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The EAC Secretariat is charged with the function, among others, of “the general promotion and dissemination of information on the community to the stakeholders, the general public and the international community.”<sup>164</sup> This crucial function has been curtailed by lack of both human and financial resources. The civil society and the private sector are therefore with the right engagement in a position to step in and fill the gap.

In order to create more public awareness of the activities and programmes of the EAC and to obtain the desired public support, there is a need to develop a publicity, marketing and communications strategy of the EAC among stakeholders especially at the grassroots level.<sup>165</sup> To this end it would be necessary to ensure that information is readily available to the public in all the major languages and in all the partner states and not only available in English on request or distributed to negotiating bodies.<sup>166</sup> This is crucial to ensure the participation and involvement of the citizenry which includes both the private sector and the civil society in the programmes and activities of the EAC and to make them fully aware of EAC affairs.<sup>167</sup> The low level of awareness of the activities and programmes of the EAC could be directly attributable to the absence of clear strategies by the EAC to launch effective public awareness, publicity, marketing and promotion campaigns among

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<sup>162</sup> The private sector through EABC organizes such conferences. National and local business associations like Kenya Association of Manufacturers or Private Sector Foundation Tanzania or Uganda Chamber of Commerce and Industry or the Rwanda Private Sector Federation routinely organize such forums and their websites always has information on such activities. This equally applies to civil society organizations.

<sup>163</sup> EAC Development Strategy 2006-2010 at p 40

<sup>164</sup> Article 71 (1) (f) of the Treaty Establishing the East African Community

<sup>165</sup> EAC Development Strategy 2006-2010 at p 40

<sup>166</sup> Braude, 2008 at p 20

<sup>167</sup> EAC Development Strategy 2006-2010 at p 40

the citizenry.<sup>168</sup> Awareness about the EAC is yet to trickle down appreciably to the grassroots levels.

### **3.2.4 Trade & Investment**

With the liberalization and the introduction of free market economies, the governments of the EAC member states have been largely left with the task of creating an enabling environment for the private sector, which is driven by the profit margin, to develop through the pursuit of policies such as state withdrawal from production activities and privatization of public enterprises.<sup>169</sup>

One of the objectives of EAC is to widen and deepen economic cooperation<sup>170</sup> and the private sector has been in the forefront in promoting trade and investment in the region and contributing to an increase in economic growth among the member states. For instance EABC, as the voice of the private sector in East Africa, has been instrumental in hosting several meetings, conferences and seminars in the region where views are exchanged on encouraging and promoting investment and trade in the region by both domestic and foreign investors.<sup>171</sup> This has made the private sector to be aptly described as the engine of economic development in the region and therefore an important vehicle for economic growth and regional integration.<sup>172</sup>

The recorded volume of intra-regional trade conducted almost exclusively by the private sector has continued to increase over the years, although at a modest and steady level, since the revival of the EAC.<sup>173</sup> This cross-border and intra-regional trade conducted by the private sector has resulted into increased economic growth in the member states and assisted in widening and deepening economic integration within the region as envisaged by the EAC Treaty. For instance in 2005 the GDP growth rates for Tanzania, Uganda and

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<sup>168</sup> EAC Development Strategy 2006-2010 at p 40

<sup>169</sup> EABC & UNECA, (2006), "Report of Regional Meeting on Investment Promotion in East Africa," p 2, held at Arusha, Tanzania between 13-15 March 2006, and available at <http://www.proinvest-eu.org/files/pubs/40/2006%20-%20Invest%20in20East%20Africa.pdf> and accessed on 8<sup>th</sup> March 2009.

<sup>170</sup> Article 5 (1) of the Treaty Establishing the East African Community

<sup>171</sup> EABC & UNECA, 2006 at pp 3-4

<sup>172</sup> United Nations Economic Commission on Africa (UNECA), (2009), "Private Business Investment Key to Economic Success," p 1, *Press Release* No. 14/2008 available at <http://www.uneca.org> and accessed on 9<sup>th</sup> March 2009

<sup>173</sup> EAC Secretariat, (2008), "East African Community Facts and Figures - 2008," pp 53-57, available [http://www.eac.int/downloads/cat\\_view/73-facts-and-figures.html](http://www.eac.int/downloads/cat_view/73-facts-and-figures.html) and accessed on 8<sup>th</sup> March 2009

Kenya were 7.4%, 10.0% and 5.7% respectively, 6.7%, 7.0% and 6.1% in 2006 and 7.1%, 8.6% and 7.0% respectively in 2007.<sup>174</sup> This was against a background of increase in the volume of intra-regional trade from US\$ 800 Million in 2003 to US\$ 1.2 Billion in 2007.<sup>175</sup> These figures might not portray the optimum trade and benefits accruing from the integration process but the growth in GDP and volume of trade over the years point to the fact that more need to be done by all the stakeholders so that the region can reap more benefits. Although the region is required to attain a consistent growth rate of at least 7% per annum considered necessary for the attainment of the Millennium Development Goals (MDGs) by 2015, the partner states have consistently and individually experienced economic growth rates of over 5% since the year 2005 when the EA Customs Union came into force.<sup>176</sup> However it should be noted that following the violence after the 2007 General Elections in Kenya, the performance of the Kenyan economy slowed down in 2008 and is expected to record a lower growth rate than in the previous years.<sup>177</sup>

The private sector has played a major role in cross-border investments in the region by both MSMEs and large corporations. This can be seen in the cross listings of companies in the Nairobi Stock Exchanges, Dar es Salaam Stock Exchange and the Uganda Securities Exchange under the umbrella of the East African Securities Exchanges Associations (EASEA)<sup>178</sup> which is a member of the Capital Markets Development Committee<sup>179</sup> of the EAC. Presently only Kenya Breweries Limited, Kenya Commercial Bank Limited and East African Breweries Limited, all Kenyan companies, are listed on all the three aforementioned stock exchanges.<sup>180</sup> Plans are underway to cross list more

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<sup>174</sup> EAC Secretariat, 2008 at p 24

<sup>175</sup> "Government Must Lead the Fight Against NTBs, Says PS Nalo," available at <http://www.meac.co.ke> and accessed on 21<sup>st</sup> March 2009

<sup>176</sup> EAC Secretariat, (2007), "Study on the Establishment of an East African Common Market: Final Report," at p 26 and available at [http://www.eac.int/downloads/cat\\_view/68-eac-common-market.html](http://www.eac.int/downloads/cat_view/68-eac-common-market.html) and accessed on 17<sup>th</sup> March 2009

<sup>177</sup> IMF, (2009), "Statement at the Conclusion of an IMF Staff Mission to Kenya," Press Release No 1BO9/77 dated 16<sup>th</sup> March 2009 and available at <http://www.imf.org/external/np/sec/pr/2009/pr0977.htm> and accessed on 21<sup>st</sup> March 2009

<sup>178</sup> See "Regionalization," available at the Nairobi Stock Exchange website at <http://www.nse.co.ke/newsite/inner.asp?cat=regionalisation> and accessed on 8<sup>th</sup> March 2009.

<sup>179</sup> Article 85 of the Treaty Establishing the East African Community - This is a committee created by the Council of Ministers of the community under Article 85 of the EAC Treaty and tasked with creating a more conducive environment for the movement of capital within the community.

<sup>180</sup> EASEA, (2005), "Report of the EASEA Committee on Mass Cross Listings," dated 17<sup>th</sup> November 2005 and available at [http://www.nse.co.ke/newsite/pdf/report\\_on\\_cross\\_listings\\_ea.pdf](http://www.nse.co.ke/newsite/pdf/report_on_cross_listings_ea.pdf) and accessed on 8<sup>th</sup> March 2009.



companies from within the region. It should be noted that all the three stock exchanges are private sector initiatives and registered and operated by the private sector with the governments only playing a regulatory and licensing role. The stock exchanges have widened investment opportunities in the region. The private sector has also been involved in cross-border investments through the setting up of businesses, enterprises and ventures that have resulted into the creation of employment opportunities in the region and the reduction of poverty levels. For example according to the 2007 investment records from the Tanzania Investment Centre, Kenya has 249 active business projects in Tanzania valued at US\$ 958.21M and employing some 37 511 Tanzanians directly. This makes Kenya the second largest investor in Tanzania after Britain and ahead of South Africa with 111 projects worth US\$ 111M and employing some 14243 people.<sup>181</sup> These cross-border investments by Kenya in Tanzania are mainly in the services, banking, insurance, media, tourism, manufacturing and agricultural sectors and makes Kenya the single most leading African country investor in Tanzania.<sup>182</sup> These cross border investments in the region are being done by the private sector and has resulted in the creation of employment opportunities, reduction of poverty, general economic growth and raising the standards of living of the people of the region. Although a lot remains to be done, the private sector is seized of a critical role in advancing trade and investment in the region and thereby making a contribution towards achieving the objectives of the EAC Treaty. Private sector investments in the region are widespread and quite visible in the manufacturing, agricultural, mining, industrial, banking, transport, insurance, education, tourism and health sectors among others both at the national and regional levels. All these investments make a contribution in one way or another in the fulfillment of the community objectives of the community<sup>183</sup> and strengthen the fields of co-operation by the partner states.<sup>184</sup>

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<sup>181</sup> Lwinda, I., (2007), "UK, Kenya Leading Investors in Tanzania," in *Sunday Observer* dated 4<sup>th</sup> June 2007, available at <http://www.ippmedia.com/ipp/observer/2007/06/03/91766.html> and accessed on 8th March 2009.

<sup>182</sup> Peter, C. M. & Mwakaje, S. J., (2004), "Investments in Tanzania: Some Comments- Some Issues," Dar es Salaam, University of Dar es Salaam & Friedrich Ebert Stiftung, at p 40

<sup>183</sup> Article 5 of the Treaty Establishing the East African Community

<sup>184</sup> The fields of co-operation are many and are set out in the EAC Treaty and include tourism, education, trade, investment, infrastructure etc among others.

