EAC with its advanced common market, it is more beneficial for any foreign investor to deal with all five Partner States than with only one of them, whether this be Tanzania or any of the other countries. It is an added advantage for one single agreement to be able to arrange access to the markets of all five EAC Partner States under the same terms and conditions that the EU adopted when it persisted that the EPA should be signed by the EAC as a group, and not by separate Partner State.

Behind the expressed statement by the EU that the negotiations approach adopted concerning the EPA is intended to support regional integration efforts in Africa, the real motivation lies in the economic interests of EU investors which would be interested in those markets. The attitude of Western countries towards developing countries is currently moving from being aid-oriented to trade-oriented. And the EPA is just a manifestation of this trend. EAC Partner States should quickly realize their changing status and take advantage of this evolution. The insistence of the EU in collective EPA negotiations and signature should rather awake Partner States' conscience as to their strength when they act as a group. In this sense, if

[854] S. Krapohl and S. Fink, *op. cit.*, pp. 474.
[855] S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 882.

they adopt an adequate regulatory and institutional regional framework, the Partner States would gain control over FDI inflow without any need to rely on the compassion of extra-regional actors. Instead the firmness of their regulatory and institutional framework would rather compel extra-regional actors not to support any Rambo-like attitude. In fact, if Partner States adopt a regional framework where the defector would be purely and simply excluded from the common market, that would reduce the available market for foreign investors. On the other hand, working with the defector – albeit the largest individual market - would not present an economic return which is equal to working with all the Partner States in the common market. Therefore, with an effective common market, Partner States have a card to play in controlling the FDI flow by excluding the defector from enjoying the common market freedoms. Of course, this sanction would not burden the defecting Partner State, especially since defection generally means that the Partner State (Rambo) concerned does not have any interest in co-operating. But excluding the defector from the enjoyment of common market freedoms would rather be considered as a dissuasive weapon against extra-regional actors so that they would not reward the Rambo state. Actually, the message behind the exclusion sanction against the defector is to alert extra-regional actors to the fact that rewarding the Rambo state threatens the economic return of foreign investors in the economic market. Foreign investors in the remaining Partner States would lose their access to the market of the defector and those hosted by the defector would no longer have access to the remainder of the common market. In other words, it would remind extra-regional actors that the economic interests of foreign investors are better served in the whole common market than in a fragmented one. In this way, instead of begging for the compassion of extra-regional actors to withhold regional integration between developing countries, the adoption of adequate regulatory and policy measures would rather compel extra-regional actors to cooperate with the member states in order to preserve the economic interests of foreign investors. This is an illustration of the fact that the member states of a regional integration between developing countries can indirectly decide that single countries are excluded from the consumption of FDI inflow, contrary to Krapohl's submission.[856]

The conclusion to be drawn at this level is that it is in their own interest to strengthen the common market as this would be their weapon of persuasion power in the coming few years. With a well-functioning common market, the EAC Partner States may gain indirect control over FDI inflow.

[856] S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 882.

5.3.2.3. Interference with other extra-EAC interests

In the interaction between extra-regional actors and individual members of a regional integration community what matters most is the interest that is at stake. A vast array of interests can influence the behavior of extra-regional actors.[857] These might be security concerns, cultural similarities, development considerations or simply political actions. These interests may become a threat to the stability of regional integration when they are shared or present higher gains for a member of a regional integration to the extent that they outweigh the gains that member states obtain or expect from the regional integration agreement. In this perspective, the identity of the extra-regional actor matters less than the weight of the gains that regional integration members expect or obtain. In other words, any extra-regional actor, regardless of its origin, location, size, etc., can influence the course of the regional integration process between developing countries provided that the gains – real or potential - it offers present a certain comparative advantage to what one of the member states expects or obtains from the regional integration arrangement.[858] This could be a developed country, a multinational company, an international organization, a fellow developing country, etc.

Strong asymmetries between EAC Partner States and the weak intra-EAC trade make each of them extremely vulnerable to extra-EAC interests. But this vulnerability is even increased by a lack of a common foreign policy.[859] This state of affairs surely relegates the regional integration interest into second place. Yet having a common foreign policy would help the EAC Partner States to harmonize their position on trendy global and regional issues in order to be able to speak with one voice.[860] This would avoid incidents that could expose Partner States' blatant differences on some trifling extra-EAC issues at first sight, but that could later drive a wedge between the community and compromise the attraction of FDI. The recent diplomatic tension between Rwanda and Tanzania may be a good illustration of the importance of an elaborated EAC common foreign policy. In an address to

[857] S. Krapohl and S. Fink, *op. cit.*, p. 475.
[858] S. Krapohl, K.I. Meissner and J. Muntschick, *op. cit.*, p. 884.
[859] A Protocol on Foreign Policy Co-ordination has been pending for ratification since December 2010. Ratification by all Partner States was expected by the 30th June 2011 but on that date only Burundi and Kenya had done so. See EAC, *EAC Protocols and other annexes to the Treaty for the establishment of the East African Community as of March 2013*, p. 4 online at http://www.eac.int/index.php?option=com_docman&Itemid=226, accessed on 19 September 2014. This means that, so far, each Partner State makes and implements its own foreign policy based on national priorities decided exclusively by the magnitude of the national interest at stake.
[860] This is for instance what appears in article 6(1) of EAC Draft Protocol on Foreign Policy Co-ordination that reads: "The Partner States undertake to collaborate in multilateral diplomacy, with a view to harmonizing their positions at the regional and international fora".

around eleven African Heads of State gathered on the sidelines of the fiftieth anniversary of the African Union to talk about peace efforts in the eastern part of the Democratic Republic of Congo (DRC) in May 2013, the President of Tanzania, Jakaya Kikwete, called for a political dialogue between Rwanda and the Forces Démocratiques pour la Libération du Rwanda (FDLR), a Rwandan rebel group based in eastern DRC. [861] The Rwandan government considered this address to be very offensive since the FDLR, which is a group generally composed of former militia who perpetrated the 1994 genocide against the Tutsi in Rwanda, has been listed by the UN as a terrorist group. It followed a wave of tensions between these two countries that even led to the expulsion of some Rwandans from Tanzania.[862] The tension between Rwanda and Tanzania has without any doubt fissured the EAC landscape.[863] This fissure could seriously affect the organization's image and

[861] F. Golooba, 'Kikwete in trouble over FDLR, but does he really understand who they are?', *African Arguments*, 11 June 2013, online at http://africanarguments.org/2013/06/11/kikwete-in-trouble-over-fdlr-but-does-he-really-understand-who-they-are-%E2%80%93-by-frederick-golooba-mutebi/ accessed on 8 September 2014.

[862] While it is obvious that this crisis occurred as a consequence of the lack of a clear EAC common foreign policy vis-à-vis the conflict in the Democratic Republic of Congo, a thorough analysis shows that it is rather the multiple membership of EAC Partner States in other regional integration communities that should be considered as the basis of the misunderstanding between Rwanda and Tanzania. Indeed, Tanzania is the only EAC Partner State that belongs to the Southern African Development Community (SADC) while all others are members of the Common Market for Eastern and Southern Africa (COMESA). Following a decision by the SADC Member States to support their fellow member, the Democratic Republic of Congo (DRC), Tanzania committed itself to contribute troops to end the proliferation of armed groups on the territory of the DRC. The Mouvement du 23 Mars (M23) was one of the armed groups that were to be eradicated by the SADC troops that included the Tanzanian contingent. The issue was that, according to a UN report, Rwandan troops were fighting along M23 rebels in the Eastern Democratic Republic of Congo. Thus, in fact, two EAC Partner States found themselves fighting each other in a third country. Although Rwanda had always denied any support for M23 rebel groups, the fact remains that the intervention of Tanzanian troops and all the surrounding politics created intense suspicion, mistrust and tension between these two countries. However, the incidence of multiple membership in EAC integration process could be mitigated by the creation of the EAC-COMESA-SADC tripartite free trade area, which is currently at an advanced level of negotiations (see Xinhua, 'Africa's "grand" FTA negotiation progressing well: SADC officials', *bilateral.org*, 17 August 2014, online at http://www.bilaterals.org/?africa-s-grand-fta-negotiation accessed on 9 September 2014. The same could be said about the agreement sealed between the EAC and CEPGL (see EAC, *Great Lakes Economic Community (CEPGL) and EAC Sign Memorandum of Understanding*, 20 March 2014, online at http://www.eac.int/index.php?option=com_content&view=article&id=1525:great-lakes-economic-community-cepgl-and-eac-sign-memorandum-of-understanding&catid=146:press-releases&Itemid=194 accessed on 9 September 2014. Communauté Economique des Pays des Grands Lacs (CEPGL) is another regional economic integration where Burundi and Rwanda are members with the DRC. But while this mega grouping can theoretically solve the conflict of interests likely to be raised by multiple membership, in practice they may only complicate the 'spaghetti bowl' of regional integrations in Africa since each of these communities has its own integration speed and level of implementation.

[863] From this incident, it emerged two groupings within the EAC. On the one hand, Burundi and Tanzania. And on the other hand, Kenya, Rwanda and Uganda. The latter created the so-called 'Coa-

stability as a single market for foreign investors if efforts are not made to mitigate the tension between the EAC Partner States.

The adoption of a common foreign policy is critical for the EAC for two main reasons. One is that foreign policy is broader than foreign investment policy. In this sense, the adoption of a broad foreign policy would pave the way for an easier and better negotiation on a common investment policy.[864] Second, as shown with the example above, foreign investment can be impacted by some factors that could be completely external to investment itself. But most of those factors, although they may be multiple and changing, usually occur in the interactions between subjects of international law – within or outside the EAC. Traditionally, states' foreign policy addresses how these kinds of issues could be dealt with. Therefore, having a clear and strong common foreign policy would anticipate the disturbance that those factors might cause for foreign investment[865], even in the absence of a specific common investment policy for EAC Partner States.

It should be reminded, however, that making a common foreign policy is not *per se* a sufficient remedy for Rambo-like behaviour in the EAC. The availability and the effectiveness of the sanction that the Rambo state could face when EAC rules are breached are rather the most dissuasive remedy. But the EAC Treaty is not only silent on the applicable sanctions against a Rambo member but also the organization's institutional framework is so weak that it may not guarantee an adequate implementation of the common market provisions. This state of affairs calls for the building of strong EAC institutions and a proactive EACJ.

5.4. CONCLUDING REMARKS

Whatever may be the opinion on the impact of FDI inflow on the economic development of the host country, the fact remains that EAC Partner States are seriously determined to make every effort that would help them attract as much FDI as possible. However, these efforts are deployed individually and separately by each Partner State. As, by nature, FDI flows from non-EAC members, especially Western countries, the quest for a higher FDI inflow turns into a fierce intra-EAC competition which is played within the common market playground where each

lition of the willing' as they affirmed their willingness to integrate further some additional aspects of the common market.

[864] This is reflected in the draft protocol on foreign policy coordination that rightly mentions investment in its articles 3(f) and 7(b) as a key element of concern in EAC foreign policy.

[865] It is amazing to note that paragraph 7 of EAC draft Protocol on foreign policy coordination already acknowledges the awareness of Partner States that "foreign policy coordination is a critical factor in creating a conducive environment for regional cooperation and integration".

Partner States is free to set its own rules. In principle, this kind of competition would not be troublesome if all the players were economically equal. But the EAC is characterized by striking economic asymmetries between its Partner States. Those asymmetries could be found in key FDI determinants such as Partner States' economic productivity, the quality of human capital, (energy, ICT, and transport) infrastructure, and compliance with the principle of good governance. Accordingly, one or two Partner States which fulfil the best combination of FDI determinants are predisposed to attract a disproportionately higher amount of FDI. And since in a common market increasing FDI inflow for one Partner State implies a correlative loss for the others, the likelihood of a defection by a frustrated Partner States is high.

As noted by commentators, the most threatening problem for members of a regional integration initiative in the developing world vis-à-vis FDI attraction lies in the fact that FDI flows depend on the behavior of economic and political actors which are external to the regional integration process. This actually puts members of a regional integration process, in this case EAC Partner States, at the mercy of these external actors – including foreign investors themselves and their home countries – which could compromise the whole integration process depending on the interest at stake. In order to face such a threat, it would be advisable for Partner States to strengthen their regional institutions. But since the hope in institutional reforms is misleading as regional institutions may indicate a credible commitment, although they cannot generate it, the most effective remedy is to change the "underlying preference constellation" that favours the Rambo game.[866]

For the EAC, changing this constellation means finding ways to eliminate the possibility of any competition between EAC Partner States based on the attraction of FDI. This would imply the adoption of a broad common foreign policy within which an adequate investment policy and regulations should be adopted. To attain this end, the principle of good governance must be the leading force for the adoption of such a common policy and its implantation institutions. Of course, good governance cannot dissipate Partner States' economic asymmetries but it can definitely prevent those asymmetries from undermining the regional integration process.

[866] S. Krapohl, *op. cit.*, p. 18.

Chapter VI

Catalytic role of good governance in attracting FDI to be equitably distributed in the EAC

6.1. INTRODUCTION

Economic asymmetries between East African Community (EAC) Partner States do not predispose them for an equitable FDI inflow, which strengthens the likelihood of a Rambo situation. However, to address the likelihood of a defection by some Partner States due to FDI not being equitably attracted, the Rambo theory suggests that institution-building could be of some help. This was confirmed by a study specifically conducted on the EAC where institutional intervention was suggested as an effective way to face industrial agglomeration.

However, it remains unknown which specific mechanism should be put in place to guarantee the building of a such institutional framework and the necessary policy for its effectiveness.

This chapter addresses this key issue in answering the following set of questions: Why does the principle of good governance matter in EAC investment-related institutional design and policy-making? What is the state of play of the EAC regional investment regulatory framework and how does it deal with the problem of FDI agglomeration? Which legal provisions should be used to strengthen the institutional and regulatory framework for investment in the EAC? Which kind of investment strategy should be privileged to promote the EAC as a single investment area?

These questions are addressed against the consensus reached between all Partner States that the EAC should be promoted at the global level as a credible and viable single investment destination. In substance this chapter provides clues for designing an appropriate *modus operandi* for an effective EAC single investment area.

6.2. WHY GOOD GOVERNANCE?

Two reasons strongly advocate the making of good governance-oriented policies concerning investment for a balanced and equitable FDI attraction in the EAC common market. The first is that FDI home countries have on several occasions expressed their concern for the observance of good governance principles in various trade agreements or pieces of legislation. Secondly, good governance is a well-developed principle that lies at the heart of the EAC architecture.

6.2.1. Good governance: bedrock for stable external trade in the EAC

The impact of FDI on the host country's economic development depends a great deal on the openness of this country's trade for external markets. An export-oriented country is likely to attract more FDI than a country that is implementing an import substitution policy. This is basically because foreign investors are usually interested in large-scale production that needs a bigger market which often goes beyond the host country's boundaries. Consequently, export facilitation provided to FDI host countries by some big economies may have a great effect on the attraction and, consequently, on the impact that FDI may have on the host country's economy. Such facilities includes zero export tariffs or some exports' preferential rights for products originating from the FDI host country.

In compliance with the World Trade Organization's (WTO) Generalized System of Preferences (GSP) there exist some arrangements which have been put in place by developed countries to grant duty exemptions to some exports from developing countries.[867] But for a country to qualify for such exemptions, the observance of good governance is one of the key conditions to be fulfilled.[868]

As such, good governance plainly appeared for the first time in a trade agreement in the Cotonou Agreement signed on 23 June 2000 between the African, Caribbean, and Pacific Group of States (ACP) and the European Economic Community (EEC).[869] Indeed after defining good governance, the second paragraph of article

[867] The EU's Everything But Arms (EBA) initiative and its American counterpart, the African Growth and Opportunity Act (AGOA), can be given as examples. EBA allows countries listed as Least Developed Countries (LDCs) by the UN to export everything they produce except weapons to the EU market. Similarly, the AGOA authorises the US President to annually name a few African countries that can export a wide range of products duty free and to some extent quota-free to the United States. For a comparison between the two regimes, see E. Davies and L. Nilsson, 'A comparative analysis of EU and US trade preferences for the LDCs and the AGOA beneficiaries', *Chief Economist Note*, Issue 1, 2013.

[868] See for instance Section 104 of the AGOA (19 U.S.C. 3703) and Section 502 of the US Trade Act of 1974 that requires, among other things, the observance of a certain level of the rule of law and the protection of workers' rights. R.R. Williams, 'African Growth and Opportunity Act (AGOA): Background and Reauthorization', *Congressional Research Service*, 24 July 2014, p. 5. See also B.D. Schaeffer, A.B. Kim, and C. Florance, 'Congress Should Pave the Way for a U.S.-Africa Free Trade Agreement', *Backgrounder*, No. 2836, 19 August 2013, p. 3. Since each trade agreement may have its own modus operandi regarding the good governance conditionality, in this work the focus will be on successive agreements that the EU has been signing with ACP countries, including the EAC Partner States.

[869] The concept first appears in paragraph 3 of the Cotonou Agreement's preamble. It is then referred to as the fundamental element of the agreement in article 9(3). It is worth repeating that EEC-ACP agreements were basically trade-related. It was the expectation of the EU to foster economic development in the ACP countries though trade cooperation. This was a one-way trade as it was functioning as a supplement to the European official development aid to ACP countries. But with the EPA negotiations, the trade aspect of this relationship now prevails. On the evolution of the trade relation-

10(3) of this agreement mentions good governance as its fundamental element. But it took a very long and progressive road for good governance to achieve this status.

For a better and full understanding of the meaning and the implications of good governance as a fundamental principle in the framework of the Cotonou Agreement, it is advisable to take a retrospective look at previous ACP-EEC agreements. In order to do so, the analysis should start with article 4 of the Lomé III Convention of 1984 that provided that support to ACP countries was intended "to promote the ACP States' social and economic progress and the well-being of their population through the satisfaction of their basic needs, the recognition of the role of women and the enhancement of people's capacities, *with respect for their dignity*" (emphasis added). The insertion of respect for the ACP people's dignity in this article is considered as the very first attempt to introduce, in a development cooperation agreement, a kind of conditionality for a developing country to be eligible for international aid.[870] The need for such a conditionality arose when in 1977 massive human rights violations were committed by the Ugandan President, Idi Amin, against his own people. The ACP-EEC agreement that was in force at that time, the Lomé I Convention, did not have an adequate clause to deal with such situations if they occurred. It is no wonder that the EEC was so embarrassed by the fact that its aid to Uganda continued while basic human rights were not being respected in the country. Since no mention of human rights or democracy was made in the Lomé I Convention, it was very difficult for the EEC not to continue with the execution of this agreement when the allegations of human rights violations were being made.[871] In the end, through the 'Uganda Guidelines', the EEC Council decided to suspend European aid to Uganda due to the subtle reason that it was inadmissible to misuse the convention for the reinforcement or prolongation of human rights violations in Uganda.[872]

The experience in Uganda then cautioned the EEC on the need to have a specific clause that would allow the suspension of cooperation in case a similar situation would occur in the future. But the prevailing landscape of international relations at

ship between the EU and Africa, see M. Farrell, 'A Triumph of Realism over Idealism? Cooperation Between the European Union and Africa', *European Integration*, Vol. 27, No. 3, September 2005, pp. 263-283.

[870] P. Hilpold, 'EU Development Cooperation at Crossroads: The Cotonou Agreement of 23 June 2003 and the principle of Good Governance', *European Foreign Affairs Review*, Vol. 7, 2002, p. 59.

[871] It was difficult to invoke article 60 or article 62 of the 1969 Vienna Convention on the Law of Treaties to justify the suspension of the Lomé I Convention on the ground that Uganda caused a material breach of the agreement or a fundamental change of its circumstances. P. Hilpold, *op. cit.*, p. 58.

[872] P. Hilpold, *op. cit.*, p. 57.

that time did not allow the EEC to insist on this issue, although some attempts were progressively made in Lomé III and IV.[873]

It was only with the advent of Lomé IV-bis in 1995 that respecting human rights obtained a special status within the EEC-ACP agreement. First of all, article 5(1)(3) clearly stated - for the first time ever - that "respect for human rights, democratic principles and rule of law (…) shall constitute as an essential element of the Convention". Second, so as to underscore the importance of these principles, article 366a was introduced in order to sanction a breach of any of the principles contained in article 5. According to article 366a(3), the non-observation of one of the principles stated in article 5, including respect for human rights, democratic principles and the rule of law, should lead to the 'partial or full suspension of the application' of the convention provided that consultations between the parties have failed.[874] This was the first appearance of the famous non-execution clause in EEC-ACP cooperation. It was based on respect for human rights, democracy and the rule of law. Logically, this non-execution clause was transposed into the Cotonou agreement, which added good governance as one of its key principles along with the traditional human rights, democracy and the rule of law. Article 96(2)(a) of the Cotonou agreement stipulates that:

If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect of human rights, democratic principles and rule of law referred in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.

The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

[873] For more details on this, see P. Hilpold, *op. cit.*, p. 58.

[874] But article 366a(3) applies immediately without any need to conduct negotiations in case of urgency or when consultation is refused. Many African countries were sanctioned in the 1990s based on this non-execution clause. One may cite Sudan (1990), the Democratic Republic of Congo (1992), Niger (1999), Comoros (1999) and Bissau Guinea (1999). See M.I. Mbandinga, 'The Non-Execution Clause in the Relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP)', *German Law Journal*, Vol. 3, 2002, pp. 3-4; and L. Bartels, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, European Union (European Parliament Policy Department DG External Policies), 2014, p. 12.

The consultation shall begin no later than 15 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultation shall last no longer than 60 days.

If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them have disappeared.

Surprisingly, while the Cotonou Convention introduced good governance as a fundamental principle of the EC-ACP relationship, it was not clearly stated whether a violation of good governance would trigger the application of the non-execution clause. This was due to the narrow meaning that this convention gave to good governance if this principle was violated. Indeed, according to article 9(3) *in fine* "only serious cases of corruption, including acts of bribery leading to such corruption" had to be construed as a violation of good governance.[875] In this sense, good governance as a fundamental element of the Cotonou agreement was excluded from the scope of article 96. However, it is rather article 97 that was to be considered as the good-governance non-execution clause. Paragraph 3 of this article authorized the parties to take 'appropriate measures' when a case of corruption was reported and when no acceptable solution could be found or consultation was refused. It is interesting to note that although the good governance non-execution clause was provided in a separate article[876], its sanction was similar to

[875] This makes it clear that good governance as referred to by the Cotonou Agreement rather reflects a very primitive conception. In this regard, good governance as a trade agreement conditionality is far below the standards developed by academia and which are considered in the normative framework of this research. Despite this semantic rupture, the concept remains the same. And for policy-makers, this distinction does not make a lot of sense. It is also to bridge this semantic gap that a holistic approach to good governance was given preference by this study.

[876] But, regardless of the provision of two separate non-execution clauses, article 96(2)(a) can also be considered as a good governance non-execution clause in the Cotonou agreement framework. This can be done through an interpretation of the first paragraph of article 9(3) that provides a broad definition of good governance in these words:

In the context of political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.

Two implications can be drawn from this provision. One, it is clear that parties to this agreement acknowledged that good governance is a broad principle, although they agreed in the second paragraph of article 9(3) to restrict its enforcement to corruption cases. Two, as discussed previously,

those that were provided when the agreement's essential elements, i.e. respect for human rights, democratic principles and the rule of law, were violated. In extreme cases of a violation, the trade agreement would be suspended, which would result in perturbations to the concerned party's external trade.[877] In other words, despite the narrowness of the concept, a violation of the principle of good governance as a fundamental principle of the Cotonou agreement would result in profound uncertainties in the EC-ACP trade relationship. This retrospective view provides a clear demonstration of the progressive role of good governance as an indispensable element for stable external trade.

This remains true even after the repealing of the Cotonou agreement. Despite the fact that the good governance non-execution clause did not survive the Cotonou agreement *expressis verbis*, there are good reasons to believe that good governance will continue to influence international trade, especially the North-South trade, for many more decades.[878] The fact that the non-execution clause was one of the key issues that delayed the EAC-EU EPA negotiations can be a good illustration.[879] Even though, finally, this clause was omitted in the final EAC-EU EPA draft upon

good governance sub-principles have cross-cutting aspects that reflect the content of concepts like human rights, democracy and the rule of law. From an academic point of view, good governance encompasses most of these concepts to the extent that a breach of any of them necessarily implies a violation of good governance. This can also be asserted from the interpretation of article 9(3) where good governance seems to be considered as the operational framework for respecting human rights, democracy, and the rule of law. Furthermore, the fact that the drafters of the Cotonou Agreement attributed to good governance a fundamental character while recognizing human rights, democracy and the rule of law as essential elements of the agreement supports this approach. Therefore, it would not be incorrect to refer to article 96 as a good governance non-execution clause since other good governance sub-principles, that were not covered by the scope of article 97, could be easily and effectively enforced under the former article.

[877] As it can be read in article 96(2)(c) and article 97(3), the suspension of the terms of the agreement was to be considered as a measure of last resort. Also any measures taken were supposed to be revoked 'as soon as the reasons for taking them have disappeared'. This demonstrates that any sanctions imposed, based on the non-execution clause, were primarily corrective and not punitive. See M.I. Mbandinga, *op. cit.*, p. 3; and J.T. Gathii, 'The Cotonou Agreement and economic partnership agreements' in UNOHCHR, *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, United Nations Publications, New York and Geneva, 2013, p. 267.

[878] C. Weller and K. Ulmer, 'Trade and Governance: Does governance matter for trade?', *APRODEV*, November 2008. See also D. Rodrik, *The Global Governance of Trade -- As If Development Mattered*, (UNDP Background Paper), 2001, pp. 37-38. For more on non-execution clauses in trade matters, see L. Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements*, Berlin, German Institute for Human Rights, February 2014.

[879] TWN Africa, 'Key areas of divergence between the EU and Africa EPA regions', *Third World Network Africa,* 8 July 2011, online at http://twnafrica.org/fr/index.php/publication/gender-a-economic-policy-digest/520-key-areas-of-divregence-between-the-eu-and-africa-epa-regions accessed on 29 September 2014. See also R. Kibui, 'EAC, EU meet to settle unresolved EPA issues', *The East African*, 12 July 2014 available at http://www.theeastafrican.co.ke/news/EAC--EU-meet-to-settle-unresolved-EPA-issues/-/2558/2381568/-/f6lpmy/-/index.html, accessed on 1 October 2014.

the vehement insistance of the EAC Partner States, it must be noted that the EAC-EU EPA – despite being a standalone agreement – cannot be historically dissociated from the Cotonou agreement. The *acquis* of Cotonou cannot be simply ignored.[880] In addition to the spirit of Cotonout, there are at least two more grounds on which good governance could be invoked in trade agreement negotiations or enforcement. One is the 2004 Pretoria Declaration on Economic, Social and Cultural Rights that urges international and regional entities to ensure that good governance is observed in bilateral and multilateral trade agreements.[881] Second, if the EU may not suspend the EAC-EU EPA on the ground of a good governance violation due to the lack of an appropriate clause inserted therein, the fact that Europe is the home of most big FDIs in the EAC gives the EU room to influence EAC Partner States' external trade based on an assessment of their compliance with good governance principles.[882]

It is conventional wisdom that foreign investors usually take the advice of their home countries seriously before investing abroad for the simple reason that if things go wrong, they may need diplomatic protection. Therefore, merely a negative warning, for instance, from EU-based FDI home countries about poor governance in a country where their nationals intend to invest could influence the latter's decision. In the end, whether empowered by a non-execution clause inserted in a trade agreement or provided in national legislation on the conduct of external trade or simply referred to as a general principle of law, the observation of good governance is indispensable for the stability of EAC Partner States' external trade.

[880] For instance, paragraph 3 of the CARIFORUM-EU EPA Preamble reaffirms the "commitment to the respect for human rights, democratic principles and the rule of law, which constitute the essential elements of the Cotonou Agreement, and to good governance, which constitutes the fundamental element of the Cotonou Agreement". Also the promotion of good governance is cited as one of the objectives of this trade agreement [article 1(b)]. It must be noted that article 241(2) of this agreement makes a clear reference to the good governance clause, i.e. article 97 of the Cotonou Agreement. It is worth noting that CARIFORUM-EU EPA is the first EPA to enter into force after the Cotonou agreement. It very likely that most of its provisions (at least the structure and rhetoric provisions such as the preamble and the objectives) will be repeated in following EPAs that the EU will sign with other groups of ACP countries, including the EAC-EU EPA, although it is expected that each EPA will be be unique.

[881] See point 11(f)(iii) of Pretoria Declaration on Economic, Social and Cultural Rights in Africa (2004). This Declaration was adopted by the African Commission on Human and Peoples' Rights at its 36th ordinary session held in Dakar on 23 November – 7 December 2004 [ACHPR/Res.73 (XXXVI)04]. See J.T. Gathii, *op. cit.*, p. 273.

[882] The EU action can be based, for instance, on article 21(1) of the Treaty on the European Union under the chapter on the Union's external actions which mentions good governance principles as the foundation on which the EU should develop relations and build partnerships with third countries, and international, regional or global organizations.

6.2.2. Good governance: the cornerstone of EAC regional integration

The place that good governance occupies in the EAC architecture may capture anyone's attention. According to the Treaty of Arusha, good governance is at the same time one of the fundamental principles of the EAC and one of its key operational principles.[883] This is particularly noticeable as good governance is the only principle, among all the others, to be expressly chosen by the Partner States to enjoy this exceptional status. In this sense, the EAC is probably one of the rarest regional economic integration agreements where good governance is statutorily given such critical functions.

As a fundamental principle, good governance is the cornerstone that supports the whole EAC architecture. In the *Mukira* case, the EACJ affirmed that good governance sets "rules that *must* be followed or adhered to by the Partner States in order that the objectives of the Community are achieved".[884] This court further clearly pinpoints that EAC integration depends on each of the fundamental principles cited in article 6 of the Treaty "singly and collectively". In the terms of this article, good governance is understood in its broadest sense where it includes: "the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and people's rights".

The fundamental character of good governance in the EAC integration process is again underscored in article 3(3)(b) of the Treaty where the "adherence to universally acceptable principles of good governance" is a precondition to be met for a third country to gain EAC membership.

Understandably, following the suggested holistic approach to the definition of good governance as advocated in this study, it is easy to identify within broad principles enunciated by the EAC Treaty all the key principles which are dear to foreign investors, that is to say properness, participation, accountability, transparency and human rights.[885] As underscored by the East African Court of Justice (EACJ) "these principles are foundational, core and indispensable to the success of the

[883] Articles 6(d) and 7(2) of the Treaty of Arusha.
[884] *Mukira* case, para 36. (emphasis in the original text).
[885] See supra (Chapter II Good Governance: Conceptual and Normative Framework). While good governance sub-principles such as accountability, transparency and human rights are clearly laid down within this provision, it is not that complicated to roughly infer participation from "democracy", whereas key characteristics of the 'rule of law', 'social justice, equal opportunity, and gender equality' fit well within the sub-principle of properness as discussed earlier in Chapter II.

integration agenda, and were intended to be strictly observed".[886] In this sense, good governance is not just an aspiration whose observance needs to be achieved by Partner States; it is rather a "treaty obligation" with which each Partner State must comply.[887] Therefore, following the EACJ's ruling, it is certain that all EAC policies including those related to foreign direct investment need to meet good governance requirements for a balanced and equitable economic development, which is the final purpose of the common market.

However, the key role of good governance in the EAC is amplified by its operational function. Unlike good governance as a fundamental principle which can be considered technically as a static overriding principle for the essence of the EAC (as an organization), good governance understood as an operational principle transcends the mere notion of an essence and gives the community its effective existence. As an operational principle, good governance is a steering mechanism that ensures that all the organs and institutions of the EAC are working effectively towards the goals assigned to this integration project. Looking closely at the structure of article 7 of the Treaty of Arusha, it comes as no surprise that one may discover the manifest intention of the treaty framers to raise good governance up to the level of the EAC's supreme operational principle. Indeed, while the first section of article 7 lists principles that should govern the practical achievement of the objectives of the Community, the second section soberly stipulates Partner States' commitment to abide by the principles of good governance in observing and implementing all the principles contained in article 7(1). This underlines that good governance is not just hierarchically a supreme operational principle in the EAC, but it must moreover be observed in the operationalization of each of those other principles. It is no wonder that the EACJ strongly held that there was no other provision in the Treaty that embodies the sanctity of the EAC integration process in the way that good governance does.[888]

To echo the voice of the treaty, good governance appears to be at the heart of the East African Community Common Market Protocol (EAC-CMP). Even though no provision in the common market protocol specifically cites good governance, article 3(1) of EAC-CMP reiterates that the "Common Market shall be guided by the fundamental and operational principles of the Community as enshrined in article 6 and 7 of the Treaty". Good governance is rather more apparent in the annexes of the EAC-CMP. It is noted that Partner States are repeatedly and constantly concerned with a uniform implementation of the key provisions of the

[886] *Mukira* case, para 36.
[887] *Ibidem*.
[888] *Mukira* case, para 36.

EAC-CMP. To this end, Regulation 2, common to the EAC-CMP annexes related to the free movement of persons, the free movement of workers, the right of establishment and the right of residence, contains a clear indication that Partner States have pledged a common market that is "transparent, accountable, fair, predictable and consistent".[889] As far as the free movement of goods is concerned, Rule 2 of the East African Community Rules of Origin (EAC-RoO) is formulated in exactly the same words.[890] Although some good governance principles, such as participation and human rights, are ignored in these provisions, it is essential to focus on the broad picture and to emphasize the Partner States' expressed intention of allowing the common market to be overseen by good governance.

As highlighted in the Treaty preamble, good governance as one of the fundamental and operational principles of the EAC is key to strengthening cooperation between Partner States.[891] But good governance is also indispensable for smooth interaction between Partner States, on the one hand, and their external partners, on the other, as rightly acknowledged by article 3(2)(b) of the draft EAC Protocol on Foreign Policy Coordination that reads: "Without prejudice to paragraph 1, the Partner States undertake to observe, among others, the following principles of foreign policy – …(b) defence of justice, human rights, equality, good governance, the rule of law and democracy".[892]

From an FDI perspective, it can be contended that good governance is crucial for a well-functioning common market where Partner States fully cooperate to ensure

[889] See Regulation 2 common to the East African Community Common Market (Free Movement of Persons) Regulations (EAC-FMP), East African Community Common Market (Free Movement of Workers) Regulations (EAC-FMW), East African Community Common Market (Right of Establishment) Regulations (EAC-RoE), and East African Community Common Market (Right of Residence) Regulations EAC-RoR. It should be said that there is no such provision regarding the free movement of services and the free movement of capital. But instead of seeing this silence as a non-commitment by EAC Partner States to good governance principles in relation with the free movement of services and capital, it is more likely that the drafting style of the annexes dealing respectively with the free movement of services and capital might have had a determinant role in the omission of good governance principles. Indeed, unlike other EAC-CMP annexes, annex V and VI are drafted in the form of tables showing Partner States' schedules on the liberalization of trade in services and on the removal of restrictions on the free movement of capital. Nevertheless, article 3(1) of EAC-CMP fully applies to each of these annexes. Therefore, good governance should not be considered as being inapplicable to the free movement of services and capital.

[890] See Rule 2 of the EAC-RoO.

[891] See paragraph 10 of the Preamble to the Treaty.

[892] While this provision seems to be more elaborate in differentiating good governance from the other cornerstones of the modern state, i.e. democracy and the rule of law, it confirms, however, that the content of good governance is still controversial and this controversy can be found even within the texts of one individual body like the EAC. However, it is to be hoped that this will be corrected or harmonized before the complete ratification of this draft protocol.

the free movement of FDI within the EAC. But at the same time, good governance is expected to play a significant role when the same Partner States are interacting with extra-EAC partners such as FDI home countries or foreign investors themselves before they move into the region. In other words, Partner States have assigned to good governance the critical function of streamlining their efforts in attracting FDI. As demonstrated in the previous chapter, these efforts could likely lead to fierce intra-EAC competition that would become fatal for the community. To avoid this, good governance in streamlining individual Partner States' efforts to attract as much FDI as possible should rather play as a catalyst role between the strict observation of all agreed regional integration requirements enshrined in the free movement principles in the Treaty and the strongly evident national development needs nurtured by strong disparities between their respective economies.

This is a very delicate function to be fulfilled by good governance since it is still seen by some Partner States as a set of "aspirations and broad policy provisions for the Community which are futuristic and progressive in application".[893] While this affirmation is partially true in the sense that some provisions of the EAC Treaty are still submitted to a progressive application and that good governance consists of broad policy provisions, it is however important to agree with the EACJ that good governance as a fundamental and operational principle of the community is "solemn" and carries serious "obligations of immediate, constant and consistent conduct by the Partner States".[894] The discussions between the parties and the subsequent ruling of the EACJ in the *Mukira* case demonstrated how big the gap is between good governance in theory and its actual enforcement in practice, i.e. the gap between the intention and the actions of the Partner States.

A close observation of the Partner States' behaviour over time tends to lead to the conclusion that they might not have been sufficiently aware of the implications of good governance as a principle when they adopted the Treaty of Arusha. Partner States' recent open opposition to the insertion of a good governance clause in the EPA could be a telling factor in this regard.[895] Also, until recently, good governance was on the top of the EAC agenda. The initiation of a draft Protocol on Good Governance in 2000s and the organization of annual good governance conferences since 2009 are good illustrations. However, this protocol has never been opened to signature and seems to have disappeared from the community's priority

[893] Statement by the Attorney General of Uganda in the *Mukira* case. See *Mukira* case, para 19.
[894] *Idem*, para 36 *in fine*.
[895] See infra (section 6.2.1)

agenda.[896] Similarly, after the successful organization of a good governance conference three times in succession in 2009, 2010, and 2011, this annual conference was not organized in 2012. In 2013, when the fourth conference was being organized in Kigali, good governance as a concept was omitted from the theme to be discussed.[897] The disappearance of 'good governance' in the theme's phrasing is not important as such, but it could provide an early warning that good governance is progressively losing ground.[898] No reason is given for this marked decline in the Partner States' interest in good governance.

However, an analysis suggests that the work of the EACJ might be partly responsible for this.[899] It should first be reminded that the EAC Partner States have for a

[896] This protocol was reportedly finalized in May 2011. In a speech marking the finalization of this protocol, the then EAC Deputy Secretary General, Beatrice Kiraso, conceded that the "EAC Protocol on Good Governance was very sensitive but the region has to apply the best practices to improve the living standards of its people". But, more than three years later, the protocol is still in a stand-by position. It seems that sensitivity has finally outweighed the improvement of EAC people's living standards. See EAC, 'EAC Protocol on Good Governance in Final Stages', Press Release, Arusha, Tanzania, 11 May 2014 available at http://www.eac.int/index.php?option =com_content&view=article&id=633:protocol-on-good-governance-in-final-stages&catid=146:press-releases&Itemid=194 accessed on 25 September 2014.

[897] The theme of the fourth edition was :"Sustaining the Fight against Corruption to Promote Regional Integration". See EAC, '4th Annual Conference on Good Governance is Underway in Kigali', 8 July 2013 online at http://www.eac.int/news/index.php?option=com_content&view=article&id=978:4th-annual-conference-on-good-governance-is-underway-in-kigali&catid=48:eac-latest&Itemid=69 accessed on 24 September 2014.

[898] This is happening despite some assurances given by some Partner States like Rwanda through its Minister in charge of EAC who promised in the opening ceremony of the 4th annual conference that Partner States were still committed to finalizing the protocol on good governance despite the delays. But one can only notice the increasing gap between the EAC and good governance, especially when the themes of all previous annual conferences are put in perspective. Indeed, in 2009 the conference theme in Dar-es-salaam was "Promoting Good Governance for Regional Integration"; "Good Governance for Sustainable Integration, Stability and Development" in Nairobi in 2010; and "Upholding the Rule of Law and Constitutionalism for the Promotion of Regional Integration" in 2011 in Kampala. So even though the themes still reflect good governance principles, the trend shows the progressive disappearance of good governance in the last two conferences. This fading might not have been deliberate, but it is a fact.

[899] Other factors can also explain this change in the Partner States' opinion about good governance. For instance, considering that the Treaty was signed in 1999 only a decade after the World Bank openly referred to good governance as a way out from poverty for developing countries, it is very likely that the EAC Partner States adopted this principle for the sake of complying with the 'fashion'. It could also be true that for an organization that expected a lot of support from international partners, it might be strategic to insert the trendiest concept at that time - good governance – to make the project attractive. Furthermore, in 1999, good governance was not yet a well-developed principle whose content could be ascertained. By the way, the debate on the content of good governance is still ongoing despite some recent clarifications. [Cf. supra Chapter II Good governance: Concept and normative framework]. So this is likely to be the reason why Partner States could not properly assess the 'hazardousness' of including it as a fundamental and operational principle in the community architecture.

long time been reluctant to confer jurisdiction over human rights violations on the EACJ. This was due to the prediction that Partner States could be dragged to this court by their citizens on the ground of human rights violations, which could politically threaten the power of some Heads of State and the stability of their respective governments. But in the *Katabazi* case, the EACJ found a way to bypass its jurisdictional confinement. This bypassing was found through article 6(d) of the Treaty that lays down good governance as one of the fundamental principles of the EAC.