It should be noted that the economies of the partner states are largely agriculture dominated and the private sector investments in the field of agriculture either as producers through large-scale farming, millers, distributors, transporters, exporters or importers has contributed to food security,<sup>185</sup> foreign exchange earnings through exports, economic growth through increase in the gross domestic product (GDP), poverty reduction and creation of employment.<sup>186</sup>

### **3.2.5 Promotion of Infrastructure Development**

The East African region is plagued with serious infrastructural handicaps and it is generally acknowledged that the state of infrastructure is poor, especially roads.<sup>187</sup> Infrastructure, especially roads, is critical in the integration process as it ensures the affordable and timely movement of people and goods within the region and the accessibility of the region to the rest of the world and also determines the competitiveness of the private sector internationally. Good infrastructure therefore ensures cross border links and thereby facilitates trade within the region.<sup>188</sup>

Although generally the member states provide the funds for infrastructure developments through budgetary allocations or loans from development partners and international financial institutions like the World Bank or in the form of grants from development partners, the private sector has taken over the duty of carrying out the actual building and construction of infrastructural facilities like roads within the region especially after competitive tendering.

However, the private sector has also been instrumental in sourcing for funds for infrastructure development like for example the EASSy<sup>189</sup> project that aims to provide a submarine cable connection to the Eastern Africa region and is expected to reduce telecommunications charges and costs that will eventually benefit the private sector businesspeople. EASSy is a purely private sector owned initiative and is an example of the power, capacity and role of the private sector in infrastructure development.

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<sup>185</sup> Articles 105-110 of the Treaty Establishing the East African Community dealing with food security

<sup>186</sup> UNECA, 2009 at p 1

<sup>187</sup> EAC Development Strategy 2006-2010 at p 8

<sup>188</sup> EAC Development Strategy 2006-2010 at p 8

<sup>189</sup> For more ownership and funding details on EASSy-Eastern Africa Submarine Cable System-see generally [http://en.wiki/EASSy\\_\(cable\\_system\)](http://en.wiki/EASSy_(cable_system))

### **3.2.6 Entrenchment of Good Governance**

One of the fundamental principles identified as intrinsic in the EAC Treaty for the achievement of the objectives of the community is “good governance including adherence to 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 peoples rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”<sup>190</sup>

In spite of the aforesaid lofty undertaking, the member states cannot be said to be pursuing good governance attributes and evidence abound of rigged and violent elections in Kenya to military coups in Burundi. This has created an atmosphere where peace, security and stability, the pre-requisites to robust social and economic development<sup>191</sup> in the region, are not guaranteed across the whole breath of the region.

The essential attribute of democracy is good governance that goes hand in hand with accountability, tolerance of opposing views, respect for human rights in general and the rule of law.<sup>192</sup> To this extent political will to fight corruption is required in the public sector. Sadly though, the requisite political will in the fight against corruption has been severely wanting in the partner states.

The private sector and civil society have been at the forefront in the region and also at national levels in advocating for good governance and pointing out lapses in governance such as abuse of human rights and endemic corruption through research and reports.<sup>193</sup>

The “three elements of participation, transparency and efficiency are principles of democratic good governance”<sup>194</sup> that bodies like the EAC must demonstrate to be seen as

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<sup>190</sup> Articles 6 (d) and 7 (2) of the Treaty Establishing the East African Community

<sup>191</sup> Article 124 (1) of the Treaty Establishing the East African Community

<sup>192</sup> See Augie, A. A., (2004), “Human Rights and Good Governance in Africa: A Critical Nexus Expanding Human Rights,” (Amina A. Augie, JCA, is a Justice of the Court of Appeal, Benin Division, Nigeria), available at [http://www.uneca.org/adf/adfiv/documents/speeches\\_and\\_presentations/amina.htm](http://www.uneca.org/adf/adfiv/documents/speeches_and_presentations/amina.htm) and accessed on 8th March 2009. The paper was presented at the Fourth African Development Forum (ADF-IV) held in Addis Ababa, Ethiopia from the 11<sup>th</sup> - 15<sup>th</sup> October 2004 on the theme “Governance for a Progressing Africa.”

<sup>193</sup> Bodies like Transparency International-Kenya (<http://www.tkenya.org/>) have been at the centre of exposing bad governance issues like endemic public corruption together with several human rights bodies in the region.

<sup>194</sup> Mori, W., (2007), “The Role of the Civil Society in the WTO – Transparency, Participation and Efficiency,” *Murdoch University E Law Journal*, Vol. 14, No.2, pp 252-264 at p 252

democratic and therefore practitioners of legitimate good governance. The participation of stakeholders like the private sector and the civil society therefore has the effect of conferring on the EAC democratic legitimacy.<sup>195</sup> The civil society, through pro-democratization initiatives, has played an important role in forcing the states to relax their authoritarian and dictatorial character in the conduct of public affairs.<sup>196</sup> This advocacy for good governance by demanding accountability, transparency and efficiency is a critical role that has enlightened the public and led to some measure of transparency and accountability in the management of public affairs in the region hence advancing the objectives of the community. The exposure of corrupt practices and scandals by public officials, for example, such as misappropriation of public funds has a deterrent effect on the perpetrators and makes the public more informed about the management of their financial affairs by those in authority. The private sector and the civil society have therefore a critical role to play in ensuring good governance in the region.

### **3.2.7 Being Part of the Solution-Think Tanks**

The private sector and civil society have an important role to play in complementing the efforts of governments at the national levels and the EAC in general in coming up with solutions and by suggesting possible solutions for debate, formulation and implementation so as to improve on the work done by member states and the EAC.<sup>197</sup> In this regard the civil society and private sector can act as “think tanks” to generate ideas which they can share with the governments of the member states and the EAC or offer at a fee in the form of consultancies and research and feasibility studies that are always conducted by the governments of member states and the EAC before embarking on implementation of various projects.<sup>198</sup>

Think tanks are basically “policy institutes or institutions for public policy research, analysis and engagement and whose major activities are analyzing, advising and engaging in advocacy on a wide range of domestic, regional and international issues as

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<sup>195</sup> Mori, 2007 at p 252

<sup>196</sup> Oyugi, W. O., “The Role of NGOs in Fostering Development and Good Governance at the Local Level in Africa with a Focus on Kenya,” *Africa Development*, Vol. XXIX, No. 4, 2004, pp 19-55 at p 49

<sup>197</sup> Augie, 2004 at p 1

<sup>198</sup> See the EAC Development Strategy 2006-2010 which has provisions for several studies prior to project implementation.

well as generation of policy-oriented research.”<sup>199</sup> The “outputs and interventions of think tanks are always invaluable to policymakers and the public for making informed decisions about public policy.”<sup>200</sup> Think tanks are not for profit organizations.

The region also has a fair share of private consultancies and consultants that are engaged in the business of conducting research, project studies, surveys, opinion polls and monitoring and evaluation services among others. These are professional persons and are to be found in virtually every professional category from lawyers to engineers to surveyors. The EAC and EABC have in the past made use of such private consultants through outsourcing. For example the Study on the Establishment of an East African Community Common Market was undertaken in 2007 by M.A. Consulting Group, a private consultancy firm.<sup>201</sup> The EAC makes use of these private sector entities to conduct research and studies and come up with recommendations which are then considered for implementation. This is an exemplification of the role the private sector can play in offering solutions and assisting in the integration process.

In the region there are several think tanks in each of the member states set up by both the private sector and civil society and their role in shaping public policy through research and public awareness creation has been commendable. For example the BCI reports compiled and released annually by the EABC informs the general public, the business community and the member states of the business environment prevailing in the region including the existence of NTBs.<sup>202</sup> The preparation of the BCI is outsourced by the EABC to private think tanks.<sup>203</sup> To that extent, the private sector and the civil society are in a position to play a leading role through think tanks in generating ideas, policies and solutions which if properly analyzed can make a contribution in deepening, strengthening and accelerating the regional integration process.

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<sup>199</sup> Muia, J., (2009), “The Role of Think Tanks in Developing Future Visions: An Application on Kenya Vision 2030,” p 2, a paper presented during the International Conference on: “The Role of Think Tanks in Developing Countries: Challenges and Solutions,” held between the 17<sup>th</sup> and 18<sup>th</sup> of January 2009 at Zamalek Marriot Hotel, Cairo, Egypt, and which is also available online at <http://www.thinktanking.idsc.gov.eg/papers/THINK%20TANK%20LONG%20PAPER%20Dec%2008%20Cairo%20Final.pdf> and accessed on 9<sup>th</sup> March 2009.

<sup>200</sup> Muia, 2009 at p 2

<sup>201</sup> The full final report of the study is available at [http://www.eac.int/downloads/cat\\_view/68-eac-common-market.html](http://www.eac.int/downloads/cat_view/68-eac-common-market.html) and accessed on 21st March 2009

<sup>202</sup> EABC, 2008 at pp 2 & 7

<sup>203</sup> For example the BCI 2008 was prepared by Steadman Group, a private research and consultancy firm based in Nairobi, Kenya, on behalf of EABC.

### **3.3 Challenges Facing the Private Sector and Civil Society**

In its quest to be the driving force behind regional integration within the East African Community, the private sector has encountered a myriad of challenges. And so does the civil society. These challenges, both national and regional in character, have slowed down the momentum of the private sector and civil society in the regional integration process.

#### **3.3.1 Prevalence and Persistence of Non-Tariff Barriers (NTBs)**

The prevalence and persistence of NTBs, which range from administrative and legislative measures to infrastructure hindrances within the region, has been one of the major hindrances to greater and deeper participation of the private sector in the development of trade and investment.<sup>204</sup> NTBs are regarded as “laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State whose effect is to impede trade.”<sup>205</sup> With the coming into force of the customs union in 2005,<sup>206</sup> the partner states committed to remove immediately any NTBs and undertook not to impose any new NTBs.<sup>207</sup> The NTBs that businesses experience most in the course of their intra-EAC trade broadly include “cumbersome customs and administrative documentation procedures, varying, cumbersome and duplicated immigration procedures, cumbersome and time wasting inspection requirements, unusually high number of police road blocks, varying and un-harmonized trade regulations, varying, cumbersome and costly transiting procedures, costly and duplicated functions of agencies involved in verifying quality, quantity and dutiable value of imports and exports cargo, high incidences of corruption manifested in the form of exhortation for bribes at police road blocks and varying, cumbersome, costly and time consuming business registration and licensing.”<sup>208</sup> These

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<sup>204</sup> EABC, (2008i), “Deepening Regional Integration through Greater Private Sector Involvement,” EABC Briefing Paper, October 2008, at p 18, available at <http://eabc.info/node/116> and accessed on 28th February 2009

<sup>205</sup> See Article 1(1) of the Protocol on the Establishment of the East African Community Customs Union available at [http://www.eac.int/eacu/downloads/doc\\_details/154-eac-customs-union-protocol.html](http://www.eac.int/eacu/downloads/doc_details/154-eac-customs-union-protocol.html) and accessed on 28th February 2009.

<sup>206</sup> The East African Community Customs Union Protocol was signed at Arusha, Tanzania on 2<sup>nd</sup> March 2004 and came into force on 1<sup>st</sup> January 2005.

<sup>207</sup> Article 13 of the Treaty Establishing the East African Community

<sup>208</sup> EAC Secretariat & EABC, 2008 at pp 3-10

NTBs have the cumulative effect of frustrating business people and translate into business time loss and additional costs during their application or implementation.<sup>209</sup>

The effect of these NTBs on the private sector and the economies of the member states have been enormous. For example, it is estimated that due to cumbersome and burdensome customs procedures, annual intra-EAC trade worth US\$31.6M goes unrecorded.<sup>210</sup> This translates to loss of much needed revenue in the form of customs duty that would have been levied and collected had that volume of trade been recorded. This unrecorded trade is also a health and security risk as it means that the goods have not undergone health and quality assurance assessment by the relevant bodies and can easily lead to the spread of animal, human and plant diseases in case of outbreaks due to absence of health inspection.<sup>211</sup> The customs declaration forms are also complex hence there is an urgent need to simplify the same for use by business people.

Following the passage of the East African Community Standardization, Quality Assurance, Metrology and Testing Act<sup>212</sup> by the East African Legislative Assembly and its coming into force on 1<sup>st</sup> August 2007, it would have been expected that there would by now be in place a harmonized system in the region regarding standards and that there would be mutual recognition of the same among the partner states. This has not been the case and the private sector is faced with the challenge of varying standards in the member states due largely to delay in the harmonization of standards in the region such as “motor vehicle safety standards, emission level standards and testing standards for used motor vehicles.”<sup>213</sup>

There is also the duplicated function of many agencies involved in verifying quality, quantity and dutiable value of imports and exports. This results in duplicated effort and wastage of valuable time for the business people. Compounding this bottleneck is the absence of established laboratories for the relevant inspection agencies at the ports or points of entry and exit.<sup>214</sup> This inevitably leads to delays before goods are cleared for entry or exit which in turn leads to additional costs born which are borne by the exporter

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<sup>209</sup> EAC Secretariat & EABC, 2008 at p 8

<sup>210</sup> Ubwani, Z., (2008), “Stringent Customs Rules Hamper EAC Trade,” Kenya’s *Daily Nation* of 9<sup>th</sup> September 2008 available at <http://www.tralac.org> and accessed on 28<sup>th</sup> February 2009.

<sup>211</sup> EAC Development Strategy 2006-2010 at p 19

<sup>212</sup> A complete copy of the Act is available at <http://www.meac.go.ke> and accessed on 28<sup>th</sup> February 2009.

<sup>213</sup> EAC Development Strategy 2006-2010 at p 20

<sup>214</sup> EAC Secretariat & EABC, 2008 at p 10

or importer and ultimately passed on to the consumer. It is not uncommon to find a constellation of police officers, veterinary officers, sanitary and phyto-sanitary (SPS) officials and standard bureau officials of a member state at a point of exit or entry awaiting their turn to individually inspect the goods prior to clearance for either export or import as the case may be.<sup>215</sup>

The prevalence of myriad NTBs within the region therefore has the effect of adding unnecessary costs and wasting valuable time and in the long run makes the private sector in the region less internationally competitive.<sup>216</sup> The full impacts of NTBs also act as a deterrent to local investment or expansion of local productive capacity to capture the regional export market by the private sector. For example Musoma Dairy in Tanzania has been unable to access the Kenyan market with its processed milk due primarily to NTBs applied by the Kenya Revenue Authority, Kenya Bureau of Standards and the Kenya Dairy Board.<sup>217</sup> It therefore follows logically that a private investor aware that it is impossible to export processed good to a neighbouring country within the region due to the prevalence of NTBs will not invest in increased productive capacity to access that market. The negative economic impact of NTBs can be measured in terms of official payments, general expenses such as staff and storage costs, non-official payments in the form of bribery payments to speed up clearance of delayed goods, lost business opportunities, wasted products in the case of perishable goods and cost of time lost in understanding and complying with unclear procedures.<sup>218</sup> The EAC secretariat has pursuant to the provisions of Article 13 (2) of the EAC Customs Union Protocol established a NTBs Monitoring Mechanism jointly with the East African Business Council (EABC) to “facilitate the process of identifying, reporting and monitoring the elimination of current and future NTBs within the EAC partner states.”<sup>219</sup> It is hoped that the monitoring mechanism will outlive the present customs union and even become stronger under the envisaged common market. The biggest handicap of the EAC Secretariat’s monitoring mechanism is its lack of enforcement power. The EAC

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<sup>215</sup> EAC Development Strategy 2006-2010 at p 21

<sup>216</sup> EAC Secretariat & EABC, 2008 at p 5

<sup>217</sup> Mwamunyange, J., (2008), “Dar cites ‘hypocrisy’ in integration talks,” appearing in *The EastAfrican* of 20<sup>th</sup> December 2008 and available at <http://www.theeastafican.co.ke/news/-/2558/504710/-/827v6hz/-/index.html> and accessed on 4th March 2009.

<sup>218</sup> EAC Secretariat & EABC, 2008 at pp 12-13

<sup>219</sup> EAC Secretariat & EABC, 2008 at p 3



Secretariat is powerless in the enforcement or elimination of NTBs among member states and only makes reports to the Council of Ministers for information and possible resolution of the dispute.<sup>220</sup> In the absence of a clear and strong enforcement mechanism, the elimination of NTBs is left to the individual member states to act in good faith and put in place necessary measures, whether legislative or administrative, to eliminate identified NTBs. For example, by 16<sup>th</sup> February 2009, Kenya had reduced the number of police road blocks from 45 to 15 along the Northern Corridor, a road that links the Port of Mombasa to the interior through Uganda all the way to the Eastern DRC.<sup>221</sup> This was done as part of the implementation of the wider EAC Mechanism on Monitoring and Elimination of Non-Tariff Barriers in the region. The EAC Secretariat in conjunction with the member states and with the active lobbying of EABC has set up NTB National Monitoring Committees in each of the five member states to coordinate the monitoring and removal of NTBs, but their effectiveness has been hindered by lack of technical capacity to facilitate the reporting and removal of NTBs.<sup>222</sup> There is however ongoing training of members of the national monitoring committees to develop their capacity to monitor, report and remove NTBs.<sup>223</sup>

In spite of the prevalence and identification of the above NTBs by the EAC Secretariat and the EABC, the private sector especially truck drivers, cross border traders and clearing agents still lack formal mechanisms through which they can report the NTBs and they are in strong support of the establishment of a formal mechanism through which they can relay their problems promptly and necessary remedial action taken.<sup>224</sup>

### **3.3.2 Inadequate Access to Information**

It is difficult for the private sector to obtain relevant, timely, affordable and reliable trade information, trade data and key instruments such as the harmonized tariff book and other relevant legal instruments to enable business people to make quick and timely

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<sup>220</sup> The Council of Ministers is one of the organs of EAC established under Article 9(1) (b) of the EAC Treaty and is clothed with the power to resolve disputes referred to it under Article 14(3) (1) of the treaty.

<sup>221</sup> Kenya, Government of, (2009), "Kenya Pulls down Road Blocks along Northern Corridor," a press release available at <http://www.meac.go.ke> and accessed on 3<sup>rd</sup> March 2009

<sup>222</sup> See "EABC Activities in Elimination of NTBs," available at the EABC website at <http://eabc.info/advocacy-lobbying/non-tariff-barriers> and accessed on 3<sup>rd</sup> March 2009

<sup>223</sup> EAC Secretariat & EABC, 2008 at 21

<sup>224</sup> EABC, 2008i at p 22

commercial decisions.<sup>225</sup> Accessing reliable business information remains a major challenge in the region and without relevant information companies and business people cannot make right and timely decisions as they are deprived of necessary ‘information on market opportunities, market and product trends, buyer contacts and buyer requirements, among others.’<sup>226</sup> The availability of information on EAC Customs Union instruments such as the Common Tariff Handbook among business people is rather low or unavailable in certain instances like for some companies in Uganda, Rwanda and Burundi according to a study by the EABC.<sup>227</sup>

The leading sources of information on the EAC are the media, business workshops, conferences and seminars, EAC Website and EAC Secretariat and EABC.<sup>228</sup> However the reach and accessibility of these sources are severely limited in scope. It cannot for example encompass the large number of the private sector that has no access to internet services or cannot attend seminars, workshops and conferences. There is an urgent need to develop and implement an outreach strategy so that as broad a spectrum of the business community as practically possible can be able to access information on the community to be able to participate in the regional integration process.<sup>229</sup>

Its in recognition of the crucial role that the availability of reliable, affordable, timely and relevant information play in the integration process that the contracting states committed themselves to “establish a quality information system that will allow collection, harmonized processing and timely dissemination of data and information” as a way of strengthening the private sector.<sup>230</sup>

The biggest challenge for the private sector however lies in access to information on rules, regulations and laws that affect trade and investment at the national level. There is as yet no centralized system or database for such information from the partner states at

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<sup>225</sup> CBI News Bulletin, (2007), “East Africa Enters a New Era through RISE Portal,” pp 38-39, available at [http://www.cbi.eu/download/actualiteit/east\\_africa\\_enters\\_RISE\\_portal.pdf](http://www.cbi.eu/download/actualiteit/east_africa_enters_RISE_portal.pdf) and accessed on 6th March 2009.