In the *Katabazi* case, the EACJ held that "…while the Court will not assume jurisdiction to adjudicate human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference includes allegations of human rights violations". The Court then pursued this by stating: "It is palpably clear that the principle of the Rule of Law contained in Article 6(d) of the Treaty, encapsulates the intention of safeguarding against arbitrary governance whether by a totalitarian leader, or by mob rule. It is hostile to both dictatorship and anarchy".[900] One may easily guess how some EAC Heads of State reacted when hearing that the EACJ had ruled that a 'dictatorship' is against the good governance principle which they had themselves adopted, on their own, as a fundamental and operational principle of 'their' community. Of course, this ruling opened the dreaded Pandora's box as more and more individuals started using the good governance provision in the Treaty to file cases which were basically based on human rights violations against Partner States.[901]

[900] *Katabazi* case, para 4(3) and 5(1).

[901] As a result roughly ⅓ of the court cases concern a breach of article 6(d) of the Treaty. The following could be interesting to note: *Mukira* Case, 2013, Reference No. 1 of 2010, *Honorable Sitenda Sibalu v. the Secretary of the EAC, Attorney General of Uganda, Honorable Sam Njuba, and the Electoral Commission of Uganda*, Judgment of 30 June 2011; Reference No. 7 of 2010, *Mary Ariviza and Okotch Mondoh v. Attorney of Kenya and Secretary General of the East African Community*, Judgment of 30 November 2011; Reference No. 30 of 2010, *Independent Medico Legal Unit v. Attorney General of Kenya*, Judgment of 1 March 2013; Reference 4 of 2011, *Omar Awadh and Six Others v. Attorney General of Kenya and Attorney General of Uganda*, Judgment of 15 April 2013; and Reference No. 8 of 2010, *Plaxeda Rugumba v. Secretary General of the EAC and Attorney General of Rwanda,* Judgment of 1st December 2011; Reference No. 9 of 2012*, East African Center for Trade Policy and Law v. Secretary General of the EAC*, Judgment of 9th May 2013. But, if one of the Partner States' fears in granting human rights competence to the EACJ was probably that political parties in opposition would be prevented from having access to the court because this would interfere with the way political matters are dealt with by national laws and institutions, this could now be a lost cause with the filing of the *UPRONA* case [Reference No 20 of 2014, *UPRONA Party v. The Attorney General of the Republic of Burundi and the Secretary General of the East African Community*, (ongoing)] on the same ground of the non-observance of the good governance principle as provided by article 6(d) of the EAC Treaty. The outcome of this case could be another landscape in the EACJ's work of drawing the boundaries of good governance as a fundamental principle of the Community.

Maybe in the beginning the Partner States assumed, like the Attorney General of Uganda in the *Mukira* case, that good governance was just a mere aspiration which was subject to future and progressive application that could neither be breached nor judicially sanctioned.[902] The court has proven them wrong. Anyway, whatever might have been the reason behind the 'infiltration' of good governance in the Treaty of Arusha, the fact remains that it is now a confirmed and indispensable principle for the EAC integration process as acknowledged by the EACJ. There is now a need to translate the Treaty's broad good governance provisions into simple, clear and tangible rules. Like other Treaty provisions, these rules would need the establishment of strong regional institutions for their effective enforcement. This is particularly true when it concerns an extremely sensible issue such as the attraction of FDI into the common market.

6.3. GOOD GOVERNANCE-ORIENTED COMMON INVESTMENT POLICY AS A PREREQUISITE FOR FDI TO BE EQUITABLY ATTRACTED BY ALL PARTNER STATES

6.3.1. State of play of regional investment regulation in the EAC

The current state of play is that there is no binding protocol or policy regulating to the promotion and the protection of FDI at the EAC level. Logically there is no regional institution or organ which is specifically in charge of investment in the EAC.[903] Rather, each Partner State is completely free to determine its own rules on investment issues, provided that those rules do not interfere with the common market provisions. It implies that, as long as Partner States' laws and policies do not contravene the free movements, there should be no concerns with regard to any other policy or actions that they might adopt to attract and retain foreign investors on their respective territories. Consequently, each Partner State is working on its own in designing the best campaign to attract as much FDI as possible. However, all their campaigns have a common denominator: they all emphasize the existence of the common market as one of the key reasons why foreign investors should choose the campaigning country. This state of affairs increases competition

[902] But even if Partner States assumed that good governance was a mere aspiration subject to future and progressive application, they would be naïve to assign to it such an important role in the EAC because, despite this alleged futuristic character, good governance would end up being enforced even centuries later, unless they intended to establish the EAC for a limited period of time – which is not the case, at least based on article 144. From this article it can be deduced that the EAC has been established for a perpetual duration. This article reads: "This Treaty shall have perpetual duration".

[903] Notwithstanding the interpretation made under section 6.3.2.1. of article 44(3)(a) of the EAC-CMP.

among Partner States. According to well tested theories,[904] this competition would end up widening the gap between Partner States' economies as a consequence of the striking imbalance in their respective strengths in evenly attracting FDI. According to the best scenario, such a situation would lead to a stagnation in the application of the common market protocol while retaining all Partner States within the community. The worst scenario would mean that the losers would defect, which could lead to the collapse of the community.

To avoid this, the EAC needs, beyond just a legal and institutional frameworks, a common investment policy.[905]

6.3.1.2. The EAC's diagnosis of the issues affecting equitable FDI inflow

The need for adequate regional regulations and policies to anticipate and address these kinds of issues is not a novelty in the EAC. This was already mentioned in the Preamble to the Treaty where the framers reminded us that one of the main reasons, if not the main one, that contributed in the collapse of the former EAC was "the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development and lack of adequate policies to address this situation".[906] Against this early warning, it could have been expected from Partner States that they would act urgently in enacting regulations and adopting policies on issues like the attraction of FDI, especially upon the entry into force of the common market protocol. But this is not the case.

However, it should be noted that the intention of having a regional investment policy in the EAC started to materialize in 2006. In the community's investment promotion strategy, Partner States agreed to adopt a "joint promotion of invest-

[904] See the agglomeration theory and the Rambo theory discussed previously.
[905] Choosing to work on a regional common investment policy instead of just focusing on the regulatory framework can be justified by reason of consistency and it does not divert this study from its purely legal approach. Indeed, in terms of dimension, a policy is broader than regulations (rules) whereas it remains narrower than a principle. Good governance being a principle, it calls for a policy which in turn is materialized in the setting up of a regulatory framework (see F. Botchway, 'Good Governance: the Old, the New, the Principle and the Elements', *Florida Journal of International Law*, Vol. 13, 2000-2001, p. 182). Therefore, as the gap regarding the regulation of investment in the EAC is so big, it is judicious that the response to this challenge should be first sought at the policy level. It is only in accordance with the blueprint of the suggested regional investment policy that a specific legal and institutional framework related to FDI would be developed. So here the idea is not to come up with a specific regulation on FDI but to suggest a broader framework that would streamline the enactment and the implementation of not just investment legislation (like the Model Investment Code) but also all acts that may govern other domains which are related to investment such as taxation, labour, etc.
[906] Paragraph 4 of the Treaty Preamble.

ment" as a strategy to create a "conducive regional investment climate devoid of harmful competition".[907] It is quite clear that the Partner States had already anticipated that the lack of a common investment policy would expose them to destructive intra-EAC competition, which they certainly did not want.[908] In this strategy, an excellent analysis has been made of the key issues and the relevant strategies to address them. Three of them deserve to be mentioned here because of their relevance to this study:

The first is the issue related to 'Investment and Export Promotion Procedures and Regulations'. The analysis of the situation demonstrated that Partner States were maintaining separate bodies, each pursuing its own strategies for the particular Partner State and that some of the procedures and regulations pursued by each of them were outdated and counterproductive. To tackle this issue, the recommended strategy was to "review and harmonize investment and export promotion procedures and regulations".[909]

The second point concerned the 'Legal, Regulatory and Institutional Framework'. Partner States commended various liberalization measures that they had undertaken. But they deplored the fact that one of their weaknesses had been the lack of or weak regulatory bodies and frameworks to correct market failures and weaknesses. The agreed strategy to address this issue was to "strengthen and fine-tune the regulatory and institutional framework".[910]

The third is about the "Regional Investment Promotion Programmes". In this regard, Partner States acknowledged that "to realize the goal of promoting the EAC as a single investment area, there is a need to come up with regional investment programmes to facilitate more coordination and harmonization" among them.[911]

In the implementation programme Partner States gave themselves three years to finalize the streamlining, simplification and harmonization of administrative procedures and regulations related to investment. Within this timeframe, among the expected activities Partner States were supposed to create investment one-stop centres; to develop client charters; to develop an investors' roadmap; to train offic-

[907] EAC, *Joint Export and Investment Promotion Strategies for the East African Community: 2006-2010*, Arusha, 30 July 2006, p. 20 (hereinafter JIPS 2006-2010).
[908] It should be noted that this strategy was adopted just a year after the entry into force of the EAC Customs Union, which presupposed the start of the free movement of goods between Partner States.
[909] JIPS 2006-2010, p. 20.
[910] *Idem*, p. 22.
[911] *Idem*, p. 23.

ers in the field of export, investment and trade facilitation; to review existing laws and regulations governing trade, investment, and export promotion; to establish a subcommittee for investment and export promotional activities under the EAC Sectoral Committee on Trade, Industry and Investment; and to appoint at the EAC Secretariat an officer to oversee investment and export promotion activities.[912] Consequently, a roadmap was suggested. It is amazing to note how effectively the draft roadmap underscored the high importance of observing good governance principles in investment promotion policies while advocating two-layered campaigns at the national and regional (supranational) levels. In fact, in this draft roadmap towards the promotion of investment, one can read:

The Partner States need to pursue open, liberal and transparent investment policies that significantly contribute to their economic progress principally through the private sector led development including policies that provide for amongst others:

a) Openness to foreign investment;
b) Right to private ownership and establishment;
c) Full protection of property rights;
d) Liberalized foreign exchange markets;
e) Conducive earnings repatriation conditions;
f) Stable, transparent and predictable regulatory framework;
g) Simplification of investment establishment procedures thereby replacing the regulatory role of investment screening and approvals with promotional assistance and facilitation;
h) National treatment status; and
i) Right to national and international impartial arbitration in the event of a dispute with government[913]

More concretely, the draft roadmap proposed the transformation of the now ignored MIC into a Common Investment Area Agreement (CIAA) as a remedy to "reduce tacit and often destructive competition among the Partner States and thereby promoting the EAC as one investment region in which to do business" since "an effective Common Market should have this kind of Agreement in place".[914] The CIAA, probably inspired by the Common Market for Eastern and Southern Africa (COMESA) model, would act as a common investment policy.

[912] Annex 2 (Implementation Programme) of the JIPS 2006-2010, p. 1.
[913] EAC Secretariat, *Draft Roadmap Towards Effective Promotion of Investments in EAC*, Arusha, Tanzania, February 2008, p. 3 (hereinafter Investment Roadmap 2008).
[914] Investment Roadmap 2008, p. 8.

6.3.1.2. Diversion in the choice of a remedy

While the Investment Roadmap 2008 appeared to have a preference for the management of investment promotion activities by a regional body over national Investment Promotion Authorities (IPA), it seemed to focus more on regional projects than on projects that would impact only one of the Partner States.[915] In this way, it would only have indirectly addressed intra-EAC competition for FDI, which arises not so much from regional projects but often from individual country projects.

Besides, the adoption of a CIAA following the COMESA model is not an adequate remedy for the problems identified above. Indeed, in 2007 its Member States adopted an Investment Agreement for the COMESA Common Investment Area (CCIA) with the objective being to "jointly promote COMESA as an attractive investment area".[916] However, despite the fact that this agreement also intends to "substantially increase the free flow of investments into COMESA from both COMESA and non-COMESA",[917] this agreement focuses more on an intra-COMESA investment flow than on the regulation of FDI inflow into COMESA. Anyway, the harmonization of COMESA Member States' regulations and policies on investment is not one of the declared objectives of this agreement. In addition, this agreement provides for a classic intergovernmental administration of investment, which highlights its congenital weakness in acting as a regional regulator. In the same vein, it is important to mention that the Economic Community of West African States (ECOWAS) is also working towards a similar regional instrument in order to enhance the ECOWAS Common Investment Market (ECIM) that would smooth out the FDI flow in the region from extra-ECOWAS members as well as as from within the community members.

However, while such initiatives are a good thing in terms of detailing and clarifying the rules to be followed during an intra-regional investment, this is not what the EAC needs the most. Indeed, intra-EAC investment is already regulated by the provisions of the EAC-CMP related to the right of establishment, the free movement of services, and the free movement of capital. So the priority of regional investment regulations and policies should rather focus on how to preserve the EAC integration process against Rambo-like behaviour that could stem from intra-EAC competition in attracting extra-EAC FDI. What the EAC needs the most is

[915] See for instance Investment Roadmap 2008, p. 6 *in fine*.
[916] Article 2(b) of Investment Agreement for the COMESA Common Investment Area (hereinafter COMESA-CIA).
[917] Article 2(a) of COMESA-CIA

to find and to create a system that would definitely change the "underlying preference constellation of a Rambo game".[918] This should be a system that would change the power balance between the EAC Partner States as a group and investment-related extra-EAC actors. It is therefore noteworthy that while the EAC investment strategy documents made a good diagnosis of the issues threatening the equitable attraction of FDI in the community, the remedy was not well selected.

6.3.1.3. Partner States' reluctance in effectively addressing the lacuna in investment regional policy

Despite the diversion mentioned above, it was already foreseen that it would be dauntingly challenging for the Partner States to expeditiously agree on the CIAA.[919] This fear was confirmed as there was no sign that the CIAA proposal went any further than the provisions of the draft Investment Roadmap 2008. The same could be said concerning most of its recommendations.

There is no easy way to assess the extent to which the JIPS 2006-2010 was implemented.[920] But the fact remains that there does not exist any form of regional investment common policy and most of the activities planned under JIPS 2006-2010 reappear in the things to be achieved by the 4th EAC Development Strategy (2011-2016).[921] The reappearance of these activities should be construed as meaning that they were not implemented during the timeframe provided by the JIPS 2006-2010. Among those activities, it is worth pinpointing the enactment of the EAC common investment protocol and the promotion of exports and investment.[922] Following the implementation matrix of the 4th EAC-Development Strategy (EAC-DS), the EAC common investment area protocol should have been finalized in 2014,[923] whereas the cluster related to the promotion of exports and investment

[918] S. Krapohl, *op. cit.*, p. 18.
[919] Investment Roadmap 2008, p. 14.
[920] In the assessment of the 3rd EAC development strategy in the framework of which the JIPS 2006-2010 was developed, the establishment of regional Private Sector Development (PSD) is reported to be the main achievement under the cluster related to investment promotion. Unfortunately the report does not have a methodical approach in discussing the achievements point by point against the set goals. The lack of harmonized policies at macro-economic and sector-specific levels (including the investment sector), and the weak institutional framework for private sector coordination and governance are again mentioned as challenges that faced the implementation of the strategic plan. See 4th EAC-DS, pp. 39-40.
[921] See for example the strategic interventions planned under the 4th EAC-DS, p. 65.
[922] *Ibidem.*
[923] The time frame for this task was 2011-2014. It should be noted that the terminology has changed from the CIAA to the Common Investment Area Protocol (CIAP). No reason is provided to justify this shift.

was scheduled to be completed in 2016. As things now stand, there are good reasons to believe that this goal will not be reached on time.

After this review, it is extremely puzzling to understand why Partner States have kept postponing the adoption of a regional investment policy after a clear and immediate recognition that the lack thereof could be a serious impediment to regional integration. Two reasons may justify this passiveness on behalf of the Partner States. First, it may be due to the lack of credible and regular studies showing the reallocation of FDI between Partner States following the implementation of the common market protocol.[924] The second reason could be that, because the EAC in general attracts a very small portion of FDI and that the discrepancy between Partner States is so huge, the change which is occurring in the volume of FDI is not yet visible.[925] These two reasons rest on the fact that the common market is not yet fully-fledged and that foreign investors are not yet widely aware of the opportunities and facilities that would be available to them in the EAC. At this rate, it could take a long time before Partner States really realize that the common market has influenced the volume of their FDI inflow in the manufacturing area. If they had realized that this change was already taking place, they would have acted promptly in adopting a common investment policy.

A juxtaposition of the 3rd and 4th EAC-DS unveils a decreasing change in the tone regarding the adoption of a regional common investment policy. While the commitment remains unchanged, it is noteworthy to underscore the insertion of a new strategy in the investment and private sector development priority area. This is the need to "develop a mechanism for equitable sharing of benefits and costs of EAC integration".[926]

[924] This is the consequence of a lack of an analytical framework and a systematic assessment of the impact and indicators. As mentioned by James Zhan, this trifold lack contributes a great deal to the reluctance of countries in a regional integration to adopt a coherent policy on investment. See J. Zhan, 'Regional Integration and Foreign Direct Investment', *Multi-year Expert Meeting on Investment for Productive Capacity-Building and Sustainable Development*, UNCTAD, Geneva, 28 January 2013, p. 7.

[925] So far the hierarchy between Partner States, in terms of the amount of FDI attracted, has not changed a great deal even though a country like Rwanda is dramatically increasing its FDI share. It could also be suspected that the fact that some Partner States like Uganda and Tanzania are increasingly obtaining a huge amount of FDI from the extractive sector contributes in minimizing (if not hiding) the small change which is happening in other sectors like manufacturing and related services. Additionally, the fact that most reports on FDI inflow do not compartment their categories does not help in an informed monitoring of the FDI clustered evolution.

[926] The feasibility study of this strategy was supposed to have been completed in 2014, but nothing substantial has been done (4th EAC-DS, p. 65, 154).

This formulation is reminiscent of mechanisms previously taken by Partner States under the former EAC in the 1970s to address trade imbalances. They included the redistribution of industries, the establishment of the former East African Development Bank (EADB), and the imposition of transfer tax.[927] But history demonstrates that all these mechanisms proved to be unsuccessful.[928] In trying to address trade imbalances in the 1970s, the real issue was the higher rate of FDI inflow into Kenya compared to other Partner States, especially in the manufacturing industry. This meant that Kenya had a production surplus. But the allocation of industries in other Partner States or the imposition of transfer taxes were not accompanied by disinvestment especially in Kenya, which continued to attract investors thanks to its strong location advantages.[929] Therefore, it appeared that those measures were superficial as they only addressed symptoms and did not reach the root cause of trade imbalances. So in order to avoid history repeating itself, any mechanism to be developed to address the equitable sharing of costs and benefits in the EAC should rather be part of a broad EAC common investment policy that would go beyond a mere revenue or industry redistribution. It should rather tackle the issue of the equitable distribution of FDI among Partner States in the EAC single market.

6.3.2. Physiognomy of an effective common investment policy in the EAC

6.3.2.1. Application of the principle of subsidiarity for the transfer of competence concerning investment

The principle of subsidiarity may provide a way out in the quest for an adequate regulatory and institutional framework for FDI inflow in the EAC. The application of the principle of subsidiarity would help the smooth transfer of competence concerning investment from Partner States to EAC regional organs.

a) Exploring the principle of subsidiarity

Subsidiarity is enshrined in article 7(1)(d) of the EAC Treaty as one of the operational principles of the Community in the following words:

[927] For the historical background of these mechanisms, cf. supra Chapter I.
[928] See Chapter I (Introduction) for an overview of these mechanisms as adopted in the past. See also R. Shams, *Trade Imbalances and the Political Economy of a Transitional Fund in the EAC*, HWWA Discussion Paper 242, August 2003, p. 16.
[929] R. Shams, *op. cit.*, p. 10-11; see also EAC, *East African Community Industrialization Strategy 2012-2032*, Arusha, Tanzania, 2012, p. 5.

The principle that shall govern the practical achievement of the objectives of the Community shall include: … (d) the principle of subsidiarity with emphasis on multi-level participation and the involvement of a wide range of stake-holders in the process of integration;

The wording of this provision is so vague that a good interpretation cannot be made without making a connection with its distant ancestor in EU law. According to article 5(3) that deals with the principle of subsidiarity in the EU Treaty,

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at the central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level.[930]

i) Conditions for the application of the principle of subsidiarity

It is based on article 5(3) quoted above that the EU, as a supranational organization, can take over some competences from its Member States.

However, a number of conditions must be fulfilled beforehand. The first is that the area concerned should not be within the exclusive competence of the EU. This is understandable because such competence is automatically exercised by the EU without any need to explain this.

The second is that the EU's action should pass the 'test of effectiveness'.[931] This means that the envisaged action by the EU should be the most effective way to attain the objectives of the EU integration in question. The EU can only be preferred when it is demonstrated that action at the supranational level is more efficient than action by Member States, either taken individually or collectively. The

[930] It is important to reiterate that the principle of subsidiarity was primarily introduced in EU law to contain the hegemony of the EU Commission on the Member States in policy-making. In its original meaning, subsidiarity advocates policy-making at the national level. The EU should intervene only if the Member States either individually or collectively cannot effectively reach the assigned goal. In this sense, subsidiarity can be understood as a shield against EU powers. However, over time subsidiarity revealed to be a dynamic principle, which could also be used by the EU to take action at the expense of the Member States. Accordingly, it can be said that subsidiarity has evolved to become a "double-edged sword which the two legal words can use when it seems to fit the political bill" (S. Constantin, 'Rethinking Subsidiarity and the Balance of Powers in the EU in the Light of the Lisbon Treaty and Beyond', *CYELP*, Vol. 4, 2008, p. 152). In the present research, subsidiarity is considered as a dynamic principle.

[931] A.G. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', *Common Market Law Review*, Vol. 29, 1992, p. 1097.

application of this test gave rise to the question of who should bear the onus of proof that the action would be more efficient if it is taken at the supranational level than at the national level. The EU Commission bears that burden. Accordingly, it must make an impact assessment to provide evidence to various decision-makers in the EU that EU action is the most appropriate after a review of the advantages and disadvantages of any alternative policy choices.[932]

The third condition is compliance with the 'test of scale'.[933] According to this test, action should be taken at the supranational level only if a better result can be achieved "by reason of the scale or effects of the proposed action". This test conditions action at the supranational level on the appreciation of its scale or the reach of its effects. Obviously, supranational action should be excluded if it is to cover just the territory of a few Member States without any real possibility of being extended to all other Member States.[934] In such a scenario, the action should be left to the Member States concerned to act individually or collectively through intergovernmental cooperation.[935]

The test of effectiveness and the test of scale are also combined in one test called the 'test of comparative efficiency'[936] as they both compare the effectiveness of the result to be attained by either the EU or its Member States' actions against its assigned objectives.

ii) Are the conditions fulfilled in the EAC?

A thorough analysis shows that the aim of transferring investment policy-making from Partner States to EAC institutions meets all three conditions set for the applicability of the principle of subsidiarity.

---

[932] S. Constantin, *op. cit.*, p. 160.
[933] A.G. Toth, *op. cit.*, p. 1097.
[934] The consideration of Member States' territory in the definition of the 'scale of the effects' is clearly shown in paragraph 2 of article 12 of the draft Treaty on European Union that provided the first orientation concerning the principle of subsidiarity. This paragraph was phrased as follows:
Where this Treaty confers concurrent competence on the Union, the Member States shall continue to act as long as the Union has not legislated. The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by the Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers
[935] In accordance with the statement made by the President of European Commission, Manuel Baroso, that the EU needed to "be big on big things and smaller on smaller things". See José Manuel Barroso, 'State of the Union Address 2013", SPEECH/13/684, European Commission, 11 September 2013.
[936] P. Craig and G. De Burca (2008), *op. cit.*, p. 103.

Unlike the Treaty on the functioning of the EU that clearly makes a distinction between matters under the competence of the EU and those remaining under the jurisdiction of EU Member States,[937] the provisions of both the EAC Treaty and the EAC-CMP are rather broad in the sense that either they state the obligations which bind Partner States or they simply empower EAC institutions, especially the Council, to take certain actions. There is no clear division of competence between the EAC and its Partner States.[938]

However, the Council is empowered to take measures which are both legally-binding, such as making regulations, issuing directives, and taking decisions, and non-binding, such as making recommendations or giving opinions in accordance with the Treaty. Whenever a particular provision empowers a regional institution to take a legally-binding measure, that provision should be construed as conferring competence on the supranational entity.[939]

Following this reasoning, it can be claimed that the EAC does have some competence concerning investment. This stems from the reading of article 44(2)(f) of the EAC-CMP that stipulates that, in pursuing cooperation in the area of industrial development, Partner States should "adopt common principles" to "promote investment … in the Community". This paragraph must be read in combination with article 44(3)(a) that entitles the Council to 'issue directives and make regulations' on the 'implementation of the East African Industrial Development Strategy'. It is

[937] The EU Treaty provides for a tripartite division of competences between the EU and its Member States. The first type is the exclusive competences stipulated in article 3 of the Treaty on the Functioning of the EU (TFEU) which entitles only the EU to legislate and adopt binding acts in specific areas. The second is the shared competence provided by article 4 of the TFEU. Shared competence allows both the EU and its Member States to adopt binding acts in some fields. Member States may exercise their competence only in so far as the EU does not exercise or has decided not to exercise its own competence. Finally, article 6 of the TFEU establishes supporting competences according to which the EU can only intervene to support, coordinate or complement the action of Member States. In other words, these are Member States' exclusive competences where the EU does not have any legislative authority and, therefore, should not interfere in their exercise.

[938] This is a basic difference between the EU and the EAC, which may influence the application of the principle of subsidiarity. In fact, because of a clear subdivision of competences between the EU and its Member States, the principle of subsidiarity mainly deals in the EU with the exercise of competences already distributed between regional and national bodies. But in the EAC where the Partner States are presumed to have the monopoly of competences, the first step in discussing the exercise of competences by the regional entity should be the identification of the legal provision or mechanism that grants such competence. The principle of subsidiarity should therefore be of great assistance as it determines the conditions to be observed so that a regional institution can exercise competence which has not yet been conferred upon it. In so doing, in a legal system like the EAC where competences between the regional authority and the member states is not clearly distributed (which presupposes that the Partner States retain all competences), the application of the principle of subsidiarity would play *ipso facto* the role of transferring competences from the Partner States to the EAC.

[939] A. G. Toth, *op. cit.*, p. 1081.

clear from these provisions that the Council has undisputed authority to issue a directive framing Partner States' common investment policy with the purpose of fostering the implementation of the EAC's industrial development.

However, while these provisions empower the Council to regulate the flow of investments in the Community, they remain silent on whether such a power includes the possibility to unilaterally confer exclusive competence on any EAC institution with regard to investments (including FDIs). In other words, does the power to issue a directive on common investment policy imply taking over Partner States' competence to promote and protect investment? This is not certain because, on the one hand, each Partner State is currently in sole charge of making its own investment policies and, on the other , as demonstrated above, the EAC-CMP recognizes the authority of the Community (through the Council) to promote investment in the EAC. The logical conclusion from this observation is that investment appears to be an area where both the Partner States and the EAC are competent in terms of regulation and policy-making. Seen through the lens of European law's conditions of subsidiarity, there is no doubt that investment appears to be within the shared competence of EAC and its Partner States and therefore it cannot be placed under the EAC's exclusive competence.

As for the test of comparative efficiency, the Rambo and agglomeration theory already provide sufficient grounds to argue that Partner States' individual actions with extra-EAC actors cannot be effective. It is claimed that any form of investment promotion done separately or collectively by Partner States with extra-EAC actors without keeping their identities absolutely quiet would not be efficient. Specifically, Partner States' separate investment policies cannot comply with the EAC's objectives of developing policies and programmes aiming at widening and deepening cooperation between them in order to promote a more balanced and harmonious development in the Community. Indeed, investment promotion and protection are so far in the hands of national IPAs in various forms such as preparing and circulating publications (leaflets, newsletters, etc.), sponsoring investment missions, and developing project proposals.[940] While the consensus is that Partner States should promote the EAC as a single market, they have found an insidious way of doing this. In fact, all Partner States' IPAs do mention the EAC-

[940] JIPS 2006-2010, p. 27. Although the pre-investment phase is the most essential role played by IPAs. It consists of presenting to prospective investors the opportunities, incentives and benefits available in the host country. This phase has become a highly professional and expensive communication activity operating according to the same standards as commercial advertisements. The amount of attracted FDI could be higher or lower depending on how far-reaching and well-designed a country's pre-investment advertisement is.

wide market as a reason why foreign investors should come to the region. But the emphasis in the message is placed on the individual country that runs the advertisement. In other words, each Partner State tries to capitalize to the maximum extent possible the market size obtained with the entry into force of the EAC-CMP as a determinant factor for FDI inflow in its own territory. Because the market size has become a shared advantage, promotion campaigns then focus on other locational advantages that the advertising Partner State can offer.

As analyzed above, this turns into harmful competition between the Partner States. To prevent this kind of intra-EAC competition in investment promotion, it was suggested to carry out joint investment promotion campaigns where EAC Partner States could, for instance, promote their individual countries at the same EAC stand at international conferences or exhibition fairs.[941] It could also be suggested that the embassy of one of the Partner States should also provide information about investment opportunities in the other Partner States. These kinds of suggestions may only lead to certain problems, however.

In the case of a joint promotion under the same roof, the competition may easily degenerate into a real battle. This is highly predictable because EAC Partner States present uneven economic potentials while producing almost identical raw materials. Consequently, the investment promotion campaign may turn into a denigration campaign, as often happens on the edges of fair competition between producers of like products. At a certain level, the promotion of one's own products may turn into, in one way or another, the denigration of a competitor's products. In this scenario, instead of branding the EAC as a single investment area, such a competition would rather turn into highlighting the already striking asymmetries between the Partner States.

In the second scenario, it is very unlikely – regardless of the nature of the applicable policy – that the embassy of one Partner State would put in its best efforts in order to advertise investment opportunities in another Partner State, especially if the embassy's home country can offer similar opportunities. This is natural behaviour especially when, in a common market, FDI belongs to a common pool of goods whose consumption by one of the actors diminishes the availability of those goods to others.[942] Accordingly, no Partner State should be blamed for being egoistic in making sure that it brings home as much FDI as possible, even to the det-

[941] JIPS 2006-2010, p. 11.
[942] S. Krapohl and S. Fink, *op. cit.*, p. 474.

riment of others, since this the logical consequence of the merciless competition imposed by today's globalization of markets for goods and capital.[943]

For this reason, it appears very challenging to prevent intra-EAC FDI competition as long as each Partner State stands behind its own projects, regardless of the strategy to be used. This demonstration suggests that Partner States' identity should not be divulged in investment promotion activities for an effective branding of the EAC as a single investment destination, that would equitably benefit all Partner States. In other words, for the best interests of the community, pragmatism compels Partner States to transfer their competence concerning investment to the supranational entity, the EAC.

iii) A partial transfer of competence concerning investment is most suitable in the EAC context

While transferring competence for investment regulation and policy-making to the Community appears to be the most efficient way to contain any fatal competition between Partner States in their respective quest in attracting FDI, a close look at the criteria used in the test of comparative efficiency suggests that the transfer of competence for investment to the EAC should rather be partial.[944]

[943] M. Bungenberg, 'The Division of Competence Between the EU and Its Member States in the Area of Investment Politics', in M. Bungenberg et al.(Eds), *International Investment Law and EU Law*, Berlin, Springer, 2011, p. 33.

[944] This is the opposite of the steps taken by the EU with the entry into force of the Treaty of Lisbon in 2009. Indeed, before the Treaty of Lisbon, investment fell within the shared competence area between the EU and Member States. Both parties were allowed to make regulations on investment. The EU regulated intra-EU investment, while its Member States were competent for investment from or in EU third countries, including FDI. With the implementation of the European Economic and Monetary Union, it was considered indispensable to give to the EU competence concerning capital to and from third countries. Of course, FDI could not escape this development. That is why the Treaty of Amsterdam of 1997 conferred competence on the EU concerning extra-EU FDI. But still this competence remained shared with Member States as the EU was merely in charge of "the establishment of FDI from outside the Union, whereas the Member States retain(ed) competence for most issues of investment protection" (J. Karl, *op. cit.*, p. 415). But this state of affairs created a kind of cacophony and incoherence in the EU and its Member States' external relations related to FDI. For instance, while transferring competence for inward FDI to the EU calmed the competition between EU Member States, it did not resolve the issue of competition between EU investors abroad (EU outward FDI). This was still the competence of Member States which separately signed BITs with the host countries of their nationals' investments. In a way, this was found to be undermining fair competition between EU investors abroad. Furthermore, the multiplicity of BITs signed by EU Member States was found to weaken European investments in the international competition of systems where the EU's biggest competitors (the US and China) were coherently protecting their respective outward FDI. To face this increasing merciless "competition of systems" with regard to FDI, it was finally found pertinent to grant to the EU exclusive competence for FDI, both inward and outward, by the Treaty of Lisbon (M. Bungenberg, *op. cit.*, pp. 32-33; see also J. Ceyssens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution',

In stating that supranational entities should be competent only and in so far as the objectives of their proposed action cannot be sufficiently achieved by the Partner States, it means that the transfer of competence is to be considered as exceptional. Based on this exceptional character, it can be asserted that even regarding investment regulations and policies, the EAC should be confined only in areas that cannot be efficiently regulated by individual Partner States. In other words, in the EAC attention should be focused on the types of investment that are attracted by the common market as the scale or the effects of such investments are likely to spread beyond the national frontiers of one Partner States, hence necessitating the need for a regional policy for better regulation.

Following this, it could be judicious to narrow down the scope of the investment competence to be transferred to the EAC. For instance, portfolio investment should be definitely discarded since, because of its very nature, it is not directly related to the common market as such and its effects could be contained within the territory of the Partner States concerned. On the other hand, not all kinds of FDI threaten the EAC common market. For instance, in the current state of play, there is no possibility that the investment boom in the extractive industries in one Partner State could be regarded as threatening the economic development of the others.[945] This is true since most FDIs in the extractive industries are geographically located and hence they are not subjected to the agglomeration theory.[946] Their effects can hardly impact on the economy of other Partner States especially be-

Legal Issues of Economic Integration, Vol. 32, Issue 3, 2005, p. 270). This brief historical evolution of the progressive transfer of competence for FDI from Member States to the EU has the advantage of showing that the avoidance of harmful competition between the EU Member States is the dominant reason why the latter decided to renounce their competence concerning FDI policies. (see J. Karl, *op. cit.*, p. 426). First, they gave the EU competence concerning inward FDI to avoid competition between them for the attraction of FDI from EU third countries. But this competence was extended to outward FDI not only to avoid unfair competition between EU investors abroad but also to strengthen Europe's standing in the international arena. This amounted to the transfer of full competence concerning FDI to the EU, as a supranational organization. But this should not be the case for the EAC, at least according to the current state of play, for the simple reason that the likelihood of competition between EAC investors abroad is very small. EAC outward FDI is very rare. Therefore, only competence concerning inward FDI is currently required to be transferred to the Community, despite the fact that article 24(1)(b) of the EAC-CMP allows for the free movement of outward FDI. Nevertheless, should circumstances in the future dictate that there is a need to expand this competence concerning EAC outward investment, then Partner States should not hesitate in taking such steps to preserve the interest of the East Africans. For more about the relevance of following the EU regional policy model, see K. Masujima, 'Is the "EU Model" Relevant to Other Regions? MERCOSUR, ASEAN and Adoption of Regional Policy', *Kobe University Law Review*, Vol. 47, 2013, pp. 1-13. See also A. Dimopoulos, *op. cit.*, pp. 231-234.

[945] E. Asiedu, *op. cit.*, 2006, p. 64.

[946] This is also in harmony with the warning formulated decades ago that "it is in the allocation and location of industries that are not tied to particular raw material sources that the real problems will be encountered". See F.I. Nixson, *op. cit.*, p. 148.

cause foreign investors in this kind of area aim at extracting raw resources such as oil or minerals that are exported out of the community for further refinement. The extractive industries' products are not intended to be immediately sold in the common market. Therefore, investment promotion in oil production by Uganda cannot compete with the same which is done by Kenya within the EAC common market. In this sector, foreign investors' choice to invest in Uganda or Kenya will not be influenced by the EAC market size but rather by some other country-specific characteristics which have less to do with regional integration.

It follows from this observation that regional investment policy does not really need to cover areas like this. Thus, it sounds logical that only competence for FDI which is closely linked to the production of goods and services that would benefit from the common market freedoms should be transferred to the community level. This view is supported by the provision of the EAC-CMP that actually empowers the Council to issue directives and make regulations to promote investment, including FDI, in the implementation of the East African Industrial Development Strategy. Article 44(1) of the EAC-CMP clearly points out that Partner States should cooperate in the "area of industrial development in the activities related to the production of goods and services in the Common Market". And this happens to be, as shown above, the area where competition between the EAC Partner States is likely to be fierce. There is no need to reiterate that the manufacturing industries are part of the business activities related to the production of goods and services. It is no coincidence that this very article 44 of the EAC-CMP is the one that provides in its various paragraphs the need for Partner States to cooperate in the area of the production of goods and services , the necessity for them to adopt common principles to promote investment, and the empowerment of the Council to take binding measures for their implementation. This indicates that the Treaty framers had already weighed and anticipated the threat that the lack of a common regional investment policy in this area would pose to the community.

The above reasoning , together with article 44 of the EAC-CMP, converge on the necessity to transfer competence for FDI related to the production of goods and services to the EAC level. While this transfer of competence for investment from Partner States to the EAC is justified and founded on the principle of subsidiarity as enshrined in article 7(1)(d) of the EAC Treaty, its narrowing down in order to apply only to FDI related to the production of goods and services can be further

motivated by the principle of proportionality which is embedded in the principle of subsidiarity.[947]

According to the principle of proportionality, action by the EAC as a supranational institution should not go beyond what is necessary to achieve regional integration objectives. Therefore the regional investment policy to be developed by the EAC should not go beyond determining regulations on FDI in specific areas that could interfere with the functioning of the common market.

iv) Meaning of the transfer of competence concerning FDI

In practice, the transfer of competence for FDI in business activities related to the production of goods and services means that Partner States should stop developing their individual investment policies in this area. It is rather the Council, as the policy organ of the EAC, that should henceforth issue directives and make regulations that would bind all Partner States, whose sole role would consist of applying the EAC's acts.

The adoption of a regional common investment policy in the area related to the production of goods and services presents two main advantages. The first advantage would be the speeding up of the harmonization of Partner States' investment laws and policies. As discussed in chapter III, despite the existence of non-binding Model Investment Code (MIC), Partner States' laws and policies concerning investment resemble a kaleidoscope of conditions, incentives, and procedures for the promotion and protection of FDI in the EAC. The issuing of a binding directive with a clearly set deadline for implementation would compel Partner States to undertake the required and recommended reforms in their national laws and policies in order to comply with the directive. The areas where harmonization is badly needed include the definition of foreign direct investment (with uniform criteria for the foreign nature of a business), the removal of minimum investment capital or the adoption of a standard amount for all Partner States, and the stand-

[947] In EU law, the principle of proportionality first manifested as a component of the principle of subsidiarity. This can be seen in the phrasing of article 3b of the Treaty of Maastricht (Treaty on the European Union – 1992) which reads: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty". Later on the principle of proportionality evolved to become an independent EU principle next to the principles of conferral and subsidiarity as can be seen in article 5 of the TFEU. However, despite the acquired independence, the principle of proportionality has remained closely linked with the principle of subsidiarity as their application is regulated by a common protocol under EU law.

ardization of fiscal and non-fiscal incentives, investment admission and treatment procedures, and investment protection mechanisms.[948]

Good governance should be central in this regional investment policy to reflect the provisions of article 7(2) of the EAC Treaty. In order to do so, good governance principles relevant to investment promotion as developed in the normative framework should be methodically integrated.[949] Harmonization which is done in this way would substantially cushion "asymmetries and uncertainties as policies on investments would become more transparent"[950], which would definitely increase the attractiveness of the EAC as a single investment location[951].