<sup>226</sup> CBI News Bulletin, 2007 at pp 38-39

<sup>227</sup> EAC Development Strategy 2006-2010 at p 18

<sup>228</sup> EAC Development Strategy 2006-2010 at p 18

<sup>229</sup> EAC Development Strategy 2006-2010 at p 18

<sup>230</sup> Article 128 (2) (c) of the Treaty Establishing the East African Community

the regional level that can be accessed by the private sector. This problem is compounded by the fact that laws, rules and regulations are yet to be harmonized across the region.<sup>231</sup> Ordinarily national rules, regulations and laws are printed and available for sale at the respective government printers and can be obtained at most libraries. However, it is almost impractical due to cost factor for members of the private sector in the respective member states to access the same from such sources. There is therefore an urgent need to ensure that such important statutes and regulations are centrally available for access by the private sector or widely distributed in the respective member states. However this requirement would be unnecessary if the relevant rules, regulations and laws were harmonized and commonly applicable in the entire region.

### **3.3.3 Infrastructure Constraints**

It need not be gainsaid that the state of infrastructure has a direct bearing on the cost of doing business for the private sector and this in turn reflects on the competitiveness of the private sector both intra-regionally and internationally.<sup>232</sup> Infrastructure is a broad term that at its most basic covers railways and rail transport, roads and road transport, civil aviation and air transport, energy, telecommunications and maritime transport and ports, postal services, meteorological services and inland waterways transport among others.<sup>233</sup> Poor infrastructure continues to be one of the greatest stumbling blocks to greater intra-regional trade and also to commercial accessibility of the region to the rest of the world and this in turn impacts negatively on the region's competitiveness. This inevitably translates into high costs of doing business for the private sector.<sup>234</sup>

The EAC in recognition of the effect of poor infrastructure on trade and investment by the private sector in the region has embarked on a series of initiatives and programmes to

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<sup>231</sup> EAC Development Strategy 2006-2010 at p 18

<sup>232</sup> See "Infrastructure," available at the EABC website at <http://eabc.info/advocacy-lobbying/infrastructure> and accessed on 3rd March 2009.

<sup>233</sup> See generally Articles 89-102 of the Treaty Establishing the East African Community that deals with cooperation in infrastructure and services within the EAC

<sup>234</sup> Empirical evidence shows that the cost of doing business is higher in Africa than in other regions of the developing world due to poor infrastructure among others. For more on this see generally Ramachandran, V., Shah, M. K., & Tata, G. M., (2007), "How Does Influence-Peddling Impact Industrial Competition? Evidence from Enterprise Surveys in Africa," also available online at [http://www.cgdev.org/files/14517\\_file\\_Influence\\_Peddling](http://www.cgdev.org/files/14517_file_Influence_Peddling) and accessed on 3rd March 2009

alleviate this situation.<sup>235</sup> High transport costs due mainly to high fuel prices and poor road, rail and air networks has been a hindrance to greater intra-regional trade and investment in the region and has discouraged many potential investors, both domestic and foreign.<sup>236</sup> It is estimated that transport costs in East Africa are four to five times higher than those in the developed world.<sup>237</sup> It is estimated that 52% of the road network in the region is in poor condition, poorly maintained, poorly serviced and in urgent need of repair and rehabilitation.<sup>238</sup> The East African Road Network project has been initiated to alleviate the infrastructure constraints in the region and to develop cross border links that can effectively facilitate trade within the region.<sup>239</sup> It should be noted that road transport is the predominant mode of freight and passenger transport in the region and carries between 80-90 per cent of the region's total trade in goods and services and also natural persons.<sup>240</sup> Plans are underway to restructure the railway and rail system in the region and to improve on the port services at Mombasa and Dar es Salaam.<sup>241</sup>

The region experiences high, fluctuating and unpredictable fuel and energy prices, insufficient and unreliable power supply, high electricity costs and low rates of electrification. These factors combined have pushed up the cost of doing business and impacted negatively on the private sector's competitiveness both intra-regionally and internationally.<sup>242</sup> Kenyan manufacturers pay between Shs. 10 and Shs. 15 per kilowatt of electricity while their counterparts in China and India pay an equivalent of between Shs. 2.50 and Shs. 3.80 per kilowatt of electricity while electricity in Kenya is four times costlier than in Egypt which is Kenya's competitor within the COMESA region.<sup>243</sup> This

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<sup>235</sup> EAC Development Strategy 2006-2010 at pp 8, 9, 27 and 44-47

<sup>236</sup> UNECA, (2009), "High Transport Costs, Bribery, Long Delays Impede Intra-African Trade-Report," at p 1, available at [http://www.uneca.org/eca\\_resources/news/2009/090226trade.htm](http://www.uneca.org/eca_resources/news/2009/090226trade.htm) and accessed on 8<sup>th</sup> March 2009

<sup>237</sup> USAID East Africa, (2008), "Regional Workshop to Review Harmonization of Key Elements and Implementation of Best Practice in Overload Control," a press release dated Friday 18<sup>th</sup> July 2008, available at <http://eastafrika.usaid.gov/en/article.1172.aspx> and accessed on 4<sup>th</sup> March 2009.

<sup>238</sup> "Road Transport," available at <http://eabc.info/advocacy-lobbying/infrastructure/road-transport> and accessed on 4<sup>th</sup> March 2009.

<sup>239</sup> EAC Development Strategy 2006-2010 at p 8

<sup>240</sup> USAID East Africa, 2008, at p 1

<sup>241</sup> EAC Development Strategy 2006-2010 at p 9

<sup>242</sup> See "Energy Sector," available at the EABC website at <http://eabc.info/advocacy-lobbying/infrastructure/energy> and accessed on 4<sup>th</sup> March 2009.

<sup>243</sup> Maina, B., (2008), "High Power Costs Make Kenya's Industrialization a Pipe-Dream," at page 1, a press release on behalf of the Kenya Association of Manufacturers available at <http://www.kam.co.ke> and accessed on 17<sup>th</sup> March 2009

makes Kenya's manufactured products costlier and hence less competitive in the market due to high energy costs. Uganda's electricity tariff is reputed to be one of the highest in Africa at approximately US\$ 0.24/Kwh while a majority of the population is rural based and poor and have no access to electricity connection.<sup>244</sup> By and large the energy sector in the region is yet to produce the amount of energy to meet the ever-increasing demand of the manufacturing industry.<sup>245</sup> The East African Power Master Plan being implemented by the EAC in conjunction with the member states aims to create an East African Power Pool and an East African Power Grid which is hoped will ensure uninterrupted power supply within the region and eventually bring down the cost of power in the region.<sup>246</sup> With reliable, cost effective and sufficient energy services it is hoped that the competitiveness of businesses in the region will be enhanced. These programmes are still in their formative stages and the private sector still grapples with huge infrastructure constraints.

### **3.3.4 Inconsistent Commitment to the EAC by Member States**

Government policies have been unpredictable and largely provide inadequate support to the business community and this has bred a perception by the private sector that there is a consistent lack of commitment to the EAC by member states.<sup>247</sup> The making of unpredictable policy changes and unilateral decisions by the member states have been one of the major impediments to the activities of the private sector. A case in point is the decision of the government of Tanzania in December 2008 to deny entry into its territory of vehicles manufactured and assembled in Kenya by General Motors East Africa Limited under the EAC Rules of Origin that accords such locally manufactured and assembled goods preferential treatment as against vehicles from outside the EAC.<sup>248</sup> General Motors East Africa Limited had exported vehicles to Tanzania since 1999 under

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<sup>244</sup> Byakola, T., (2007), "Improving Energy Resilience in Uganda," at p 6, and available at <http://www.helio-international.org/Uganda.En.pdf> and accessed on 17th March 2009

<sup>245</sup> See "Energy Sector," available at the EABC website at <http://eabc.info> and accessed on 4<sup>th</sup> March 2009

<sup>246</sup> See "Energy Sector" available at <http://eabc.info> and accessed on 4<sup>th</sup> March 2009

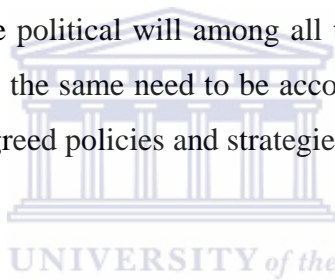
<sup>247</sup> EAC Development Strategy 2006-2010 at p 18

<sup>248</sup> EABC, (2009), "Locally Manufactured Vehicles Given Access to Tanzanian Market," a press release of EABC dated 20<sup>th</sup> January 2009, available at <http://eabc.info/node/103> and accessed on 4th March 2009.

the EAC Rules of Origin<sup>249</sup> and the decision to deny its exports preferential treatment was arbitrary and exhibited inconsistency with Tanzania's commitment to the EAC. It took the intervention of the EABC and the EAC Secretariat to hold a meeting with the Tanzanian Revenue Authority and the Tanzanian Minister for East African Community to have the preferential treatment reinstated.<sup>250</sup> This was a matter where no law had been changed but bureaucrats in government just arbitrarily changed the rules of the game that in effect hurt a private sector member.

Commerce, the world over, thrives in an atmosphere of predictability of rules and regulations. Arbitrariness and inconsistencies in the application of rules and regulations has the singular effect of discouraging businessmen from engaging in commercial activities for fear of suffering huge losses or incurring high costs when rules and regulations are changed midstream.

Although there is demonstrable political will among all the partner states to deepen and strengthen regional integration, the same need to be accompanied by firm and consistent political commitment for the agreed policies and strategies of the EAC to be implemented within all the partner states.<sup>251</sup>



### **3.3.5 Lack of Access to Affordable Credit, Capital, Finance and Funds**

It is estimated that the structure of the private sector in the region is such that it is dominated by Micro, Small and Medium size Enterprises (MSMEs) which account for 87% of all enterprises in the region and on average contribute over 70% of non-agricultural employment in the region.<sup>252</sup> The private sector in East Africa consists of a large percentage of MSMEs and a small percentage of large corporations. Lack of access to finance combined with a weak regulatory framework that is not supportive of flow of

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<sup>249</sup> Complete text of the Rules of Origin is available at the EAC website at <http://www.eac.int/> and requires manufactured or assembled products from partner states to meet a minimum of 35% value addition to be eligible for preferential treatment.

<sup>250</sup> EABC, 2009 at pp 1 & 2

<sup>251</sup> EAC Development Strategy 2006-2010 at pp 3 & 19

<sup>252</sup> See generally the abridged version of a draft "EAC Private Sector Development Strategy," available at <http://eabc.info/files/PSD%20STRATEGY-%20abridged%20version.doc> and accessed on 5<sup>th</sup> March 2009.

capital to MSMEs is a key constraint to the development of MSMEs in Kenya<sup>253</sup> and within the entire region.

There are weak and inadequate financial sector policies that could act as a boost to private sector development in the region and this is more particularly expressed in the form of absence of regional harmonization of banking laws, insurance laws, capital markets laws, pension legislations and social security schemes.<sup>254</sup> This was demonstrated when Tanzania on 4<sup>th</sup> April 2008, through Bank of Tanzania, the country's central bank and principal financial markets regulator, blocked its citizens and the Dar es Salaam Stock Exchange from participating<sup>255</sup> in the Safaricom<sup>256</sup> Initial Public Offering (IPO) at the Nairobi Stock Exchange. This action by the Bank of Tanzania occurred against a policy decision by the Council of Ministers of the community in September 2004 to allow the participation of the citizens of East Africa, both natural and juridical, in capital markets investment and that requires that all the partner states treat East Africans as domestic investors in the allocation of new IPOs.<sup>257</sup> This shows a divergence of policies mainly attributable to the absence of harmonization of the financial services sector in the region. This hinders the participation of the private sector regionally.

The problem of access to finance, capital and credit regionally is also deepened by the inadequate capacity of the East African Development Bank (EADB)<sup>258</sup> to participate in private sector finance due to the limited mandate it enjoys under its constitutive charter and its low capital base. Presently EADB<sup>259</sup> only finances medium and large scale enterprises and is short of resources for lending to national level financial institutions that

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<sup>253</sup> World Bank, (2007), "Kenya: Unleashing the Potential for Trade and Growth," at p xii, available at [http://siteresources.worldbank.org/INTRANETTRADE/Resources/Kenya\\_DTIS.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/Kenya_DTIS.pdf) and accessed on 5<sup>th</sup> March 2009

<sup>254</sup> EAC Development Strategy 2006-2010 at p 19

<sup>255</sup> Mugabe, D., (2008), "Speculators Smile over IPO," Uganda's *East African Business Week* dated 28<sup>th</sup> April 2008, and available at <http://www.propertykenya.com/news/533000-speculators-smile-over-ipo.php> and accessed on 5<sup>th</sup> March 2009

<sup>256</sup> Safaricom is a telecommunications company in Kenya and is reputed to be the biggest company in East and Central Africa in terms of turnover. The government of Kenya, one of its initial shareholders, offloaded its 10 billion shares to the public in early 2008. East Africans were treated as local investors in the offer. For more on safaricom see generally its website at <http://www.safaricom.co.ke>

<sup>257</sup> EAC Development Strategy 2006-2010 at p 37

<sup>258</sup> EADB is one of the institutions of the EAC established under Article 9(3) of the EAC Treaty.

<sup>259</sup> For more on EADB see generally its website at <http://www.eadb.org/>

can in turn lend to small and micro enterprises.<sup>260</sup> So regionally the private sector has no access to affordable credit, finance or capital in the form of a regional financial body while nationally access to capital, finance or credit is impeded by high interest rates that make servicing loans by the private sector an uphill task. For instance in 2007, short term loan<sup>261</sup> commercial bank lending rates were averagely 17.7%, 14.7%, 18.2%, 13.0% and 16.4% per annum in Burundi, Tanzania, Uganda, Kenya and Rwanda respectively.<sup>262</sup> These rates prevailing in the region are high and prohibitive for the private sector and stifles access to affordable credit. This region-wide weakness in access to capital, credit or finance is further exacerbated by limited banking networks, non-performing loans, low level of monetization of the EA economy and the absence of a regional investment code. In recognition of the problem posed by lack of access to credit, capital and finance, to the private sector and especially MSMEs, the partner states undertake in the EAC Treaty to “collaborate with their national chambers of commerce and industry to establish lending institutions that shall primarily cater for the private sector especially the small-scale entrepreneurs who find it difficult to obtain credit from commercial banks and financial institutions.”<sup>263</sup> This is recognition of the financial constraints facing the private sector at the inception of the community. Sadly though, there has been no actualization of the aforesaid provision and the national chambers of commerce and industry are generally weak and inefficient and engaged in endless leadership wrangles at the expense of serving the business community.<sup>264</sup> Indeed no lending institution has been established within the member states constituting the EAC that exclusively caters for the small-scale entrepreneurs in the private sector.

The civil societies in the region, being not for profit, rely on donor funds or grants from government and routinely suffer from absence of adequate funding.<sup>265</sup> This has impaired and hampered their functions and they are in certain cases unable to carry out projects

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<sup>260</sup> On the limitations of EADB see generally, ADB, (2007), “Multinational Fifth Line of Credit to East African Development Bank (EADB): Project Performance Evaluation Report,” dated 13<sup>th</sup> March 2007 and available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Evaluation-Reports/14586358-EN-MULTINATIONAL-FIFTH-LINE-OF-CREDIT-TO-EADB.PDF> and accessed on 5<sup>th</sup> March 2009.

<sup>261</sup> A short term loan is a loan with a maturity period of one to five years.

<sup>262</sup> EAC Secretariat, 2008 at p 31

<sup>263</sup> Article 127 (2) (f) of the Treaty Establishing the East African Community

<sup>264</sup> See generally “Resolve Chamber Mess,” published in Kenya’s *Saturday Nation* of 2<sup>nd</sup> June 2007 and available at <http://www.nation.co.ke> and accessed on 7<sup>th</sup> March 2009.

<sup>265</sup> Augie, at p 1



due to lack of funds.<sup>266</sup> Adequate financing for both the private sector and the civil society therefore comes out as a major challenge that can either stall or slow down the implementation of their various activities.

### **3.3.6 Inefficient and Weak National and Regional Institutions**

The organs and institutions of the EAC and mostly the Secretariat do not have the financial and human resources capacity necessary to carry out their functional mandates and is also hampered by the limited legal executive authority for enforcement in terms of implementation of community programmes.<sup>267</sup> The EAC Secretariat is understaffed and this impedes its role in carrying out its functions like monitoring and evaluating the implementation of council or summit decisions.<sup>268</sup> The EAC Secretariat in the 2006-2010 Development Strategy admits that “the secretariat is thin on the ground with departments understaffed (sometimes with one person).”<sup>269</sup> The EAC Secretariat also admits that its mandate has “expanded over time without corresponding expansion of its capacity in terms of professional cadre of staff, thus overstretching the capacities of such staff.”<sup>270</sup> This has had negative implications on the efficiency and effectiveness of the EAC Secretariat staff on service delivery in terms of administration and implementation.<sup>271</sup> The EAC also relies on funding from member states which is inadequate and is mostly not remitted in time.<sup>272</sup> This hinders its capacity to perform optimally. Lately the EAC is becoming more and more dependant on development partners for its budgetary support, a situation that is not sustainable as its mandate widens and responsibilities increase that translates into need for more stable and assured financial resources.<sup>273</sup> The partner states have not ceded enough sovereignty to the EAC to enable its organs and institutions to

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<sup>266</sup> Augie, 2004 at p 1

<sup>267</sup> EAC Development Strategy 2006-2010 at pp 24-25

<sup>268</sup> EAC Development Strategy 2006-2010 at p 20

<sup>269</sup> EAC Development Strategy 2006-2010 at p 25

<sup>270</sup> EAC Development Strategy 2006-2010 at p 25

<sup>271</sup> EAC Development Strategy 2006-2010 at p 25

<sup>272</sup> Ubwani, Z., (2009), “Tanzania to the Rescue as Regional Bloc Faces Crunch,” appearing in Kenya’s *Daily Nation* of 20<sup>th</sup> February 2009 and available at <http://www.nation.co.ke/News/africa/-/1066/532538/-/haxx0f/-/index.html> and accessed on 5th March 2009.

<sup>273</sup> EAC Development Strategy 2006-2010 at p X

operate with more strength in implementing treaty provisions.<sup>274</sup> This failure to cede some sovereignty to the EAC by the partner states has acted to further weaken the capacity of the EAC to have strong regional level institutions and organs that can decisively act to the benefit of the private sector at the regional level. The principle of sublimity, one of the operating principles of the EAC, which allows for harmonization of national policies, strategies, plans, laws, regulations, practices and standards with regional counterparts has not been operationalised in the community although it has been endorsed.<sup>275</sup> The principle of sublimity when implemented ensures that regional laws, practices, regulations, standards, plans and strategies supercede any national law, policy, regulation, plan, strategy, standard or practice.<sup>276</sup> This will in effect entail the ceding of national sovereignty to the community in respect of certain shared values and areas by the partner states. The partner states are yet to cede any such sovereignty. All these weaknesses of the EAC is compounded by the absence of an effective monitoring and evaluation mechanism backed with the requisite resources and human capacity to measure the progress of implementation of community programmes both at regional and national levels.<sup>277</sup>

In spite of governance reforms initiated over the years in the member states, public institutions are still weak and in most cases lethargic and do not possess the requisite attitude in their service and relationship with the private sector. Improved systems of governance reduce the cost of doing business for the private sector by curbing corruption and promoting financial discipline.<sup>278</sup> Improved levels of public sector governance must go hand in hand with good corporate governance that inculcates a culture of democratic leadership and cohesion in business organizations for positive results for the private

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<sup>274</sup> Kingi, A. J., (2009), “Cede Some Ground, Minister Kingi Appeals to EAC Partners,” a Ministerial Speech delivered on 29<sup>th</sup> January 2009 during a High Level Task Force (HLTF) Meeting on the Negotiations on the East African Common Market Protocol at Kisumu, Kenya, and available at <http://www.meac.go.ke> and accessed on 5<sup>th</sup> March 2009. See also Menya, W., (2009), “Tanzania Takes Tough Stance at Regional Trade Talks”, Kenya’s *The Daily Nation* of 30<sup>th</sup> January 2009, available at <http://www.nation.co.ke/News/africa/-/1066/521588/13rwi2qz/-/index.html> and accessed on 5<sup>th</sup> March 2009

<sup>275</sup> EAC Development Strategy 2006-2010 at pp vii, ix,52, 53 & 54

<sup>276</sup> EAC Development Strategy 2006-2010 at p 53

<sup>277</sup> EAC Development Strategy 2006-2010 at pp 24-25

<sup>278</sup> EAC Development Strategy 2006-2010 at p 19

sector to be realized.<sup>279</sup> Public sector organizations should provide the necessary to the private sector and the civil society like streamlining administrative procedures, providing an enabling environment for private sector and civil society growth and development, facilitating trade and investment, ensuring the dissemination of information to the public and facilitating communication with the stakeholders. The obstacles posed to the private sector by inefficient and weak institutions both nationally and regionally need to be addressed to ensure accelerated growth of the private sector in the region. This would call for political, administrative, legal and financial interventions both nationally and regionally to provide the requisite policy space for the private sector and the civil society to grow and thrive.