The second advantage would be that with some FDI competences having been transferred to the EAC, a supranational authority would be the only interlocutor with foreign actors on matters related to investment in the area of the production of goods and services in the Community. This implies that promotional activities which are currently done by national IPAs would be transferred to the community level. But this should not be construed as national IPAs therefore having to be dismantled. On the contrary, they would be strengthened in working for the effective attainment of regional integration objectives. They would still carry out the same activities but now under the direction and guidance of the supranational authority. In the specific area conferred upon the EAC, IPAs would cease to mirror investment projects and opportunities in their own country. Instead, they would be in charge of implementing the investment strategic plan and roadmap, which could be developed and adopted under the conditions required for the Council's decisions.[952] Establishing a supranational authority as the sole interlocutor with foreign investors would foster stability in the community since only one mouth would speak on behalf all Partner States. Beyond the fact of equally promoting invest-

[948] It must be noted that investment is at the crossroads of many Partner States' policy areas and the harmonization of factors directly related to investment should be accompanied with broad harmonization in other domains such as taxation, labour and other social policies. Otherwise, the competition between Partner States in attracting FDI would change the ground and start being played on other grounds such as taxation or labour policies. See J. Karl, *op. cit.*, p. 426.

[949] Those principles are properness, accountability, transparency, participation and respect for human rights. For more details on the content of each of these principles, see *supra* Chapter II.

[950] C. Hjalmroth and S. Westerberg, 'A common investment policy for the EU', *The contribution of trade to a new EU growth strategy Part 1*, Kommerskollegium, 2009, pp. 21-22.

[951] Article 80(1)(f) of the Treaty of Arusha namely cites the harmonization and rationalization of investment incentives as a way towards the promotion of the EAC as a single investment area.

[952] According to article 15(4) of the Treaty, the decisions of the Council are made by consensus. As the European experience demonstrates, the transfer of competence for FDI to the EAC should not give rise to the fear of the establishment of a centralized regional common investment policy. On the contrary, this transfer would lead to an increase in cooperation between Partner States and EAC policies. See J. Ceyssiens, *op. cit.*, pp. 259-291.

ment opportunities in each Partner State, a common investment policy would strengthen the EAC's bargaining power in international and bilateral investment fora. This would protect Partner States against the risk of engaging in a 'race to the bottom' concerning various social and environmental standards that they would likely fall into should each of them negotiate individually and separately with foreign investors.

b) Who should decide on the applicability of the principle of subsidiarity?

The transfer of competence for FDI in the area of the production of goods and services from Partner States to the EAC will increase the power and the visibility of the Community. But formally, investment in general and FDI in particular would still remain an area which falls under the shared competence of Partner States and the EAC. In practice, Partner States would retain the power to enact laws, regulations and policies regarding inward investment (including FDI) in all other areas other than the production of goods and services. In these areas, Partner States' laws and policies should remain unchanged notwithstanding the provisions of the regional common investment policy that could recommend harmonization even in domains left to the exclusive competence of the Partner States. It could also be argued that Partner States would remain competent concerning all types of outward FDI.[953] On the other hand, the EAC should exercise competence for investment in two areas. The first area, based on the EAC-CMP, is where the EAC has competence to regulate investment flows between Partner States in order to make sure that their national laws and policies do not impede the implementation of the free movement rights. Secondly, following the imperatives of the common market, Partner States should transfer a portion of their competence for FDI to the EAC.

Accordingly, the EAC should have sole and exclusive competence concerning inward FDI related to the production of goods and services. This includes the competence to issue directives or to make regulations on *inter alia* FDI in the manufacturing and tourism industries, two key areas for the economic development of the EAC. But for this to be achieved, one question should be answered: who has competence to decide that investment policy-making should be transferred from

[953] But this assertion only holds true as long as the free movement of capital is not yet fully-fledged in the EAC. It should be reminded that Annex V of the EAC-CMP on the schedule on the removal of restrictions on the free movement of capital has determined 31 December 2015 as the date on which the very last type of capital operation should be liberalized. Until that time, the provisions related to the free movement of capital such as the article 24(1)(b) of EAC-CMP may not be fully applicable in the EAC.

Partner States to the EAC? The response to this question should be easy. Article 14(3)(a) of the Treaty gives the Council the authority to "make policy decisions for the efficient and harmonious functioning and development of the Community". But for the Council to be called upon to adopt a certain policy, some work must be done beforehand by various actors.

i) A start-up role for the EAC Secretariat

For the case under scrutiny, the Secretariat as the executive organ of the EAC is most appropriate institution to trigger the Council's activity.[954] To do this, the Secretariat may initiate a recommendation to the Council suggesting the transfer of Partner States' competence on inward FDI to the EAC as an indispensable pre-requisite for an effective common investment regulation and policy. This kind of recommendation could be sustainable only if it is supported, for instance, by strong empirical evidence from rigorous studies or research. These studies or research must demonstrate with reliable data how that transfer would be "the most appropriate, expeditious and efficient ways of achieving the objectives of the Community".[955] In this sense, the article 71(1)(d) empowers the Secretariat to be responsible for "the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination". According to this provision, the Secretariat has full power to undertake *sua sponte* any such investigation or research whose results may advance the EAC towards the attainment of its objectives.

In principle, the Secretariat has carte blanche to carry out this attribution as reiterated by the EACJ in ruling that it is the responsibility of the Secretariat to "actively and proactively carry out his Treaty functions for the sake of bringing Partner States in compliance with Treaty obligations they voluntarily subscribed to in order to ensure the advancement of East African integration".[956] This Secretariat's competence is reinforced by the independence and the impartiality that its staff are required to observe when discharging their duties. This independence includes *inter alia* refraining from seeking or receiving instructions from any Partner State or any other authority external to the Community.[957] As a consequence, this puts the Secretariat in a good position to act as the engine of the regional integration progress.

[954] See article 66 of the EAC Treaty read in combination with the article 71(1)(a).
[955] See article 71(1)(b) of EAC Treaty.
[956] Reference No. 1 of 2014, *East Africa Law Society vs. The Attorney General of the Republic of Burundi and The Secretary General of the East African Community*, Judgment of 15 May 2015, para 113.
[957] Article 72(1) of the EAC Treaty.

It is up to this organ to start-up new extra-mile step in the furtherance of various regional integration programmes. It is in this framework that the Secretariat should take the responsibility of making the first step in the formulation of the recommendation to transfer to the EAC the competence on inward FDI from Partner States. Such a recommendation should be submitted to the Council.

ii) The Council's decision-making: a difficult balance between diverging Partner State interests

Upon receiving the Secretariat's recommendation, the Council as the policy-making organ of the Community should in principle make a regional investment policy as part of the implementation of the broad East African Investment Strategy. *A priori*, nothing should preclude the Council from doing this since its decisions are binding on Partner States.[958]

In digging deeper, however, things are not as easy as they appear. Within the institutional unity of the Council as referred to in the Treaty, this institution is not cosmopolitan. In fact, members of the Council are representatives of Partner States.[959] Generally speaking, they are political appointees. This is enough to convey their political peculiarity to the Council.[960]

Accordingly, the Council's decision-making could be dominated by political considerations reflecting both the domestic and foreign realities of Partner States.[961] In this way, it might be complicated to adopt a common policy, especially in highly sensitive and strategic areas such as FDI inflow. This should be said bearing in mind the striking economic discrepancies between Partner States that are translated into strongly noticeable differences in the amounts of FDI that they individually attract. The issue could be that while the transfer of FDI competence to the EAC as a prerequisite for the adoption of a regional common investment policy would seem critical and urgent for a country like Burundi or Rwanda because this policy would help balance their respective locational disadvantages, Tanzania and Kenya may not see this as a priority. Tanzania and Kenya could even oppose such an

[958] Article 16 of the Treaty

[959] According to article 13 of the Treaty, members of the Council are: (a) the Minister responsible for EAC affairs of each Partner State; (b) such other Minister of the Partner States as each Partner State may determine; and (c) the Attorney General of each Partner State.

[960] In the EAC, like in the EU, the Council is the institution where the national interests of its Member States are represented. Consequently, decision-making by this body faces the difficult task of finding a balance between the Partner States' interests and the advancement of the regional integration agenda. See S. Constantin, *op. cit.*, p. 173; and P.P. Craig, 'Subsidiarity, a Political and Legal Analysis', *Journal of Common Market Studies*, Vol. 50, Issue 72, 2012, p. 22.

[961] D.Z. Cass, 'The World That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', *Common Market Law Review*, Vol. 29, 1992, p. 1129.

initiative because it implies, in practice, that they should put their locational advantages into a common basket. But beyond that, transferring competence for FDI to the EAC would be seen by reluctant Partner States as a proactive surrender of their dearly won national sovereignty.[962]

Against this background, it could be very challenging for the Council to come up with a decision, in so far as consensus is needed for "policy decisions made pursuant to Article 14(3)(a) of the Treaty".[963] The multiplicity of interests that emerge within the Council could make it impossible to reach this consensus on critical issues. This procedure alone would certainly lead the Community into a deadlock in the implementation of the integration process, since each Partner State could determine which policies should be pursued in common according to its own convenience and interests.[964]

The adoption of consensus as a mode of decision-making in the key organ of a growing multilateral organization like the EAC could seriously hinder the decision-making process.[965] As much as consensus does not necessarily amount to the creation of a minority bias, it certainly constitutes a counter-majority mechanism.[966] But the problem is that failing to reach consensus may immediately lead to the immobilization of the whole decision-making process.[967] Unlike majority decision-

[962] As rightly put by Fanta, "for both historical reasons and more practical and economic reasons, in Africa there is a strong reluctance to transfer sovereign powers to other levels of governance than the state". See E. Fanta, 'Understanding Regional Integration Policies in Africa' in E. Fanta, T. Shaw, and V. Tang, *Comparative Regionalisms for Development in the 21st Century*, Farnham, Ashgate Publishing Ltd, 2013, p. 46.

[963] See article 2(1)(g) of the Protocol on the Decision Making by the Council of the EAC (hereinafter Council Decision-Making Protocol). Due to the multiplicity of actors in the Council and probable conflicting interests between Partner States, there are strong risks that the Council's decisions would represent the lowest common denominator if consensus is required for the decision to be adopted. See also J. Karl, *op. cit.*, p. 424-425.

[964] A.G. Toth, *op. cit.*, p. 1100.

[965] While the EACJ rightly opined that "[consensus] does not imply unanimity when used in the Treaty", it also noticed that since the Treaty does not provide any definition of the term 'Consensus' the practice in EAC decision-making has filled that vacuum by unanimity. For this Court, the only way to address this issue would be an amendment of the relevant instruments where 'consensus' is referred to. See Application No. 1 of 2008 (Advisory opinion), p. 39.

[966] A. Estella, *The EU Principle of Subsidiarity and its Critique*, Oxford, Oxford University Press, 2002, p. 138.

[967] In its advisory opinion on the application of the principle of variable geometry vis-à-vis the requirement of consensus in decision-making, the EACJ noted that this issue arises when "consensus in making a decision is equated and/or juxtaposed to consensus in implementing it and is debated as one and same issue in the process of decision-making". As a way out, the Court suggested the application of the principle of variable geometry when no consensus is met in implementing a decision. In the Court's opinion, "Variable geometry is, therefore, intended, and actually allows, those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a

making that, in principle, leaves the door open for the outvoted minority to seek a judicial review, such an option can prove difficult in consensus-led decision-making since, in general, there would not be any act to submit to the court for a judicial review.[968]

iii) Strong pro-integration activism needed from the EACJ

In case the Council fails to reach a consensus in order to agree on the transfer of competence on inward FDI in the production of goods and services to the EAC, there are two main ways that the EACJ can be of assistance.

The first possibility is through an advisory opinion on the issue. For this question, the advisory opinion may be requested by the Council or any Partner State.[969] The Council may request an EACJ opinion if no consensus has been reached on a specific matter following the vote by Council members. This is feasible because unlike a certain number of issues expressly named by the Council Decision-Making Protocol, a decision by the Council to refer a case to the EACJ does not require consensus. Therefore, it is conceivable that proponents of an inward FDI competence

suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so". [Application No. 1 of 2008 (Advisory Opinion), p. 35.] This would be the case if Partner States agreed on the transfer of competence for FDI to the EAC. But it should be noted that variable geometry could not work in this case due to the nature of the policy involved and the space where it could be implemented. In fact, if two or three countries of the EAC agree, pursuant to the principle of variable geometry, to have the type of common investment policy suggested by the present work, foreign investors would easily circumvent this policy by entering through the Partner State which opted out. Once settled in that Partner State, foreign investors would still have access to the market of the Partner States which opted for the common investment policy since all the Partner States are in a common market. For variable geometry to succeed in this case, it would require Partner States in the common policy agreement to probably institute customs checks and duties against products from the Partner State which opted out of the common policy. This kind of decision would simply take the integration process many steps backwards.

[968] For reasons of efficiency, it would be advisable for the EAC to adopt a majority decision-making method in policy decisions that could be made pursuant to Article 14(3)(a) of the Treaty. In so doing, the EAC would simply borrow a leaf from the EU's long experience. Indeed, the EU modified the EU Council's voting method to 'qualified majority' instead of consensus on matters related to its Common Commercial Policy (FDI competence included). See article 207(4) of the TFEU; and the comments by A. Reinisch, 'The EU on the Investment Path – *Quo vadis* Europe? The Future of EU BITs and other Investment Agreements', *Santa Clara Journal of International Law*, Vol. 12, Issue 1, 2014, p. 114;

[969] See article 36(1) of the Treaty. Besides, this article also entitles the Summit or a Partner State to request the EACJ to give an advisory opinion regarding a question of law arising from the Treaty that may affect the Community. So far, the EACJ has delivered one advisory opinion. This was upon the request of the Council seeking clarification about the application of the principle of variable geometry and whether this principle is compatible with the requirement for consensus in decision-making in the EAC. See Application No. 1 of 2008.

transfer to the EAC may persuade the Council to refer to the EACJ for an advisory opinion, provided that they constitute a simple majority.[970]

In case they do not reach such a simple majority, it is also admitted that a Partner State may submit such a request to the EACJ[971]. The request for an advisory opinion addressed to the EACJ must contain the exact statement of the question submitted to the court accompanied by all relevant documents that could likely assist it. Such documents could include studies or research reports submitted by the Secretariat in support of its recommendation. However, the weakness of this option consists of the non-binding character of the advisory opinion. It implies that after the EACJ advisory opinion supporting the transfer of competence concerning inward FDI, the issue would return to the Council in order to be submitted to a vote. This would mean starting all over again with the hectic voting procedure in the Council.

The second option is the use of article 28(1) that provides a Partner State with the possibility to refer a matter to the adjudication of the EACJ if that Partner State considers that "an organ or an institution of the Community has failed to fulfil an obligation" under the Treaty.

As an organ of the EAC, the Council has the responsibility of ensuring that the Community is functioning properly. It is in relation to this responsibility that the Treaty imposes on the Council the general obligation to make policy decisions for the efficient and harmonious functioning and development of the Community.[972] This obligation is reiterated in the EAC-CMP where the Council has the obligation to issue directives and make regulations on the implementation of the East African Development Strategy including helping Partner States to adopt common principles to promote investment in the activities related to the production of goods and services in the Common Market for the attainment of sustainable growth and development in the Community.[973]

The words "efficient and harmonious functioning and development" and "attainment of sustainable growth and development" add a qualitative dimension to the obligation imposed on the Council. They mean that the Council's obligation is not just formal. It is not about whether or not the Council has made a policy, nor is it about the number of policies made by the Council. But it is rather about the teleo-

[970] Article 2(2) of the Council Decision-Making Protocol.
[971] Article 36(1) of the EAC Treaty.
[972] Article 14(3)(a) of the Treaty.
[973] Article 44 of the EAC-CMP.

logical quality of such policies. So for whatever reason, if the Council does not make necessary policies for the smooth running of the EAC, this can be considered as a failure to fulfill its obligation under the Treaty. Accordingly, if the Council fails to adopt an effective regional common investment policy due to the disagreement of its members to transfer competence on inward FDI in the production of goods and services to the EAC, it should be considered as a failure pursuant to article 28(1) of the Treaty.[974] Hence, any Partner State concerned by this failure should assign the Council to the EACJ.[975]

In its application, instead of requesting the EACJ to order the Council to take a measure, the Partner State concerned should rather request the Court to interpret the applicability of the principle of subsidiarity as enshrined in article 7(d) of the Treaty on Partner States' competence concerning FDI.[976] In doing this, the EACJ would be required to assess the suitability of transferring competence on inward FDI in the production of goods and services from the Partner States to the EAC against the aims and objectives of the Treaty.

Of course, the Partner State which is minded to make subsidiarity a principal element of its legal action should expect that its claim would be opposed by legal interventions from other Partner States, which would contend that action at individual Partner State level was warranted.[977] This puts the EACJ under the obligation to carefully balance not just the interests of the opposing Partner State(s)

[974] This should also be the case if, following political manoeuvres, the Council adopts a minimal measure that falls short of the efficiency and harmonisation standard.

[975] Under EU law, subsidiarity is often adjudicated by the ECJ due to applications by Member States which have been outvoted in the EU Council. Such Member States usually tend to request an annulment of the EU institution's action. See A. Estella, *op. cit.*, p. 140. In the EAC where consensus is the rule, there is no way that a Partner State can be said to have been formally outvoted. In consensual decision-making, it is either that the act is passed or it simply fails. The Partner State(s) which could support an act that fails to meet the consensus may not have any alternatives but to refer to the court pursuant to article 28(1) of the Treaty. If this option is denied, the EAC might find itself caught in a kind of Luxembourg Compromise where any Partner State's vagaries would take the whole organization hostage.

[976] But the applicant Partner State should be careful in its referral. The Partner State's claim should not be to request the EACJ to directly order the Council to adopt a regional common policy. The EACJ does not have such jurisdiction because policy-making falls within the discretionary power of the Council. By so doing, the Partner State would be requesting the Court to "interfere with the legislative process by replacing the institutions' discretion with its own views" (A.G. Toth, *op. cit.*, p. 1102). The *ex ante* decision on the application of the principle of subsidiarity belongs to Partner States and EAC organs, such as the Secretariat and the Council (see for instance S. Constantin, *op. cit.*, p. 165).

[977] Warning from Craig on the applicability of the principle of subsidiarity under the EU context where in general Member States rather oppose the EU institutions' excessive powers. See P.P. Craig, *op. cit.*, p. 22.

against the objectives of EAC regional integration, but also the very fact that at least one of the Partner States finds the Council's inaction to be harmful.[978] Thus, the EACJ should base its appreciation on the premise that the EAC was established with a *communautaire*[979] aim that presupposes that Partner States accept compromises. Therefore, the mere fact that it is just one Partner State which honestly believes that the Council's immobilization is the result of the lack of consensus to decide on the transfer of inward FDI competence to the EAC and threatens not only its own economic interests but also the entire regional integration should not condemn that Partner State to lose its legal action, nor that its vision of the balance between EAC objectives and other Partner States' interests over its own should not be given due consideration.[980]

Despite its delicateness,[981] this option is likely to succeed following the trend observed in the ECJ's case law. Indeed, in *United Kingdom v. Council*[982], where the ECJ had to deal with the observation of the principle of subsidiarity, this court held that a judicial review of the exercise of the Council's discretionary power in policy-making should examine whether "it has been vitiated by manifest error or misuse of power". In this ruling the ECJ recalled its definition of misuse of powers as "the adoption by a Community institution of a measure with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case"[983]. In the

[978] To tackle this issue, it is advisable for the EACJ to use a teleological method of interpretation that seeks to interpret a rule by taking into account the purpose, aim and objective that it pursues. See O. Pollicino, 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint', *German Law Journal*, Vol. 05, No. 03, 2004, p. 489.

[979] This approach has been identified as predominant in the ECJ's reasoning. See G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Oxford, Hart Publishing, 2012, p. 318-331.

[980] This is an *a contrario* reasoning from Craig's comment on an application by one EU Member State to the ECJ against the principle of subsidiarity. See P.P. Craig, *op. cit.*, p. 23.

[981] It is generally acknowledged that the principle of subsidiarity is highly political. Therefore, it was argued that its adjudication by a court needed a certain level of care. See for instance P.P. Craig, *op. cit.*, 2012; S. Constantin, *op. cit.*, p. 164; D.Z. Cass, *op. cit.*, p. 1134; A.G. Toth, *op. cit.*, p. 1104; and P. Matthews, 'Subsidiarity in article 3b of the EC Treaty – Gobbledegook or Justiciable Principle', *International and Comparative Law Quarterly*, Vol. 45, 1996, p. 435. While Matthews acknowledges that the court's standing and independence could be jeopardized by any involvement in policy matters during the probable adjudication of the principle of subsidiarity, he also concedes that this risk represents at least "as much danger of loss of respect if the Court shows that it will not give meaningful consideration to serious applications of the principle to be upheld". Then the Court would face a very delicate dilemma.

[982] Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*, Judgment 12 November 1996, I-05755, para 58(hereinafter *United Kingdom* case).This paragraph must be read in combination with paragraph 54 to find the link with the principle of subsidiarity.

[983] *United Kingdom* case, para. 69. *Prima facie*, this case does not directly address a Partner State's claim to the EACJ against the Council's deadlock preventing the adoption of a measure that would save the objectives of regional integration. But this should not be surprising as EAC Partner States and EU

EAC context, nothing should preclude the Partner State concerned from complaining that using the Council's voting method (consensus) provided for by the Treaty to block the transfer of competence concerning FDI in the production of goods and services to the EAC is tantamount to a misuse of powers leading *ipso facto* to a violation of the principle of subsidiarity.[984] Further, this should be a logical result of an *a contrario* interpretation of the ECJ's definition of 'misuse of powers' which would be construed, in this context, as 'any reluctance by a Community institution to adopt a measure with the exclusive or main purpose of thwarting the achievement of regional integration goals' or 'taking advantage of a procedure specifically prescribed by the Treaty to impede the regional integration process'.[985]

Member States are characteristically different. One of the most important differences between them is that EU Member States do not have economic asymmetries which are as striking as those displayed by EAC Partner States. Therefore, the nature of some of the issues they face in their respective regional integration process could be totally different. Or when they may face similar challenges, the legal principles intended to address those challenges could be applicable in a diametrically different way. The implementation of the principle of subsidiarity offers a good illustration. In the EU, the principle of subsidiarity is often invoked by Member States to oppose EU institutions' *action* on the ground that it was taken beyond what is necessary. In the EU integration process, it is fairly impossible to envisage a case where a Member State could complain about the *inaction* or ineffective action of EU institutions since the lack of a regional common policy would not necessarily dramatically favor some Member States to the detriment of others. EU Member States' economic interdependence and relative proportional economic development make them capable of surviving common market conditions with less supranational intervention. For this reason, the action of the EU may sometimes be counterproductive or simply too much. So an EU Member State which finds that a given action by the EU is too much has the right to challenge it before the ECJ based on the principle of subsidiarity. It is with reference to this scenario that next to "manifest error" and "misuse of power" the ECJ has mentioned the manifest excess of an institution's limits of discretion as one of the conditions for a judicial review based, inter alia, on the principle of subsidiarity. Therefore, even the definition of 'misuse of powers' as stated above by the ECJ should be understood in the European context. But the power balance in the EAC is different. The imbalance between Partner States' economic development makes a case for a proactive regional common policy since a lack thereof could be disastrous for the economy of some of them, especially the smallest (see D.W. te Velde and D. Bezemer, *Regional Integration and Foreign Direct Investment in Developing Countries*, 2006, pp. 1-32). This shows that inaction by the regional institution in making a common policy in some vital areas such as investment cannot have the same consequence for EU Member States and for EAC Partner States. Therefore, if it can be illusory to think about an EU Member State's action before the ECJ against the inaction of the EU Council or Commission, such an action by EAC Partner States before the EACJ could be totally justified and supported by article 28(1) of the Treaty.

[984] In theory the consensual decision-making in the EAC Council does not leave any room for any kind of majority or minority. But in practice, it does. A. Estella, *op. cit.*, p. 138.

[985] This is likely to be the definition the EJC would have come up with if it had to deal with a regional integration process between members that have the features of the EAC. As rightly put by de Waele, the likelihood of this kind of definition by the ECJ cannot be doubted since this "Court is in fact legally obligated to steer a pro-integration course, and required to always deliver judgments that strengthen and expand the Community/Union legal order". This commentator adds that the "shortcomings of the institutional architecture, where progress is easily stalled if institutions do not follow-up on each other's actions, as well as the all-too lengthy and cumbersome legislative process, would even demand such a habitus: for the process of the European integration was meant to continue incessantly, entailing that any inaction from the side of the other actors (Commission, Council, Par-

In adopting this reasoning, the EACJ should logically come to the conclusion that the Council's veto on transferring competence concerning inward FDI to the EAC was vitiated by a manifest misuse of power, which implies a violation of the Treaty principle of subsidiarity.

In dealing with the principle of subsidiarity, it would not be necessary for the EACJ to make an exhaustive cost-benefit analysis of whether leaving the competence concerning FDI in the production of goods and services with the Partner States would be adequate or whether its transfer to the EAC level would provide an added value. What could matter would be to have submissions from the parties to the proceedings and possibly also from other Partner States. These submissions would help the Court to "weigh up the issues concerned, even bearing in mind that it is trying to hit a moving target in view of the dynamic nature of subsidiarity".[986]

liament) compels the Court to interpret rules of primary and secondary law as boldly and as expansively as possible". (H. de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', *Hanse Law Review*, Vol. 6, No. 1, 2010, p. 11). See also K.K. Patel and H. Schweitzer, *The Historical Foundations of the EU Competition Law*, Oxford, Oxford University Press, 2013, pp. 38-39; A. Estella, *op. cit.*, p. 138; and H. Rasmussen, 'Towards A Normative Theory of the Interpretation of the Community Law', *The University of Chicago Legal Forum*, 1992, p. 137. This commentator supports the fact that the ECJ's "judicial activism was needed in order to break the impasse into which the political branches had settled". This advocates a strongly active EACJ to advance the integration process especially when political actors are reluctant to do so. The step taken by the EACJ in extending its jurisdiction on human rights issues despite the inaction of the Council in doing this pursuant to article 27(2) of the Treaty is a sign that the EACJ is likely to follow in the footprints of the ECJ's activism. See for instance the *Katabazi* case, as upheld in the *Mukira* Case, para. 26. Unlike the ECJ that faced a strong dilemma between EU applicant Member States' expectations (that this court should annul EU acts on the ground of subsidiarity) and its own political agenda (fostering European integration), the EACJ could have a slightly easier task. Since by default Partner States have full competence and considering the passiveness of EAC organs, it is likely that most requests regarding the application (interpretation) of the principle of subsidiarity before the EAC would consist of imploring this court to rather increase the Community's competences. And this would be in compliance with the needed pro-integrationist approach to adjudicate this principle, which is an approach that the EAC has already commended. For a further explanation of the ECJ's doctrine on subsidiarity, see A. Estella, *op. cit.*, p. 159-175.

[986] Paul Matthews, *op. cit.*, p. 435. This is the approach used by the ECJ in dealing with the principle of subsidiarity. See for instance *United Kingdom*, paras 47 and 55. It should be noted that few cases have involved the application of the principle of subsidiarity before the ECJ. In about twenty-years there have been barely ten cases where this principle has been challenged (P. Craig and G. De Burca, *EU Law, Text, Cases and Materials*, 5th ed., Oxford, Oxford University Press, 2011, Chapter 3. This is not surprising in the EU which is a well-organized regional integration process with active institutions working towards the implementation of their mutual goals while respecting checks and balances. For a regional integration organization like the EAC where the debate is dominated by Partner States which are symmetrically different in their economic development, the activation of the principle of subsidiarity is not an option but it is rather a necessity for a balanced and equitable development of Partner States. Furthermore, there is no way that the EAC can aspire towards attaining its final step

With a good argumentation supported by analytical evidence as discussed earlier (the role of the Secretariat), there are strong probabilities that the EACJ would be able to hold that, based on the principle of subsidiarity, the promotion and protection of inward FDI in the production of goods and services would be more efficient if they were done by an EAC institution rather than by Partner States separately or collectively. In other words, the EACJ would hold that Partner States' diverging inward FDI policies leads to the distortion of the common market.[987] Since this was the key point opposing Council members, it may be possible that they would abide by the Court's ruling and accept such a transfer. This acceptance would be a big step towards the adoption of broad and effective common investment regulations and policies in the EAC.

c) Good governance: a reconciling factor for the smooth application of the principle of subsidiarity

The EACJ ruling on the necessity to transfer competence for inward FDI in the production of goods and production should in principle bind EAC Partner States. This would imply compliance by the Council, which should act accordingly. But one thing should not be ignored. The regional integration process is first and foremost a creature of the Partner States. It only works if members are willing to implement its various steps. Therefore, if they have already manifested their hostility towards such a transfer of competence to the EAC, a contrary decision by the EACJ would be binding but unwelcome. Depending on the power and the number of hostile Partner States, such a decision may end up serving everything but eroding the court's legitimacy as the decision could simply be ignored.[988]

Knowing the pre-emptive fragility of most African regional integration communities, it is likely that such an aggressive decision might prove counterproductive and might instead spur Partner States to become wary of the implementation of further integration programmes.[989] To avoid any kind of unhealthy arm wrestling between the EACJ and the Council, as a result of Partner States arm twisting following an

of political integration if the principle of subsidiarity is not used to progressively empower the yet-to-be (future) federal institutions.

[987] The ECJ reached a similar decision in the *United Kingdom* case. See A. Estella, *op. cit.*, p. 166.

[988] *Idem*, p. 159.

[989] E. Fanta, T. Shaw, and V. Tang, *Comparative Regionalisms for Development in the 21st Century*, Farnham, Ashgate Publishing Ltd, 2013, pp. 41-55.

EACJ decision, it would be better for both EAC organs to rather establish an adequate cooperation framework with clear guiding principles.[990]

Of course, good governance principles would be very helpful for a smooth collaboration between the EAC and the Partner States, on the one hand, and between EAC organs, on the other. As far as the interaction between the EAC and Partner States is concerned, subsidiarity is likely to be very much called upon in the coming years to find a settlement as to what each of them can do more efficiently than the other for the achievement of the regional integration objectives. But as discussed above, the principle of subsidiarity could be very difficult to apply especially when the primary and secondary texts of the EAC are not clear enough to help decision-makers to decide which one between Partner States and the EAC should be competent in a specific matter. This creates a blurring uncertainty about the functioning of the EAC.

Good governance principles would recommend the adoption of a clear-cut division of competence between the EAC and Partner States in some specific areas. At least, a line should be drawn to separate areas within the EAC's exclusive competence from others.[991] This would shed a light of transparency that would motivate the Secretariat to initiate actions at the EAC level without any fear of encroaching upon Partner States' residual sovereignty. Furthermore, the lack of transparency as to the division of competences between the EAC and the Partner States makes it very difficult for both internal and external observers to know who should be held accountable for delays in the achievement of various regional integration steps.[992] Should the line between the EAC and Partner States' competence be clearly drawn, the debate in the Council would no longer start by analyzing whether or not the EAC should have competence concerning the matter in question, but attention would focus on the appropriateness of the suggested measure. This would be the case at least for matters falling within the exclusive competence of the EAC.

[990] For instance, in the EU in order to entertain a dispute related to the application of the principle of subsidiarity, the Protocol on the Application of the Principles of Subsidiarity and Proportionality was introduced in 2007 almost 15 years after the principle first appeared. Prior to this protocol, there was an agreement between European institutions that obliged them to respect the principles of better regulation (see S. Blockmans et al., *op. cit.*, p.4 mentioning the Interinstitutional Agreement of 2003). The EAC could obtain inspiration from these EU mechanisms.

[991] It should be noted, however, that even under EU law where there exists a tripartite type of competences for the EU, the latter's competence is rarely exclusive except in the areas of common commercial policy, fisheries conservation, and monetary policy. See A. Dashwood, 'The Relationship between the Member States and the European Union/European Community', *Common Market Law Review*, Vol. 41, 2004, pp. 369-370.

[992] Craig is also of the opinion that the principle of subsidiarity enhances accountability. See P.P. Craig, *op. cit.* (2012), p. 25.

Regarding the smooth management of tensions between EAC organs during the decision-making process, "the overall objective of better regulation"[993] should be regarded as a central issue. In other words, actors involved in EAC decision-making should be motivated by the desire to have a better EAC.[994] This would stress the need to have better EAC governance rather than focusing on egoistic national interests. Should all actors involved in EAC decision-making have such a vision, there would not be any difficulty in applying the principle of subsidiarity, which would simply mean 'EAC regulations where necessary and national where possible'.[995]

6.3.2.2. An adequate institutional framework for the implementation of regional investment policy

Without any doubt, good governance in regional investment policy would materialize through the harmonization of EAC Partner States' FDI laws, policies and procedures coupled with a common investment policy where competence concerning inward FDI in the production of goods and services would be a giant leap towards a more equitable, balanced and harmonious industrial development as expected by the EAC Treaty. But the effectiveness of such a common investment policy would depend on the institutional arrangements for its implementation.[996]

[993] S. Blockmans et al., 'From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU', *CEPS Essay*, No. 10, 8 April 2014, p. 3.

[994] Noting the fundamentally political nature of the principle of subsidiarity, the EU Committee of the regions stated in one of its internal documents that "The aim of the subsidiarity principle is 'better Europe'". See the position of the Committee of the Regions (EC), "The application and monitoring of the subsidiarity and proportionality principles: The Committee of the Regions' political and operational role', (Bureau document) R/CdR 191/2006 item 8 fin, 2 August 2006 cited by S. Constantin, *op. cit.*, p. 162 (note 52).

[995] This is a paraphrase of the overriding principle in a Dutch subsidiarity exercise that was "European where necessary, national where possible". See Ministry of Foreign Affairs (the Netherlands), *Uitkomsten subsidiariteitexercitie*, MINBUZA-2013.184321, 21 June 2013 cited by S. Blockmans et al., *op. cit.*, p. 3.

[996] It should be mentioned at the outset that as far as investment is concerned, there is no 'institution' as such in the EAC. The EAC has very few operational institutions. For this section, the institutional arrangement includes both organs and institutions of the Community as provided by article 9 of the Treaty. In addition attention will be mainly focused on the institutional structure (design) as studies have demonstrated the impact that the institutional structure of the investment authority plays in attracting FDI. See J. Morrisset and K. Andrews-Johnson, *The Effectiveness of Promotion Agencies at Attracting Foreign Direct Investment*, FIAS, Occasional Paper 16, 2004, p. 45.

a) Suffocation of EAC's institutional functioning by the Council's hypertrophic powers

As things now stand, the EAC machinery is characterized by hypertrophy on the part of the Council which has a concentration of all powers. In reverse, the Secretariat, which is supposed to be the executive organ of the Community, is alarmingly atrophied to the extent that it is constantly under a "fear to act" as its Treaty powers have been confiscated by a leviathan Council.[997] In reality, instead of working as the EAC executive organ, the Secretariat is subjugated to function as a subunit of the Council in the sense that 'its main work emanates from directives and tasks assigned to it by the Council'.[998]

The same remark applies to the EACJ. Despite this court's activeness in its pro-integration interpretation of the EAC Treaty, the Council has taken some steps to restrict the EACJ's room to manoeuvre in pushing forward the integration agenda. Two actions deserve to be mentioned. One is the amendment of article 27(1) in order to subtract from EACJ jurisdiction on the interpretation of the Treaty the "application of any such interpretation to jurisdiction conferred by the Treaty on organs of Partner States". This provision somehow dilutes the monopoly of the EACJ in interpreting the Treaty, although in theory Partner States' courts faced with an issue regarding the interpretation of the Treaty should in principle refer to the EACJ for a preliminary ruling. Of course, any interpretation of the EAC Treaty by Partner States' courts does not guarantee the uniform application and understanding of EAC law, which may lead to a scattered implementation of EAC law depending on each Partner state's perspective.[999]

Second is the amendment of article 26(d) of the Treaty making it possible that judges of the EACJ could be removed from office if they are "convicted of an offence involving dishonesty or fraud or moral turpitude under any law in force in a Partner State". This provision which contains open-ended terms such as 'dishonesty', 'fraud' or 'moral turpitude' constitutes a subtle reminder to the EAC judges

[997] See EAC Secretariat, *Institutional Review of EAC, Organs and Institutions (Final Report)*, Arusha, Tanzania, March 2011, (part one) p. 35 (hereinafter Institutional Review Report 2011). For unknown reasons, the page numbering of this report restart from 1 at the 73rd page. For the clarity of reference, it should be read that part one represents the first 72 pages whereas part two represent the following part.

[998] See Institutional Review Report 2011, (part one) pp. 31-32

[999] In the wording of the EACJ, this amendment undermines its supremacy as the judicial body whose responsibility is to ensure adherence to law in the interpretation of the Treaty. See Reference No. 9 of 2012, *The East African Centre for Trade Policy and Law vs The Secretary General of the East African Community*, Judgment of 9th May 2013, para 57 and 62 (hereinafter *Centre for Trade Policy* case).

that they do not escape the control of their home countries. In case EACJ judges would compromise the interests of their home country in discharging their duties at the regional level, they should not lose the sight that a cane is pending and that at any time the home country or any Partner State could use its own courts to dismiss the judges concerned. This article places the EACJ's judgment-making activity in a very precarious position and undermines the court's independence vis-à-vis the Partner States.[1000]

Notwithstanding the EACJ's warning to the Partner States that not respecting the Court would make the Treaty and all it seeks to achieve stand in sinking sand,[1001] these two amendments are a blatant manifestation of the Partner States' obstinacy in making the EACJ useless.

[1000] These provisions restricting the jurisdiction of the EACJ were not accidentally inserted in the Treaty. They were introduced in 2007 in retaliation against the EACJ ruling of 27 November 2006 in which this court enjoined the EAC Secretary General not to recognize nine persons chosen by Kenya to be members of EALA and not to permit those persons to participate in any functions of the EALA on the ground that the method of their designation fell short of the election mode prescribed by article 50 of the Treaty [see, Reference 1 of 2006, *Prof. Peter Anyang' Nyong'o and 10 others vs. The Attorney General of Kenya and 5 others*, Application for Injunction, 27 November 2006, para 3(8)]. The least that can be said about this ruling is that it took all Partner States (three at that time, i.e. Kenya, Tanzania and Uganda) by surprise as they could not have expected a Court made up of the judges they had appointed to halt a decision on sovereignly taken by a Partner State. This decision could not just be considered as an affront, especially by Kenya, but a warning to all Partner States that the EACJ was running out of control. So instead of just submitting the names of the nine persons who were designated to represent Kenya in the EALA to a formal election in the Kenyan Parliament as recommended by article 50 of the Treaty, Kenya influenced other Partner States to react vigorously. The result was a speedy amendment of the Treaty provisions that clipped the wings of the EACJ forever. To discourage individuals like Prof. Nyang'o from referring a case to the court at an untimely moment, it was decided to introduce a two-month time limit. This is the rationale behind the introduction of article 30(2) of the Treaty. And to make sure that unsubmissive judges like Ole Keiwua do not take control of the court, it was found appropriate to subject judges' removal from EACJ office for any reason deemed appropriate by a Partner State. By the way, it must be said that Justice Ole Keiwua was a judge named by Kenya. In 2003, a case was filed against him before a Kenyan Court while he was already serving at the EACJ. But Kenya never requested his dismissal as an EACJ judge until he delivered a ruling that invalidated the controversial designation by Kenya of nine EALA members. So the Ole Keiwua issue could be the only rationale behind the enactment of article 26(d). And to seal the deal, Partner States found that the EACJ should not have the power to oppose action taken by them, like Kenya's choice of EALA members regardless of whether or not that action is contrary to the Treaty's provisions. It was understood by Partner States that their national prestige would be tarnished if individuals or legal persons could challenge their actions before the EACJ. Therefore, the Court should be denied jurisdiction for any acts, regulations, directives, decisions or actions that the Treaty confers on an institution of a Partner State. This is what appears under article 30(3) of the amended Treaty.

[1001] Reference No. 1 of 2006, *The Attorney General of Kenya vs. Prof. Peter Anyang Nyong'o and 10 others*, Ruling of 6 February 2007, para. 11. On more than one occasion, the EAC has strongly recommended these amendments to be revisited but in vain. See Ref. No. 3 of 2007, *East African Law Society & Others vs. Attorney General of Kenya & Others*, Judgment of 1 September 2008, p. 42 as reaffirmed by the court in *Centre for Trade Policy* case, para 66.