### **3.3.7 Lack of Public-Private Partnership**

Public-Private Partnership (PPP) has been variously defined as an agreement between government and private sector regarding the provision of public services or infrastructure<sup>280</sup> or a government service or private business venture which is funded and operated through a partnership of government and one or more private sector companies.<sup>281</sup> At the national level, the PPP concept has gained currency in terms of broad policy statements, policy dialogue, advocacy and participation in consultations and conferences and has had some successes for example in the provision of pharmaceuticals in Uganda.<sup>282</sup> This particular PPP initiative has provided the Uganda national programmes for leprosy, lymphatic filariasis, onchocerciasis and sleeping sickness, which pose serious public health problems in some districts in the country, by assuring a “sustained and consistent supply of free, high quality drugs with no unreasonable conditionalities.”<sup>283</sup> The Kenyan government, as a manifestation of the importance of

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<sup>279</sup> EAC Development Strategy 2006-2010 at p 25

<sup>280</sup> This is according to Answers.com available at <http://www.answers.com/topic/public-private-partnership> and accessed on 5th March 2009.

<sup>281</sup> This is according to Wikipedia available at <http://en.wikipedia.org/wiki/Public-private-partnership> and accessed on 5th March 2009

<sup>282</sup> Caines, K, Bataringaya, J, Lush, L, Murindwa, G, & N’jie, H, (2003), “Impact of Public-Private Partnerships Addressing Access to Pharmaceuticals in Low Income Countries: Uganda Pilot Study,” pp 5-6, report of a pilot study on the impact of selected public-private partnerships addressing access to pharmaceuticals, available at <http://www.dfid.gov.uk/pubs/files/ipph-accesspharmaceuticals-uganda.pdf> and accessed on 5th March 2009.

<sup>283</sup> Caines, et al, 2003 at p 5

PPP, has joined resources with the private sector in The East African Marine System (TEAMS) project, an undersea cable system to provide broadband connectivity that is hoped will reduce the costs of communication as well as spur the growth of Business Process Outsourcing (BOP).<sup>284</sup> The Kenya government owns 20% of the project while the rest is shared among a consortium of national and international private sector companies. The governments of Burundi, Rwanda and Tanzania on 23<sup>rd</sup> January 2009 at the close of a five-day Meeting of the 6<sup>th</sup> EAC Sectoral Council on Transport, Communications and Meteorology held at Arusha, Tanzania signed a Memorandum of Understanding (MoU) aimed at developing a multinational railway project based on the PPP financing model.<sup>285</sup> This exemplifies how PPP assists in filling the financial gap in the financing of infrastructure and service ventures by the partner in the region. These PPP initiatives largely take place in the partner states without defined legal frameworks to guide them and are based mostly on Memorandum of Understanding (MoUs) signed between the government and the private sector.<sup>286</sup>

At the national level Kenya has set an example in the region by going a step further and establishing rules on PPP.<sup>287</sup> The rules published in a special issue of the Kenya Gazette<sup>288</sup> on 20<sup>th</sup> March 2009 provide the legal framework that defines the roles, duties and liabilities of the private sector and the government in a PPP project. This is a welcome move to the private sector as it provides them with legal backup when they engage in investments directly in public projects in partnership with the government.

In spite of its financial constraints, however, the EAC lacks PPP framework at the regional level and indeed the private sector is not mainstreamed in the formulation, financing and implementation of its programmes, a position that has been contested by

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<sup>284</sup> Kenya, Government of, (2008), "Fibre Optic Cable to Significantly Improve Kenya's Connectivity," p 1, available at [http://www.information.go.ke/home/index2.php?option=com\\_content&do\\_pdf=1&id=20](http://www.information.go.ke/home/index2.php?option=com_content&do_pdf=1&id=20) and accessed on 15<sup>th</sup> March 2009

<sup>285</sup> Anyango, G, (2009), "Multi-national Pact Signed for Railway Project in East Africa," *The News Times*, Arusha, of 27<sup>th</sup> January 2009, which is available online at [http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause\\_dir\\_news\\_item&cause\\_id=1694&news\\_id=59121&cat\\_id=1051](http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=59121&cat_id=1051) and accessed on 16<sup>th</sup> March 2009

<sup>286</sup> Anyango, 2009 - the railways project is being carried out under a MoU.

<sup>287</sup> Kathuri, B., (2009), "State Publishes Rules for Public-Private Partnerships," appearing in Kenya's *The Standard* of Saturday the 21<sup>st</sup> of March 2009 and available online at <http://www.eastandard.net/business/InsidePage.php?id=1144009436&cid=14&> and accessed on 21<sup>st</sup> March 2009

<sup>288</sup> Published by the Government Printer, Haile Selassie Avenue, Nairobi and open to purchase by the public without any preconditions whatsoever

the private sector that is keen on partnering with the EAC to ensure realization of deeper and faster integration.<sup>289</sup> It would be a better idea if PPP was mainstreamed and institutionalized in the EAC as a way of integrating the private sector in the policies and programmes of the community and as a way of filling the community's resource gap.

### **3.3.8 Inadequate Justice Delivery System**

The justice system is always the last recourse of the private sector and the civil society in the enforcement of a varied set of rights ranging from breaches of contractual obligations and property rights to enforcement of fundamental human rights in case of state abuse.<sup>290</sup> The justice system in the region is faced with major problems ranging from perceived lack of independence, long delays in the conclusion of cases, political interference, corruption and inadequate judicial officers.<sup>291</sup> For example in September 2003, a judicial report in Kenya implicated 5 Court of Appeal Judges (56%), 18 High Court Judges (50%), and 82 Magistrates (32%) in judicial corruption, misbehaviour and want of ethics.<sup>292</sup> This report indicted the “capacity of the Kenyan judiciary to be an independent and impartial arbiter of legal disputes and a champion and safeguard of human rights and the rule of law.”<sup>293</sup> A survey conducted in Tanzania in 2003 revealed that 36% of the respondents thought that Judges and Magistrates were corrupt and that one had to pay something “extra” to receive services in the judiciary.<sup>294</sup> A National Integrity Survey<sup>295</sup> in Uganda in 1998 revealed that 50% of those who had come into contact with the courts had paid bribes to officials and that the judiciary was ranked the second most corrupt

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<sup>289</sup> Hitimana, B, (2009), “East Africa: EABC Urgently Needed in EAC Integration Process,” p 1, Uganda's *East African Business Week* of 21<sup>st</sup> February 2009, available at <http://allafrica.com/200902231437.html> and accessed on 5th March 2009.

<sup>290</sup> Augie, 2004 at p 1

<sup>291</sup> Anassi, P, (2004), “Corruption in Africa: The Kenyan Experience: a Handbook for Civic Education on Corruption,” Victoria, BC, Trafford Publishing, pp 79-100

<sup>292</sup> Kenya, Government of, (2003), “Report of the Integrity and Anti-Corruption Committee,” Nairobi, Government Press, at p 46

<sup>293</sup> Ringera, A. G, (2007), “Corruption in the Judiciary,” at page 13, a speech presented at the World Bank, Washington DC, on Wednesday, 25<sup>th</sup> April 2007. The speech is available at [http://www.kacc.go.ke/archives/Speeches/Justice\\_Ringera\\_Presentation200407.pdf](http://www.kacc.go.ke/archives/Speeches/Justice_Ringera_Presentation200407.pdf) and accessed on 16th March 2009.

<sup>294</sup> REPOA, (2006), “Combating Corruption in Tanzania: Perception and Experience,” Afrobarometer Briefing Paper No. 33, at p 4, and available at <http://www.afrobarometer.org/papers/AfrobrieffNo33.pdf> and accessed on 16th March 2009

<sup>295</sup> The survey was conducted by the Inspector General of Government of Uganda, a public office, and was titled, “Building Integrity to Fight Corruption to Improve Service Delivery.”

institution in Uganda.<sup>296</sup> This empirical evidence shows that there is widespread corruption, among other ills, in the judiciary in East Africa. This has resulted in loss of confidence by the private sector in the justice system in case of the need for litigation and impartial and timely resolution of commercial disputes through the court system and hampered the work of civil society in pursuit of good governance cases.

The legal and judicial affairs of the member states have not been harmonized.<sup>297</sup> This ties in with the jurisdiction of the East African Court of Justice (EACJ) which is limited<sup>298</sup> and cannot come to the rescue of the private sector and civil society on a wide range of issues due to want of jurisdiction. The good news for the private sector and civil society is that there is a proposed protocol to enhance and extend the jurisdiction of EACJ to deal with common market tribunal functions among others,<sup>299</sup> which hopefully will ameliorate the inadequacies prevalent in the municipal courts.

Another limitation in the dispute settlement process for the private sector is the failure by the council of ministers of the community to “formulate a business and business related dispute settlement mechanism”<sup>300</sup> for the community as envisaged in the treaty. Such a mechanism might enable the private sector to avoid the problems in the judiciary like corruption and inordinate delay in settlement of commercial disputes especially in cases where both parties emanate from different partner states and where the issues involved revolve around the provisions of the treaty or community laws and regulations.

### **3.3.9 Lack of Governmental Cooperation**

The private sector and the civil society have no political power to effect changes or policies and can only act as pressure groups and pursue available channels of dialogue with the government.<sup>301</sup> A responsive government is therefore needed to give effect to the ideas, activities and efforts of the private sector and civil society.

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<sup>296</sup> Commonwealth Human Rights Initiative (CHRI), (2006), “The Police, The People, The Politics: Police Accountability in Uganda,” New Delhi, Commonwealth Human Rights Initiative (CHRI), at p 35,

<sup>297</sup> EAC Development Strategy 2006-2010 at p 48

<sup>298</sup> Article 27 (1) of the Treaty Establishing the East African Community – it only grants EACJ jurisdiction in respect of the interpretation and application of the treaty.