It appears from the above observation that only one of the three major organs has any real power to decide what can be implemented within the integration framework. This organ is the Council where Partner States' individual interests are bargained. But, as observed on many occasions, EAC Partner States' bargaining generally leads to 'negative' measures against the integration process. Partner States squarely stick to their respective positions; and, since consensus is needed for key decision-making, no real progress can be registered. In this sense, the EAC integration process can be described as radical intergovernmentalism. The EAC approach can be explained by the fact that Partner States' interests and choices influence all decisions. But since these interests and choices are divergent and due to the lack of strong economic interdependence between Partner States, it is very difficult to agree on the establishment of adequate regional institutions that would watch over common interests. There is no such emergency simply because the common interest is presumably too small. For sure there is some interest, otherwise they would not form the Community. But perhaps the cost of having such institutions outweighs the expected benefits.[1002]

b) Necessity for a more dynamic integration approach

An observation of the EAC integration approach leads to a kind of paradoxical conclusion that Partner States have enrolled themselves in a regional integration process but without being willing to put in place adequate institutions which are needed to effectively support that process. This is unfortunately another pure manifestation of the observation made by some commentators about the Arab League that "Leaders committed to their own domestic political requirements got the weak institutions they wanted: just enough to demonstrate their commitment to Arabism but not so much as to allow Arabism to threaten their individual sovereignties, domestic political alliances, and power base".[1003]

However, this kind of position cannot hold true for a long time for an ambitious organization like the EAC with a common market in which the free movement of investment is enforced.[1004] Statistics show that there is a dramatic increase in intra-EAC trade and investments. These statistics could also inform us that the pro-

[1002] D.C. Esty, *op. cit.*, p. 1514.
[1003] See M. Barnett and E. Solingen, 'Designed to fail or failure of design? The sources and institutional effects of the Arab League' in A. Acharya and A.I. Johnston (Eds.), *Crafting Cooperation: Regional International Institutions in Comparative Perspective*, Cambridge, Cambridge University Press, 2007, pp. 184-185. In the same perspective see also B. Fagbayibo, 'Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview', *PER*, Vol. 16, No. 1, 2013, p. 49; and T. A. Oyejide, *op. cit.*, p. 21.
[1004] The World Bank, *Regulatory Capacity Review: East African Community*, Washington, 2011, p. 15(48).

fessed weak interdependence between EAC Partner States' economies is not indomitable. It could be expected that the full operationalization of the common market would increase interdependence between Partner States. Accordingly, it would be highly recommendable for the EAC to shift at least to a liberal intergovernmentalist integration approach.

This is the approach observed in EU policy-making in its early stages when many countries such as France, the United Kingdom, Ireland and Denmark, for instance, were openly opposed to the idea of transferring sovereignty to the supranational level.[1005] But their reluctance did not prevent them from entrusting their regional organization, then the European Communities (EC), with some real powers. EC policy-making was simple. Everything started by the bargaining of Member States' interests. This led to a "gradual process of preference convergence among the most powerful member states, which then struck a central bargain among themselves, offered side-payments to smaller member states, and delegated strictly limited powers to supranational organizations that remained more or less obedient servants of member states".[1006]

Of course, the convergence of EC member states' preferences was possible because of their interdependence. Interdependence fosters intra-regional business. As a consequence the establishment of adequate supranational institutions becomes necessary not only as a means of "locking one another into commitments"[1007] but also as a "response to the inability of traditional formal state institutions to manage the size and the complexity of the regulatory tasks"[1008] that would face States in their quest for protecting the security and well-being of their citizens who have moved to spatial domains that extend beyond the jurisdiction of national governments.

Recall that among the reasons advocating the adoption of a common investment policy at the EAC level is the fact that, due to the common market, the policy of individual Partner States could not be efficient. That is why competence concerning inward FDI in the production of goods and services needs to be transferred to

[1005] H. Wallace, M.A. Pollack, and A.R. Young, *Policy-Making in the European Union*, 6th edition, Oxford, Oxford University Press, 2010, p. 19.
[1006] *Idem*, p. 20. These commentators were paraphrasing Moravcsik. See A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, Ithaca, Cornell University Press, 1998.
[1007] D.J. Puchala, 'Institutionalism, Intergovernmentalism and European Integration: A Review Article', *Journal of the Common Market Studies*, Vol. 37, No. 2, June 1999, p. 319.
[1008] K. Armstrong and S. Bulmer, *The Governance of the Single European Market,* Manchester, Manchester University Press, 1998, p. 259.

the EAC. Consequently, that transfer should also be accompanied by a real institutional empowerment of the regional organization.

c) No need for the creation of a new institutional framework

The required institutional empowerment for the EAC to take over competence concerning inward FDI in the production of goods and services does not necessitate any Treaty amendment. *De jure*, the EAC Treaty is generally well drafted to operationalize this transfer once approved by the Council. But it is the *de facto* situation characterized by the Council's micro-management of everything, including that which falls within the Treaty attribution to the Secretariat for instance, that poses the most threatening challenge to the effective functioning of the EAC at large.[1009] Therefore, the most needed and most difficult step would rather be a factual renunciation by the Partner States (acting through the Council) of encroaching upon the EAC's functioning.

This alone would allow the EAC, especially the Secretariat, to carry out its executive role without necessarily having to resort to the establishment of new regional institutions for the implementation of regional common policies, like the common investment policy under scrutiny. Indeed, according to article 76(3) of the Treaty and article 46 of the EAC-CMP, the Council has exclusive power to create institutions deemed necessary to administer the common market.[1010] But as much as it is worth noting that few institutions have been established by the Council pursuant to these provisions, it is deplorable that much fewer have been optimally operationalized. The example of the EAC Competition Authority is particularly appealing. In fact, this institution was established by the East African Competition Act in 2006. Eight years later, the EAC Competition Authority is still non-operational allegedly because some Partner States do not yet have competition laws.[1011] Like the Competition Authority, there are many other institutions that have been in the

[1009] One of the striking examples of such micro-management by the Council includes its involvement in the recruitment of EAC staff through its participation in the shortlisting of candidates [see Institutional Review Report 2011(part one), p. 32]. Although article 70(1) of the Treaty states that "The salaries, jobs and other terms and conditions of services of the staff in service of the Community shall be determined by the Council", it cannot be construed that this article expected the Council to be involved in the shortlisting of each and every EAC staff member. It should be reminded that some commentators mentioned the lack of adequate institutions as one of the causes of the collapse of the defunct EAC. See for instance I.D. di Delupis, *op. cit.*, p. 57.

[1010] But these provisions seem to be in conflict with article 9(3) of the Treaty that recognizes the power of the Summit to establish institutions. This article reads: "The institutions of the Community shall be such bodies, departments and services as may be established by the Summit".

[1011] Institutional Review Report 2011 (part one), p. 24.

pipeline for many years awaiting the Council's go-ahead either for their formal establishment[1012] or for their effective operationalization.[1013]

Against this background, suggesting the establishment of a Regional Investment Authority to take charge of the implementation and the monitoring of common investment policy in the EAC could be choosing a very long, hazardous and uncertain road. For this reason, once the competence concerning inward FDI in the production of goods and services is transferred to the EAC, the Secretariat should be able to manage that within its structure as recommended by the final report of the EAC Institutional Review of 2011.[1014]

This report came up with recommendations which are so reasonable that they can be adhered to for the implementation of the proposed EAC common investment policy. In accordance with this report's first phase of the institutional framework that was supposed to be implemented over two years with effect from 1 July 2011,

[1012] For instance, the EAC Culture and Sports Commission, the Infrastructure Agency, and the East African Medium Range Weather Forecasting Centre. See Institutional Review Report 2011(part one), pp. 62-63.

[1013] Apart from the EAC Competition Authority, one could also note the East African Science and Technology Commission, the East African Health Research Commission, the East African Kiswahili Commission, the Tourism and Wildlife Management Agency, the East African Monetary Institute, the East African Customs Authority, and the Trade Negotiations Commission. The extreme relevance of the last two institutions for the proper functioning of the EAC common market does not need to be emphasized. The Trade Negotiations Commission that would be entrusted with the task of implementing the regional common investment policy, for instance, has been established by the EAC Trade Negotiations Act since 2008. But it has never been operationalized due to, among other things, "the difficulties the Partner States envisage in ceding powers of negotiations to a regional body". Institutional Review Report 2011(part one), pp. 24, 60-62.

[1014] Institutional Review Report 2011. This review was undertaken by the EAC Secretariat upon the order of the 20th Extra-Ordinary Meeting of the Council in April 2009 that directed the Secretariat to carry out an extensive study of the Community and to come up with suggestions for institutional reforms to transform the Community into an effective and efficient organization following its expanded mandate. This review critically analyzed the functioning of the EAC and came up with strong recommendations that would allow the Community to move to the next level. It should be reminded that this was the second report on the institutional review of the EAC. The first review was carried out and presented by Adam Smith International in 2010. This report was not made public and was vigorously rejected by Partner States because it was built on the EU model with 'too much' power being given to the Secretariat, as it was suggested that it should be changed into a Commission. It was alleged that one of the reasons why Adam Smith International came up with an EU-like model for the EAC was that it was not aware of EAC realities. To remedy this weakness, it was suggested that the review should be undertaken by an EAC task force that was constituted by the Secretary General and comprised of members from the Secretariat, EALA and EACJ. Workshops were also organized to obtain input from various stakeholders like Partner States' Ministers and Permanent Secretaries. The final report suggested the implementation of its ambitious recommendations over four years starting from 2011. But up to the time of writing (three years later) there is no sign that any of its recommendations have been taken seriously by the Council. Fears that significant parts of this report would end up being everything but paper may be well founded.

regional investment policy should be well managed by the Office of the Director General at the secretariat.

This office is subdivided into two directorates: the Directorate of Customs and the Directorate of Trade. So it is obvious that regional investment policy should be under the latter. This is a very good setting since, as developed previously, foreign investment is closely related to international trade.[1015] In this way, a proper foreign investment policy can only be conceived within a broad foreign trade policy.[1016] So it is appropriate to keep investment under the Directorate of Trade, especially because this directorate is expected to be endowed with a department specifically dedicated to Investment and Private Sector Development.

According to the 2011 Institutional Review Report, this department would be responsible for "promoting local, cross-border and foreign investment in the region through development of regional policies, strategies and laws on investment" and coordinating "investment conferences in and outside the region in order to market EAC as an investment destination".[1017] There is no way to agree less that, based on this description, this department could adequately accommodate the implementation of the EAC common policy on inward FDI in the production of goods and services without the need to establish any new institution.

Even if the Trade Directorate seems to have been given a broad competence for all kinds of investments, it is still very pragmatic and realistic to start claiming, first, the transfer of competence concerning inward FDI in the production of goods and services. This is the most urgent issue. Perhaps this extended competence could be claimed in a later phase (phase II) when this Directorate is transformed into the Office of the Commissioner in charge of Trade, Industry and Development.[1018]

[1015] J. Karl, *op. cit.*, p. 428.
[1016] In the EU, for instance, the transfer of competence concerning FDI was facilitated by the fact that the EU already had exclusivity in regulating its Member States' Common Commercial Policy. It should be mentioned that in terms of transferring competence concerning FDI to a regional entity, the EU is so far the only regional integration community to have done so. However, MERCOSUR coordinates the conclusion of international investment agreements between its Members States and third countries. See J. Karl, *op. cit.*, p. 425.
[1017] Institutional Review report 2011 (part two), p. 55.
[1018] The Institutional Review Report 2011 provided for the transformation of the EAC Secretariat into a Commission with decision-making independence and autonomous powers. This was supposed to come into effect in 2013 after a prior amendment of the EAC Treaty. It is in line with the Secretariat's transformation that its departments were also supposed to adopt new terminologies. See Institutional Review Report 2011 (part two), p. 16-17, and 55.

6.3.2.3. Scrupulous observance of good governance principles in decision and law-making

Once the competence concerning inward FDI in the production of goods and services is transferred, the Directorate of Trade should make sure that good governance principles are scrupulously observed in law and policy-making related to regional investment.[1019] In analyzing good governance indicators mentioned above,[1020] it is really impressive to see how the United Nations Conference on Trade and Development (UNCTAD) profoundly departs from the WGI classification to come so close to the academic setting.[1021] This strengthens the choice of the academic classification over the World Governance Indicators (WGI). But although the UNCTAD indicators will be generally retained, two adjustments are needed for this research. Firstly, predictability will be expanded to mean properness as the former sounds too narrow. Secondly, human rights protection should be added as an indicator since there has been a discussion for a long time about the relationship between human rights and investments.[1022] It would be simply logical to consider respect for human rights as an indicator of good governance in relation to investments.

a) Properness

Instead of using UNCTAD's terminology - predictability - we have preferred to use properness as a principle of good governance to be observed in the promotion and protection of investments. While legal predictability is "the most important concern of investors",[1023] it sounds too narrow. A look at the principles of good governance as elaborated by academia shows that legal predictability is encompassed in the properness principle together with other equally important concerns of investors. Furthermore, UNCTAD's explanation as to predictability refers to practices or realities that fall outside the strict domain of predictability and, yet, are effectively covered by other elements that can be controlled by the principle of

[1019] The assessment of good governance in this context should be done following the holistic approach pursuant to section 2.3.
[1020] Cf. supra section 2.3.
[1021] UNCTAD, *Good governance in Investment Promotion*, TD/B/COM.2/EM.15/2, 25 August 2004 (hereinafter UNCTAD 2004a)
[1022] S. L. Blanton and R. G. Blanton, "What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment", *The Journal of Politics*, Vol. 69, n°1, February 2007, pp. 143-155; B. Letnes, "Foreign Direct Investment and Human Rights: An Ambiguous relationship", *Forum for Development Studies*, N° 1-2002, pp. 34-62.
[1023] UNCTAD 2004a, p. 4.

properness.[1024] For this reason, it is appropriate to enlarge predictability to mean properness when measuring good governance in relation to foreign investments.

In relation to investment promotion, properness is twofold. A distinction should be made between institutional properness and normative properness. Institutional properness refers to how proper the investment authority makes decisions, and normative properness implies how fitting the regulations are. These two aspects are two sides of the same coin and should not be assessed separately as they complement each other. The normative framework provides a basis for the actions of investment authorities. However, it is well known that having good rules is one thing, but implementing them is another thing altogether. This is true especially when one takes into account the fact that laws cannot foresee everything and, therefore, administrative authorities mostly use their discretionary power to fill in the gap. Anyway, whether administrative authorities, such as the Directorate of Trade, are simply applying the law or whether they are using their discretionary power, the observance of the principle of properness should be understood as encompassing the following eight elements.

i) Avoidance of the misuse of power:

The regional investment authority should have real authority in assessing and deciding whether or not a foreign investor should be issued with an investment certificate or any other investment-related permit. In this sense, it will be the depository of public power. But regional investment authority should not use that power for any other purpose than the one for which it has been vested. For instance, persons appointed to work for the investment authority should not use their power to resolve personal issues such as favouring or delaying a service to an investor due to their friendship or animosity. Similarly, every organ involved in investment decision-making should use its powers to make effective regulations and policies aimed at, at the same time, both the economic development of the host country and the conduciveness of the business environment for foreign investors, while upholding the fundamental principles of EAC regional integration.

ii) Avoidance of arbitrariness:

Most of the time arbitrary decisions are a consequence of the exercise of discretionary power by the public authority. For instance, in Uganda the investment authority has up to ninety days to deliver a decision about the admission of a for-

[1024] For instance, the equal treatment of investors and a fair application of the law are beyond mere predictability and are more closely related to equality and the prohibition of arbitrariness, respectively.

eign investment. However, it is not because they have ninety days that investment officers should wait for a long time before they start processing the investor's application. To avoid this, regional investment authority needs to be reasonable all through its decision-making process.

iii) Observance of legal certainty:

Also called legal predictability, legal certainty implies that all decisions by the investment authority are taken according to the law. Investment policies and laws in force should be clear and made known to foreign investors. For this, the investment authority should "insure simplicity in rules and regulations, including the removal of unnecessary steps and procedures and the reduction of the number of documents that need to be completed".[1025] The legal framework should be stable. The stability of the legal framework implies that changes in laws and policies should be less frequent; and, when they occur, they should be done to improve the existing situation and should be made known to foreign investors well in advance. Political stability is a component of legal predictability as a change of political leaders either through democratic means or following an uprising or an armed conflict often affects policies. In developing countries, especially in Africa, the threat of political instability always has disastrous consequences. The dramatic decrease of FDI in Kenya following the 2008 post-electoral crisis is a telling case. However, while the legal stability can hardly be guaranteed to foreign investors after political change at the national level, the transfer of competence concerning inward investment to regional bodies can be seen as a guarantee that the stability of the investment legal environment would be preserved no matter the political change that could happen in the territory of any Partner State. Legal predictability is a core element of the rule of law.

iv) Satisfying legitimate expectations:

People generally trust the administrative authorities because of the office they hold in offering public services. Thus, the investment authority should always act in a way which is consistent with laws and policy rules as the latter create legitimate expectations.[1026] Foreign investors expect investment authorities to implement investment laws and policies as they currently stand. In principle, legitimate expectations created by the provisions of the laws, policies and instructions should be

[1025] UNCTAD 2004a , p. 5.
[1026] G.H. Addink, *Good Governance: Concept and Context*, Oxford, Oxford University Press, 2015 (forthcoming), p. 99 [hereinafter GH Addink 2015b].

upheld.[1027] For instance, a building permit legally issued by the competent administrative authority should not be subsequently questioned by the same authority or by another administrative organ, for example by alleging that the permit concerned had been issued for a *non aedificandi* area.[1028] Having legitimate expectations is strongly in line with the observance of legal certainty and the equal treatment of people who are in the same position.[1029]

v) Equal treatment of people in the same position:

Foreign investors in the same position should be treated equally. A situation which takes the form of case-by-case negotiations between the host state and the foreign investor should be exceptional and take place as infrequently as possible since it may affect the confidence of investors in the regional authority's administration.[1030]

vi) Carefulness in decision-making:

Carefulness is one of the qualities that people expect from the administration, even though its meaning remains undefined and has a very broad scope. However, for the investment authority, carefulness implies that it should collect enough information before granting any certificate or before taking any decision that may affect foreign investments. To reach this goal, the regional investment authority should rely on the research carried out by Partner States' task forces in order to identify the relevant facts and interests at stake, and both investors and their direct stakeholders need to be given an opportunity to voice their opinion before any decision that could impact on them is taken. Carefulness also implies that sensitive information relating to investments should be kept in a safe place.

vii) Preservation of proportionality:

In taking their decisions, the investment authority should find a "right balance between the means and the aims which have to be reached".[1031] As an illustration, there should be a good assessment of the objectives, the impact and the Partner

[1027] *Ibidem.*
[1028] This kind of decision might be made in order to correct a previous erroneous decision. But as highlighted by the European Court of Human Rights (ECtHR), "the need to correct an old 'wrong' should not disproportionately interfere with a new right which has been acquired by an individual relying on the legitimacy of the public authority's action in good faith". See *Maksymenko* case, para. 64.
[1029] G.H. Addink 2015b, p. 99.
[1030] UNCTAD 2004a, p. 4.
[1031] G.H. Addink 2015b, p. 101.

States' regulatory capacity before the enactment of any regulation related to investment.[1032]

viii) Providing reasons for any decision

Any person is pleased to know the reasons why a decision affecting him or her has been taken. This justification helps the persons concerned to accept the decision or to discover the missing elements in order to complete their application or to appeal against a negative decision. The investment authority should be able to justify each decision it takes, especially when it refuses to grant an investment certificate or other relevant permit as corruption could often be a hidden underlying reason for decisions that are not properly justified.

b) Accountability

In general, the concentration of power in the hands of an individual usually leads to undesirable situations characterized by corruption, misuse of power, and a lack of effectiveness. Therefore Partner States could legitimately suspect that the concentration of power on investment matters in the hands of a centralized regional authority would lead to abuse. For this reason, there is a need for a checks and balances system in order to allow each decision-maker at any level to be accountable to another.

Accountability is "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences".[1033] In the promotion of investment, while the actor is the investment promoting authority, the forum differs depending on the nature of the accountability obligation. There is vertical accountability when "the forum formally wields power over the actor … due to a hierarchical relationship", and when the forum gives account to various stakeholders on a voluntary basis without a legal requirement the accountability is horizontal.[1034] In Partner States, the Investment Promotion Authorities (IPAs) are accountable to the minister in charge of trade who, in principle, has the power to review their decisions.[1035] Therefore the forum for investment promotion authori-

[1032] UNCTAD 2004a, p. 4.
[1033] M.A.P. Bovens, 'Analysing and Assessing Public Accountability. A conceptual Framework', *European Governance Papers (EUROGOV)*, N° C-06-01, 2006, p. 9.
[1034] M.A.P. Bovens, *op. cit.*, p. 20.
[1035] In all EAC Partner States the investment authorities have been placed under the control of the ministry of trade, and in most cases decisions by the former can be appealed before the latter.

ties in a situation of vertical accountability is the minister in charge of trade (or the Cabinet as a whole). In a situation of horizontal accountability, however, investors are the forum to whom investment authorities are supposed to render account.

However, the problem is that most civil servants in investment promotion offices hardly realize that they owe accountability towards investors in the accomplishment of their duties[1036]. This attitude can be explained by the absence of a clear legal obligation enjoining them to do so. The lack of a possibility for the forum to assess and to sanction the actor (if need be) is the main shortfall of horizontal accountability.[1037] So the efficacy of the accountability of IPAs towards investors very much depends on the seriousness of the vertical accountability which the former owes to its hierarchy.

At the regional level, to be effective vertical accountability of should operate at two levels. Internal vertical accountability within the investment authority (Directorate of Trade) needs to be established by setting standards of application, wrongdoing detectors, report mechanisms, and adequate sanctions against its own staff throughout their internal hierarchy. Each employee at the office of the investment authority should be given a clear job description with a well identified person or organ to whom they are directly accountable internally.[1038] Following this scheme, "middle managers are, in turn, both actor and forum".[1039]

External vertical accountability involves the questioning of the investment authority before the Council. As the investment authority would be part of the Secretariat, it is the Secretary General who should be the one to answer any the complaint filed against the institution alleging misbehaviour by any of its staff. This should be considered as a last resort. In principle, if cases involving a poor attitude or the mishandling of investments by lower-level IPA staff are reported to the Council, it should be presumed that the relevant internal vertical accountability is deficient. Internal vertical accountability is the backbone of the system; its failure generally undermines even the effectiveness of external vertical accountability. When the entire system of the 'box' is corrupt, sometimes even though the Secretary General may face accountability consequences the change might take too long to occur.

However, the existence of effective laws and policies does not always guarantee accountability. In many countries, there exist clear legal provisions about the ac-

[1036] UNCTAD 2004a, p. 5.
[1037] M.A.P. Bovens, *op. cit.*, p. 18.
[1038] UNCTAD 2004a, p. 5.
[1039] M.A.P. Bovens, *op. cit.*, p. 19.

countability of IPAs towards ministers. But it is always the implementation that poses problems. Most of the time, corruption anesthetizes the whole system to the extent that hierarchical control becomes paralyzed. Corruption also creates blindness that makes everything in the system opaque for outsiders like investors vis-à-vis IPAs. The only way to break through this opaqueness is to strengthen horizontal accountability by providing enough information and performance benchmarks to investors.

The availability of detailed clients' charters stating the vision and mission of the investment authority and its standard of services in accessible public areas, especially in the buildings where the authority operates from, could be a good starting point in empowering investors. However, while the creation of clients' charters is commendable,[1040] it would be meaningless if investors are not provided with clear mechanisms to report non-compliance therewith by the investment authority's staff. Similarly, reporting without any subsequent follow-up and sanctions (when necessary) could be seen as a waste of time. This is an illustration of how vertical accountability needs to work in synergy with horizontal accountability in order to be as effective as possible.

Besides, there might be other issues that could necessitate more than an administrative remedy between the foreign investors and the investment authority or any other administrative authority in the host country. This highlights the need to extend the accountability of the investment authority from an administrative to a judicial level. In this regard, courts of law should play a major role in reassuring foreign investors that there exists an alternative to the administrative accountability discussed above. Depending on the nature of the dispute, the case could be taken either before the court of the host country or before the EACJ. But dealing with local courts is a constant source of nervousness for foreign investors. They usually doubt the independence and the impartiality of the local judiciary in settling their dispute. This is a factor that advocates that the transfer of competence on investment in the production of goods and services to a regional body should be done in conjunction with the granting to the EACJ full competence to adjudicate investment disputes.[1041] It should be reiterated that foreign investors' confidence in the courts is a good indicator of accountability.[1042]

[1040] UNCTAD 2004a, p. 5 & 9. It should be noted, however, that a clients' charter cannot be seen *per se* as a form of accountability as long as the "relationship with a forum is lacking".

[1041] It should be noted that the Summit meeting held on 20 February in Nairobi adopted a protocol for the extension of the EACJ's competence to cover trade and investment. It is to be hoped that the ratification of this protocol will take place by 30 November 2015 as instructed by the Summit. See

Nevertheless, court proceedings are usually long and costly. Therefore even where there is complete trust in the judicial system "it should be considered only a last-resort measure".[1043] Consequently, it is judicious to think about another effective non-judicial mechanisms to supplement the courts as a credible alternative to judicial accountability. International or national arbitration tribunals are frequently referred to along with some new mechanisms such as the Office of the Investment Ombudsman in the Republic of Korea as a good alternative for accountability of the investment authority.[1044]

c) Transparency

Secrecy is generally a hotbed for misdeeds, including corruption and the misuse of power that sow the seeds of ineffectiveness in the public administration at large. Transparency is therefore a powerful antidote to overcome this. Transparency is usually understood as the availability and accessibility of information. For foreign investors, access to information about their host country is very crucial.[1045] Prospective foreign investors would be interested in obtaining enough information about investment opportunities in their future host country, while current foreign investors need to know how decisions affecting their business are taken.

An investor is by definition *homo economicus,* characterized by a tireless pursuit of profit maximization.[1046] For this reason, the gathering of maximum information before any commitment is made is crucial to ensuring that the best deal is struck. As a consequence, it is clear that if investors had to make a choice between two countries to invest in, foreign investors would prefer the one on which they had gathered the greatest amount of information. Thus, the regional investment authority in its quest for FDI optimization should start its work by making sure that information about each and every opportunity offered in the EAC is widely available.

EAC, *Communiqué of the 16th Ordinary Summit of the East African Community Heads of State*, Nairobi, Kenya, February 2015, paras 9 an 10.

[1042] An effective court system remains a good indicator for foreign investors as they may be dragged to the courts in disputes with private individuals concerning, for example, employment contracts, supply-customer relationships, competition law, etc.

[1043] UNCTAD 2004a, p. 10.

[1044] UNCTAD 2004a, p. 11.

[1045] M. Ogutcu, 'Good governance and best Practices for Investment Policy and Promotion', *UNCTAD workshop on Efficient and Transparent Investment Promotion Practices: the Case of LDCs*, Geneva, 6-7 June 2002, p. 5.

[1046] For details on the role of transparency for *homo economicus*, see A. Buijze, *The Principle of Transparency in EU Law*, 's-Hertogenbosch, Uitgeverij BOXPress, 2013, p. 124-133.

Nowadays, information technology and the internet are effective tools to reach the widest audience worldwide.[1047] The assessment of an investment authority's transparency should start by its connection to the internet and the richness of the information contained on its website. The richness of a website should be assessed based on the extent to which its content is likely to anticipate questions from investors and to provide answers thereto.

Beyond the available opportunities, foreign investors are much more concerned about the safety and the profitability of their investments in the host country. The investment authority cannot provide enough information about an investment's profitability because the latter depends on market factors (supply vs. demand). However, the investment authority should be able to provide an insight by making existing statistics and figures available, especially in relation to Partner States investment priority areas, about the available infrastructure, manpower availability, market size, etc.

As far as safety is concerned, although some factors such as political stability are important, investors are also interested in knowing more about the legal landscape of the host country. Therefore both national and regional laws, regulations, instructions and policies on investment should be as accessible as possible.

Accessibility extends beyond availability. A given regulation could be available on the website of the investment authority but might not be accessible as it is written in a "local language not spoken at the international level".[1048] Accessibility also requires the use of less complex terms that can be easily understood. Much as the terminology used in laws, the investment legal framework should also be user-friendly. A complex investment legal framework with scattered provisions in different legal texts undermines the transparency of the system. When only a handful of people can navigate their way through the investment legal framework, corruption is likely to set in. Of course, it may be impossible to enact one single law regulating all investment aspects such as taxation, employment, competition, and energy to name but a few. But efforts should be made to keep these laws as few as possible, and investors should be able to clearly know which law governs which aspects of their business.

[1047] Unlike many other governmental institutions IPAs cannot afford not to use the internet in their activities as "their clientele is Internet-oriented". UNCTAD 2004a, p. 10.
[1048] UNCTAD 2004a, p. 6. However, this is unlikely to happen at least at the regional level as English is the official language of the EAC pursuant to article 137 of the Treaty of Arusha.

Information about investment-related procedures, policies and practices needs to be available and accessible as well. For instance, investors should be able to know exactly how long it may take for their project to be given the green light, which documents are required and how much money they are supposed to pay. An adequate application-tracking mechanism is very important not only to alleviate investors' uncertainty but also to reinforce their trust in the administrative authority. An online tracking mechanism could be a major asset as it contributes to strengthening the "single window system".[1049]

In addition, clear information about incentives and other rights to which investors are entitled is crucial in order to minimize the temptation to engage in corruption. In the same vein, investors should know how to appeal against a decision that they do not agree with or how to report any abuse of power or misbehavior that they encounter when dealing with IPA employees. It must here be remembered that transparency is a prerequisite for horizontal accountability[1050]. That is why transparency matters.

The availability and the accessibility of information is not enough to achieve full transparency. In order to be useful for foreign investors, information must be provided when it is needed. The timeliness of information is a core element of transparency. In this regard, the investment authority should strive to provide the required information to investors in real time, or at least as soon as possible. In a well-functioning transparent institution, investors should be able to receive information about probable changes to the laws and procedures that could affect their business early enough to allow them to be prepared for all contingencies.[1051] The internet still offers a cheap and effective interface for timely information delivery. However, not everything can be easily put online, and even when this is possible many developing countries experience inaccessible internet services. Hence, as an alternative to the internet, a full-time helpdesk could be an ideal response to the timeliness of information. To be effective, the helpdesk would have to work on a face-to-face basis, by phone, by mail, and by interactive instantaneous messaging on the website of the investment authority. Once again, language matters. People appointed to work at the investment authority's helpdesk or in other services

[1049] Investment experts have suggested that IPAs should "supply web-enabled online clients services to create transparent and predictable 'single window systems'. See UNCTAD, *Report of the Expert Meeting on Good Governance in Investment Promotion*, TD/B/COM.2/EM.15/3, 17 November 2004, p. 4 (hereinafter UNCTAD 2004b). This was certainly inspired by the example of India where the Rajasthan Bureau of Investment Promotion successfully put in place a full online service for investors (UNCTAD 2004a, p. 10).
[1050] M.A.P. Bovens, *op. cit.*, p. 13.
[1051] M. Ogutcu, *op. cit.*, p. 6.

where contacts with foreign investors are inevitable (such as on the reception or in the public relations office) should have a very good command of at least one international language. While this will facilitate communication between the investment authority and the foreign investor, it could also contribute to the building up the image of not only the host country in terms of professionalism and customer care but also that of the whole EAC.

d) Participation

The investment authority would be assigned, first of all, the task of attracting and retaining investors. The number and the amount of investments they regularly attract is one of the key performance indicators. But it would not make much sense if investors that are attracted in a particular year thanks to good marketing and incentive advertising were to leave the region the following year because they finally discover that the reality on the ground is far below their expectations and in total contrast to the advertised image. This kind of scenario reflects the fact that retaining investors is as important as attracting them for the investment authority. Therefore any conscientious investment authority should be equally engaged in both attracting and retaining investors. But retention deserves somewhat more attention than attraction as attracting without retaining would be nothing more than fetching water in a pail full of holes.

Just like any person, foreign investors need to feel at home in their host countries if they are to remain there. Yet, in order to feel at home one needs to engage in local activities in order to feel involved. They would like to feel that they are wanted and that their opinion matters. In other words, one needs to fully participate in the social life of one's community to create long-lasting ties. This is exactly what should happen with foreign investors if IPAs expect them to remain. Foreign investors' participation in the development of investment-related laws and policies is paramount for the successful achievement of the investment authority's mission.[1052] Participation in the decision-making process persuades foreign investors to understand and, consequently, to easily accept the decision affecting their interests. As they are involved, investors (like any person) end up by appropriating the system for themselves. Such an appropriation could definitely be a striking expression of investors' trust, acceptance and satisfaction with the regional investment laws and policies[1053].

[1052] UNCTAD 2004a, p. 6.
[1053] T.R. Tyler and Y.J. Huo, *Trust in the Law. Encouraging public cooperation with the police and courts*, New York, Russel Sage Foundation, 2002 cited by G.H. Addink 2015b, p. 128.

This is the optimal outcome that could be expected from unadulterated participation. The investment authority should be constantly working to reach this point as this is what would make the EAC become an investment paradise. This is particularly true since the genuine participation of foreign investors in the regional investment policies implies the fulfilment of other good governance principles, especially the principles of transparency and accountability. Participation makes transparency interactive, and transparency is the premise of accountability.

In order to make this happen, some standards are required. The CLEAR test[1054] must be passed. According to this test, five elements are necessary for effective participation: (1) the suitability of stakeholders' participation, (2) their commitment to participate, (3) their ability to participate, (4) the opportunity given to them to participate, and (5) the acknowledgment of their participation.

Whether investors' participation is suitable or not depends mainly on the matter under discussion and the time when they should be involved. In principle, investors should systematically participate in any policy-making or in any development of regulations that may affect their business. Some laws or policies are of general concern to all investors as their amendment may affect the investor community at large. Laws related to taxation, employment, and competition are good examples. In this case, all investors need to be equally consulted, or at least informed. Some other laws, while they can generally affect investments, may in fact affect some investors more than others. For instance, legislation related to the cost of electricity is likely to impact every investor in the manufacturing sector, but those who have actually invested in electricity production or distribution are the ones most likely to be affected by new changes. It is clear that in such a case if prior information would be enough for "every investor", those who invested in electricity companies would need more than just information.

As for the time when investors should be brought in, it would be suitable to involve them before any decision is reached. The investment authority should seek investors' opinions at the very beginning of the process that would lead to the change of the regulatory framework. This is the connection between participation and properness. Investment authority should be able to engage in research and carry out surveys with their stakeholders in order to make sure that their opinions are taken into account. Investors also need to remain involved during and after any

[1054] CLEAR stands for **C**an citizens participate? Do they **L**ike to participate? Are they **E**nables to participate? Are they **A**sked to participate? Are they **R**esponded to if they do participate? See G.H. Addink 2015b, p. 133.

policy is developed and legislation is enacted.[1055] Consultation with investors should occur as often as possible.

A commitment to participate is usually difficult to anticipate. But it is generally admitted that "people would only get involved if their own interests were directly affected".[1056] Investors are not an exception to this rule. As for the example given above, investors in electricity companies would be likely to participate more actively than others as the new law would directly affect their interests. So the investment authority should carry out this kind of assessment to find out which investors deserve more attention in a specific matter, although the principle remains that all investors should be reached. Focusing attention on investors who are likely to be more affected by a policy or a regulation could be a recommendation when the investment authority does not have enough resources or when the decision must be taken at short notice. Short notice or not having expertise in the discussed policy or regulations are among the factors that may undermine investors' ability to participate effectively and fruitfully. It would not make sense to invite an investor in the distribution of pharmaceuticals to discuss electricity production regulations, for instance. Not only will their commitment to participate be very low, but also their input would not be useful.

In practice, IPAs do not engage in discussions with all investors in the same room at the same time. This would be logistically difficult and the debate would not be interesting since investors do not necessarily have the same priorities. That is why investors' participation occurs in many countries through their representatives, such as private sector umbrella organizations. But this is not the most effective way to involve the investor community. While the investment authority would consider its job to have been done once they have discussed with such private sector umbrella organizations, there would be a gap if those organizations do not have strong structures with adequate communication channels to reach out to each and every investor. Thus the effectiveness of investors' participation depends on the capability of private sector leaders to interact with and to share information with their members. This is something which could be not within the investment authority's control. But, it is its responsibility to organize private sector organizations when they notice that they are not dynamic and are less organized.[1057] It is in the interest of investment authority to have well-functioning private sector organi-

[1055] UNCTAD 2004a, p. 6.
[1056] V. Lowndes, L. Pratchett and G. Stoker, "Trends in Public Participation: Part 2 – Citizens' perspective", in *Public Administration*, vol. 79, N°2, 2001, p. 447.
[1057] UNCTAD 2004a, p. 12.

zations, preferably at each Partner State's level, in order to make sure that its message reaches the final destination[1058].

In addition, participation means interaction between the investment authority and the investor community. Once they have received their licences, investors are busy setting up their business and seeking profits. Most of them rarely go back to the investment authorities. Their attention rather shifts towards other administrative authorities such as revenue and standards offices to name but a few. But in the meantime, the task and the mission of the investment authority do not change. It still needs to improve the business environment to attract more investors. For this reason, the investment authority should not be tempted to take advantage of investors' diversion (as they are focused more on their business than on policy-making) in the hope of persuading the latter to accept anything that it comes up with at a later stage. As the authority is the one to be the most interested in the participation of investors in order to fulfil its mission, it need to ask investors to intervene. It is the duty of the investment authority to inform investors about available opportunities to make their voice heard. A lack of awareness concerning opportunities to participate has been identified as one of the reasons why people do not participate in public affairs.[1059] This applies to the IPA-investor relationship as well. Not involving investors may have disastrous consequences. Inadequate policy and legislation in which investors have not participated may suffocate the business environment. At a certain point the business atmosphere may become so polluted that investors would be obliged to escape from their business diversion. But it could be too late. At that time, they would have only one intention: to leave.

At the beginning, investors would be very interested in participating if they feel that the new policies or legislation could affect their business. However, if in the end of the consultation process they notice that their views have not been taken into consideration, they would be less enthusiastic to participate at a later stage. The biggest deterrent to participation is when participants do not see their views reflected in the final output.[1060] Thus the investment authority should avoid creating in investors' minds a kind of 'it will happen, whatever we suggest' feeling. Fictitious participation does not help IPAs to achieve their goals. Therefore effective participation requires the investment authority to to redesign its internal decision-making process in order to be able to "accommodate" investors' input.[1061] This

[1058] It is for this reason that the EAC Treaty has provided the possibility for Partner States to strengthen their private sector. See article 128(1) and (2)(c) of the Treaty.
[1059] V. Lowndes, L. Pratchett and G. Stoker, *op. cit.*, 451.
[1060] V. Lowndes, L. Pratchett and G. Stoker, *op. cit.*, 452.
[1061] V. Lowndes, L. Pratchett and G. Stoker, *op. cit.*, 452.

could be the materialization of another form of public-private partnership in the investment domain. Interactive fora should be created to ensure that civil society and business groups are able to provide an input in investment policy and legislative development. This is the only way to have development goals and stakeholders' interests balanced in governmental policies and programmes.[1062] It has been recommended that an IPA should convert to being a policy advocate which "supports initiatives to improve the quality of the investment climate, identifies the views of the private sector on that matter, and brings it to the attention of policy makers".[1063] So the policy advocacy role of the investment authority can only work if the authority is open to accommodating investors' views. However, if after consultations the investment authority believes that the investors' views are of little value, it is advisable to inform them of the reasons for this. It is always good to provide feedback on outcomes, whether positive or negative, 'soft' or 'hard', as it clarifies the participant's opinion and could increase its trust in the investment authority.[1064]

e) Respect for Human Rights

Even at the national level, IPAs do not deal directly with human rights issues. That could be the reason why UNCTAD did not underscore the protection of human rights as an important indicator of good governance in relation to FDI. However, human rights standards in the host country do not leave investors indifferent. Within the perspective of attracting investment, respect for human rights by the host country could interfere with the inflow of FDI as most Western countries – where the majority of FDIs originate – would discourage their nationals from investing in countries with a poor human rights record.

Furthermore, foreign investors intending to open factories abroad are usually careful with regard to the host countries' human rights standards which are related to the environment. Interestingly, studies have shown an interaction between human rights and foreign investments. The traditional view that prevailed in the 1970s according to which "foreign investors are attracted to, support, and potentially perpetuate regimes that abuse human rights" is nowadays challenged as it is has been constantly demonstrated that due to the diversification of FDI and the emerging monitoring mechanisms which point the finger at investors involved in human rights violations, foreign investors are increasingly going to countries where

[1062] UNCTAD 2004a, p. 4.
[1063] UNCTAD 2004a, p. 11.
[1064] V. Lowndes, L. Pratchett and G. Stoker, *op. cit.*, 453.

human rights are respected.[1065] Therefore, whether or not a country respects international human rights standards on its territory could affect its FDI attractiveness and retention. This applies to the EAC as a region, as well. Accordingly, the investment authority could engage in useful advocacy to promote investment, but if the overall image of the region is tarnished by damning human rights reports, the inflow of FDI could be affected.

6.3.2.4. Alignment of the regional common investment strategy

a) Bottom-up approach to foster the legitimacy of regional authorities

The institution-building of supranational entities is always faced with the reluctance of member states which are afraid of losing some of their sovereignty.[1066] In the case of the EAC, this has been translated into the Partner States' lack of confidence in the Secretariat to the extent that they, through the Council, do not feel safe to leave the Secretariat to discharge its Treaty duties. This is astonishing in so far as the staff of the Secretariat are composed of Partner States' nationals. Nevertheless, the behaviour of the Partner States may be explained by the fact that it is too difficult for them to attach any legitimacy to the Secretariat, and the EAC at large, despite the fact that it is a creature of their own initiative. Yet the legitimacy of supranational institutions very much depends on the binding force of the decision or policy they make and on the level of their autonomy. The more the autonomy of international officials increases, the more legitimacy questions emerge.[1067]

Based on this theory, conferring competence on such a sensible and important operation as inward FDI in the production of goods and services on the EAC and allowing it to make binding regulations or policies would definitely increase Partner States' concern about its legitimacy. Fortunately, "policy-making at the international scale can, however, be improved and endowed with greater legitimacy through the adoption of a set of rules and procedures that are associated with good governance".[1068] The key good governance principle to dispel Partner States' fears and doubts is the principle of participation. Therefore, in order to build legitimacy the supranational authority (the EAC) may want to give as much room as possible to Partner States in its policy-making process to reassure that their interests and preferences are not being ignored. Similarly, as discussed above, the participation of

[1065] S. L. Blanton and R.G. Blanton, *op. cit.*, pp. 143-155; B. Letnes, *op. cit.*, pp. 34-62.
[1066] D.C. Esty, *op. cit.*, p. 1508.
[1067] D.C. Esty, *op. cit.*, p. 1510.
[1068] D.C. Esty, *op. cit.*, p. 1561.

investors in this policy-making should also be guaranteed through extensive consultations with private sector organizations in the territories of the Partner States.

To do this, discussions on regional investment policy or regulations should start not at the Council but at a very low level in each Partner State's decision-making architecture. Thus, following the EAC's institutional functioning, it may be advisable to start with national Task Forces.

Each Partner State's Task force would identify the country's investment priorities within the domain of the production of goods and services. Each investment priority area should be accompanied by a non-complacent Strength, Weakness, Opportunity and Threat (SWOT) analysis supported by strong statistical data, if need be. In principle, it should not be complicated for Partner States' respective Task Forces to carry out this duty. In fact, Partner States' IPAs have been separately doing this kind of exercise for at least the last five years in the bid to promote themselves as a foreign investment destination.[1069] It is for this reason that IPA officers must be part of the each Partner State's Task Force. Each Task Force would submit its findings (report) to an ad hoc Sectoral Committee whose work would be to pool Partner States' priorities and preferences in order to draft a regional five-year strategic plan for investment in the production of goods and services. This strategic plan would be implemented by the Secretariat.

The Sectoral Committee's task would not be so easy, however. The 5-year strategic plan to be drafted would need to be as detailed as possible in order not only to obtain Partner States' endorsement but also to allow the Secretariat to engage in good implementation. The hardest task for the Sectoral Committee would be, for instance, to reach an agreement between representatives from all Partner States about the prioritization of Partner States' proposals, especially when they offer similar investment opportunities.[1070] And this is likely to happen because of the similarities in the economic opportunities that Partner States can offer.

Maybe it is important, first, to give a full idea of the operationalization of the common investment policy by the Secretariat in order to illustrate how difficult the task of the Sectoral Committee could be. Indeed, it should be kept in mind that the purpose of transferring competence for inward FDI in the production of goods

[1069] See for instance EAC Investment Guidebook 2013, pp. 42-84.
[1070] Drawing lessons from the collapse of the defunct EAC, it was suggested that a system that encourages a compromise at a lower level of decision-making would make relations between Partner States less crisis-prone, and it would mean that Community cooperation would run more smoothly. A. Hazlewood (1979), *op. cit.*, p. 47.

and services is to foster the promotion of the EAC as a single investment destination and to avoid harmful competition between the Partner States. Towards this end, a regional investment policy must be established and implemented at the EAC level where the Secretariat would be in charge. This means that, upon this transfer of competence, Partner States would cease to engage in, certainly on their own, any activity aiming at the promotion and protection of FDI in the production of goods and services. It is expected that the agenda of inward FDI in this domain would be extensively and exhaustively carried out by the Secretariat on behalf of each and every Partner State. The Secretariat's task in this regard would consist of everything that Partner States' IPAs are currently doing separately to attract foreign investors in the field of the production of goods and services, including negotiating and concluding investment agreements.

b) A shift from investor choice to a host-oriented investment strategy

To attain the objective of a balanced development within the Community, it would not be advisable for the Secretariat to simply present the investment opportunities offered by Partner States and then to give the foreign investor the latitude to choose the country it wants for its investment project. Doing this would lead to foreign investors investing in the territory of the Partner State that offers the best locational advantages, which would lead to exactly the same result if each Partner State were in charge of promoting its own investment opportunities. This is exactly what the transfer of investment competence to the Secretariat is meant to dispel.

To avoid this, the Secretariat should have full authority to direct foreign investment into one Partner State or another depending on the regional foreign investment strategic plan. This strategic plan should present not just investment opportunities in Partner States but also a priority investment roadmap conceived as a tool to foster balanced industrialization in the EAC. This second aspect is indispensable for the success of the regional investment policy as it would sustainably address the long-complained of issue of the disproportionate sharing of Community benefits among the Partner States by progressively distributing foreign companies' investments where they are most needed.[1071]

[1071] This policy would provide what the Kampala agreement missed when Partner States decided, before the collapse of the defunct EAC, to distribute existing industries between them. But this regional policy would go beyond this in delineating the road to be followed for the future industrialization of the EAC. It should be reminded that the planning of the development of industry is a *sine qua non* for successful regional integration and the failure to undertake such planning was a major cause of the collapse of the defunct EAC. See A. Hazlewood, *op. cit.*, p. 50.

In practice, this means that foreign investors would address their intention to make FDIs in the production of goods or services in the EAC (without mentioning in which Partner States) to the Secretariat. After identifying the most appropriate investment area, the Secretariat would refer to the regional investment strategic plan and its roadmap to discover the most appropriate location for that investment. It would then inform the foreign investor about the country where the investment must be made or any alternative as prescribed by the strategic plan. The investor would only have to agree with the Secretariat's offer. Of course, this may sound somewhat strange and be prone to the accusation that too much interventionism in the investment process would be reintroduced.[1072] It can even be contended that this strategy would be counterproductive as foreign investors would be tempted to refuse the Secretariat's offer, especially if they are directed to invest in a Partner State with lower locational advantages as this might impact on their capital return. This allegation might not be justified, however, because most investments in the production of goods and services in the EAC are likely to be market-seeking investments. It is true that, depending on each Partner State's locational advantage, the return from FDI might be higher or lower depending on the territory where the investment is located. But Partner States' priority should be the achievement of a more balanced economy in the region as reaffirmed by the Treaty. And this policy principally aims for this, in terms of avoiding market distortion that a strict *laisser-faire* attitude would lead to.

As is the case with any real change, some people would not be happy with the configuration of this new regional investment policy. The first to be concerned would be foreign investors because the new procedure would erode the freedom that they used to enjoy. Of course, they would complain and would make their best efforts, through the usual channels,[1073] to counter this initiative. Various kinds of pressure would be exercised on Partner States. But they should remember that foreign investors are not philanthropists. It is never a favour when they choose to

[1072] Economists are usually pessimistic about governmental intervention in the decision-making of private business operators as it is assumed that business people are well placed to know and understand the business environment and what it requires in order to deliver the best returns on their investments. But as cautioned by Nixson, it would be "misleading to assume that private industry has a monopoly of knowledge and that governments are invariably wrong in their attempts to influence or control the workings of a private enterprise system". See F.I. Nixson, *op. cit.*, p. 71.

[1073] Foreign investors include big multinational companies that have undeniable influence on their home countries and on international organizations such as the World Bank, the WTO, etc. Sometimes policies commissioned by these countries and institutions are simply initiated to serve the interest of the multinational companies concerned. A close look at the final end of various initiatives related to the concept of 'trade liberalization' such as the World Bank's Doing Business Report, the EU's EPA, etc. denotes a stranglehold of multinational companies on the whole international trading system.

invest in the EAC. They decide to do business in the EAC because this region offers a certain margin for them to gain acceptable benefits. That is business. Therefore, EAC Partner States should avoid the appearance of being beggars, which would undermine their bargaining power. They should stand united behind their investment strategic policy as this is the only way to reaffirm their economic sovereignty and to strengthen the regional integration process.

Partner States should not be intimidated by or afraid that the implementation of this policy would make the EAC unattractive for FDI. Economic studies suggest that foreign investors are mainly preoccupied with guarantees that minimize their business and non-business risks.[1074] It has been empirically shown that "the most important factors in the investment decision (assuming the investment to be profitable in the first place) are political stability giving freedom from arbitrary expropriation and freedom to repatriate capital and profits, and financial stability and the ability to convert currency".[1075] Yet as demonstrated earlier, not only do all EAC Partner States already guarantee these freedoms for foreign investors but also the suggested compliance with the principle of good governance would be a guarantee for investors that the invested capital and its profits are in a safe place. Based on the guaranteed good governance and other advantages related to the common market, it is likely that foreign investors would simply comply with such a regional policy as "the choice would then be between a site in a particular country in the common market or the complete loss of the whole East African market, and it would require a very uneconomic site selection to make the investor reject some form of planned location".[1076] As the participation of the private sector should be one of the key elements of common investment policy-making, it is to be hoped that that practical business challenges associated with a particular investment in a specific site would be anticipated and that adequate remedies would be suggested to balance Partner States' locational advantages. In this way, the likelihood of an uneconomic site would be seriously reduced.

This shows that the success of the implementation of this policy strategy would necessitate a great deal of consultation with various actors at the national level and the harmonization of at least the quality of the infrastructure between Partner States so that an investor interested in investing in one country would not feel exces-

[1074] F.I. Nixon, *op. cit.*, p. 71.
[1075] F.I. Nixon, *op. cit.*, p. 71. The author refers to some previous studies carried out on the EAC. See for instance D.J. Morgan, *British Private Investment in East Africa*, London, Overseas Development Institute, 1965; W.M. Clarke, *Private Enterprise in Developing Countries*, London, Overseas Development Institute, 1966; A.N. Hakam, 'The Motivation to Invest and the Location Pattern of Foreign Private Industrial Investments in Nigeria', *Nigerian Journal of Economic Studies*, Vol. VIII, Issue 1, March 1966.
[1076] F.I. Nixon, *op. cit.*, p. 71.

sively discriminated against compared to those producing like-products or like-services in another country. Maybe a solution would be the allocation of appropriate incentives for investors which are interested in comparatively difficult areas.

This strategy would instill a progressive and monitored distribution of wealth between various corners of Partner States' territories. But its successful implementation depends on the agreement that Partner States must find in deciding which investment sector in the territory of which Partner State should be considered as the Community's priority.

In other words, the common investment strategic plan must come up with a kind of priority ranking between Partner States in specific investment areas. This ranking must be done objectively, which implies that independent experts would have to be consulted. Those experts should have the full confidence of the Council. And the most appropriate way to win the Council's confidence would be to involve these experts at the very bottom level of the Community's policy-making. In this case, it means that experts should work in close tandem with the *ad hoc* Sectoral Committee. This should be considered as the most delicate part of regional investment policy-making as it involves striking a balance between Partner States' interests. In other words it would involve comparing the proposals from the Partner States' respective Task Forces not just against each other but also against the regional integration objectives. This is what would make the Sectoral Committee's task particularly difficult. To facilitate this process, independent experts should be able to conduct high-quality studies with the most accurate data to support, for instance, why a greenfield FDI in textile manufacturing would be better located in Burundi than in the other four Partner States while they all offer similar opportunities in terms of cotton, textiles, and the necessary materials.[1077]

Rotation is one of the ways used by Partner States to take responsibility for positions that all of them cannot occupy at the same time.[1078] Similarly, rotation could be regarded as the simplest way of assigning FDI projects concerning the production of goods and services between Partner States. But rotation should not be the rule in deciding the order in which the Secretariat would assign investment projects to Partner States because it could overlook the inequality in industrial development between the Partner States. Experts and members of the Sectoral Committee would have to come up with a formula that satisfies all Partner States.[1079] This

[1077] See for instance EAC Investment Guidebook 2013, p. 66.
[1078] See for instance articles 12(2), 15(2), 24(9), 53(1), and 67(1) of the Treaty of Arusha.
[1079] The Treaty does not refer to who should be a member of a Sectoral Committee, but it could be suspected that each Partner State would send its best technical advisors in the matter under discus-

would lead to the adoption of a draft regional investment strategic plan to be forwarded by the Sectoral Committee to the Coordination Committee for approval. Since most of the qualitative work would have been done by the Sectoral Committee with the help of independent experts, it can be anticipated that this regional strategic plan would be endorsed by the Coordination Committee probably with very few changes. In this way, it can be expected that the Sectoral Council on Trade, Industry and Investment would not have much to review in this regional strategic plan.

Intensively involving Partner States and trying to address the most critical issues at the very beginning of the policy-making would be a good approach in smoothing out the work of the Secretariat in the implementation of the regional investment policy. Of course, this alone would not provide enough legitimacy for the Secretariat. The Secretariat itself would be requested to do more in the sense of producing satisfactory results. As rightly put by Esty, legitimacy can also stem from the "institution's delivery of good results, its capacity to carry out rulemaking in ways that provide clarity and stability, its systemic strength and structure of checks and balances, its ability to promote political dialogue, and its commitment to procedural rigor".[1080] So, in the end, it would be about how well the Secretariat would instill good governance principles in this policy-making process, and the involvement of various stakeholders, but also its own standing as an supranational institution. For Partner States, satisfactory results would mean the continuity of or even an increase in their FDI inflow in the domain of producing goods and services after this competence is transferred to the Secretariat. It could be expected that Partner States which were reluctant to transfer investment competence to the Secretariat could be the first to put pressure on the Secretariat to deliver. But the fact that FDI in the production of goods and services represents just a part of the general investment inflow in some Partner States could mean that they would hopefully show a little patience and constraint before starting to demand results.

In any event, the success of the designing and the implementation of the regional policy on inward FDI in the production of goods and services could be a real baptism of fire for the Secretariat. As supported by the neo-functionalist theory of regional integration, the success of this first transfer of competence to the EAC

sion. In the case of FDI, it is likely that CEOs of Partner States' IPAs would be part of the ad hoc Sectoral Committee. Being experts in this domain, the report they could produce with the help of independent experts would be well received by Partner States since, as submitted by Esty, "legitimacy may derive from the expertise of the policymaker". See D.C. Esty, *op. cit.*, p. 1517.

[1080] D.C. Esty, *op. cit.*, p. 1561.

would strongly impact on Partner States' future decisions to entrust this supranational entity with more responsibilities.[1081]

However, this bottom-up approach would end up creating a two-way decision-making process since, once policies are made at the regional level, they would need to be implemented by the Partner States. This could be seen as a consequential up-down process. The most advantageous of the latter would be the acceleration of legal and policy harmonization in the EAC. Currently, the Partner States are all engaged in reforming their laws. But this is not necessarily with the impetus of aligning them with EAC laws and policies *per se* but simply to modernize their own laws.[1082] And this is not necessarily done simultaneously but at different speeds as can be witnessed by various Doing Business Reports. The legal and policy meandering is clearly caused by the lack of appropriate regional institutions which are able to direct Partner States' policies and regulations in one direction. So the transfer of competence concerning investment policy to the EAC level would allow guidance and an effective approximation of national laws and policies, at least in the investment area concerned.[1083]

6.3.2.5. EACJ Competence concerning investment-related disputes

The promotion of FDI works in tandem with its protection. So, as said above, the transfer of competence concerning FDI to the EAC entails the transfer of promotion and protection attributes. Since the investment contract would be signed by the Community on behalf of its Partner States, the EACJ should be competent to adjudicate investment-related disputes. To this effect, as provided by article 32(a)

[1081] According to neo-functionalists, the success of this transfer would create a 'functional spill-over', in which the initial decision by governments to place a certain sector, such as inward FDI in the production of goods and services, under the authority of supranational institutions would create pressures to extend the authority of these institutions into neighbouring policy areas. See H. Wallace, M.A. Pollack, and A.R. Young, *op. cit.*, pp. 17-18; citing E. Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957*, Stanford, Stanford University Press, 1958 (reprinted by Notre Dame University Press in 2004). Subscribing to the neo-functionalist approach would suggest that transferring competence for inward FDI in the production of goods and services could be a determining step towards a EAC Political federation. In other words, maintaining the current radical intergovernmentalism would make the attainment of the political federation remain something of an illusion. See also the Institutional Review Report 2011 (part one), p. 9.

[1082] See also T. Thorp, 'The Rule of Law and the Implementation of an Economic Acquis Communautaire in Sub Saharan Africa: Legal Challenges for the East African Community', in C. Herrmann and J.P. Terhechte (Eds.), *European Yearbook of International Economic Law (EYIEL)*, Vol. 3, Dordrecht, Springer, 2012, p. 520.

[1083] Partner States would be persuaded to comply with the regional policy by the direct effect of the EAC laws and policies on Partner States according to article 8(4) which consecrates the precedence of Community organs, institutions and laws over similar national ones in matters pertaining to the implementation of the Treaty. See also T. Thorp, *op. cit.*, p. 525; R.F. Oppong, *op. cit.,* 2011, pp. 190-203.

of the Treaty, the investment agreement should confer such jurisdiction on the Court. Adding EACJ jurisdiction concerning investment agreements extends the range of protective mechanisms which are available to foreign investors. While this would increase not only the confidence of foreign investors in the region, but also the visibility of the EACJ as a living organ of the Community.

The recently extended competence of the EACJ for investment matters can also be considered to be a very good step in making the suggested regional investment policy.[1084]

6.4. CONCLUDING REMARKS

A Rambo situation (defection) is caused by regional integration initiatives between asymmetric developing countries because the member states compete individually against each other for extra-regional FDI.[1085] This implies that although, legally speaking, EAC Partner States are united by the Treaty of Arusha, in fact they are disunited when it comes to the fight to attract FDI. This competition puts the whole integration process at the mercy of extra-regional actors.

To thwart the agglomeration of FDI in one or two EAC Partner States and its Rambo-like consequence, it is indispensable to adopt common investment regulations and policies as part of a broad foreign common policy and to firmly implement them at the regional level as soon as possible. In order to do this Partner States should use the principle of subsidiarity as enshrined in article 7(d) of the Treaty of Arusha in order to transfer the competence for FDI in the domain of the production of goods and services to the EAC as a supranational entity.

This transfer should go hand in hand with a firm change in investment strategy. Currently, the EAC is dominated by an investment strategy that gives foreign investors a free choice as to the country where they want to make their investments. While this kind of strategy is very investor-friendly, it rather fosters competition between Partner States. This competition may end up jeopardizing the whole EAC integration system. To rectify this problem, a new strategy is suggested. This is a host-oriented investment strategy. This strategy consists of the Secretariat mapping all the investment opportunities and facilities in the EAC with the far-reaching participation of the Partner States and investors. This mapping should lead to the

[1084] C. Mwai, 'Heads of States endorse expanded EACJ mandate', *The New Times*, 21 February 2015 online at http://www.newtimes.co.rw/section/article/2015-02-21/186213/ accessed on 19 March 2015.
[1085] S. Krapohl and S. Fink, *op. cit.*, p. 475.

adoption of a regional investment strategic plan which would be followed in allocating FDI in the territory of any EAC Partner State. In substance, this host-oriented investment strategy rather suggests that foreign investors should not be free to choose a particular Partner State as the final destination of their investment. But, instead, after the submission of their investment proposals, the Secretariat should be able to indicate to the foreign investor the Partner State where such an investment is most suitable based on the EAC regional investment strategic plan. In consciously directing FDI towards pre-designated areas in the EAC, the Partner States would no longer be passive victims of a regime that undermines their integration efforts in order to become active actors which would strongly boost their economic development.

The host-oriented investment strategy may be criticized for having an interventionist character that would make the EAC unattractive for FDI. But this criticism may not be justified as governmental influence or control over economic life is not always a disadvantage. Leaving aside the fact that such a policy strategy has been commended by economists, it could be the only way to sustainably promote the EAC as a single investment area while assuring a balanced industrial development in the region.

However, the successful implementation of the regional common investment policy would depend a great deal on the strength of EAC's institutional framework. Therefore, principles of good governance such as participation, properness, transparency, accountability and respect for human rights should be observed all along this policy-making chain and in the provisions of regulations and policies that would be enacted towards this end. The observance of good governance principles in both regional policy-making and policy-implementation would help the EAC, as a supranational institution, to gain legitimacy in the eyes of the Partner States. Such legitimacy is very crucial for the furthering of the EAC integration process.

Chapter VII

General conclusion

The differences in the levels of Partner States' development have been the Achilles' heel of the regional integration process in the EAC since the very inception of this organization in the early 1900s. Various remedies have been tried in the past, but without much success. More than fifteen years after the resurrection of the EAC in 1999, this issue still represents a serious threat to the good functioning of this organization. Much as the preamble to the Treaty of Arusha acknowledges the imminence of this threat and the necessity to adopt consequent policy measures, *inter alia*, to avoid its negative impact on the community, the indifference of Partner States is astonishing. Should this nonchalance be seen as a serein resignation by Partner States to surrender the fate of the EAC regional integration process to this pigheaded challenge? Maybe not. Otherwise, the wish repeatedly expressed in successive EAC development strategies to devise an effective mechanism to deal with it would not exist. Even though, alas, in the end no real action follows. Probably Partner States' indifference could be a sign of embarrassment when faced with a situation whose adequate solution seems to be out of sight. If this is the case, it might be that the diagnosis of the problem was not appropriately made. This research intended to diagnose in depth the problem of economic imbalances between EAC Partner States and to provide a legal contribution to the solution of this sempiternal issue. It was anticipated that the FDI inflow in the production of goods and services would be the ghost that has been haunting regional integration initiatives in East Africa for a long time. This assertion is backed up by historical facts, and supported by well-tested economic and regional integration theories.

The history of the EAC teaches us that the industrial imbalance between Kenya, Tanzania and Uganda was originally caused by massive European and Indian investment in the Nairobi area following the activities to construct the Kenya-Uganda railway. At that time, European settlers in Nairobi and its surroundings were extensively involved in the agribusiness, whereas Indians dominated the trading area. This marked the beginning of industrial development in Kenya, especially in the manufacturing sector. Despite the fact that both Kenya and Uganda were both British protectorates and that the railway was built to connect their respective territories, they did not equitably enjoy the benefits thereof. Nairobi was chosen as the capital city of East Africa, and Europeans were given incentives to settle in Kenya. In the meantime, "Kenyan Europeans" gained more political power that led them to impose customs union tariff policies mainly oriented towards favouring Kenyan agriculture and industrial development. This induced to "wider economic development and the growth of a market for manufactured products".[1086] As for Tanzania, it is a similar story. But despite the fact that Tanzania has similar

[1086] F.I. Nixson, *op. cit.*, p. 68.

locational advantages as Kenya, its historical background inconvenienced its industrial development. Indeed, originally, Tanzania was not a British territory. When it was placed under British control after the German debacle in World War I, it was already too late to compete with Kenya which had taken an economic and political lead. To date, this Kenyan industrial leadership has kept on growing..

However, when observing the industrial landscape of the EAC, one question could be raised: why, despite its bigger market, relative political stability, and locational advantage similarities, did Tanzania never catch up with Kenya in terms of industrial development? The response can be provided by economic theory. According to New Economic Geography (NEG), when the mobility of production factors is allowed within an economic area, there is a propensity for industries to agglomerate in a specific region.[1087] This theory explains, in part, the concentration of industries in Kenya in the past following the implementation of a customs union between Kenya, Tanzania and Uganda. It should be reminded that at some point this customs union was simply designed to foster Kenyan-based industries.[1088] This was simply one extra motivation for industrial agglomeration, which would occur anyway following established economic theories as a consequence of the customs union.

History informs us that the claimed trade imbalances between Kenya, on the one hand, and Tanzania and Uganda, on the other, caused the transformation from the EACSO to the former EAC as the Kampala Agreement of 1964 had proved ineffective. History also informs us, and this is confirmed by the preamble to the Treaty of Arusha, that the same reason played a critical role in the collapse of the former EAC in 1977.

The above observation and its underlying economic theory provide an insight in order to understand the reason behind the persisting economic imbalances between the EAC Partner States. But beyond this insight, this retrospective background should be regarded as a severe warning against the collapse of the current EAC integration process based on the very differences in economic development levels between the Partner States, as like causes tend to produce like effects.

Therefore, it should be logically deduced that an uneven distribution of FDI in the production of goods among Partner States has been the constant cause of the failure of regional integration in the EAC. This would be unequivocal if it is agreed

[1087] P. Monfort and R. Nicolini, *op. cit.*, p. 286; and P. Krugman, *op. cit.*, 1995.
[1088] F.I. Nixson, *op. cit.*, p. 68.

that an inequitable FDI inflow among Partner States led to unbalanced industrial development which, in turn, caused a disproportionate sharing of the benefits of the community. A failure to adequately address this issue of a disproportionate sharing of the community's benefits led frustrated Partner States to sabotage the regional integration process.

This hypothesis has been verified and confirmed by a new regional integration theory. In their unfolding new theory of regional integration between developing countries, Krapohl and Fink submit that before joining a regional integration process each member balances the probable share of gains and losses it would incur.[1089] If the balance is positive (more gains than losses), the member state would become a proactive player in regional integration. While, if the balance is negative (more losses than gains), the member state concerned would have a tendency to become a Rambo with the dominant strategy of defection. Rambo's defection can be manifested by blocking any further integration initiatives or simply by withstanding the implementation of the laws and policies of the regional integration bloc. According to this theory, strong economic imbalances between member states of the regional integration initiative, as is the case for the EAC, augments the likelihood of defection. An FDI inflow is specifically at the heart of this theory as it is assumed that "the rationale of regional integration in developing regions is to attract FDI and access extra-regional exports markets".[1090] This theory postulates that as FDI is a common pool resource, implying that increasing FDI inflow into one member state reduces the availability of the same for others, this makes cooperation between members of the regional integration initiative difficult. Consequently, if, as a consequence of belonging to a regional integration community, a member state would notice that it is attracting less FDI than it would have done if it had not been in the economic integration area, that member state would be tempted to defect.[1091] Yet, the economic agglomeration theory simply states that - as a matter of principle - in a common market some member states definitely concentrate more industries (hence FDI) than others. From a combination of these two theories it can be deduced that the defection of one or two Partner States on the ground of an inequitable FDI inflow is less a concern for the past than a threat to the future of the EAC.

A proper identification of the problem is half way to its solution. For this research, it is postulated that an inequitable FDI inflow into the EAC is the knot in the issue of a disproportionate sharing of the benefits of the community between the Part-

[1089] S. Krapohl and S. Fink, *op. cit.*, p. 475.
[1090] *Idem*, p. 474.
[1091] *Ibidem*

ner States. The difference in the economic development levels of the Partner States is simply the most visible part of the iceberg. Therefore, a lasting solution should imply finding the most sustainable way of balancing the flow of inward FDI among Partner States. Accordingly, it is claimed that a good governance-oriented legal and institutional framework for inward FDI in the production of goods and services in the EAC constitutes an indispensable foundation for a so coveted lasting mechanism to level the economic imbalances between Partner States. Indeed good governance lies at the heart of the EAC integration process as articles 6(d) and 7(2) of the Treaty of Arusha lay down good governance as a fundamental and an operational principle of the Community. As such, good governance is the only principle in the whole EAC legal framework to hold such a double position. In line with this, it should not be considered as an overstatement to assert that good governance can help to resolve the problem of an inequitable sharing of the benefits of the community. Besides, a close look at the preamble to the Treaty of Arusha reveals the Partner States already assigned a preponderant role to the observance of good governance in deploring the lack of 'adequate policies' in addressing the problem of an inequitable inflow of FDI caused by the differences between Partner states' economies. It is submitted in the present work that, as a principle, good governance works through its sub-principles such as properness, transparency, accountability, participation and respect for human rights. Through the observance of these principles, good governance can foster the building up of a strong institutional framework and the making of adequate laws and policies related to investment.

Of course, it would be too naive to imagine that good governance in terms of effective regulations, strong institutions and adequate policies on inward FDI could suffice to inhibit this century-old scourge. Other mechanisms, especially economic ones, such as the creation of an EAC pool fund are very much required to work hand in hand with regional FDI regulation.[1092] Nevertheless, whatever the nature of any mechanism that may be considered to tackle the issue of Partner States' economic inequalities, it must be agreed that the existence of an adequate regulatory and institutional framework is primordial.

[1092] Some mechanisms, such as tax harmonization as advocated by the EAC-PS, have proved their limits in influencing the location of FDI. Therefore, they should be very well thought out before being implemented in order not to become counterproductive. See EAC-PS, p. 11. See also F.I. Nixson, *op. cit.*, p. 72 where the author warns against regional regulations and policies aiming at tax harmonization. For more about the interaction between tax and FDI, see R.U. de Mooij and S. Ederveen, 'Taxation and Foreign Direct Investment: A Synthesis of Empirical Research', *International Tax and Public Finance*, November 2003, Vol. 10, Issue 6, pp. 673-693.

Yet the EAC regulatory and institutional framework can be accused of having serious loopholes and inadequacies that, instead of converging policies towards a more balanced region, rather contribute to widening the discrepancies between Partner States' economic development. In order to notice this, one needs to take a look at the EAC-CMP and its annexes that regulates the major common market freedoms, i.e. the free movement of goods, persons, services and capital, and to contrast it with Partner States' legislation. The scope of this research could not allow an exhaustive review of Partner States' legislation in order to demonstrate how they are not aligned with the regional legal arsenal. This was also not the purpose of this research. But instead of embarking on such a broad enterprise, this research marginally illustrates the dramatic consequences that the cacophony between regional integration texts and national legislation in the area of foreign investment may cause.

As far as FDI is concerned, the analysis of Partner States' legislation depicts a patchwork where each Partner State stands alone at least on one key aspect. Their divergence ranges from a point as basic as the definition of 'foreign investment' to provisions related to the protection measures which are available, without forgetting some other aspects such as the conditions for the admission of FDI, available investment incentives, etc. Further, through their individual Investment Promotion Authority (IPA), each Partner State establishes its own investment policies and regulations, and decides on the best FDI attraction strategy to be implemented in order to maximize its potential. A regional instrument like the Modal Investment Code (MIC), which has been available since 2006, is simply being ignored; while a regional institution specifically dedicated to investment is blatantly non-existent. Consequently, one of the strongest challenges that the EAC integration process faces is Partner States not aligning their laws with the regional Treaty and its protocols. For instance, a study conducted in 2013 by the World Bank has confirmed that Partner States do not comply with their basic commitments not to introduce new restrictions and to progressively remove all restrictions to trade that existed at the time of the entry into force of the EAC-CMP. Those restrictions concern the free movement of goods, persons, services and capital that Partner States have agreed to fully liberalize by the end of December 2015. While Partner States rarely take into consideration the regional integration process in the drafting of their investment laws and policies, it is however perplexing to note that they do not refrain from presenting the EAC common market as an incentive to attract FDI. This is simply an illustration of the fact that, as in any other regional integration community, the EAC Partner States are all ready to reap the benefits of trade liberalization without being willing to pay the necessary costs.

Nevertheless, it should be noted that, despite these alignment and conformity shortcomings, the liberalization process has gone a very long way. With the customs union in force since 2005, the free movement of goods produced within the community has been legally accepted as a principle by Partner States. Despite an incessant multiplication of NTBs, an extra step was taken in furthering the liberalization of the trade in goods between Kenya, Rwanda and Uganda with the creation of the EAC-SCT with a very unique – but progressive – clearing procedure.

As for the free movement of persons, the EAC-CMP makes a distinction between persons *tout court*, workers, self-employed persons and legal persons. Basically, all these categories of persons are free to enter, to move, to stay, and to leave the territory of any Partner State without a visa, provided that the person in question is a national of one of the EAC Partner States. The right of free movement for persons in the EAC is inextricably linked to the nationality of the person concerned. It does not apply to non-EAC nationals regardless of their status as a spouse, child, or employee of EAC nationals. In this regard, the free movement of persons in the EAC appears to be so restrictive that it may impinge on the enjoyment of other freedoms, including the free movement of investment in the region. For instance, while the free movement of workers is guaranteed, the limitation of its enjoyment to only EAC Partner States' nationals could make it very difficult for a foreign enterprise located on the territory of one of the Partner States simultaneously to conduct business activities on the territory of another Partner State if an employee who is qualified to carry out the task does not have the citizenship of one of the Partner States. Similarly, an EAC national who is married to a non-EAC citizen could face difficulties in moving, even for employment purposes, to another Partner State as the entry and movement of non-EAC nationals are regulated by individual national immigration laws. This means that in this situation the foreign spouse of the EAC national has to apply for an entry visa subject to the same conditions as any other non-EAC national.

As far as the free movement of services is concerned, according to article 16(2) of the EAC-CMP four methods for the supply of services are set to be fully liberalized. Firstly, Partner States are committed to allow service providers located in the territory of one Partner State to provide their services to consumers in the territory of another Partner State without either of them leaving their respective locations. Secondly, Partner States have agreed that consumers should be free to leave the territory of one Partner State in order to move to the territory of another Partner state so as to enjoy services supplied there by locally established providers. Thirdly, service providers registered in one Partner State are allowed to establish temporary branches in the territory of other Partner States as long as this is to provide the

same services. Finally, Partner States have agreed to liberalize services supplied through the presence of a natural person, who is a national of one of the Partner States, so that that person can then move to the territory of another Partner State for the purpose of providing that service there. The free movement of services in the EAC is currently in progress, but in the meantime the Partner States have committed themselves not only to refrain from introducing any new restriction but also to remove any existing restriction on the movement of services supplied following any of the above-mentioned methods. In principle, the free movement of services in the EAC could be fully-fledged by 31 December 2015.

The last freedom in the EAC common market is the free movement of capital, including direct investment, equity and portfolio investments, bank and credit transactions, the payment of interest on loans and amortization, dividends and other income on investments, the repartition of proceeds from the sale of assets, and other transfers and payments relating to investment flows.[1093] It should be noted that, strictly speaking, direct investment appears on the list of specific operations that Partner States have agreed to liberalize by 31 December 2015. But in a broad sense, one can see, through the free movement of investment derivatives or factors such as goods, services, or workers, a form of indirect liberalization of direct investment in the region. But, unlike the other freedoms, the coverage of the free movement of capital could be extended to third countries in order to encourage non-EAC nationals and companies to invest in the EAC.

When they become fully implemented these freedoms will make the EAC a single market where production factors will be fully mobile, except, of course, in the case of limitations and restrictions on this mobility, such as public policy or public order, provided by EAC law. But whatever the implementation status may be, the mobility of factors is in principle guaranteed, and its progressive implementation is on the right path. Consequently, following economic theories that posit that the free movement of production factors, especially workers, has an impact on companies' productivity and wages which in turn leads to industrial agglomeration, the operationalization of the common market might already be playing an erosive role in the location of inward FDI in the EAC, at least in the background. There is no need to reiterate the fact that, in a regional integration scheme, industrial agglomeration fosters a development imbalance between participating member states.

Yet, in the end the EAC common market rather fosters an "accelerated, harmonious and balanced development" between Partner States for an equitable sharing of

[1093] Article 28 of EAC-CMP

the benefits.[1094] In order to live up to this expectation, the EAC as a supranational organization should be proactive to ensure that regional laws and policies are producing the necessary effects on the territories of the Partner States. One of the reasons for the persisting non-alignment of national laws and policies with regional instruments is the weakness of the EAC institutions, if not the total lack of adequate institutions, either in designing efficient regional policies and regulations or in following up their effective implementation in order to tackle specific regional integration issues. As illustrated by the case study on the inflow of FDI, the progressive implementation of common market freedoms, while being unable to provide adequate monitoring at the regional level, creates a conducive environment for intra-regional competition.

In the context of the EAC characterized by striking economic discrepancies between Partner States, this intra-regional competition would be won by one or two Partner States offering the best combination of FDI location determinants, including *inter alia* economic productivity, the availability of qualified human capital, the existence of adequate infrastructure, and the overall observance of good governance principles. To these determinants, there is a need to add the agglomeration effect professed by the NEG. In confronting one Partner State against the other, a twofold observation can be made. On the one hand, Kenya leads the way by far when it comes to the majority of FDI determinants compared, i.e. economic productivity, human capital, infrastructure, and – of course – the agglomeration potential. On the other hand, Burundi seems to be worse off in attracting FDI in this intra-EAC competition. As suggested by Krapohl and Fink, the likelihood of a "Rambo situation" (defection) is very high for an unbalanced regional integration like the EAC. Recently, Burundi and Tanzania have demonstrated the applicability of this theory in the EAC by their reluctance to join some fast-tracked projects such as a single-customs territory, a single tourist visa, and the approval of national ID cards to be used as travel document to cross their mutual borders. As no consensus could be found within the community to fast-track these aspects of integration, Kenya, Rwanda and Uganda – now known as the Coalition of the Willing – decided to strike a tripartite intergovernmental deal under the Northern Corridor integration projects. The defectors, Burundi and Tanzania, are allowed to join at a time which is most convenient for them, however. Although this was perceived at the beginning as a sidelining of Burundi and Tanzania, this kind of arrangement is however allowed by the Treaty under the principle of variable geometry enshrined in article 7(1)(e) as one of the operational principles of the Community. Undisputedly, the three projects named above are not directly linked to the flow of inward

[1094] See article 5(2) of the Treaty of Arusha.

FDI into the EAC. But the behaviour of some Partner States exemplifies the propensity of defection when regional integration does not, for one reason or another, match national expectations.

The regional cohesion is even more vulnerable when the object of the competition is external, such as the attraction of FDI. In this case, if there is no common regional policy to streamline the behaviour of member states vis-à-vis external actors, the likelihood of defragmentation is high. Is is in line with this view that, in order to minimize the risks of defection based on Partner States' frustration over the claim of an inequitable FDI inflow, this research has suggested that there is an urgent need for a good governance-oriented regional common investment policy,[1095] especially on inward FDI in the area of the production of goods and services. The adoption of such a regional policy is sine qua non for the harmonization of Partner States' laws and policies. It is therefore a necessary prerequisite for the establishment of any sustainable mechanism for equitably sharing the benefits from and the costs of EAC integration. Regional investment policy would lay down common rules and principles for the admission and treatment of foreign investment in the EAC.

Since playing by the same rules does not necessarily guarantee the bona fide good application of those rules by all the players, it is imperative to have a central referee to monitor the game. For the EAC common regional investment policy to be effectively implemented, it is suggested that the competence concerning FDI in the production of goods and services should be entrusted to a central regional authority, the Secretariat. This can be easily done based on the already provided – but so far unused – principle of subsidiarity contained in article 7(d) of the EAC Treaty. Indeed, the Treaty of Arusha defines subsidiarity as a "principle which emphasizes multi-level participation of a wide range of participants in the process of economic integration". This short definition does not do justice to the rich content encompassed in this principle. To grasp this principle to its fullest extent, a leaf needs to be borrowed from the book of EU law where the principle has been debated, clarified and tested in various areas.

In the EU, when it becomes obvious that an action can efficiently achieve its objectives only when it is taken at the supranational level rather than when it is taken by EU Member States individually or collectively, then the competence to take that action is left to the EU level. At the beginning, the principle of subsidiarity was

[1095] It should be noted, however, that such a regional policy must be within a large framework of common commercial policies which, to some extent, may require the adoption of a common foreign policy, which Partner States have failed to do.

conceived as a shield for the Member States against the invasion of the Commission. But over the years, subsidiarity has revealed to be a 'double-edged sword' that can be used by either the Member States or the Commission to claim competence concerning a specific matter.[1096] The efficiency of the regional entity to take action on the ground of the principle of subsidiarity can be assessed in taking into consideration the scale or the effects of the proposed action.

The principle of subsidiarity has not yet received any substantial attention in the EAC. But as experienced by the EU and supported by this research, the development of the EAC's operational framework will greatly depend on the applicability of this principle in the future.