<sup>299</sup> EAC Development Strategy 2006-2010 at p 50

<sup>300</sup> Article 129 (3) of the Treaty Establishing the East African Community

<sup>301</sup> Augie, 2004 at p 1

However, sometimes the government can treat the private sector and civil society with mistrust and ignore their petitions and an antagonistic or unresponsive attitude does not allow civil society and private sector to constructively engage the governments. A good example is the case of the withdrawal of Tanzania from the Common Market for Eastern and Southern Africa (COMESA) to join the Southern African Development Community (SADC). The private sector has been urging the Tanzanian government to rejoin COMESA as they have lost more business by leaving COMESA than they have gained by sticking to SADC.<sup>302</sup> The Tanzanian government has so far declined and indeed warned the private sector against the clamour to rejoin COMESA.<sup>303</sup> The private sector in Tanzania, unlike their counterparts in the other member states is therefore unable to enjoy the benefits of the opportunities presented by COMESA. Within the region certain civil society bodies like those in the human rights field are treated worse than the opposition and are more often than not arrested, incarcerated and harassed.<sup>304</sup> Such acts do not help in achieving the objectives of the EAC Treaty.

It is therefore clear that lack of cooperation from the governments of the member states in certain instances has been and can continue to be a major drawback to the activities of both the private sector and the civil society in helping to deepen regional integration.

### **3.3.10 Counterfeiting and Piracy**

The region suffers from the influx of cheap and sub-standard counterfeit and pirated products mostly from the Far East and in particular China.<sup>305</sup> This has affected the profitability and market share of legally registered East African companies and especially those involved in the manufacture of fast moving consumer goods.<sup>306</sup>

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<sup>302</sup> Lusekelo, P., (2007), "Rejoin COMESA, Business Lobby Urges Government," p 1, Tanzania's *Guardian* newspaper of 24<sup>th</sup> December 2007, which is also available online at <http://kurayangu.com/ipp/guardian/2007/12/24/104906/html> and accessed on 9<sup>th</sup> March 2009.

<sup>303</sup> Kiseembo, P., (2008), "Govt. Cautions TPSF on Rejoining COMESA," Tanzania's *Guardian* newspaper of 17<sup>th</sup> December 2008, available at <http://www.ippmedia.com/ipp/guardian/2008/12/17/128305.html> and accessed on 9<sup>th</sup> March 2009.

<sup>304</sup> Augie, 2004 at p 1

<sup>305</sup> Koros, K., (2009), "Kenya 'Loses' Shs. 70bn As Fakes Flood Market," Kenya's *Daily Nation* of 25<sup>th</sup> April 2009

<sup>306</sup> The East African market is a destination for counterfeit goods such as medicines emanating mainly from Asia. These cost as low as 1/3 of the prices of the genuine products.

Counterfeiting refers to the “unauthorized representation of a registered trademark carried on goods identical or similar to goods for which the trademark is registered, with a view to deceiving the purchaser that he/she is buying the original goods.”<sup>307</sup> The products of counterfeiting are usually referred to as counterfeits or fakes or imitations or forgeries.

Piracy on the other hand refers to the “unauthorized copying of materials protected by intellectual property rights such copyright, trademarks, patents, geographical indications, neighbouring rights etc, for commercial purposes and unauthorized commercial dealings in copied materials.”<sup>308</sup>

Counterfeiting and piracy constitute illicit trade in the region and there are indeed in existence statutes in the entire five partner states that criminalize counterfeiting and piracy.<sup>309</sup> All the partner states are also signatories to international treaties and agreements on the protection of intellectual property rights (IPRs).<sup>310</sup> However the problem of counterfeiting and piracy poses a serious challenge to the private sector and is a major deterrent to investors in the region, both domestic and foreign and has led to the collapse or near collapse of certain industries especially in the textiles and dry cells manufacturing sectors.<sup>311</sup> It is estimated that rights holders loose approximately 30 Billion Shillings (about US\$ 420 Million) in Kenya per annum to trade in counterfeit and piracy and that counterfeiting and piracy cost the Kenyan government an estimated 6 Billion Shillings (about US\$ 84 Million) in lost revenue collections annually.<sup>312</sup> It is also estimated that over 90% of all music sold in Kenya is pirated while the Kenya Association of Pharmaceutical Industry estimate that counterfeit pharmaceutical products

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<sup>307</sup> Goode, W., (2003), “Dictionary of Trade Policy Terms,” Fourth Edition, Adelaide, Cambridge University Press, at p 93

<sup>308</sup> Goode, 2003 at pp 284-285

<sup>309</sup> All the partner states have intellectual property legislations in the areas of copyrights, industrial designs, trademarks, patents etc. The problem lies in enforcement.

<sup>310</sup> All the member states are WTO contracting parties and therefore signatories to the TRIPS agreement and also members of WIPO and therefore signatories to WIPO Copyright Treaty (WCT), Berne Convention among others.

<sup>311</sup> EAC Secretariat, (2008i), “Inception Report on the Formulation of an EAC Policy on Anti-Counterfeiting, Anti-Piracy and Other Intellectual Property Rights Violations,” at p 5, and available online at <http://eabc.info/node/112> and accessed on 17th March 2009

<sup>312</sup> Wako, A., (2007), “Promoting Better Legislation and Enforcement of Intellectual Property Rights in Kenya,” a Keynote address by the Kenyan Attorney General during the Third Global Congress on Combating Counterfeiting and Piracy at the International Conference Centre in Geneva, Switzerland on January 30<sup>th</sup> 2007 at pp 1 & 2, and which is also available online at [http://www.wipo.int/enforcement/en/global/\\_congress/docs/amos\\_wako.doc](http://www.wipo.int/enforcement/en/global/_congress/docs/amos_wako.doc) and accessed on 17th March 2009.



account for about Kshs. 7.8 Billion in sales annually.<sup>313</sup> These are mind boggling figures that just give a glimpse of the magnitude of counterfeiting and piracy in the region and the damage it is doing to the rights holders, the governments of the partner states and the risk to the general public. However it should be noted that the counterfeiting and piracy industries have active actors and also provides jobs to those who trade in those goods and products. It is therefore a big challenge that is like a double-edged sword to the partner states given that most people are jobless and live below the poverty line.

The dangers posed by counterfeiting and piracy in the region include job losses when local industries collapse due to influx of cheap counterfeit goods and pirated products that make locally manufactured products uncompetitive, loss of tax revenues to the member states, risk to human health and safety as a result of sale of counterfeit and sub-standard drugs and goods like electrical appliances, diversion of investments by prospective investors to other regions, loss of investment competitiveness as investors avoid the region to set up businesses in regions enjoying better intellectual property protection, loss of trade and loss of international competitiveness and revenue by rights holders.<sup>314</sup> Counterfeiting and piracy constitute unfair competition in the market place as counterfeit goods and pirated products are usually cheaper than genuine and original ones and are preferred by consumers due to their low and affordable prices.

Related to counterfeiting and piracy in the region and which also constitute illicit trade is smuggling, parallel imports and undeclared local production. Since it is estimated that cross-border trade in the region worth US\$ 31.6 Million goes unrecorded due to smuggling,<sup>315</sup> the magnitude of smuggling as a challenge to both the private sector and the governments of the partner states cannot be gainsaid. Smuggling occurs when there is “movement of products, whether genuine or counterfeit, from one jurisdiction or customs regime to another in circumstances where it is unlawful to do so because it is done without payment of applicable taxes or duties in the relevant jurisdiction or in breach of laws prohibiting its import or export.”<sup>316</sup>

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<sup>313</sup> EAC Secretariat, 2008i at pp 5-6

<sup>314</sup> See “Illicit Trade,” available at the EABC website at <http://eabc.info/advocacy-lobbying/illicit-trade> and accessed on 17th March 2009

<sup>315</sup> EABC, 2008i at p 16

<sup>316</sup> See “Illicit Trade,” available at the EABC website at <http://eabc.info> and accessed on 17<sup>th</sup> March 2009

Parallel imports on the other hand involve “non-counterfeit products imported from another country without the permission of the intellectual property owner.”<sup>317</sup> Parallel importation mainly occurs when different versions of a genuine product being produced legally for sale in different markets find themselves being sold by unofficial distributors in markets outside their territories.”<sup>318</sup> This is rampant practice in the region and it is not uncommon to find products marked for sale only in certain customs territories outside the region being sold within the EAC region. Parallel importers ordinarily purchase goods and products in cheaper markets so that they can sell them in the more expensive markets with a view to making huge profits.

These practices such as counterfeiting and piracy are facilitated by development in reprographic technologies where digitization has facilitated the rapid and extensive production of copies at a minimal cost, failure by public authorities in the region and the business organizations to communicate to the consuming public the dangers of using unauthorized products, weak border controls that facilitate mostly smuggling of goods across borders, inadequate sanctions that do not act as a proper deterrent against the offenders, corruption both within the police and the judiciary which weakens enforcement of existing regulations and undermines any controls that are in place and lastly consumer behaviour, who being aware that the products are counterfeit or pirated go ahead to buy them because of cheap prices.<sup>319</sup> There is also high consumer demand for the counterfeit and pirated products thereby fuelling the trade in counterfeit and pirated products.

Weak enforcement of intellectual property rights at the national levels has exacerbated the illicit trade in counterfeit, pirated and smuggled goods and products and there seem to be limited capacity in the member states to confront the problem.<sup>320</sup>

At the regional level there is not yet in place clear policies and strategies to fight and combat illicit trading activities like piracy and counterfeiting although there is general consensus among the partner states that it is a major challenge that requires collaborative

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<sup>317</sup> “Illicit Trade,” available at the EABC website at <http://eabc.info> and accessed on 17<sup>th</sup> March 2009

<sup>318</sup> “Illicit Trade,” available at the EABC website at <http://eabc.info> and accessed on 17<sup>th</sup> March 2009

<sup>319</sup> Blakeney, M., (2004), “Enforcement of Intellectual Property Rights: Challenges, Remedies and Public Awareness,” at pp 2-3, and which is also available online at [http://www.wipo.int/edocs/mdocs/arab/en/wipo\\_ip\\_uni\\_dub\\_04/wipo\\_ip\\_uni\\_dub\\_04\\_7.pdf](http://www.wipo.int/edocs/mdocs/arab/en/wipo_ip_uni_dub_04/wipo_ip_uni_dub_04_7.pdf) and accessed on 17<sup>th</sup> March 2009-also see EABC, undated (n 249 above) at p 1

<sup>320</sup> EAC Secretariat, 2008i at p 13

efforts between the public and the private sector to combat.<sup>321</sup> There is need for a collaborative effort at both the national and regional levels between public bodies, private sector, civil society, EAC Secretariat and even the international community through bodies like WIPO to stem the tide of illicit trade in the region. The legal framework in the form of various statutes is in place in all the member states. What is needed is enforcement.