As the Partner States' individual promotional campaigns to attract FDI would lead to fratricidal intra-EAC competition, this research advises that the most efficient alternative would be to apply the principle of subsidiarity in order to transfer the competence to promote and, to some extent, to protect FDI to the EAC Secretariat. Obviously, it is foreseeable that some Partner States would resist such a transfer of competence as, for many, competence in an area as vital as the attraction of FDI could mean the loss of an extra portion of national sovereignty. For this, despite the fact that Partner States have themselves decided to give up some parts of their national sovereignty by the mere fact of joining the EAC, it is important to indicate that there are channels which are available in the EAC system for such decision-making. As the Council, due to its predominantly political character, might be tempted to block such a transfer of competence, the EACJ, on the other hand, has a very powerful role to play in furthering the pro-integration agenda. But instead of endangering the EACJ's legitimacy in trying to impose a position that the primary players in the regional integration process have already opposed, good governance as a principle may help in reconciling Partner States' diverging points of view about the decision to transfer the competence concerning FDI in the production of goods and services from the Partner States to the EAC. On this specific issue, it would be sufficient for all Partner States to think about this transfer not from the point of view of their individual national interests, but rather as a step towards better governance in the EAC. Better governance can only materialize through the adoption of better regulations and a better institutional framework in terms of promoting the observation of good governance principles.

To avoid long and hazardous discussions within the Council on the creation a new structure that would be in charge of the implementation of the regional common

[1096] S. Constantin, *op. cit.*, p. 152.

policy, it is suggested that the Directorate of Trade could effectively fulfil this mandate. Based on the 2011 EAC Institutional Review, this unit would be charged with "promoting local, cross-border and foreign investment in the region through the development of regional policies, strategies and laws on investment". This fits perfectly well. Therefore, the shifting of competence concerning investment from the Partner States to the EAC might not necessitate the creation of a new institutional framework, merely a few adjustments to the existing framework may be necessary. Current Partner States' IPAs would be converted into decentralized offices of the EAC Directorate of Trade, and function accordingly.

However, it is critical to remember that as much as this research advocates the centralized promotion of regional investment at the level of the EAC, the success of this centralized implementation is highly dependent on a careful bottom-up policy-making strategy. The suggestion of a bottom-up policy-making strategy simply implies that Partner States and foreign investors must be consulted to the widest and greatest extent possible in making the regional common investment policy in order to ensure that their various interests and preferences are not omitted. Only bottom-up policy-making can guarantee the observance of good governance principles, which in turn confers greater legitimacy on the policies made.[1097] In this regard, good governance principles such as participation, transparency, accountability, properness and human rights are extremely paramount.

In principle, the adoption of a regional common investment policy should lead to periodical (five-year, ten-year, etc.) regional investment strategic plans where the priority economic and geographic investment areas of the community are determined. In practice, the bottom-up approach would mean that Partner States' IPAs (converted into national branches of the EAC Directorate of Trade) should be fully involved in data collection and the design of various regional investment plans in accordance with a procedure that they would need to agree upon. It is suggested that such consultations should start with the active involvement of national investment officers in their own national investment Task Force. Each Partner State's Task Force would lay down the priority area of that Partner State, and then forward it for selection to Council-designated external independent experts who would have the delicate duty of making a kind of priority ranking between Partner States' investment plans. The decision of these independent external experts should be research-based to avoid any bias. When discharging their duty, the independent external experts should keep in mind that the rationale for their intervention is the fight against inequalities in the EAC. Therefore, complacent work by

[1097] D.C. Esty, *op. cit.*, p. 1561.

these experts would simply mean disproportionate industrial development, especially as the regional investment office at the EAC Secretariat would simply have the task of implementing the investment plan proposed by those experts.

The core idea behind advocating a mechanism to transfer inward FDI competence from the Partner States to the EAC and adopting a common regional investment policy is to direct foreign investors towards a specific Partner State as soon as they express their interest in investing in the EAC. It presupposes that no foreign investor would be allowed to choose in advance to invest in a particular Partner State. It would be the Directorate of Trade, based on the expert-designed regional investment strategic plan previously approved by the Partner States, that would inform the foreign investor about the Partner State where that kind of investment has been assigned. Basically, this means a shift from a widespread investor choice to a more efficient host-oriented (or host-choice) investment policy strategy. Obviously, this would be the most concrete way to materialize the desire to promote the EAC as a single investment destination. Furthermore, if this policy strategy is implemented, there would be no easy way for Partner States to be once again in a position of having to compete in order to attract FDI. In the long run, this investment policy strategy would foster stability and reinforce trust in the EAC. In the end, the systematic allocation of FDI by a central regional office based not on a choice by the foreign investor (investor-choice strategy) but rather on the identified locational needs (host-oriented strategy) would progressively – but definitely – address the much-deplored issue of industrial imbalances between the Partner States.

However, despite the expected effective impact of the adoption of a host-oriented investment strategy in the EAC, one should not overlook the fact that Partner States have been too passive, if not unwilling, to work on a sustainable solution to the century-old issue of the unbalanced industrial development among them. This indifference could mean that the current system, despite its failures, is indeed working for some of the Partner States, probably the strongest ones. Therefore, resistance against the implementation of the main recommendations of this work (the shifting of competence concerning inward investment in the production of goods and services from the Partner States to the EAC Secretariat followed by a host-oriented investment policy strategy) can be expected. One of the easiest and most effective ways of justifying such resistance would be to allege that the recommendations made by this research are pure legal fiction that would never work in practice, especially when they could be confronted with regional and national economic realities. To address this anticipated criticism, it may be useful to refer, once again, to the economic research entitled "Economic Integration and Industri-

al Location: An East African Case Study" carried out between 1965 and 1967 by F.I. Nixson. In this research, the author provided an extensive explanation of the interaction between industrial location and economic integration in East Africa. After finding that the industrial imbalance between the Partner States could be attributed to the historical uneven attraction of FDI, Nixson opined that "market forces alone are unlikely to produce a politically acceptable distribution of industrial activity between the three countries [Kenya, Tanzania and Uganda] in the near future, and the governments concerned will have to take collective action to promote a more equitable distribution of industry".[1098] In line with this, he recommended that a "central planning authority" should be entitled to allocate industrial enterprises among Partner States so "as to eliminate the efficiency/equity conflict".[1099]

It is extremely exasperating that more than four decades after Nixson published his work, the situation of the core issue which he tackled therein is still making headlines on the EAC's regional integration agendas. Nothing much has really changed. Considering the topicality of the problem addressed and the relevance of the economic recommendations made by Nixson, the present research could be seen as a legal continuum of Nixson's findings. In other words, the present research should be seen as a contribution that suggests an adequate legal and institutional framework for the operationalization of Nixson's economic recommendations for ensuring a more balanced and harmonious development of the EAC Partner States, of course *mutatis mutandis*.

[1098] F.I. Nixson, *op. cit.*, p. 70.
[1099] *Ibidem.*

Samenvatting in het Nederlands

Al sinds de oprichting van de organisatie aan het begin van de twintigste eeuw vormen de verschillende ontwikkelingsniveaus van de betrokken lidstaten de achilleshiel van het regionale integratieproces in de EAC. Diverse remedies zijn in het verleden zonder succes uitgeprobeerd. Ruim vijftien jaar na de herleving van de EAC in 1999 vormt dit probleem nog steeds een ernstige bedreiging voor het goed functioneren van deze organisatie. Hoewel in de preambule bij het Verdrag van Arusha deze dreiging wordt erkend, evenals de noodzaak tot het nemen van consequente beleidsmaatregelen, onder andere ter voorkoming van de negatieve gevolgen ervan voor de gemeenschap, wekt de onverschilligheid van de lidstaten verbazing. Dienen wij deze nonchalance te zien als berusting door de lidstaten die, wat het lot van het regionale integratieproces van de EAC betreft, capituleren voor deze weerbarstige uitdaging? Misschien toch niet. Anders zou niet in diverse opeenvolgende EAC ontwikkelingsstrategieën de wens zijn geuit, een effectief mechanisme te bedenken om hieraan het hoofd te bieden. Ook al volgt er uiteindelijk, helaas, geen echte actie. De onverschilligheid van de lidstaten zou een teken kunnen zijn van gêne vis-à-vis een situatie, waarvoor een adequate oplossing niet in zicht lijkt te zijn. Indien dit het geval is, is het mogelijk dat men geen juiste diagnose van het probleem heeft gesteld. In dit onderzoek is getracht om een grondige diagnose te stellen van het probleem van de economische onevenwichtigheid tussen de EAC-lidstaten, en om een juridische bijdrage te leveren aan de oplossing van dit eeuwigdurende probleem. De verwachting was, dat de instroom van directe buitenlandse investeringen (DBI's) bij de productie van goederen en diensten het spook is dat de regionale integratie-initiatieven in Oost-Afrika lange tijd heeft ach-

tervolgd. Deze stelling wordt geschraagd door historische feiten en gesteund door beproefde economische en regionale integratietheorieën.

De geschiedenis van de EAC leert ons dat de industriële onevenwichtigheid tussen Kenia, Tanzania en Uganda in eerste instantie het gevolg was van omvangrijke Europese en Indiase investeringen in het gebied rondom Nairobi na de bouw van de spoorlijn tussen Kenia en Uganda. In die periode waren Europese kolonisten in Nairobi en omgeving sterk vertegenwoordigd in de landbouwindustrie, terwijl Indiërs de handel domineerden. Dit vormde het begin van de industriële ontwikkeling in Kenia, met name in de productie-industrie. Ondanks het feit dat zowel Kenia als Uganda Britse protectoraten waren, en dat de spoorlijn werd aangelegd om beide territoria te verbinden, profiteerden ze niet in gelijke mate van de voordelen ervan. Nairobi werd gekozen tot hoofdstad van Oost-Afrika en Europeanen werden gestimuleerd om zich te vestigen in Kenia. Ondertussen verwierven "Keniaanse Europeanen" meer en meer politieke macht, die zij aanwendden voor de invoering van een douane-unie met een tariefbeleid, dat vooral diende ter bevordering van de landbouw en de industriële ontwikkeling van Kenia. Dit leidde tot een verdere economische ontwikkeling en tot de groei van een markt voor productiegoederen. Voor Tanzania geldt een soortgelijk verhaal. Echter, ondanks het feit dat de ligging van Tanzania net zo gunstig is als die van Kenia, vormde de historische achtergrond van het land een rem op de industriële ontwikkeling. Tanzania was van oorsprong geen Brits territorium. Toen het na het Duitse debacle in de Eerste Wereldoorlog onder Brits toezicht kwam, was het al te laat om nog te kunnen concurreren met Kenia, dat een economische en politieke voorsprong bezat. De industriële voorsprong van Kenia nam in de loop der jaren toe.

Het industriële landschap van de EAC overziende, rijst er één vraag: waarom heeft Tanzania, ondanks een grotere markt, relatieve politieke stabiliteit, en vergelijkbare voordelen qua ligging, Kenia nooit ingehaald wat de industriële ontwikkeling betreft? Een economische theorie geeft hierop het antwoord. Volgens de Nieuwe Economische Geografie (NEG) zijn, bij een vrije mobiliteit van productiefactoren binnen een economisch gebied, industrieën geneigd om te agglomereren in een specifieke regio. Deze theorie verklaart ten dele de concentratie van industrieën in Kenia na de invoering van een douane-unie tussen Kenia, Tanzania en Uganda in het verleden. Het dient te worden benadrukt, dat deze douane-unie ooit was opgezet ter bevordering van in Kenia gevestigde industrieën. Dit vormde simpelweg een extra reden voor industriële agglomeratie, die volgens gevestigde economische theorieën toch al zou zijn opgetreden als gevolg van de douane-unie.

De geschiedenis leert ons dat de genoemde handelsonevenwichtigheden tussen Kenia enerzijds en Tanzania en Oeganda anderzijds resulteerden in de *East African Common Services Organization* (EACSO), die, nadat het Kampala Verdrag van 1964 onwerkzaam bleek, opging in de voormalige EAC. De geschiedenis leert ons ook, en de preambule bij het Verdrag van Arusha bevestigt dit, dat dezelfde reden van doorslaggevende betekenis was bij het uiteenvallen van de voormalige EAC in 1977.

Deze waarneming en de onderliggende economische theorie verschaffen inzicht in de achtergrond van de voortdurende economische onevenwichtigheid tussen de lidstaten van de EAC. Los van dit inzicht dient deze retrospectieve beschouwing echter te worden gezien als een serieuze waarschuwing tegen het mislukken van het huidige integratieproces van de EAC, juist vanwege de verschillende economische ontwikkelingsniveaus van de lidstaten: identieke oorzaken kunnen identieke gevolgen hebben.

De logische conclusie is derhalve dat een ongelijke verdeling van DBI's over de lidstaten bij de productie van goederen steeds de oorzaak is geweest van het mislukken van de regionale integratie binnen de EAC. Dit is eenduidig indien men vaststelt dat de onevenwichtige instroom van DBI's in de lidstaten heeft geleid tot een onevenwichtige industriële ontwikkeling, die op haar beurt leidde tot een onevenredige verdeling van de voordelen van de gemeenschap. Het ontbreken van een adequate aanpak voor de oplossing van het probleem van de onevenredige verdeling van de voordelen van de gemeenschap heeft geleid tot frustratie bij lidstaten, die het regionale integratieproces gingen saboteren.

Deze hypothese is geverifieerd en wordt bevestigd door een nieuwe, regionale integratietheorie, die stelt dat, alvorens zich aan te sluiten bij een regionaal integratieproces, elk lid de te verwachten aandelen in de winsten en verliezen tegen elkaar afweegt. Indien de balans positief is (meer winsten dan verliezen), wordt de lidstaat een proactieve speler bij de regionale integratie. Indien de balans echter negatief is (meer verliezen dan winsten), neigt de desbetreffende lidstaat tot 'afvalligheid'. Deze afvalligheid kan zich manifesteren door het blokkeren van alle verdergaande integratie-initiatieven, of simpelweg door het tegenwerken van de tenuitvoerlegging van de wetgeving en het beleid van het regionale integratieblok. Volgens deze theorie leidt een grote economische onevenwichtigheid tussen lidstaten bij het regionale integratieproces, zoals dit het geval is bij de EAC, tot een grotere kans op afvalligheid. In deze theorie staat de instroom van DBI's centraal, aannemende dat het doel van regionale integratie in ontwikkelingsregio's bestaat in het aantrekken van DBI's en het hebben van toegang tot buitenregionale exportmarkten. Deze

theorie stelt dat DBI's als gemeenschappelijke bron, hetgeen inhoudt dat een grotere instroom van DBI's naar één lidstaat de beschikbaarheid hiervan voor de anderen verkleint, de samenwerking tussen de lidstaten bij het regionale integratieproces bemoeilijkt. Als een lidstaat merkt dat deze, als gevolg van het lidmaatschap van een regionale integratiegemeenschap, minder DBI's aantrekt dan deze zou hebben aangetrokken indien men geen lid van de regionale integratiegemeenschap was geweest, komt deze lidstaat in de verleiding om zich hieraan te onttrekken. De economische agglomeratietheorie stelt echter eenvoudigweg dat - in principe - in een gemeenschappelijke markt duidelijk meer industrieën (en dus DBI's) zijn geconcentreerd in enkele lidstaten dan in anderen. Indien men deze twee theorieën samenvoegt kan men stellen dat de afvalligheid van een of twee lidstaten vanwege de ongelijke instroom van DBI's niet zozeer een probleem vormt voor het verleden als wel een bedreiging voor de toekomst van de EAC.

Een juiste analyse van het probleem vormt de eerste stap naar een oplossing ervan. Uitgangspunt van dit onderzoek is dat de ongelijke instroom van DBI's in de EAC de kern vormt van het probleem van de onevenredige verdeling van de voordelen van de gemeenschap tussen de lidstaten. De economische niveauverschillen tussen de lidstaten vormen slechts het meest zichtbare deel van de ijsberg. Voor een permanente oplossing dient derhalve te worden gezocht naar de meest duurzame manier om de instroom van DBI's gelijkmatiger over de lidstaten te verdelen.

Derhalve wordt gesteld, dat een op goed bestuur georiënteerd wettelijk en institutioneel kader van inkomende DBI's bij de productie van goederen en diensten in de EAC een essentiële basis vormt voor het zo begeerde permanente mechanisme gericht op de nivellering van de economische onevenwichtigheden tussen de lidstaten. Het is waar dat het concept van goed bestuur aan de basis ligt van het integratieproces in de EAC: in artikel 6(d) en artikel 7(2) van het Verdrag van Arusha wordt goed bestuur vermeld als een fundamenteel en operationeel principe van de Gemeenschap. Hiermee is goed bestuur het belangrijkste beginsel in het totale juridische kader van de EAC en bovendien dat het een dergelijke dubbele positie heeft als fundament en als uitvoeringsbeginsel. Het is daarom niet overdreven te stellen dat goed bestuur kan en moet bijdragen aan de oplossing van het probleem van een ongelijke verdeling van de voordelen van de gemeenschap. Bovendien blijkt bij nadere bestudering van de preambule bij het Verdrag van Arusha dat de lidstaten daarin al een belangrijke rol toebedeeld hebben gekregen bij het in acht nemen van goed bestuur: in de preambule wordt het gebrek aan 'adequaat beleid' betreurd als het gaat om het probleem van de ongelijke instroom van DBI's, veroorzaakt door de economische verschillen tussen de lidstaten. Dit onderzoek stelt dat het beginsel van goed bestuur effect sorteert via zijn sub-principes zoals deug-

delijkheid, transparantie, verantwoording, participatie en respect voor de mensenrechten. Als deze principes worden nageleefd, zal goed bestuur bijdragen aan de opbouw van een stevig institutioneel kader en het opstellen en uitvoering van adequate wetgeving en beleid op het gebied van investeringen.

Het zou natuurlijk naïef zijn om te veronderstellen, dat effectieve regelgeving, sterke instellingen en adequaat beleid ten aanzien van inkomende DBI's volstaan ter bestrijding van deze eeuwenoude plaag. Andere mechanismen, bij voorkeur economische, zoals de instelling van een gemeenschappelijk EAC-fonds, zijn dringend noodzakelijk als aanvulling op de regionale regelgeving inzake DBI's. Desalniettemin is, ongeacht het type mechanisme voor het oplossen van het probleem van de economische ongelijkheid tussen de lidstaten, het bestaan van een adequaat regelgevend en institutioneel kader van fundamenteel belang.

Het regelgevend en institutioneel kader van de EAC vertoont echter ernstige mazen en tekortkomingen die, het beleid niet coördineren in het belang van een evenwichtigere regio, maar juist bijdragen aan het vergroten van de verschillen in economische ontwikkeling van de lidstaten. Een illustratie hiervan biedt het *EAC Common Market Protocol* (EAC-CMP) en de bijbehorende aanhangsels, die de belangrijkste vrijheden van de gemeenschappelijke markt reguleren - te weten het vrije verkeer van goederen, personen, diensten en kapitaal - indien men deze legt naast de wetgeving van de lidstaten. De omvang van dit onderzoek laat geen diepgaande studie van de wetgeving van de lidstaten toe en dat was ook niet het doel van het onderzoek, maar het toont wel aan dat deze wetgeving niet strookt met het regionale juridische arsenaal. Ook zonder een dergelijke brede onderzoeksopzet illustreert het onderhavige onderzoek summier de dramatische gevolgen van de 'kakofonie' van regionale integratieteksten en nationale wetgeving op het terrein van buitenlandse investeringen.

De analyse van de wetgeving van de lidstaten inzake DBI's laat een lappendeken zien, waarbij iedere lidstaat zich op minstens één essentieel onderdeel onderscheidt van de anderen. De verschillen variëren van essentiële zaken zoals de definitie van 'een buitenlandse investering' tot bepalingen ten aanzien van beschikbare beschermingsmaatregelen, om nog maar niet te spreken van enige andere aspecten, zoals de voorwaarden voor goedkeuring van een DBI, beschikbare investeringsprikkels, etc. Iedere lidstaat stelt bovendien, via zijn eigen *Investment Promotion Authorities* (IPA's), zijn eigen investeringsbeleid en regelgeving inzake investeringen vast, en beslist welke strategie het best kan worden gehanteerd voor het aantrekken van DBI's om de mogelijkheden ten volle te benutten. Een regionaal instrument, zoals de *Modal Investment Code* (MIC) die sinds 2006 bestaat, wordt door de lidstaten een-

voudigweg genegeerd; dit terwijl er niets anders bestaat dat ook maar lijkt op een regionale instelling die zich specifiek bezighoudt met investeringen. Dit betekent dat een van de grootste problemen van het integratieproces van de EAC het gebrek is aan harmonisering van de wetgeving van de lidstaten en de naleving van het regionale Verdrag met de protocollen. Zo toont een door de Wereldbank in 2013 uitgevoerde studie aan, dat de lidstaten hun elementaire verplichtingen, om geen nieuwe beperkingen in te voeren, en om geleidelijk alle ten tijde van de inwerkingtreding van de EAC-CMP geldende handelsbeperkingen af te schaffen, niet nakomen. Deze beperkingen betreffen het vrije verkeer van goederen, personen, diensten en kapitaal, dat de lidstaten conform afspraak tegen het einde van december 2015 volledig moeten hebben geliberaliseerd. Ofschoon de lidstaten bij het formuleren van hun wetgeving en beleid inzake investeringen zelden het regionale integratieproces in hun overwegingen betrekken, is het opmerkelijk te constateren dat zij de gemeenschappelijke EAC-markt wèl presenteren als een stimulans voor het aantrekken van DBI's. Dit vormt een illustratie van het feit dat, net als bij andere regionale integratiegemeenschappen, de EAC-lidstaten wel willen profiteren van de voordelen van een liberalisering van de handel, maar niet bereid zijn om de noodzakelijke maatregelen voor hun rekening te nemen.

Desalniettemin dient te worden vermeld dat het proces van liberalisatie, ondanks de tekortkomingen wat harmonisatie en conformiteit betreft, al een hele ontwikkeling heeft doorgemaakt. Nu de douane-unie sinds 2005 van kracht is wordt het vrije verkeer van in de gemeenschap geproduceerde goederen door de lidstaten geaccepteerd als een juridisch principe. Ondanks de voortdurende toename van non-tarifaire handelsbelemmeringen (NTB's), werd een volgende stap gezet in het proces van liberalisatie van de handel in goederen tussen Kenia, Rwanda en Uganda door de oprichting van de EAC *Single Customs Territory* (EAC-SCT) dat een unieke - maar progressieve - clearing procedure kent.

Ten aanzien van het vrije verkeer van personen maakt de EAC-CMP onderscheid tussen personen tout court, werknemers, zelfstandigen en rechtspersonen. In principe zijn al deze categorieën van personen vrij om het grondgebied van enige lidstaat binnen te komen, hier te blijven en weer te verlaten, dit alles zonder visum, op voorwaarde dat de persoon in kwestie staatsburger is van één der EAC-lidstaten. Het recht op vrij verkeer van personen in de EAC is onlosmakelijk verbonden met de nationaliteit van de desbetreffende persoon. Het geldt niet voor staatsburgers uit een niet-EAC-land, ook al hebben deze de status van echtgenoot/echtgenote, kind of werknemer van een EAC-staatsburger. Het vrije verkeer van personen in de EAC lijkt in dit opzicht zo restrictief, dat het mogelijkerwijs inbreuk maakt op het genot van andere rechten, waaronder het vrije verkeer van

investeringen in de regio. Ofschoon vrij verkeer van werknemers is gegarandeerd, kan de beperking van het genot ervan tot enkel staatsburgers van de EAC-lidstaten een buitenlandse onderneming, die is gevestigd op het grondgebied van één van de lidstaten, en tevens een zakelijke activiteit op het grondgebied van een andere lidstaat wil ontwikkelen voor een groot probleem stellen, indien de werknemer die in aanmerking komt om de taak uit te voeren geen staatsburger is van één der lidstaten. Evenzo kan een EAC-staatsburger die is getrouwd met een niet-EAC-staatsburger problemen ondervinden bij de verhuizing naar een andere lidstaat, zelfs vanwege het werk, omdat de toegang en verplaatsing van niet-EAC-staatsburgers worden geregeld in de individuele, nationale immigratiewetgeving. Dit houdt in, dat in dit geval de buitenlandse echtgenoot/-note van een EAC-staatsburger een inreisvisum dient aan te vragen onder dezelfde voorwaarden als alle niet-EAC-staatsburgers.

Ten aanzien van het vrije verkeer van diensten bepaalt artikel 16 lid 2 van het EAC-CMP dat vier types dienstverlening volledig zullen worden geliberaliseerd. Ten eerste hebben de lidstaten zich ertoe verplicht om de op het grondgebied van een lidstaat gevestigde dienstverleners toe te staan hun diensten te leveren aan consumenten op het grondgebied van een andere lidstaat, zonder dat één van beide hun respectieve locatie hoeft te verlaten. Ten tweede zijn de lidstaten het erover eens, dat consumenten de vrijheid dienen te hebben om het grondgebied van een lidstaat te verlaten om naar het grondgebied van de andere lidstaat te gaan voor het afnemen van aldaar door lokale dienstverleners verleende diensten. Ten derde wordt het in een lidstaat geregistreerde dienstverleners toegestaan om tijdelijke vestigingen op te richten op het grondgebied van een andere lidstaat, zo lang deze vestigingen dezelfde diensten aanbieden. Ten slotte zijn de lidstaten overeengekomen om diensten die via de aanwezigheid van een natuurlijk persoon worden verleend te liberaliseren, zodat het een staatsburger van een lidstaat is toegestaan naar het grondgebied van een andere lidstaat te gaan, om dezelfde dienst in de laatstgenoemde staat te verlenen. Aan het vrije verkeer van diensten in de EAC wordt op dit moment gewerkt, en in de tussentijd hebben de lidstaten zich er toe verplicht, om zich te onthouden van het introduceren van nieuwe restricties, en om alle bestaande restricties op het verkeer van diensten af te schaffen conform één der bovengenoemde vormen. Het vrije verkeer van diensten in de EAC zou in principe op 31 december 2015 volledig moeten zijn gerealiseerd.

De laatste vrijheid in de gemeenschappelijke markt van de EAC betreft het vrije verkeer van kapitaal, waaronder directe investeringen, beleggingen in aandelen en beleggingen op lange termijn, bank- en krediettransacties, de betaling van rente over leningen en afschrijvingen, dividenden en ander inkomen uit investeringen, de

herverdeling van inkomsten uit de verkoop van activa, en andere overschrijvingen en betalingen met betrekking tot investeringsstromen. Overigens staan directe investeringen strikt genomen op de lijst met specifieke handelingen die de lidstaten volgens afspraak per 31 december 2015 moeten hebben geliberaliseerd. Men kan vrij verkeer van investeringsderivaten of factoren als goederen, diensten of werknemers in ruime zin echter ook zien als een vorm van indirecte liberalisatie van directe investeringen in de regio. Anders dan de andere vrijheden strekt vrij verkeer van kapitaal zich ook uit tot derde landen, om investeringen in de EAC door staatsburgers en bedrijven die niet onder de EAC vallen aan te trekken.

Nadat deze vrijheden volledig zijn gerealiseerd zal de EAC één enkele markt vormen, waarbinnen productiefactoren zich volledig vrij kunnen bewegen, uiteraard onder voorbehoud van de uit het EAC-recht voortvloeiende voorwaarden en beperkingen inzake algemeen belang en openbare orde. Ongeacht de status van deze realisatie is mobiliteit van de factoren echter in principe gegarandeerd en is de voortschrijdende realisatie ervan op het goede spoor. In navolging van economische theorieën die stellen dat het vrije verkeer van productiefactoren, met name van werknemers, van invloed is op de productiviteit en op de lonen van bedrijven, hetgeen op zijn beurt leidt tot industriële agglomeratie, zou de operationalisatie van de gemeenschappelijke markt daarom nu reeds een beslissende rol kunnen spelen bij de locatie van inkomende DBI's in de EAC, in ieder geval op de achtergrond. Er zij nog eens op gewezen dat industriële agglomeratie in een regionaal integratieplan een onevenwichtige ontwikkeling van de deelnemende lidstaten in de hand werkt.

Het doel van de gemeenschappelijke EAC-markt is conform artikel 5 lid 2 van het Verdrag van Arusha echter juist het bevorderen van een versnelde, harmonieuze en evenwichtige ontwikkeling van de lidstaten voor een billijke verdeling van de voordelen. Om deze verwachting waar te maken dient de EAC als supranationale organisatie proactief te zijn om te garanderen dat regionale wetgeving en regionaal beleid effect sorteren op het grondgebied van de lidstaten. Eén der redenen voor het aanhoudende gebrek aan harmonisering van nationale wetgeving/nationaal beleid en regionale instrumenten vormt de zwakte van de EAC-instellingen, zo niet het volledig ontbreken van passende instellingen, zowel voor het opstellen van efficient regionaal beleid en regelgeving als voor de effectieve realisering hiervan bij de aanpak van specifieke regionale integratieproblemen. Zoals reeds bleek uit de case study naar de instroom van DBI's, zorgt de voortschrijdende realisering van vrijheden in een gemeenschappelijke markt, ondanks het feit dat adequate controle op regionaal niveau ontbreekt, voor het scheppen van een stimulerende omgeving voor interregionale competitie.

Eén of twee lidstaten van de EAC, die als geheel gekenmerkt wordt door frappante economische verschillen, zullen deze interregionale competitie winnen, namelijk zij die de beste combinatie bieden van locatie determinanten voor DBI's, waaronder economische productiviteit, beschikbaarheid van gekwalificeerd menselijk kapitaal, aanwezigheid van een passende infrastructuur en algemene naleving van beginselen van goed bestuur. Naast deze determinanten speelt het door de theorie van de Nieuwe Economische Geografie (NEG) geponeerde agglomeratie-effect een rol. Bij een vergelijking van de lidstaten vallen twee zaken op. Kenia loopt verreweg aan kop bij het merendeel der determinanten, te weten economische productiviteit, menselijk kapitaal, infrastructuur, en – uiteraard - het agglomeratiepotentieel. En Burundi lijkt er in de onderlinge EAC competitie minder goed in te slagen om DBI's aan te trekken. Krapohl en Fink suggereerden al dat de kans op een "Rambo situatie" waarbij alles bij het oude wordt gelaten en er in het kader van de EAC sprake is van afvalligheid, relatief groot is indien sprake is van een onevenwichtige regionale integratie zoals bij de EAC. In het verleden hebben Burundi en Tanzania de toepasselijkheid van deze theorie in de EAC aangetoond door hun terughoudende opstelling bij de deelname aan een aantal 'fast-track' projecten zoals één enkele douane-unie, één enkel toeristenvisum, en het toelaten van nationale ID-kaarten als reisdocument voor de interne grensovergang. Aangezien binnen de gemeenschap geen consensus kon worden bereikt over de versnelling van voornoemde aspecten van de integratie besloten Kenia, Rwanda en Uganda - nu bekend als de 'Coalitie van de Bereidwilligen' - om een trilaterale, intergouvernementele deal te sluiten voor de 'Noordelijke Corridor' integratieprojecten. De afvalligen, Burundi en Tanzania, zijn echter gerechtigd om zich op het voor hen meest geschikte moment aan te sluiten. Ofschoon men dit aanvankelijk zag als het passeren van Burundi en Tanzania, staat het Verdrag een dergelijke regeling wel toe conform het principe van variabele geometrie, dat is vastgelegd in artikel 7(1)e als zijnde één van de operationele beginselen van de Gemeenschap. Het is duidelijk dat de drie bovengenoemde projecten niet in direct verband staan met de instroom van DBI's in de EAC. Maar het gedrag van enkele lidstaten illustreert de neiging tot afvalligheid, indien regionale integratie om welke reden dan ook niet strookt met de nationale verwachtingen.

Regionale cohesie staat bijzonder onder druk als de competitie een externe zaak betreft, zoals het aantrekken van DBI's. Zonder een gemeenschappelijk regionaal beleid dat het gedrag van lidstaten ten opzichte van externe actoren stroomlijnt, is de kans op versplintering groot. Ter minimalisering van het risico van afvalligheid van lidstaten vanwege hun frustratie over de ongelijke instroom van DBI's, wordt in dit onderzoek, in lijn met de voornoemde opvatting, gesteld dat er dringend behoefte is aan een regionaal gemeenschappelijk investeringsbeleid dat gericht is

op het ontwikkelen en uitvoeren van goed bestuur, met name inzake inkomende DBI's op het gebied van de productie van goederen en diensten. De overeenstemming en de uitvoering van een dergelijk regionaal beleid is een conditio sine qua non voor de harmonisering van wetgeving en beleid van de lidstaten. Het is derhalve een noodzakelijke voorwaarde ter vaststelling van een duurzaam mechanisme voor een gelijke verdeling van de voordelen en kosten van integratie binnen de EAC. Dit regionale investeringsbeleid legt gemeenschappelijke regels en principes vast voor het toelaten van, en omgaan met buitenlandse investeringen in de EAC.

Aangezien het hanteren van dezelfde spelregels nog niet noodzakelijkerwijs garandeert dat alle spelers deze te goeder trouw toepassen, dient een centrale scheidsrechter toe te zien op het spel. Om het gemeenschappelijke regionale investeringsbeleid van de EAC effectief te realiseren, wordt voorgesteld om de bevoegdheid inzake DBI's bij de productie van goederen en diensten in handen te leggen van een centrale regionale autoriteit, het Secretariaat. Dit kan eenvoudig geschieden op basis van het reeds aanwezige - maar tot op heden ongebruikte - subsidiariteitsbeginsel als bedoeld in artikel 7 sub d van het EAC-Verdrag. Het Verdrag van Arusha definieert subsidiariteit als een "principe dat de deelname van een brede groep deelnemers in het proces van economische integratie op diverse niveaus benadrukt". Deze beknopte definitie doet geen recht aan de ruime strekking van dit beginsel. Om de volle omvang van dit beginsel te begrijpen dienen we te kijken naar het EU recht, waar het beginsel al op diverse terreinen is besproken, verhelderd en getest.

In de EU werkt het als volgt: indien het evident is dat een bepaalde actie haar doelstellingen enkel op een efficiënte wijze kan behalen wanneer deze wordt genomen op supranationaal niveau en niet wanneer deze wordt genomen door de individuele lidstaten van de EU of door de lidstaten van de EU gezamenlijk, wordt de bevoegdheid tot het nemen van deze actie op EU-niveau gelaten. In het begin werd het subsidiariteitsbeginsel opgevat als een beschermschild voor de lidstaten tegen de bemoeienis van de Commissie. In de loop der jaren heeft subsidiariteit zich echter ontpopt als een 'dubbelzijdig zwaard' dat zowel door de lidstaten als door de Commissie kan worden gebruikt om bevoegdheid te claimen op een bepaald gebied. De efficiëntie van de regionale instelling bij het nemen van actie op grond van het subsidiariteitsbeginsel kan beoordeeld worden door rekening te houden met de schaal of de resultaten van de voorgestelde actie.

In de EAC heeft men nog weinig aandacht besteed aan het subsidiariteitsbeginsel. Maar zoals de ervaring in de EU heeft geleerd, en dit onderzoek propageert deze

stelling: De ontwikkeling van het operationele kader van de EAC zal sterk afhangen van de toekomstige toepasselijkheid van dit beginsel.

Aangezien individuele promotiecampagnes van de lidstaten voor het aantrekken van DBI's zouden leiden tot een moordende onderlinge competitie binnen de EAC, is de stelling in dit onderzoek dat toepassing van het subsidiariteitsbeginsel, door het verleggen van de bevoegdheid tot het promoten en tot op zekere hoogte beschermen van DBI's naar het EAC Secretariaat, het efficiëntste alternatief is. Het ligt in de lijn der verwachting dat enkele lidstaten zich hiertegen zullen verzetten, aangezien het verleggen van de bevoegdheid op een zo essentieel terrein als het aantrekken van DBI's, betekent dat een extra deel van de nationale soevereiniteit verloren gaat. Hoewel lidstaten zelf door hun toetreding tot de EAC hebben besloten om delen van hun nationale soevereiniteit op te geven, is het ook van belang om erop te wijzen dat het EAC-systeem beschikt over kanalen voor deze besluitvorming. De Raad (Council) zou, vanwege zijn overwegend politieke karakter, geneigd kunnen zijn om een dergelijke bevoegdheidsverlegging te blokkeren, maar het Oost-Afrikaanse Hof van Justitie (EACJ) vervult een zeer belangrijke rol bij het bevorderen van de pro-integratie agenda. In plaats van de legitimiteit van het EACJ echter op het spel te zetten door het afdwingen van een door de grote spelers bij de regionale integratie reeds verworpen standpunt kan het beginsel van goed bestuur bijdragen tot het verzoenen van de diverse standpunten van de lidstaten aangaande de beslissing om de bevoegdheid inzake DBI's bij de productie van goederen en diensten te verleggen van de lidstaten naar de EAC. Ten aanzien van dit specifieke onderwerp dienen alle lidstaten deze verlegging niet te bezien vanuit hun eigen, individualistische, nationale belangen, maar juist als een stap in de richting van een beter bestuur in de EAC. Beter bestuur kan enkel worden gerealiseerd door het invoeren van betere regelgeving en een beter institutioneel kader ter bevordering van de naleving van de beginselen van goed bestuur.

Ter vermijding van lange en onzekere discussies in de Raad over het creëren van een nieuwe structuur ter uitvoering van het regionale gemeenschappelijke beleid, wordt voorgesteld dat het Directorate of Trade dit mandaat krijgt en ook effectief zou kunnen vervullen. Op basis van de herziening van de instellingen van de EAC in 2011 is dit orgaan belast met "het bevorderen van lokale, grensoverschrijdende en buitenlandse investeringen in de regio door de ontwikkeling van regionaal beleid, regionale strategieën en wetten inzake investeringen". Dit past wonderwel. Voor de verschuiving van de bevoegdheid betreffende investeringen van de lidstaten naar de EAC hoeft derhalve geen nieuw institutioneel kader te worden geschapen. Enkele aanpassingen van het bestaande kader volstaan. De huidige IPA's van

de lidstaten kunnen worden omgezet in gedecentraliseerde kantoren van het *Directorate of Trade* van de EAC, en als zodanig opereren.

Het is echter cruciaal zich te realiseren dat, hoe zeer dit onderzoek een gecentraliseerde promotie van regionale investeringen op het niveau van de EAC propageert, het succes van deze gecentraliseerde uitvoering in hoge mate afhankelijk is van een behoedzame, bottom-up beleidsbepalende strategie. Het voorstel van een bottom-up beleidsbepalende strategie houdt in, dat lidstaten en buitenlandse investeerders zo uitgebreid mogelijk worden geraadpleegd bij het opstellen van een regionaal gemeenschappelijk investeringsbeleid om ervoor te zorgen, dat rekening wordt gehouden met de diverse belangen en voorkeuren. Enkel een bottom-up beleidsbepaling garandeert de naleving van de beginselen van goed bestuur, en dit laatste verleent op zijn beurt een grotere legitimiteit aan het beleid. De beginselen van goed bestuur, te weten participatie, transparantie, verantwoording, legitimiteit en mensenrechten zijn in dit opzicht van wezenlijk belang.

De vaststelling van een gemeenschappelijk regionaal investeringsbeleid heeft in beginsel tot gevolg dat er een periodiek (vijfjaren, tienjaren, etc.) regionaal strategisch investeringsplan wordt opgesteld, waarin wordt vastgelegd welke economische en geografische investeringsgebieden van de gemeenschap prioriteit krijgen. In de praktijk betekent deze bottom-up benadering dat de IPA's van de lidstaten (die zijn omgezet in nationale afdelingen van het Directorate of Trade van de EAC) volledig worden betrokken bij het verzamelen van de data en bij het opstellen van diverse regionale investeringsplannen conform een nog vast te stellen procedure. Voorgesteld wordt om deze besprekingen te initiëren door een actieve betrokkenheid van nationale investeringsfunctionarissen in hun eigen nationale investeringstaskforce. De taskforces van alle lidstaten bepalen welke gebieden voor de respectieve lidstaat prioriteit hebben en sturen deze informatie vervolgens naar door de Raad aangewezen externe onafhankelijke deskundigen, die de lastige taak hebben om prioriteiten toe te kennen aan de investeringsplannen van de lidstaten. Ter vermijding van elke vorm van vooringenomenheid dienen de beslissingen van deze onafhankelijke externe deskundigen te zijn gebaseerd op onderzoek. Bij de vervulling van hun taak dienen de onafhankelijke externe experts zich ervan bewust te zijn, dat de doelstelling van hun interventie bestaat in het bestrijden van ongelijkheid binnen de EAC. Onzorgvuldig werk van deze deskundigen zou daarom leiden tot een voortgaande disproportionele industriële ontwikkeling, met name omdat het regionale investeringskantoor bij het Secretariaat van de EAC enkel de taak heeft om het door deze deskundigen ingediende investeringsplan uit te voeren.

De achterliggende gedachte bij het propageren van een mechanisme voor het verleggen van de bevoegdheid inzake inkomende DBI's van de lidstaten naar de EAC en voor het vaststellen van een gemeenschappelijk regionaal investeringsbeleid is, om buitenlandse investeerders, zodra deze blijk hebben gegeven van interesse om te investeren in de EAC, toe te wijzen aan een specifieke lidstaat. Dit veronderstelt dat buitenlandse investeerders van meet af aan niet meer de keuzemogelijkheid hebben om te investeren in een bepaalde lidstaat. Het Directorate of Trade informeert op basis van het door deskundigen opgestelde regionale strategische investeringsplan, dat is goedgekeurd door de lidstaten, de buitenlandse investeerder aan welke lidstaat dit type investering werd toegewezen. In wezen verschuift de keuze van de strategie voor het investeringsbeleid zo van de gangbare keuze door de investeerder naar een efficiëntere keuze door het gastland. Op deze wijze kan de wens om de EAC te promoten als één enkele investeringsbestemming het meest concreet worden gerealiseerd. Indien deze beleidsstrategie wordt gehanteerd, is het voor lidstaten niet meer eenvoudig om elkaar onder ogen te komen in de competitie om DBI's aan te trekken. Op de lange termijn zal deze beleidsstrategie voor investeringen zorgen voor stabiliteit en het vertrouwen in de EAC versterken. Uiteindelijk zal een systematische allocatie van DBI's door een centrale, regionale instantie, niet op basis van de keuze van de buitenlandse investeerder (*investor-choice strategy*) maar veeleer op basis van behoeften die zijn geconstateerd aan de zijde van de ontvanger (*host-oriented strategy*), langzaam - maar zeker - het betreurenswaardige probleem van de industriële onevenwichtigheid tussen lidstaten aanpakken.

Ondanks de verwachting dat het vaststellen van een host-oriented investeringsstrategie in de EAC een gunstige uitwerking zal hebben, kan men niet om het feit heen, dat de lidstaten te passief (en soms onwillig) zijn geweest bij het zoeken naar een duurzame oplossing voor het eeuwenoude probleem van een onevenwichtige industriële ontwikkeling. Deze onverschilligheid zou kunnen betekenen dat het huidige systeem, ondanks de gebreken ervan, voor sommige lidstaten, waarschijnlijk de sterkste, wèl werkt. Het ligt daarom in de lijn der verwachting dat er weerstand zal zijn tegen de uitvoering van de belangrijkste aanbevelingen die in het kader van dit onderzoek worden gedaan (i.e. het verschuiven van de bevoegdheid inzake inkomende investeringen voor de productie van goederen en diensten van de lidstaten naar het Secretariaat van de EAC, gevolgd door een op het gastland georiënteerde beleidsstrategie voor investeringen). Een eenvoudige en effectieve rechtvaardiging van deze weerstand vormt de bewering, dat de in dit onderzoek gepresenteerde aanbevelingen enkel een juridische fictie zijn die in de praktijk nooit zal werken, vooral indien men wordt geconfronteerd met de regionale en nationale economische realiteit. In weerwoord op deze verwachte kritiek, is het nuttig om een economisch onderzoek te raadplegen met de titel "Economische integratie en

industriële ligging: een Oost-Afrikaanse case study", dat tussen 1965 en 1967 werd uitgevoerd door F.I. Nixson. In dit onderzoek weidde de auteur uit over de interactie tussen industriële ligging en economische integratie in Oost Afrika. Na de constatering dat de industriële onevenwichtigheid tussen de lidstaten kon worden toegeschreven aan de historisch gegroeide ongelijke aantrekking van DBI's, was Nixson de mening toegedaan dat het onwaarschijnlijk was dat enkel de krachten van de markt in de nabije toekomst een politiek acceptabele verdeling van industriele activiteit tussen de drie landen in kwestie [Kenia, Tanzania en Uganda] zouden teweegbrengen, en dat de betrokken regeringen een collectieve actie dienden te ondernemen om een gelijkere verdeling van de industrie te bevorderen. In overeenstemming hiermee deed hij de aanbeveling, dat een centrale planningsautoriteit bevoegd zou moeten zijn om industriële ondernemingen aan lidstaten toe te wijzen, om "het efficiëntie-/billijkheidsconflict uit de weg te ruimen".

Het is bijzonder frustrerend dat, meer dan vier decennia na de publicatie van Nixson's werk, het door hem hierin behandelde kernprobleem nog steeds bovenaan de agenda van de regionale integratie van de EAC staat. Er is nog maar weinig veranderd. Gezien de actualiteit van het behandelde probleem en het belang van de door Nixson gedane economische aanbevelingen, kan het huidige onderzoek worden gezien als een juridisch continuüm van Nixson's bevindingen. Met andere woorden: het onderhavige onderzoek dient te worden gezien als een bijdrage die een passend juridisch en institutioneel kader voorstelt voor de operationalisatie van Nixson's economische aanbevelingen om een evenwichtigere en harmonieuzere ontwikkeling van de lidstaten van de EAC te realiseren, uiteraard mutatis mutandis.

Bibliography

LEGAL INSTRUMENTS

EAC and Partner States

1. 'Kenya, Tanganyika, and Uganda: Kampala agreement on redressing trade imbalance' in *International Legal Materials*, Vol. 3, No. 6, November 1964.
2. East African Community Common Market (Free Movement of Persons) Regulations, 2009.
3. East African Community Common Market (Free Movement of Workers) Regulations, 2009.
4. East African Community Common Market (Right of Establishment) Regulations, 2009.
5. East African Community Common Market (Right of Residence) regulations, 2009.
6. East African Community Common Market Protocol, 2009.
7. East African Community Customs Union (Rules of Origin) Rules
8. East African Community Customs Union Protocol, 2004.
9. East African Community Mediation Act, 1987 (Revised Edition 2012).
10. Kenya Investment Promotion Act, 2004.
11. EAC Trade Negotiations Act, 2008.
12. Law N° 1/24 of 10 September 2008 establishing investment code of Burundi.
13. Law N° 26/2005 of 17/12/2005 relating to investment and export promotion and facilitation of Rwanda.
14. Protocol on the Decision Making by the Council of the EAC, 2001.
15. Protocol on the establishment of the East African Customs Union, 2005.
16. Tanzania Investment Act, 2007.
17. Treaty for the establishment of the East African Community signed in Arusha on 30 November 1999 (as amended on 14 December 2006 and 20 August 2007).
18. Uganda Investment Code (revised version), 2000.

Other regional communities

1. Investment Agreement for the COMESA Common Investment Area, 2010.
2. Maastricht Treaty on the European Union of 29 July 1992.
3. Schengen Agreement of 14 June 1985 between Benelux countries, France and Germany.
4. Treaty on the Functioning of the European Union, consolidated version (C83/49), 2010.
5. Treaty establishing the European Economic Community (ECC) signed in Rome on 25 March 1957.

International agreements

1. Convention Against Discrimination in Education, 1960.
2. Convention on the Elimination of all forms of Discrimination Against Women, 1979.
3. Convention on the Rights of the Child, 1989.
4. Cotonou Agreement between African, Caribbean, and Pacific Group of States (ACP) and the European Economic Community (EEC), 2000.
5. Declaration on Economic, Social and Cultural Rights in Africa, 2004.
6. General Agreement on Trade in Services (GATS), 1995.
7. International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
8. International Covenant on Economic Social and Cultural Rights, 1966.
9. Universal Declaration of Human Rights, 1948.

LIST OF CASE-LAW

EACJ cases

1. Application No. 1 of 2008, Advisory opinion, 13 September 2008.
2. Reference No. 1 of 2006, Prof. Peter Anyang' Nyong'o and 10 others vs. The Attorney General of Kenya and 5 others, Application for Injunction, 27 November 2006.
3. Reference No. 1 of 2006, The Attorney General of Kenya vs. Prof. Peter Anyang Nyong'o and 10 others, Judgment, 6 February 2007.
4. Reference No. 1 of 2010, Honorable Sitenda Sibalu v. the Secretary of the EAC, Attorney General of Uganda, Honorable Sam Njuba, and the Electoral Commission of Uganda, Judgment of 30 June, 2011.
5. Reference No. 1 of 2014, East Africa Law Society vs. The Attorney General of the Republic of Burundi and The Secretary General of the East African Community, Judgment of 15 May 2015.
6. Reference No. 3 of 2007, East African Law Society & Others vs. Attorney General of Kenya & Others, Judgment of 1 September 2008.
7. Reference No. 3 of 2007, *Independent Medico Legal Unit v. Attorney General of Kenya*, Appeal Judgment of 1 March 2013.
8. Reference No. 4 of 2011, Omar Awadh and Six Others v. Attorney General of Kenya and Attorney General of Uganda, Judgment of 15 April 2013.
9. Reference No. 5 of 2011, Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda, Judgment, 17 May 2013.
10. Reference No. 7 of 2010, Mary Ariviza and Okotch Mondoh v. Attorney of Kenya and Secretary General of the East African Community, Judgment of 30 November 2011.
11. Reference No. 8 of 2010, *Plaxeda Rugumba v. Secretary General of the EAC,* Judgment of 1st December 2011.
12. Reference No. 9 of 2012, The East African Centre for Trade Policy and Law vs The Secretary General of the East African Community, Judgment of 9th May 2013.

ECJ/CoJ cases

1. Case 115/78, J. Knoors v. Secretary of State for Economic Affairs [1979] ECR 399
2. Case 2/74, *Jean Reyners v. Belgian State* [1974] ECR 631
3. Case 207/81, Kuno Ditterich v. Commission of the European Communities [1983] ECR 1359
4. Case 263/86, Belgian State v. René Humbel and Marie-Thérèse Edel [1988] ECR 5365
5. Case 30/77, *Régina v. Pierre Bouchereau* [1977] ECR 1999
6. Case 308/86, *Ministère Public v. R. Lambert* [1986], ECR 4369
7. Case 33/74, Johannes Henricus Maria Van Binsbergen v. Bestuur Van De Bedrijfsvereniging Voor De Metaalnijverheid [1974] ECR 1299.
8. Case 427/85, *Commission v. Genmany* [1988] ECR 1123.
9. Case 53-72, Pierre Guillot v. Commission of the European Communities [1974] ECR 791
10. Case 67/74, Carmelo Angelo Bonsingore vs. Oberstadtdirektor der Stadt Koln [1975] ECR 297
11. Case 71/76, Jean Thieffry v. Conseil de l'Ordre des Avocats à la Cour de Paris [1977] ECR 765

12. Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. [1988] ECR 5483
13. Case 9-88 Mario Lopes da Veiga v. Staatsecretaris van Justitie [1989] ECR 2989
14. Case C-157/99, B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen [2001] ECR I-5473
15. Case C-158/96, Raymond Kohll v. Union des Caisses de Maladie [1998] ECR I-1931.
16. Case C-159/90, Society for the Protection of the Unborn Child (SPUC) v. Grogan [1991] ECR I-4685
17. Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. [2003] I-10155
18. Case C-200/98, *X and Y* [1999] ECR I-8261
19. Case C-205/99, Asociacion Profesional de Empresas Navieras de Lineas Regulares (Analir) and Others v. Administracion General del Estado [2001] ECR I-1271.
20. Case C-208/00, Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC) [2001] I-09919
21. Case C-212/97, Centros Ltd. v. Erhvervs- og Selskabsstyrelsen [1999] ECR I-01459
22. Case C-222/97, *Manfred Trummer and Peter Mayer* [1999] ECR I-1661
23. Case C-268/99, Aldona Malgorzata Jany and Others v. Staatssecretaris van Justitie [2001] ECR I-8615.
24. Case C-274/96, *Horst Otto Bickel v. Ulrich Franz* [1998] ECR I-7637
25. Case C-275/92, Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler [1994] ECR I-1039
26. Case C-288/89, Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media [1991] ECR I-4007.
27. Case C-302/97, *Klaus Konle v. Republic of Austria* [1999] ECR I-3099
28. Case C-340/89, Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg [1991] ECR I-02357
29. Case C-367/98, *Commission v. Portugal* [2020] ECR I-4731
30. Case C-370/05, *Uwe Kay Festersen*, [2007] ECR I-1129
31. Case C-381/93, *Commission v. France* [1994] ECR I-5145
32. Case C-385/99, V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA [2003] ECR I-4509
33. Case C-413/99, Baumbast and R v. Secretary of State for the Home Department [2002], ECR I-7091.
34. Case C-414/06, Lidl Belgium GmbH & Co.KG v. Finanzamt Heilbronn [2008] ECR I-3601
35. Case C-42/92, Adrianus Thijssen v. Controledienst voor de verzekeringen [1993] ECR I-04047
36. Case C-483/99, *Commission v. France* [2002] ECR-4781
37. Case C-484/93, Peter Svensson and Lena Gustavsson v. Ministre du Logement et de l'Urbanisme [1995] ECR I-3955.
38. Case C-503/03, Commission of the European Communities vs. Kingdom of Spain [2006] ECR I-1097
39. Case C-503/99 *Commission v. Belgium* [2002] ECR I-4809.
40. Case C-531/06, *Commission v. Italy (Pharmacists)* [2009] ECR I-4103
41. Case C-61/89, *Marc Gaston Bouchoucha* [1990] ECR I-3551
42. Case C-67/98, *Questore di Verona v. Diego Zenatti* [1999] ECR I-7289.
43. Case C-76/90, Manfred Sager v. Dennemeyer & Co. Ltd [1991] ECR I-421.
44. Case C-84/94, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, Judgment 12 November 1996, I-05755.
45. Joined cases C-286/82 & 26/82, Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro [1984] ECR 377.
46. Joined cases 1/57 and 14/57, Société des usines à tubes de la Sarre v. High Authority [1957] ECR 201.
47. Joined cases 33/79 and 75/79, Richard Kuhner v. Commission of the European Communities [1980] ECR 1677.
48. Joined Cases C-307/09 to C-309/09, Vicoplus SC PUH and Others v. Minister van Sociale Zaken en Werkgelegenheid [2011] ECR I-453.
49. Joined Cases C-358/93 and C-416/93 Aldo Bordessa and Vicente Marí Mellado and Concepción Barbero Maestre [1995] ECR-I361
50. Joined Cases C-463/04 and 464/04, *Federconsumatori v. Commne di Milano* [2007] ECR I-10419
51. Joint cases C-48/90 and C-66/90, Kingdom of the Netherlands, Koninklijke PTT Nederland NV et PTT Post BV v. Commission of the European Communities [1992] ECR I-565.

52. Case C-55/94, Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165.

ICSID cases

1. ICSID case N° ABR/00/5, *Autopista Concesionada de Venezuela, CA v. Venezuela*, Award, 23 September 203, ICSID Rev-FILJ, Vol. 16, 2001.
2. ICSID case N° ARB/99/7, *Patrick Mitchell v. The Democratic Republic of Congo*, Decision on the Application for annulment of the Award, 1 November 2006.
3. ICSID Case N° ABR/04/13, *Jan de Nul v. Arab Republic of Egypt*, Decision on jurisdiction, 16 June 2006.
4. ICSID Case N° ARB/02/13, *Salini and Italstradale v. Kingdom of Morocco*, Decision on jurisdiction, 23 July 2001, International Legal Materials, Vol. 42, p. 622 (para 52).
5. ICSID Case N° ARB/05/3, Consorzio Groupement LESI and ASTALDI v. Allgeria (LESI Dipenta), Award, 10 January 2005.
6. ICSID case N° ARB/03/29, *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, Decision on Juridisdiction, 14 November 2005.
7. ICSID Case N° ARB/05/07, *Saipem SPA v. The People's Republic of Bangladesh*, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 march 2007.
8. ICSID Case No. ARB/07/21, Pantechniki S.A. Contractors & Engeneers (Greece) v. Republic of Albania, Award, 30 July 2009.
9. ICSID case No ARB/03/11, *Joy Mining Machinery Ltd v. The Arab Republic of Egypt*, Award on jurisdiction, 6 August 2004.

ECtHR and ICJ cases

1. Application No.49317/07, *Maksymenko and Gerasymenko v. Ukraine* [2013], ECHR, 16 May 2013.
2. Elettronica Sicula S.P.A. (ELSI) [1989] ICJ Reports 15.
3. Barcelona Traction, Light and Power Co. [1970], ICJ Reports 1.

LIST OF LITERATURE

1. Abed, G.T., and Davoodi, H.R., 'Corruption, Structural Reforms, and Economic Performance in the Transition Economies' in G.T. Abed and S. Gupta (Eds), *Governance, Corruption, & Economic Performance*, Washington DC, International Monetary Fund, 2002.
2. Ackello-Ogutu, C. and Echessah, P., Unrecorded Cross-border trade between Kenya and Uganda: Implications for Food Security, Technical Paper N° 59, July 1997.
3. Ackello-Ogutu, C. and Eshessah, P., Unrecorded Cross-Border Trade Between Tanzania and Her Neighbors: Implications for Food Security, Technical Paper n° 89, September 1998.
4. Addink, G.H., 'Good Governance: A Principle of International Law', in C. Ryngaert, E. Molenaar, and S.M.H. Nouwen, *What is Wrong with the International Law?*, Leiden, Brill, 2015 (forthcoming).
5. Addink, G.H., "Principles of Good Governance: Lessons from Administrative Law" in D.M. Curtin and R.A. Wessel (eds), *Good Governance and the European Union: Reflections on the Concepts, Institutions and Substance*, Antwerpen, Intersentia, 2005.
6. Addink, G.H., et al., *Sourcebook: Human Rights and Good Governance*, SIM special 34, Utrecht, 2010.
7. Addink, G.H., *Good Governance: Concept and Context,* Oxford, Oxford University Press, 2015 (forthcoming).
8. Aharoni, Y., *The Foreign Investment Process*, Harvard Business School, Boston, 1966.
9. Ahlquist, J.S., 'Economic Policy, Institutions, and Capital Flows: Portfolio an Direct Investment Flows in Developing Countries', *International Studies Quarterly*, Vol. 50, 2006.
10. Aitken, B.J., and Harrison, A.E., 'Do Domestic Firms Benefit from Direct Foreign Investment? Evidence from Venezuela', *The American Economic Review*, 1999.
11. Aitken, B.J., Hanson, G.H. and Harrison, A.E., 'Spillovers, foreign investment, and export behavior', *Journal of International Economics*, Vol. 43, 1997.

12. Akehurst, M., "Equity and General Principles of Law", *International and Comparative Law Quaterly,* Vol. 25, 1976.
13. Alfaro, L., et al., 'FDI and economic growth: the role of local financial markets', *Journal of International Economics,* Vol. 64, 2004
14. Amiti, M., and Pissarides, C.A., 'Trade and industrial location with heterogeneous labor', *Journal of International Economics*, Vol. 67, 2005.
15. Anghel, B., 'Do Institutions Affect Foreign Direct Investment?', *International Doctorate in Economic Analysis*, October 2005.
16. Armstrong, K., and Bulmer, S., *The Governance of the Single European Market,* Manchester, Manchester University Press, 1998.
17. Arndt, C., and Oman, C., 'Uses and Abuses of Governance Indicators', *OECD Development Center Study*, 2006.
18. Asiedu, E., 'Foreign Direct Investment in Africa: The Role of Natural Resources, Market Size, Government Policy, Institutions and Political Instability', *The World Economy*, Vol. 23, Issue N° 1, 2006.
19. Asiedu, E., 'On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different?', *World Development*, Vol. 30, N° 1, 2002.
20. Astorga, R.L., 'The Nationality of Juridical Persons on the ICSID Convention in Light of Its Jurisprudence', *Max Plank UNYB,* Vol. 11, 2007.
21. Avila, H.B., *Theory of Legal principles*, Springer, Dordrecht, 2007, p. 90; J. Wintr, "A Conception of the content of Law using General and Particular Principles" in M. Borowski, *On the nature of legal principles*, Franz Steiner Verlag, Stuttgart, 2010.
22. Balassa, B., *Theory of Economic Integration*, New York, Routledge Revivals, 1961.
23. Balasubramanyam, V.N., and Salisu, M.A., 'Export promotion, import substitution and direct foreign investment in less developed countries' in A. Koekkoek and L.B.M. Mennes (Eds), *International Trade and Global Development*, London, Routledge, 1991.
24. Balasubramanyam, V.N., Salisu, M., and Sapsford, D., 'Foreign Direct Investment and Growth in EP and IS Countries', *The Economic Journal*, Vol. 106, N° 434, January 1996.
25. Baldoni, E., *The Free Movement of Persons in the European Union: A Legal-historical Overview*, State of the Art Report, Pioneur Working Paper N°2, July 2003
26. Barnard, C., *The Substantive Law of the EU. The Four Freedoms*, 4th edition, Oxford, Oxford University Press, 2013.
27. Barnett, M., and Solingen, E., 'Designed to fail or failure of design? The sources and institutional effects of the Arab League' in A. Acharya and A.I. Johnston (Eds.), *Crafting Cooperation: Regional International Institutions in Comparative Perspective*, Cambridge, Cambridge University Press, 2007.
28. Barrios, S., Gorg, H., and Strobl, E., 'Foreign direct investment, competition and industrial development in the host country', *European Economic Review*, Vol. 49, Issue 7, October 2005.
29. Bartels, L., *A Model Human Rights Clause for the EU's International Trade Agreements*, Berlin, German Institute for Human Rights, February 2014.
30. Bartels, L., *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, European Union (European Parliament Policy Department DG External Policies), 2014.
31. Beck, G., The Legal Reasoning of the Court of Justice of the EU, Oxford, Hart Publishing, 2012.
32. Beck, T., Demirguç-Kunt, A., and Levine, R., 'Law, endowments, and finance', *Journal of Financial Economics,* Vol. 70, 2003.
33. Bénassy-Quéré, A., Coupet, M., and Mayer, T., 'Institutional Determinants of Foreign Direct Investment', *The World Economy*, 2007.
34. Bevan, A., Estrin, S., and Meyer, K., 'Foreign investment location and institutional development in transition economies', *International Business Review*, Vol. 13, 2004.
35. Bhagwati, J., and Panagariya, A., Why Growth Matters: How Economic Growth in India Reduced Poverty and Lessons for Other Developing Countries, New York, Public Affairs, 2013.
36. Birmingham, R., 'Economic Integration in East Africa: Distribution of Gains', *Virginia Journal of International Law*, Vol. 9, Issue 2, 1969.
37. Blalock, G., and Gertler, P.J., 'Welfare gains from Foreign Direct Investment through technology transfer to local suppliers', *Journal of International Economics*, Vol. 74, 2008.
38. Blanton, S.L., and Blanton, R.G., "What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment", *The Journal of Politics*, Vol. 69, n°1, February 2007.
39. Bloch, J., Les inscriptions d'Asoka traduites et commentées, Paris, Belles Lettres, 1950.

40. Blockmans, S., et al., 'From Subsidiarity to Better EU Governance: A Practical Reform Agenda for the EU', *CEPS Essay*, No. 10, 8 April 2014.
41. Blomstrom, M., and Kokko, A., 'Multinational Corporations and Spillovers', *Journal of Economic Surveys*, Vol. 12, N° 2, 1998.
42. Blomstrom, M., and Sjoholm, F., 'Technology transfer and spillovers: Does local participation with multinationals matter?', *European Economic Review* 43 (1999), p. 922.
43. Bloningen, B.A., and Piger, J., *Determinants of foreign direct investment*, NBER working paper 16704, January 2011.
44. Borensztein, E., De Gregorio, J., Lee, J-W., 'How does foreign direct investment affect economic growth', *Journal of International Economics*, Vol. 45, Issue 1, June 1998.
45. Borrmann, A., Busse, M., and Neuhaus, S.,'Institutional Quality and the Gains fromTrade', *Kykos*, Vol. 59, N°3, 2006.
46. Botchway, F.N., "Good Governance: The new, the principle and the elements", *Florida Journal of International Law,* Vol. 13, 2000-2001.
47. Boven, T.C., van., 'Is There an Emerging Right to Good Governance?', *Netherlands Quarterly of Human Rights*, vol. 13, 1995.
48. Bovens, M.A.P., 'Analysing and Assessing Public Accountability. A conceptual Framework', *European Governance Papers (EUROGOV)*, N° C-06-01, 2006.
49. Bradlow, D.D., and Escher, A., (Eds), *Legal Aspects of Foreign Direct Investment*, The Hague, Kluwer Law International, 1999.
50. Briant, P., Histoire de l'empire perse de Cyrus à Alexandre, Vol. I, Paris, Fayard, 1996.
51. Brulhart, M., 'Economic Geography, Industry Location and Trade: The Evidence', *The World Economy*, Vol. 21, Issue 6, 1998.
52. Buigut, S., 'Assessment of the Trade Effects of the East African Community Customs Union on Member Countries', *International Journal of Economics and Finance*, Vol. 4, N°10, 2012.
53. Buijze, A., *The Principle of Transparency in EU Law*, 's-Hertogenbosch, Uitgeverij BOXPress, 2013.
54. Bungenberg, M., 'The Division of Competence Between the EU and Its Member States in the Area of Investment Politics', in M. Bungenberg et al.(Eds), *International Investment Law and EU Law*, Berlin, Springer, 2011.
55. Cass, D.Z., 'The World That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community', *Common Market Law Review*, Vol. 29, 1992.
56. Ceyssens, J., 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution', *Legal Issues of Economic Integration*, Vol. 32, Issue 3, 2005.
57. Chiti, M.P., "Are there Universal Principles of Good Governance?", in *European Public Law*, Vol. 1, Issue 2, 1995.
58. Choi, C., 'Does the Internet stimulate inward foreign direct investment?', *Journal of Policy Modeling,* Vol. 25, 2003.
59. Chowdhury, N., (with C.E. Skarstedt), 'The Principle of Good Governance', Legal Working Paper, *CISDL Series (Recent Development in International Law Related to Sustainable Development)*, Oxford, 2005.
60. Clarke, W.M., *Private Enterprise in Developing Countries*, London, Overseas Development Institute, 1966.
61. Cleeve, E., 'How Effective Are Fiscal Incentives to Attract FDI to Sub-Saharan Africa?', *The Journal of Developing Areas*, Vol. 42, No. 1, 2008.
62. Cobbah, J.A.M., 'African Values and the Human Rights Debate: An African Perspective', *Human Rights Quarterly*, Vol. 9, 1987.
63. Coller, P., and Gunning, J., 'Explaining African Economic Performance', *Journal of Economic Literature*, Vol. 37, 1999.
64. Collison, D., et al., 'Legal Determinants of External Finance Revisited: The Inverse Relationship Between Investor Protection and Societal Well-Being', *Journal Business Ethics*, Vol. 108, Issue 3, July 2012.
65. Constantin, S., 'Rethinking Subsidiarity and the Balance of Powers in the EU in the Light of the Lisbon Treaty and Beyond', *CYELP*, Vol. 4, 2008.
66. Craig, P. and de Burca, G., *EU Law Text, Cases and Materials*, 4th ed., New York, Oxford University Press, 2008.
67. Craig, P. and De Burca, G., EU Law, Text, Cases and Materials, 5th ed., Oxford, Oxford University Press, 2011.

68. Craig, P.P., 'Subsidiarity, a Political and Legal Analysis', *Journal of Common Market Studies*, Vol. 50, Issue 72, 2012.
69. Crozet, M., and Soubeyran, P.K., 'EU enlargement and the internal geography of countries', *Journal of Comparative Economics*, Vol. 32, 2004.
70. Curtin, D.M., and Wessel, E.A., (eds), Good governance and the European Union. Reflections on concepts, institutions and substance, Antwerpen, Intersentia, 2005.
71. Dae-Bong Kwon, 'Human capital and its measurement', The 3rd OECD World Forum on "Statistics, Knowledge and Policy" Charting Progress, Building Visions, Improving Life, Busan, Korea, 27-30 October 2009
72. Dam, K.W., The Law-growth Nexus: The Rule of Law and Economic Development, Chicago, Brookings Institution Press, 2007
73. Dashwood, A., 'The Relationship between the Member States and the European Union/European Community', *Common Market Law Review*, Vol. 41, 2004.
74. Daude, C. and Stein, E., 'The quality of institutions and foreign direct investment', *Economics & Politics*, Vol. 19, n° 3, November 2007.
75. Davies, E., and Nilsson, L., 'A comparative analysis of EU and US trade preferences for the LDCs and the AGOA beneficiaries', *Chief Economist Note*, Issue 1, 2013.
76. de Waele, H., 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment', *Hanse Law Review*, Vol. 6, No. 1, 2010.
77. di Delupis, I.D., *The East African Community and Common Market*, London, Longman Group Limited, 1970
78. Dimopoulos, A., *EU Foreign Investment Law*, Oxford, Oxford University Press, 2011.
79. Donner, J.P.H., 'Abolition of Border Controls' in H.G. Schemers et al., *Free Movement of Persons in Europe. Legal Problems and Experiences*, The Hague, Kluwer Academic Publishers, 1993
80. Dunning, J.H., 'Determinants of Foreign Direct Investment: Globalization-Induced Changes and the Role of FDI Policies', in B. Tungodden, N. Stern and I. Kolstad, *Toward Pro-Poor Policies: Aid, Institutions, and Globalization*, New York, World Bank and Oxford University Press, 2004.
81. Durham, J.B., 'Absorptive capacity and the effects of foreign direct investment and equity foreign portfolio investment on economic growth', *European Economic Review,* Vol. 48, 2004
82. Dusinberre, E.R.M., *Empire, Authority, and Autonomy in Achaemenid Anatolia*, Cambridge, Cambridge University Press, 2013.
83. Dworkin, R., *Taking rights seriously*, Duckworth, 1977.
84. Dzidzornu, D.M., "Four principles in marine Environment Protection: A Comparative Analysis", *Ocean development & International Law*, Vol. 29, 1998.
85. Economou, P., 'Harnessing ICT for FDI and development', *OECD Global Forum on International Investment VII*, 27-28 March 2008.
86. Edwards, S., 'Openness, Trade Liberalization, and Growth in Developing Countries', *Journal of Economic Literature*, Vol. XXXI, September 1993.
87. Eggermont, P.H.L., and Hoftijzer, J., (Eds.), 'The Moral Edicts of King Asoka', *Textus Minores*, Vol. XXIX, Leiden, E. J. Brill, 1962.
88. Escher, A., "Foreign Direct Investment (FDI)" in Daniel D. Bradlow and Alfred Escher (Eds), *Legal Aspects of Foreign Investment*, The Hague, Kluwer Law International, 1999.
89. Estella, A., *The EU Principle of Subsidiarity and its Critique*, Oxford, Oxford University Press, 2002.
90. Esty, D.C., "Good governance at Supranational Scale: Globalizing Administrative Law", *The Yale Law Journal*, 2006.
91. Fagbayibo, B., 'Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview', *PER*, Vol. 16, No. 1, 2013.
92. Fanta, E., 'Understanding Regional Integration Policies in Africa' in E. Fanta, T. Shaw, and V. Tang, *Comparative Regionalisms for Development in the 21st Century*, Farnham, Ashgate Publishing Ltd, 2013.
93. Fanta, E., Shaw, T., and Tang, V., *Comparative Regionalisms for Development in the 21st Century*, Farnham, Ashgate Publishing Ltd, 2013.
94. Farrell, M., 'A Triumph of Realism over Idealism? Cooperation Between the European Union and Africa', *European Integration*, Vol. 27, No. 3, September 2005.
95. Fayissa, B., and El-Kaissy, M.I., 'Foreign aid and the economic growth of developing countries (LDCs): Further evidence', *Studies in Comparative International Development*, Vol. 34, Issue 3, Fall 1999.

96. Fortanier, F., 'Foreign direct investment and host country economic growth: Does the investor's country of origin play a role?', *Transnational Corporations*, Vol. 16, N°2, August 2007
97. Fortescue, A., 'Abolition of Border Controls: Some Comments on Mr Donner's Paper', in H.G. Schemers et al., *Free Movement of Persons in Europe. Legal Problems and Experiences*, The Hague, Kluwer Academic Publishers, 1993.
98. Francois, J., 'Factor Mobility, Economic Integration and Location of Industry', in R.E. Baldwin and A. Brunetti (Eds.), *Economic Impact of EU Membership on Entrants: New Methods and Issues*, New York, Springer, 2001.
99. Galbraith, J.S., 'Italy, the British East Africa Company, and the Benadir Coast, 1888-1893', *The Journal of Modern History*, Vol. 42, N° 4, December 1970
100. Gathii, J.T., 'The Cotonou Agreement and economic partnership agreements' in UNOHCHR, Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development, United Nations Publications, New York and Geneva, 2013.
101. Ghai, D., 'Territorial Distribution of Benefits and Costs of the East African Common Market', *East African Economic Review*, June 1964.
102. Gitelson, S.A., 'Major Shifts in Recent Ugandan Foreign Policy' in *African Affairs*, Vol. 76, N° 304, July 1977.
103. Gong, L., and Heng-fu Zou, 'Foreign Aid Reduces Labour Supply and Capital Accumulation', *Review of Development Economics*, Vol. 3, N° 1, 2001.
104. Gormley, L.W., *EU Law of Free Movement of Goods and Customs Union*, New York, Oxford University Press, 2009.
105. Green, R.H., 'The Treaty for East African Co-Operation: A Summary and Interpretation', *The Journal of Modern African Studies*, Vol. 5, n° 3, Nov. 1967
106. Haas, E., The Uniting of Europe: Political, Social, and Economic Forces 1950-1957, Stanford, Stanford University Press, 1958.
107. Haddad, M., and Harrison, A., 'Are There Positive Spillovers from Direct Foreign Investment? Evidence from Panel Data for Morocco' in *Journal of Development Economics*, Vol. 42, 1993.
108. Hakam, A.N., 'The Motivation to Invest and the Location Pattern of Foreign Private Industrial Investments in Nigeria', *Nigerian Journal of Economic Studies*, Vol. VIII, Issue 1, March 1966.
109. Hangi, M.A., The Non-Tariff Barriers in Trading Within the East African Community, Research Paper, 2010.
110. Hansen, H., and Tarp, F., 'Aid Effectiveness disputed' in F. Tarp (Ed.), (Ed.), *Foreign Aid and Development: Lessons learnt and directions for the future*, London, Routledge, 2000.
111. Haverman, R., 'Rule of Law Quick Scan Rwanda: Prospects and Challenges', *HiiL Rule of Law Quick Scan Series*, April 2012.
112. Hazlewood, A., 'The End of the East African Community: What Are Lessons for Regional Integration Shemes', *Journal of Common Market Studies*, Vol. XVIII, N° 1, September 1979.
113. Hazlewood, A., Economic Integration: The East African Experience, London, Heinemann, 1975.
114. Hermes, N., and Lensink, R., 'Foreign Direct Investment, Financial Development and Economic Growth', *The Journal of Development Studies*, Vol. 40, N°1, October 2003.
115. Hill, C., *International Business – Competing in the Global Marketplace*, University of Washington, Irwin McGraw-Hill, 2000.
116. Hilpold, P., 'EU Development Cooperation at Crossroads: The Cotonou Agreement of 23 June 2003 and the principle of Good Governance', *European Foreign Affairs Review*, Vol. 7, 2002.
117. Hjalmroth, C., and Westerberg, S., 'A common investment policy for the EU', *The contribution of trade to a new EU growth strategy Part 1*, Kommerskollegium, 2009
118. Hjertholm, P., and White, H., 'Foreign Aid in historical perspective: Background and trends', in F. Tarp (Ed.), *Foreign Aid and Development: Lessons learnt and directions for the future*, London, Routledge, 2000.
119. Hjertholm, P., and White, H., 'Survey of Foreign Aid: History, Trends and Allocation', *Foreign Aid and Development: Lessons of Experience and Directions for the Future*, Discussion Papers, 1998.
120. Holzer, M., and Byong-Joon, K., (eds), *Building Good Governance: Reforms in Seoul*, National Center for Public Productivity and Seoul Development Institute, 2006.
121. Holzinger, K., 'Common Goods, Matrix Games and Institutional Response', *European Journal of International Relations*, Vol. 9, Issue 2, 2003
122. Hufbauer, G., 'The multinational corporation and determinants of foreign direct investment', in P.B. Kenen (Ed.), *International Trade and Finance: Frontiers of Research*, London, Cambridge University Press, 1975.

123. Islam, R. and Montenegro, C.E., 'What Determines the Quality of Institutions?', *World Bank Policy Research Paper* 2764, Washington DC, 2002.
124. Javorcik, B.S., 'Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers Through Backward Linkages', *The American economic Review*, Vol. 94, N° 3, 2004.
125. Jenkins, R., 'Comparing Foreign Subsidiaries and Land Firms in LDCs: Theoretical Issues and Empirical Evidence', *The Journal of Development Studies*, Vol. 26, Issue 2, January 1990
126. Jovanovic, M.N., *Geography of Production and Economic Integration*, London and New York, Routledge, 2001.
127. Karl, J., 'The Competence for Foreign Direct Investment: New Powers for the European Union?' in 5 *J. World Investment & Trade*, 2004.
128. Karugia, J. et al., 'The Impact of Non-tariff Barriers on Maize and Beef Trade in East Africa', *Alliance for a Green Revolution in Africa and International Livestock Research Institute*, 2011.
129. Kaufmann, D., Kraay, A., and Mastruzzi, M., 'The Worldwide Governance Indicators: Methodology and Analytical Issues', *World Bank Policy Research Working Paper No. 5430*, September 2010.
130. Kaufmann, D., Kraay, A., and Mastruzzi, M., *The Worldwide Governance Indicators Project: Answering the Critics*, Policy Research Working Paper 4149, March 2007.
131. Kerr, W.A. and Perdikis, N., *A Guide to the Global Commercial Environment: The Economics of International Business*, Saskatoon, Estey Centre for Law and Economics in International Trade, 2014
132. Kimbugwe, K. et al., Economic Development Through Regional Trade: A Role for the New East African Community?, Basingstoke, Palgrave Macmillan, 2012.
133. Knack, S., 'Measuring Corruption in Eastern Europe and Central Asia: A Critique of the Cross-Country Indicators', *World Bank Policy Research Department Working Paper 3968*, 2006.
134. Kokko, A., 'Technology, market characteristics, and spillovers', *Journal of Development Economics,* Vol. 43, 1994.
135. Kokko, A., Tansini, R., and Zejan, M.C., 'Local Technological Capability and Productivity Spillovers from FDI in the Uruguayan Manufacturing Sector', *The Journal of Development Studies*, Vol. 32, n° 4, April 1996.
136. Kolstad, I., and Villanger, E., 'Determinants of foreign direct investment in services', *European Journal of Political Economy,* Vol. 24, 2008
137. Koopmans, T., 'The Birth of European Law At the CrossRoads of Legal Traditions', *The American Journal of Comparative Law*, Vol. 39, 1991.
138. Kosack, S., and Tobin, J., 'Funding Self-Sustaining Development: The Role of Aid, FDI and Government in Economic Success', *International Organization 60*, Winter 2006.
139. Krapohl, S., and Fink, S., 'Different Paths of Regional Integration: Trade Networks and Regional Institution-Building in Europe, Southeast Asia and Southern Africa', *Journal of Common Market Studies*, Vol. 51, Number 3, 2013.
140. Krapohl, S., Meissner, K.I., and Muntschick, J., 'Regional Powers as Leaders or Rambos? The Ambivalent Behaviour of Brazil and South Africa in Regional Economic Integration', *Journal of Common Market Studies*, Vol. 52, Number 4, 2014.
141. Krasner, S.D., "Structural Causes and Regime Consequences: Regimes as Intervening Variables", in *International Organization*, Vol. 36, No 2, International Regimes, 198.
142. Krishna, K., *Understanding Rules of Origin*, Pennsylvania State University and NBER, February 2004.
143. Krueger, A.O., Foreign trade regimes and economic development: Liberalization attempts and consequences, Cambridge, Ballinger Publishing Company, 1978.
144. Krueger, A.O., *Free Trade Agreements as Protectionist Devices: Rules of Origin*, Working Paper n° 4352, National Bureau of Economic Research, April 1993.
145. Krugman, P., *Development, Geography, and Economic Theory*, London, MIT Press, 1995.
146. Kruijtbosch, E.D.J., 'Benelux Experiences in the Abolition of Border Control', in H.G. Schemers et al., *Free Movement of Persons in Europe. Legal Problems and Experiences*, The Hague, Kluwer Academic Publishers, 1993
147. Kurtishi-Kastrati, S., 'The effects of Foreign Direct Investments for Host Country's Economy', *European Journal of Interdisciplinary Studies*, Vol. 5, Issue 1, 2013.
148. La Porta, R., et al., 'Legal Determinants of External Finance', *The Journal of Finance*, Vol. LII, n° 3, July 1997.
149. La Porta, R., Lopez-de-Silanes, F., and Shleifer, A., 'The Economic Consequences of Legal Origin', *Journal of Economic Literature*, Vol. XLVI, June 2008.
150. Lam, N.V., "A perspective on good governance", *Bulletin on Asia-Pacific Perspectives*, November 2003
151. Landell-Mills, P., and Sarageldin, I., 'Governance and the external factor', *Proceedings of the World Bank Annual Conference on Development Economics 1991*, Washignton DC, Word Bank, 1992.

152. Landsmeer, A., 'Movement of Capital and Other Freedoms', *Legal Issues of Economic Integration* 28(1): 57-69, 2001.
153. Legrand, P., 'European Legal Systems Are Not Converging', *International and Comparative Law Quarterly*, Vol. 45, January 1996.
154. Letnes, B., "Foreign Direct Investment and Human Rights: An Ambiguous relationship", *Forum for Development Studies*, N° 1-2002.
155. Li, X., and Liu, X., 'Foreign Direct Investment and Economic Growth: An Increasingly Endogenous Relationship', *World Development*, Vol. 33, N° 3, 2005.
156. Lipsey, R.E., 'Home- and Host-Country Effects of Foreign Direct Investment', in R.E. Baldwin and L.A. Winters (Eds), *Challenges to Globalization: Analyzing the Economics*, University of Chicago Press, 2004.
157. Lipsy, R.E., and Sjoholm, F., 'The Impact of Inward FDI in Host Countries: Why Such Different Answers?', in T.H. Moran, E.M. Graham and M. Blomstrom (Eds), *Does Foreign Direct Investment Promote Development?*, Washington DC, Peterson Institute for International Economics, 2005
158. Losch, A., *The Economics of Location*, 2nd ed., Yale University Press, 1954.
159. Lowndes, V., Pratchett, L., and Stoker, G., "Trends in Public Participation: Part 2 – Citizens' perspective", in *Public Administration*, vol. 79, N°2, 2001.
160. Makafu, K., and Seme, Y., 'Inclusion of geographical indicators in the final EAC-EU economic partnership agreement: a two legged myth', *Open University Law Journal*, vol. 3, N° 1, 2014.
161. Maldonado, N., 'The World Bank's evolving concept of good governance and its impact on human rights', *Doctoral workshop on development and international organizations*, Stockholm, Sweden, May 29-30, 2010.
162. Mansfield, E., and Romeo, A., 'Technology Transfer to Overseas Subsidiaries by US-based Firms', *Quarterly Journal of Economics*, Vol. 95, N° 4, 1980.
163. Markusen, J.R., Venables, A.J., 'Foreign direct investment as a catalyst for industrial development', *European Economic Review*, Vol. 43, 1999.
164. Marshall, A., *Principles of Economics*, London, Macmillan, 1890.
165. Masujima, K., 'Is the "EU Model" Relevant to Other Regions? MERCOSUR, ASEAN and Adoption of Regional Policy', *Kobe University Law Review*, Vol. 47, 2013.
166. Matthews, P., 'Subsidiarity in article 3b of the EC Treaty – Gobbledegook or Justiciable Principle', *International and Comparative Law Quarterly*, Vol. 45, 1996.
167. Mattli, W., 'Explaining regional integration outcomes', *Journal of European Public Policy*, Vol. 6, 1 March 1999.
168. Mattli, W., *The Logic of Regional Integration: Europe and Beyond*, Cambridge, Cambridge University Press, 1999.
169. Mavrotas, G. (Ed.), *Foreign aid for development: Issues, challenges and the new agenda*, New York, Oxford university Press, 2010.
170. Mbandinga, M.I., 'The Non-Execution Clause in the Relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP)', *German Law Journal*, Vol. 3, 2002.
171. Mitchell, L., and Melville, C., "'Every Inch a King". Kings and Kingship in the Ancient and Medieval Worlds' in L. Mitchell and C. Melville (Eds.), *Every Inch a King: Comparative Studies on Kings and Kingship in the Ancient and Medieval Worlds*, Leiden, Brill, 2013.
172. Mold, A., 'The Impact of the Single Market Programme on the Locational Determinants of US Manufacturing Affiliates: An Econometric Analysis', *Journal of Common Market Studies*, Vol. 41, Number 1, 2003.
173. Monfort, P., and Nicolini, R., 'Regional Convergence and International Integration', *Journal of Urban Economics*, Vol. 48, 2000.
174. Moran, T.H., 'How Does FDI Affect Host Country Development? Using Industry Case Studies to Make Reliable Generalization', in T.H. Moran, E.M. Graham and M. Blomstrom (Eds), *Does Foreign Direct Investment Promote Development?*, Washington DC, Peterson Institute for International Economics, 2005.
175. Moran, T.H., 'How Does FDI Affect Host Country Development? Using Industry Case Studies to Make Reliable Generalization', in T.H. Moran, E.M. Graham and M. Blomstrom (Eds), *Does Foreign Direct Investment Promote Development?*, Washington DC, Peterson Institute for International Economics, 2005.
176. Moran, T.H., Graham, E.M. and Blomstrom, M. (Eds.), *Does Foreign Direct Investment Promote Development?*, Washington D.C., Peterson Institute for International Economics, 2005.
177. Moravcsik, A., The Choice for Europe: Social Purpose and State Power from Messina to Maastricht, Ithaca, Cornell University Press, 1998.
178. Morgan, D.J., *British Private Investment in East Africa*, London, Overseas Development Institute, 1965.
179. Morrisset, J., and Andrews-Johnson, K., *The Effectiveness of Promotion Agencies at Attracting Foreign Direct Investment*, FIAS, Occasional Paper 16, 2004.

180. Morisset, J. and Pirnia, N., *How Tax Policy and Incentives Affect Foreign Direct Investment: A Review*, Policy Research Working Paper 2509 (The World Bank and International Finance Corporation), 2000.
181. Mugomba, A.T., 'Regional Organizations and African Underdevelopment: The Collapse of the East African Community', *The Journal of Modern African Studies*, Vol. 16, N° 2, June 1978.
182. Musonera ,E., Nyamulisa, B., and Karuranga, E., 'FDI Fitness in Sub-Saharan Africa: The case of Eastern African Community (EAC)', *The Journal of International Business Research and Practice*, Vol. 4, 2010
183. Mutai, H.K., 'Regional Trade Integration Strategies Under SADC and the EAC: A Comparative Analysis' in *SADC Law Journal*, vol. 1, 2011.
184. Nanda, V.P., "The 'Good Governance' Concept Revisited", *The Annals of the American Academy of political and Social Science*, 2006
185. Navaretti, G.B., and Venables, A.J., *Multinational Firms in the World Economy*, Princeton and Oxford, Princeton University Press, 2004
186. Neary, J.P., 'Of Hype and Hyperbolas: Introducing the New Economic Geography', *Journal of Economic Literature*, Vol. 39, June 2001.
187. Nixson, F.I., Economic Integration and Industrial Location: An East African Case Study, London, Longman Group Limited, 1973.
188. Nolte, D., 'How to compare regional powers: analytical concepts and research topics', *Review of International Studies*, Vol. 36, 2010.
189. Noorbakhsh, F., Paloni, A., and Youssef, A., 'Human Capital and FDI Inflows to Developing Countries: New Empirical Evidence', *World Development*, Vol. 29, N° 9, 2001.
190. Nsengiyumva, S., Etude des budgets de la République du Rwanda: Période d'étude 2000-2008, Mémoire, Université Nationale du Rwanda, 2009.
191. O'Keeffe, D., 'Freedom of Movement for the Workers in Community Law' in Jean-Yves Carlier and Michel Verwilghen, *Thirty Years of Free Movement of Workers in Europe*, Proceedings of the Conference Brussels (European Commission and Université Catholique de Louvain), 17 to 19 December 1998.
192. OECD, OECD Benchmark Definition of Foreign Direct Investment, 4th edition, 2008.
193. Ogutcu, M., 'Good governance and best Practices for Investment Policy and Promotion', *UNCTAD workshop on Efficient and Transparent Investment Promotion Practices: the Case of LDCs*, Geneva, 6-7 June 2002.
194. Okumu, L. and Nyankori, J.C., *Non-Tariff Barriers in EAC Customs Union: Implications for Trade Between Uganda and Other EAC Countries*, Research Series N°75, Economic Policy Research Centre, December 2010.
195. Olmstead, A.T., *History of the Persian Empire (Achaemenid period)*, Chicago, The University of Chicago Press, 1948
196. Oppong, R.F., 'Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law into National Legal Systems in Africa', *Fordham International Law Journal*, Vol. 30, 2006-2007.
197. Oppong, R.F., *Legal Aspects of Economic Integration in Africa*, Cambridge, Cambridge University Press, 2011.
198. Ostrom, E., 'How types of goods and property rights jointly affect collective action', *Journal of Theoretical Politics*, Vol. 15, Issue 3, 2003
199. Oyejide, T.A., *Policies for Regional Integration in Africa*, Economic Research Paper, N° 62, African Development Bank, 2000.
200. Papadopoulou, R.-E, Principes généraux du droit et du droit communautaire. Origines et concrétisation, Bruxelles, Bruylant, 1996.
201. Patel, K.K., and Schweitzer, H., *The Historical Foundations of the EU Competition Law*, Oxford, Oxford University Press, 2013.
202. Pearson, P., 'Policy without a plan: English as a medium of instruction in Rwanda', *Current Issues in Language Planning*, Vol. 15, N° 1, 2014
203. Perry, A., 'Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence', *International and Comparative Law Quarterly*, Vol. 49, October 2000
204. Pi-ying, P., Lai and Fischer, D., The determinant of foreign property investment in Islands nations – the case of Taiwan, NR051.
205. Pollicino, O., 'Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint', *German Law Journal*, Vol. 05, No. 03, 2004.
206. Puchala, D.J., 'Institutionalism, Intergovernmentalism and European Integration: A Review Article', *Journal of the Common Market Studies*, Vol. 37, No. 2, June 1999.
207. Puga, D., 'The rise and fall of regional inequalities', *European Economic Review*, Vol. 43, 1999

208. Ranganathan, R., and Foster, V., *East Africa's Infrastructure: A Continental Perspective*, World Bank Policy Research Working Paper, 5844, September 2011.
209. Rao, P.M., 'The ICT revolution, internationalization of technological activity, and the emerging economies: implications for global marketing', *International Business Review,* Vol. 10, 2001
210. Rasmussen, H., 'Towards A Normative Theory of the Interpretation of the Community Law', *The University of Chicago Legal Forum*, 1992.
211. Reinisch, A., 'The EU on the Investment Path – *Quo vadis* Europe? The Future of EU BITs and other Investment Agreements', *Santa Clara Journal of International Law*, Vol. 12, Issue 1, 2014.
212. Reiter, S.L., and Steensma H.K., 'Human Development and Foreign Direct Investment in Developing Countries: The Influence of FDI Policy and Corruption', *World Development*, Vol. 38, N° 12, 2010
213. Rodley, N.S., 'Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case', *Indiana Law Journal*, Vol. 47, Issue 1, 1971.
214. Rodriguez, P.J., and Loomis, R.S., 'A new view of Institutions, Human Capital, and Market Standardization', *Education, Knowledge & Economy*, 1(1), 2007.
215. Rodrik, D., The Global Governance of Trade -- As If Development Mattered, (UNDP Background Paper), 2001.
216. Rodrik, D., *The New Global Economy and Developing Countries: Making Openness Work*, Washington, John Hopkins University Press for the Oversees Development Council, 1999
217. Roe, M., and Siegal, J., 'Financial and Politics: A Review Essay Based on Kenneth Dam's Analysis of Legal Traditions in the Law-Growth Nexus', *Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series*, 2009.
218. Rogers, N. and Scannell, R., *Free Movement of Persons in the Enlarged European* Union, London, Sweet and Maxwell, 2005
219. Romer, P., 'Idea gaps and object gaps in economic development', *Journal of Monetary Economics,* Vol. 32, 1993.
220. Samuels, B.C., Managing Risk in Developing Countries: National Demands and Multinational Response, Princeton, Princeton University Press, 1990.
221. Scaperlanda, A.E., 'The EEC and US foreign investment: some empirical evidence', *Economic Journal*, Vol. 77, N° 305, March 1967.
222. Schaeffer, B.D., Kim, A.B., and Florance, C., 'Congress Should Pave the Way for a U.S.-Africa Free Trade Agreement', *Backgrounder*, No. 2836, 19 August 2013.
223. Schlesinger, R.B., "Research on the General Principles of Law Recognized by Civilized Nations", *American Journal of International Law*, Vol. 51, No. 4 (Oct. 1957).
224. Schrijver, N., The Evolution of Sustainable Development in International Law: Inception, Meaning and Status, The Hague Academy of International Law, 2008.
225. Seetanah, B., and Khadaroo, J., 'The Role of Transport Infrastructure in Attracting FDI in Africa', *Proceedings of African Economic Conference,* 2007.
226. Sen, A., *Development as Freedom*, New York, Knopf, 1999.
227. Shams, R., Trade Imbalances and the Political Economy of a Transitional Fund in the EAC, HWWA Discussion Paper 242, August 2003.
228. Shang-Jin Wei, 'How Taxing is Corruption on International Investors', *The Review of Economics and Statistics*, Vol. LXXXII, N° 1, February 2000.
229. Shyaka, A. (Dir.), *Rwanda Governance Scorecard 2012*, Rwanda Governance Board-RGB, December 2012
230. Snell, J., 'Free Movement of Capital: Evolution as a Non-linear Process' in P. Craig and G. de Burca (Eds), *The Evolution of the EU*, Oxford, Oxford University Press, 2011.
231. Soubbotina, T.P., and Sheram, K.A., *Beyond Economic Growth: Meeting the Challenges of Global Development*, Washington DC, The World Bank, 2000.
232. Staats, J.L., and Biglaiser, G., 'Foreign Direct Investment in Latin America: The Importance of Judicial Strength and Rule of Law', *International Studies Quarterly*, Vol. 56, 2012.
233. Stone, I., "British Direct and Portfolio Investment in Latin America Before 1914", *The Journal of Economic History*, Vol. 37, No. 3, Sep., 1977.
234. Strong, J.S., The Legend of King Asoka: A study and Translation of the Asokavadana, Princeton, Princeton University Press, 1983.
235. Tandon, Y., "Reclaiming Africa's Agenda: Good Governance and the NGOs in the African Context", *Australian Journal of International Affairs*, vol. 50, No 3, 1996.

236. te Velde, D.W., and Bezemer, D., Regional Integration and Foreign Direct Investment in Developing Countries, 2006.
237. Thapar, R., *A History of India*, Vol. 1, Marmondsworth, Penguin Books, 1966.
238. Thomas, M., 'What Do Worldwide Governance Indicators Measure?', *Manuscript*, John Hopkins University, 2006.
239. Thorp, T., 'The Rule of Law and the Implementation of an Economic Acquis Communautaire in Sub Saharan Africa: Legal Challenges for the East African Community', in C. Herrmann and J.P. Terhechte (Eds.), *European Yearbook of International Economic Law (EYIEL)*, Vol. 3, Dordrecht, Springer, 2012.
240. Tisch, S.J., and Wallace, M.B., Dillemmas of Development Assitance: The What, Why, and Who of Foreign Aid, Oxford, Westview Press, 1994.
241. Todaro, M.P., and Smith, S.C., *Economic Development*, 11th edition, New York, Pearson Education Limited, 2011.
242. Toth, A.G., 'The Principle of Subsidiarity in the Maastricht Treaty', *Common Market Law Review*, Vol. 29, 1992
243. Tridimas, T., *The General Principles of the EU Law*, Oxford, Oxford University Press, 2006.
244. Truman, E.M., *How Far Have We/They Come? Performance Scorecard for Major Emerging Market Economics*, The Bretton Woods Committee, Scorecard Symposium, Washington, 19 April 2002.
245. Tsai, P-L., 'Determinants of Foreign Direct Investment and Its Impact on Economic Growth', *Journal of Economic Development*, Vol. 19, N° 1, June 1994.
246. Turner, C., *EU Law Key Facts Key Case*, New York, Routledge, 2014.
247. Tyler, T.R., and Huo, Y.J., Trust in the Law. Encouraging public cooperation with the police and courts, New York, Russel Sage Foundation, 2002.
248. Vecchio, G. Del, *General principles of law* (Forte translation), 1956.
249. Vitalis, V., 'Official Development Assistance and Foreign Direct Investment: Improving the Synergies', *Round Table on Sustainable Development*, 2001.
250. wai Ko, K., 'Internet externalities and location of foreign direct investment: A comparison between developed and developing countries', *Information Economics and Policy,* Vol. 19, 2007
251. Wallace, H., Pollack, M.A., and Young, A.R., *Policy-Making in the European Union*, 6th edition, Oxford, Oxford University Press, 2010.
252. Weiss, F. and Wooldridge, F., *Free Movement of Persons within the European Community*, 2nd edition, Alphen aan den Rijn, Kluwer Law International, 2007
253. Weiss, T.G., "Governance, Good Governance and Global Governance: conceptual and actual challenges", *Third World Quarterly*, vol. 21, No 5, October 2000.
254. Weller, C., and Ulmer, K., 'Trade and Governance: Does governance matter for trade?', *APRODEV*, November 2008.
255. Wells, L.T., and Wint, A.G., *Marketing a Country: Promotion as a Tool for Attracting Foreign Investment,* Revised Edition, FIAS, Occasional Paper 13, 2000.
256. Wheeler, D., and Mody, A., 'International investment location decisions: the case of U.S. firms', *Journal of International Economics*, 1992.
257. Williams, R.R., 'African Growth and Opportunity Act (AGOA): Background and Reauthorization', *Congressional Research Service*, 24 July 2014.
258. Wionczek, M.S., 'Introduction: Requisites for Viable Integration', in M.S. Wionczek (Ed.), *Latin American Economic Integration: Experience and Prospects,* New York, 1966.
259. Yabara, M., Capital Market Integration: Progress Ahead of the East African Community Monetary Union, IMF Working Paper WP/12/18, January 2012.
260. Yannaca-Small, C., "Definition of Investor and Investments in International Investment Agreements" in OECD, *International Investment Law: Understanding Concepts and Tracking Innovations*, 2008.
261. Zhan, J., 'Regional Integration and Foreign Direct Investment', *Multi-year Expert Meeting on Investment for Productive Capacity-Building and Sustainable Development*, UNCTAD, Geneva, 28 January 2013.

EAC DOCUMENTS AND REPORTS

1. Colonial Office, East Africa: Report of the Economic and Fiscal Commission, CMND 1279.
2. EABC, Monitoring Mechanism for Elimination of Non-Trade Barriers in EAC, Arusha, 2009.
3. EAC Model Investment Code, 2006 (MIC).

4. EAC Secretariat, Draft Roadmap Towards Effective Promotion of Investments in EAC, Arusha, Tanzania, February 2008.
5. EAC Secretariat, Institutional Review of EAC, Organs and Institutions (Final Report), Arusha, Tanzania, March 2011.
6. EAC, Communiqué of the 16th Ordinary Summit of the East African Community Heads of State, Nairobi, Kenya, February 2015.
7. EAC, EAC Development Strategy (2011/2012-2015-2016): Deepening and Accelerating Integration, Arusha, Tanzania, August 2011.
8. EAC, *EAC Investment Guidebook*, Arusha, October 2013.
9. EAC, East African Community Industrialization Policy 2012-2013, Arusha, 2011.
10. EAC, *Investment Guidebook*, October 2013.
11. EAC, Joint Export and Investment Promotion Strategies for the East African Community: 2006-2010, Arusha, 30 July 2006.
12. East African Commission Report, August to December 1924, London, H.M. Stationner off, (Cmd. 2387)
13. Transparency International – Kenya, *The East African Bribery Index 2013*, October 2013

REPORTS OF INTERNATIONAL INSTITUTIONS

1. African Development Bank(AfDB), *State of Infrastructure in East Africa*, Statistics Department Africa Infrastructure Knowledge Program, April 2013.
2. IMF, *Balance of Payments Manual*, 6th edition, 2008 [2011 updated version], p. 100.
3. International Research by Students Programme (IRSP), *A strategy to enhance Dutch FDI in Rwanda 2010-2011*, University of Groningen, 2011.
4. UN General Assembly, Report of the High-level Panel on Financing for Development (2001), A/55/1000
5. UNCTAD (2004a), *Good governance in Investment Promotion*, TD/B/COM.2/EM.15/2, 25 August 2004.
6. UNCTAD (UNCTAD 2003), Mid-term evaluation: The Good Governance in Investment Promotion Programme, UNCTAD/DOM/EPU/2007/9, December 2003.
7. UNCTAD (UNCTAD 2004b), Report of the Expert Meeting on Good Governance in Investment Promotion, TD/B/COM.2/EM.15/3, 17 November 2004.
8. UNCTAD, World Investment Report 2014 Investing in the SDGs: An Action Plan, New York and Geneva, United Nations, 2014.
9. UNDP, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World, New York, United Nations, 2013.
10. UNECA, *Assessing Regional Integration in Africa*, EAC Policy Research Report, 2004.
11. UNECA, Economic Report on Africa 1999: The Challenges of Poverty Reduction and Sustainability, Addis Ababa, 2000.
12. World Bank and East African Community Secretariat, EAC Common Market Scorecard 2014: Tracking EAC Compliance in Movement of Capital, Services and Goods, Washingtin DC and Arusha, 2014.
13. World Bank and International Finance Corporation, Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises, 2013.
14. World Bank Group, *Doing Business 2010: Reforming through Difficult Times*, Washington DC, Palgrave MacMillan, 2009.
15. World Bank, Development in Practice. Governance: the World Bank's Experience, Washington, World Bank Publication, 1994.
16. World Bank, Doing Business in the East African Community 2013: Smarter Regulations for Small and Medium-Size Enterprises, Washington, DC, 2013.
17. World Bank, *Governance and Development*, Washington DC, The World Bank Publication, 1992.
18. World Bank, Regulatory Capacity Review: East African Community, Washington, 2011.
19. World Bank, Sub-Sahara Africa. From Crisis to Sustainable Growth (A long-Term Perspective Study), November 1989, p.60. [Hereinafter referred as World Bank 1989.
20. World Bank, *Trade Blocs*, Washington DC, 2000.

ELECTRONIC AND OTHER SOURCES

1. Agritrade, 'Final stage of EPA negotiations generating tensions between EAC members', 23 March 2014 online at http://agritrade.cta.int/Agriculture/Topics/EPAs/Final-stage-of-EPA-negotiations-generating-tensions-between-EAC-members accessed on 29 August 2014.
2. Agutamba, K., 'EAC partners harmonize position on EU trade pact', *The New Times*, 23 September 2014 online at http://www.newtimes.co.rw/section/article/2014-09-23/181196/ accessed on 23 September 2014.
3. Agutamba, K., "Railway will test tenacity of 'Coalition of the willing'", *The New Times*, 12 January 2014 online at http://www.newtimes.co.rw/news/index.php?i=15600&a=14395 last access 14 January 2014.
4. Barroso, J.M., 'State of the Union Address 2013", SPEECH/13/684, European Commission, 11 September 2013.
5. BBC World Service, 'Tanzania quits COMESA trading bloc', Saturday 2 September 2000, online at http://news.bbc.co.uk/2/hi/africa/908008.stm accessed on 29 August 2014
6. BBC, 'UK and the Netherlands withhold Rwanda budget aid', online at http://www.bbc.com/news/world-africa-19010495 accessed on 26 July 2014.
7. Binda, E.M., 'Why East Africans Should Have Said No to Economic Partnership Agreement with Europe', online at http://bindael.weebly.com/eac-eu-epa.html accessed on 24 October 2015.
8. Case ICC-01/09-02/11, *The Prosecutor v. Uhuru Muigai Kenyatta*, online at http://www.icc-cpi.int/en_menus/icc/situationspercent20andpercent20cases/situations/situationpercent20iccpercent200109/relatedpercent20cases/icc01090211/Pages/icc01090111.aspx accessed on 17 July 2014.
9. Christabel Ligami, 'Tanzania, Burundi snub EPAs meeting, negotiations postponed', *The East African*, 12 October 2013, online at http://www.theeastafrican.co.ke/business/Tanzania-and-Burundi-snub-EPAs-meeting-negotiations-postponed-/-/2560/2029128/-/wa2sxu/-/index.html, accessed on 29 August 2014.
10. Commission of the European Communities, *European Governance. A White Paper*, (2001) 428 final, Brussels, 2001.
11. Daniel, A., "Foreign Direct Investment in East African. A comparative analysis of its investment laws", p. 19 online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593731 (last access 23 October 2012).
12. Dhammika, V. S., 'The Edicts of King Asoka', *Access to Insight (Legacy Edition)*, 30 November 2013, online at http://www.accesstoinsight.org/lib/authors/dhammika/wheel386.html accessed on 7 November 2014.
13. EAC, '4th Annual Conference on Good Governance is Underway in Kigali', 8 July 2013 online at http://www.eac.int/news/index.php?option=com_content&view=article&id=978:4th-annual-conference-on-good-governance-is-underway-in-kigali&catid=48:eac-latest&Itemid=69 accessed on 24 September 2014).
14. EAC, 'EAC Protocol on Good Governance in Final Stages', Press Release, Arusha, Tanzania, 11 May 2014 available at http://www.eac.int/index.php?option=com_content&view=article&id=633:protocol-on-good-governance-in-final-stages&catid=146:press-releases&Itemid=194 accessed on 25 September 2014.
15. EAC, *EAC Protocols and other annexes to the Treaty for the establishment of the East African Community as of March 2013*, p. 4 online at http://www.eac.int/index.php?option=com_docman&Itemid=226, accessed on 19 September 2014.
16. EAC, *Great Lakes Economic Community (CEPGL) and EAC Sign Memorandum of Understanding*, 20 March 2014, online at http://www.eac.int/index.php?option=com_content&view=article&id=1525:great-lakes-economic-community-cepgl-and-eac-sign-memorandum-of-understanding&catid=146:press-releases&Itemid=194 accessed on 9 September 2014.
17. Ehrenfeld, D., 'Foreign Aid Effectiveness, Political Rights and Bilateral Distribution', *Journal of Humanitarian Assistance*, 1 February 2004, online at online at http://sites.tufts.edu/jha/archives/75 accessed on 26 August 2014.
18. Ernest, S., 'Kikwete says Tanzania won't pull out of troubled EAC', *Mail and Guardian*, 8 November 2013, online at http://mg.co.za/article/2013-11-08-president-denies-claims-tanzania-pulling-out-of-east-african-community, accessed on 29 August 2014.
19. European Commission, *European Union, Trade in goods with Kenya*, online at http://trade.ec.europa.eu/ doclib/docs/2006/september/tradoc_113407.pdf accessed on 8 September 2014.
20. European Commission, *Fact Sheet on the Interim Agreements: An Overview of the Interim Agreements*, online at http://trade.ec.europa.eu/doclib/docs/2009/january/tradoc_142188.pdf accessed on 9 September 2014.
21. Executive Committee on Economic and Social Affairs of the United Nations Secretariat, 'Towards a New Aid Compact (ECESA/01/1), United Nations, New York, 20 June 2001

22. Golooba, F., 'Kikwete in trouble over FDLR, but does he really understand who they are?', *African Arguments*, 11 June 2013, online at http://africanarguments.org/2013/06/11/kikwete-in-trouble-over-fdlr-but-does-he-really-understand-who-they-are-%E2%80%93-by-frederick-golooba-mutebi/ accessed on 8 September 2014.
23. Guardian on Sunday, 'Landlocked countries fear single customs territory', 7th October 2012 at http://www.tralac.org/2012/10/09/landlocked-eac-countries-fear-single-customs-territory/ accessed on 28 October 2013.
24. Hjalmroth, C. and Westerberg, S., 'The Contribution of trade to a new EU growth strategy: Ideas for a more open European Economy (Part 1 A Common investment policy for the EU), Report, National Board of Trade, p. 11(29) online at http://www.kommers.se/upload/Analysarkiv/Arbetsomr percentE5den/WTO/ Handel percent20och percent20investeringar/A percent20common percent20investment percent20policy percent20for percent20the percent20EU.pdf accessed on 19 June 2014.
25. Ihucha, A., 'Intra-EAC trade rises 22pc, defies barriers and policies', *The East African*, 2 November 2013, online at http://www.theeastafrican.co.ke/news/-/2558/2057510/-/7pt6x4z/-/index.html accessed on 8 September 2014.
26. Kabeera, E., 'EAC Integration Hurt by Lack of Harmonized Laws', *The New Times*, 13 March 2014, online at http://www.newtimes.co.rw/news/index.php?a=75265&i=15660 last access on 23 April 2014.
27. Kabeera, E., 'EAC presidents set timelines for major integration projects', *The New Times*, 30 August 2013, online at http://www.newtimes.co.rw/news/index.php?i=15465&a=69992 accessed on 1 August 2014.
28. Kanyesigye, F., 'Heads of State push for strong ICT strong', *The New Times*, 30 October 2013, online at http://www.newtimes.co.rw/news/index.php?a=71676&i=15526 accessed on 30 July 2014.
29. Khisa, I., 'Ethiopian, Rwandair to fly from Entebbe', *The East African*, 26 July 2014, online at http://www.theeastafrican.co.ke/business/Ethiopian--RwandAir-to-fly-from-Entebbe/-/2560/2398392/-/un9is3z/-/index.html, accessed on 31 July 2014.
30. Kibui, R., 'EAC, EU meet to settle unresolved EPA issues', *The East African*, 12 July 2014 available at http://www.theeastafrican.co.ke/news/EAC--EU-meet-to-settle-unresolved-EPA-issues/-/2558/2381568/-/f6lpmy/-/index.html, accessed on 1 October 2014.
31. Kituo cya Katiba, 'Towards an East African Federation: Debate, Rationale and Declaration of June 1963', online at http://www.kituochakatiba.org/index2.php?option=com_docman&task=doc_view&gid=314&Itemid=36 (last access 21 august 2013).
32. Krapohl, S., 'Asymmetries and Regional Integration: The Problems of Institution-Building and Implementation in ASEAN, MERCUSUR and SADC', University of Bamberg, 2010, p. 12 online at http://www.uni-bamberg.de/fileadmin/uni/fakultaeten/sowi_professuren/politikwissenschaft_insb_int/Dateien/Mit-arbeiter/ Forschungsp._region._Integration/BOPIR4-2010.pdf, accessed on 12 August 2013.
33. Kubwani, Z., 'M-Pesa hits $1bn mark transfer in EA states', online at http://mobilemoneyafrica.com/details.php?post_id=462, accessed on 30 July 2014.
34. Letter N° 1608/15.03.01/INT/2011 of 26 July 2011 of the Minister of Trade and Industry reminding the enforment of Prime Ministers letters
35. Letter nº 1116/03.0 of 26 October 2010 written by the Prime Minister to all Ministers and State Secretaries about public servants going on service mission abroad.
36. Letter Nº1242/03.5 of 23 November 2010 of the Prime Minister to all ministers to support this national industry in buying only milk processed by *Inyange Industries*.
37. Manishatse, L.J., 'French will be adopted as an official language in EAC', *Iwacu English News*, 22 November 2013, online at http://www.iwacu-burundi.org/blogs/english/french-will-be-adopted-as-an-official-language-in-eac/ accessed on 11 September 2014.
38. McGreal, C., 'Why Rwanda said adieu to French', *The Guardian Weekly*, Friday 16 January 2009 online at http://www.theguardian.com/education/2009/jan/16/rwanda-english-genocide accessed on 24 July 2014.
39. Ministry of Economy, Trade and Industry (METI), 'Rules of Origin' online at http://www.meti.go.jp/english/report/data/gCT9909e.html, last access on 30 September 2013.
40. Ministry of Foreign Affairs (Netherlands), *Uitkomsten subsidiariteitexercitie*, MINBUZA-2013.184321, 21 June 2013.
41. Mugabe, R., 'EAC wants Rwanda, Burundi to adopt common law system', *The New Times*, 2 June 2009 available at http://www.newtimes.co.rw/news/views/article_print.php?i=13914&a=16230&icon=Print accessed on 21 August 2014.
42. Mumo, M., 'EAC to discuss calling costs', *Daily Nation*, 24 October 2013 online at http://www.trademarkea.com/eac-to-discuss-calling-costs/ accessed on 30 July 2014.

43. Mungai, C., 'Sub-Saharan Africa Power Production way below' online at http://www.theeastafrican.co.ke/news/Sub+Saharan+Africa+power+production+way+below+potential/-/2558/1210866/-/aap9p3/-/index.html accessed on 25 July 2014.
44. Muramira, G., 'Kenya, Rwanda and Uganda to construct joint railway line', *The New Times*, 26 June 2013 online at http://www.newtimes.co.rw/news/index.php?a=68146&i=15400, accessed on 1 November 2013.
45. Mutuma, M., 'East African Community (EAC) fights for low calling rates in the region', *Duwaa*, 9 July 2014, online at http://www.duwaa.co.ke/news/consumer-tech/606-east-african-community-eac-fights-for-low-calling-rates-in-the-region accessed on 30 July 2014.
46. Mwai, C., 'Heads of States endorse expanded EACJ mandate', *The New Times*, 21 February 2015 online at http://www.newtimes.co.rw/section/article/2015-02-21/186213/ accessed on 19 March 2015.
47. Nakayima, L., 'Rwandair launches second Kigali-Kamembe flight', The New Times, 15 May 2011, online at http://www.newtimes.co.rw/news/index.php?i=14626&a=9420 accessed on 31 July 2014
48. Ndabaga, E., 'English language issue in Rwanda: An Educational, globalization and economic development trend', *The New Times*, October 2008 online at http://www.newtimes.co.rw/news/views/article_print.php?i=15027&a=10655&icon=Print accessed on 24 July 2014
49. New Times Reporter, 'Top story: Rwandair launches Kigali – Gisenyi flights', *The New Times*, 17 March 2009, online at http://www.newtimes.co.rw/news/index.php?i=13837&a=14229 accessed on 31 July 2014
50. Ng'wanakilala, F., 'Tanzania's Tigo starts cross-border mobile money transfer service' online at http://www.reuters.com/article/2014/02/24/tanzania-tigo-idUSL6N0LT2W120140224, accessed on 30 July 2014.
51. Ng'wanikilala, F., 'Tanzania complains of being sidelined in east African bloc', *Reuters*, 5 November 2013, online at http://www.reuters.com/article/2013/11/05/us-tanzania-eastafrica-idUSBRE9A40SY20131105 accessed on 29 August 2014.
52. Obonyo, O., 'Tanzania threatens to pull out of East Africa Community', *Standard Digital*, 3rd November 2013, online at http://www.standardmedia.co.ke/thecounties/article/2000096753/tanzania-threatens-to-pull-out-of-eac accessed on 29 August 2014.
53. Ojulu, E., 'Indangamuntu to cross the border but not passport for everything', *The New Times*, 25 August 2013 online at http://www.newtimes.co.rw/news/index.php?a=14027&i=15460, last access 28 November 2013.
54. Plaut, M., 'Uganda donors cut aid after president passes anti-gay law", *The Guardian*, online at http://www.theguardian.com/global-development/2014/feb/25/uganda-donors-cut-aid-anti-gay-law accessed on 26 August 2014.
55. RDB, 'East African States Waive Tourism Visa Fee For Foreign Residents', online at http://www.rdb.rw/home/newsdetails/article/east-african-states-waive-tourism-visa-fee-for-foreign-residents-1.html, accessed on 22 February 2015.
56. Republic of Rwanda, '70 percent of Rwandans to have access to electricity in 2017', available at http://www.gov.rw/70-of-Rwandans-to-have-access-to-electricity-by-2017-1175 accessed on 29 July 2014.
57. Republic of Uganda, Ministry of Energy and Mineral Development, 'Departments in Uganda's Oil and Gas Sector', September 2011 online at http://www.petroleum.go.ug/page.php?k=curnews&id=12 accessed on 17 July 2014.
58. Sambu, Z., 'Horticulture farmers stare at harsh reality of EU duties after talks flop', *Daily Nation*, 30 August 2014, online at http://mobile.nation.co.ke/business/Horticulture-farmers-stare-at-harsh-reality-of-EU-duties-/-/1950106/2435638/-/format/xhtml/-/19fu6q/-/index.html, accessed on 8 September 2014.
59. Tairo, A., 'Tanzania president calls for competitive East African tourism', *eTN*, online at http://www.eturbonews.com/31337/tanzania-president-calls-competitive-east-african-tourism accessed on 29 August 2014.
60. The Nairobi Chronicle, *Kenya-Uganda Railway: A Short Story*, online at http://nairobichronicle.wordpress.com/2008/08/09/kenya-uganda-railway-a-short-history/ consulted on 1st August 2013. At that time, Kisumu was part of Uganda.
61. The With House, 'Remarks by President Obama at Business Leaders' online at http://www.whitehouse.gov/the-press-office/2013/07/01/remarks-president-obama-business-leaders-forum last access 13 June 2014.
62. Thome, W.H., 'Chinese company wins tender for new Bugesera Airport in Rwanda', 14 April 2013, online at http://www.eturbonews.com/34311/chinese-company-wins-tender-new-bugesera-airport-rwanda, accessed on 31 July 2014.

63. Trade Mark East Africa, *Single Customs Territory Delayed*, available on http://www.trademarkea.com/single-customs-territory-delayed/ accessed on 25 November 2013.
64. Tumwebaze, P., 'Rwanda ready to roll out single tax policy', *The New Times*, 25 September 2013 online at http://www.newtimes.co.rw/news/index.php?a=70696&i=15491, accessed on 28 October 2013.
65. TWN Africa, 'Key areas of divergence between the EU and Africa EPA regions', *Third World Network Africa,* 8 July 2011, online at http://twnafrica.org/fr/index.php/publication/gender-a-economic-policy-digest/520-key-areas-of-divregence-between-the-eu-and-africa-epa-regions accessed on 29 September 2014.
66. UNDP, "Governance and sustainable human development: A UNDP policy document", 1997, online at *http://mirror.undp.org/magnet/policy/* accessed on July 28, 2011.
67. World Bank Group, 'FDI Regulations Database: A Joint Project by the World bank and IFC' online at http://iab.worldbank.org/~/media/FPDKM/IAB/Documents/What-is-FDI-Regulations-Database.pdf accessed on 20 August 2014.
68. World Bank Group, 'Investing Across Borders: Indicators of Foreign Direct Investment Regulation', online at http://iab.worldbank.org/ accessed on 20 August 2014.
69. World Bank, 'Access to electricity (percent of the population), online at http://data.worldbank.org/ indicator/ EG.ELC.ACCS.ZS/countries/KE?display=default accessed on 29 July 2014.
70. World Bank, 'The World Bank to Finance New Hydro Power Generation in Burundi' online at http://www.worldbank.org/en/news/feature/2014/04/22/world-bank-to-finance-new-hydropower-development-in-burundi accessed 29 July 2014
71. World Bank, 'World Databank' online at http://databank.worldbank.org/data/home.aspx accessed on 10 July 2014.
72. Xinhua News Agency, 'Tanzania mulls for a new regional economic bloc outside EAC', online at http://coastweek.com/3644-focus-07.htm accessed on 29 August 2014.
73. Xinhua, 'Africa's "grand" FTA negotiation progressing well: SADEC officials', *bilateral.org*, 17 August 2014, online at http://www.bilaterals.org/?africa-s-grand-fta-negotiation accessed on 9 September 2014.
74. Yilmazkuday, H., 'Export Promotion vs. Import Substitution', online at https://www.academia.edu/1104964/EXPORT_PROMOTION_VS._IMPORT_SUBSTITUTION accessed on 26 June 2014.

About the author

Mbembe Binda, commonly called Elvis, was born in Kisangani in the Democratic Republic of Congo on 22 November 1979. After completing his secondary education in Latin and Philosophy at IDAP/ISP-Bunia, he left DR Congo in 2001 amidst the bloody rebellion led by the Congolese Rally for Democracy (Rassemblement Congolais pour la Démocratie) to move to Rwanda where he could pursue his undergraduate studies at the Law faculty of the then National University of Rwanda in Butare.

Based on his outstanding grades, he was recruited as a Tutorial Assistant at the same university where he started teaching in June 2007.

In 2008, he was one of the fourteen graduates in Business Law in the first LL.M. programme ever organized in Rwanda. A few months after his graduation, Mbembe was elected Head of the Private Law Department at the same university, making him the youngest person ever to occupy this position. In this regard, Mbembe directly supervised 14 lecturers and was in charge of about 250 students. He resigned from this position in order to start his PhD research at Utrecht University in March 2011.

Apart from his academic background, Mbembe is also a human rights advocate. In 2006, he founded Initiatives for Peace and Human Rights (IPHR), an organization that strives to enhance the culture of peace in Africa's Great Lakes region through human rights and good governance education. This organization is currently active in Burundi, Rwanda, DR Congo, and the Netherlands. In 2013 the American magazine, The Diplomatic Courier, named Mr. Mbembe Binda as one of the world's top 99 most influential young persons under the age of 33 in foreign policy.