### **3.3.11 Access to Land**

The structure of the economies of the EAC countries is dominated by agriculture and a majority of the population lives in rural areas eking out their living from tending their parcels of land.<sup>322</sup> Access to affordable land therefore by the population and investors, both domestic and foreign, either for agricultural, commercial or industrial use and ownership rights is critical to the socio-economic development of the region.

The region is characterized by a situation where the state has the overriding interest over matters of access, control and management of land and this is irrespective of the tenure category under which it is held or controlled.<sup>323</sup> The state is therefore in law, within the region, the ultimate authority on matters of access, control and management of land. For instance in Tanzania, all land is public land and vested in the President in trust for all the citizens.<sup>324</sup> In Tanzania, foreigners or non-citizens are ineligible to be allocated or granted land unless it is strictly for investment purposes<sup>325</sup> under the Tanzania Investment Act, No. 26 of 1997. The other unique feature of the land situation within the region is the multiplicity of legislation dealing with land and the absence of consolidated legislation at the national levels dealing with issues to do with acquisition, access, management,

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<sup>321</sup> This is the central theme in the inception report aforesaid by the EAC to formulate a regional anti-counterfeiting and anti-piracy policy- EAC Secretariat, 2008 (n 246 above)

<sup>322</sup> EAC Development Strategy 2006-2010 at p vi

<sup>323</sup> Okoth-Ogendo, H. W. O., (1999), "Land Policy Development in East Africa: A Survey of Recent Trends," at p 4 {A Regional Overview for the DFID Workshop on 'Land Rights and Sustainable Development in Sub-Saharan Africa' held at Sunningdale Park Conference Centre, Berkshire, England between 16-19 February, 1999) and available at <http://www.oxfam.org.uk/resources/learning/landrights/downloads/eafover.rtf> and accessed on 3rd May 2009.

<sup>324</sup> See Section 4 of the Tanzania Land Act, 1999 and also Minde, E. M., (2006), "Law Reform and Land Rights in Tanzania," at p 3 and which is also available online at [http://www.athenanetwork.org/docs/downloads/LAW\\_REFORM\\_AND\\_LAND\\_RIGHTS\\_IN\\_TANZANIA.dc](http://www.athenanetwork.org/docs/downloads/LAW_REFORM_AND_LAND_RIGHTS_IN_TANZANIA.dc) and accessed on 3rd May 2009

<sup>325</sup> Section 20 of the Tanzanian Land Act, Act No. 4 of 1999.

control and ownership of land and to the settlement of disputes that may arise thereof. For instance, Tanzania has a series of at least 11 statutes that deal with land matters in one way or the other.<sup>326</sup> The situation in Kenya is no less different where there are at least 12 separate legislations including the constitution dealing with land matters.<sup>327</sup> In fact Kenya does not have clear or comprehensive land laws or policies, has one of the highest incidences of unequal distribution of land characterized by a few people owning huge chunks of land against a majority that is either landless or owning small and economically unviable parcels of land with the unequal access to land by different sections of the citizenry being one of the factors that led to violence after the 2007 disputed general elections.<sup>328</sup> Attempts to have a national land policy in Kenya have been unsuccessful over the years.<sup>329</sup> There is also the underlying problem of security and sanctity of title within the region. Investors especially those in the agricultural sector are not assured of peaceful and quiet enjoyment of their land. A case in point is the worrying invasion of private lands and ranches in Kenya by squatters and herders.<sup>330</sup> This is a situation that is not conducive to private investment and although not rampant, it is symptomatic of the precarious nature of property ownership rights in the region. The Uganda Land Act of 1998 brought some measure of reform and vested all land in Uganda in the citizens, but customary titles to land still persist that fall out of the scope of the aforesaid Act.<sup>331</sup> It should be noted that Rwanda<sup>332</sup> and Burundi<sup>333</sup> are two of the most

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<sup>326</sup> These include the Land Act, the Village Land Act, the Land Acquisition Act, the Urban Leaseholds (Acquisition and Regrant) Act, the Public Land (Preserved Areas) Act and the Land Registration Act among others.

<sup>327</sup> These include the Registered Land Act, the Land Titles Act, the Indian Transfer of Property Act, Trust Lands Act, the Government Land Act and the Land (Group Representatives) Act among others.

<sup>328</sup> "Report of the Commission of Inquiry into Post Election Violence," at pp 30-33 available at [http://www.eastandard.net/downloads/Waki\\_Report.pdf](http://www.eastandard.net/downloads/Waki_Report.pdf) and accessed on 3rd May 2009

<sup>329</sup> Civil society organizations like the Kenya Land Alliance have been at the forefront in the agitation for the enactment of a National Land Policy in Kenya over the years. This led the government through the Ministry of Lands to embark on the formulation of a National Land Policy through a widely consultative process involving the public, private sector and civil society. This gave rise in May 2007 to a draft National Land Policy. The same however is yet to be approved by the Kenyan Cabinet for presentation to Parliament so that it can be debated and passed into law. A copy of the draft National Land Policy is available at <http://www.kenyalandalliance.or.ke/landpolicy/> and accessed on 6<sup>th</sup> May 2009

<sup>330</sup> Sielep, S., (2009), "White Farmers in Fear After Herdsmen Grab Land," *Daily Nation* of 4<sup>th</sup> May 2009 available at <http://www.nation.co.ke/News/-/1056/593794/-/u66dmg/-/index.html> and accessed on 4th May 2009 – This is a report of invasions of large-scale farms by herdsmen and squatters in the Rift Valley Province of Kenya.

<sup>331</sup> Mugambwa, J., (2007), "A Comparative Analysis of Land Tenure Law Reform in Uganda and Papua New Guinea," *Journal of South Pacific Law* Vol. 11, No. 1, pp 39-55 at p 52

densely populated countries in Africa and the world. With increasing populations the land tenure regime within the region does not encourage free movement of investors and cross border agricultural movements.

The critical nature of access to land within the region has been played out in the ongoing negotiations to conclude a protocol on the establishment of the EAC Common Market, the next stage in the integration process to succeed the current customs union. The negotiations are dragging on and almost deadlocked on the issues of free movement of labour and access to land especially ownership of land. Tanzania has declined to open up its land for ownership to the rest of the region.<sup>334</sup> Indeed a communiqué issued by the Heads of State at the conclusion of the 10<sup>th</sup> Summit at Ngurdoto Mountain Lodge, Arusha, Tanzania on 29<sup>th</sup> April 2009 observed that the granting of right of access to land, right of establishment and right of permanent residency would not be automatic and would abide national policies and legislations of the partner states.<sup>335</sup> The decisions of the EAC Summit are by consensus<sup>336</sup> and therefore the position by Tanzania over land means that the integration process cannot be pushed forward at least as far as land is concerned. So land is a very sensitive issue within the region and is guarded and protected jealously to an extent that its access, control and management is turning out to be an impediment to domestic and cross border investment in the region and even faster and deeper integration in the region.

### **3.4 The Case for a Private Sector and Civil Society Development Strategy**

The partner states on signing or acceding to the Treaty undertook to “formulate a strategy for the development of the private sector.”<sup>337</sup> No such undertaking is made in respect of the civil society in the Treaty. This is a serious lapse in the Treaty and might give the

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<sup>332</sup> Rwanda is the most densely populated country in Africa at 368 persons per sq km in 2007. See EAC Secretariat, (2008), “East African Community Facts and Figures,” at p 6, available at <http://www.eac.int> and accessed on 3<sup>rd</sup> May 2009

<sup>333</sup> Population density of 285.7 persons per sq km for Burundi against for example 45, 64 and 141.1 persons per sq km in Tanzania Kenya and Uganda in 2007.

<sup>334</sup> Mukaruliza, M., (2009), “Report of the Council of Ministers for the Period July 2008-March 2009 to the 10<sup>th</sup> Summit of the Heads of State of the East African Community,” at p 3, available at <http://www.eac.int/> and accessed on 3<sup>rd</sup> May 2009

<sup>335</sup> EAC Secretariat, (2009), “Communiqué of the 10<sup>th</sup> Ordinary Summit of the EAC Heads of State,” at p 1, available at <http://www.eac.int> and accessed on 3<sup>rd</sup> May 2009

<sup>336</sup> Article 12 (3) of the Treaty Establishing the East African Community

<sup>337</sup> Article 127 (1) of the Treaty Establishing the East African Community

impression that the partner states are desirous to make the participation of the private sector in the community affairs deeper and stronger through the development of an appropriate strategy more than that of the civil society. The partner states only “agree to provide an enabling environment for the private sector and civil society to take full advantage of the community.”<sup>338</sup> This agreement is followed by the undertaking to formulate a development strategy for the private sector while leaving out the civil society. This gives the impression that the partner states attach more weight to the participation of the private sector in the affairs of the community as they do that of the civil society. The undertaking by the partner states to formulate a private sector development strategy has not been implemented by the community although it forms part of the ongoing community development strategy.<sup>339</sup>

It should be noted that the private sector and the civil society are not represented in any of the existing organs<sup>340</sup> of the community. Granted that it is not practical to have the private sector and civil society representation in all the organs of the community, there are crucial organs where their representation is necessary like the sectoral committees that deal with formulation of sectoral issues such as for example on transport. This is in stark contrast to the situation prevailing in the Southern African Community (SADC) where for instance, the private sector and civil society as stakeholders are members of the SADC National Committees in the member states.<sup>341</sup> Such situation does not prevail in the EAC. Without such guaranteed membership even at the committee level,<sup>342</sup> the input of the private sector and the civil society in the formulation of the policies of the community is not guaranteed as a matter of right and therefore their participation or contribution could only be a matter of privilege extended to them through invitation by the concerned organ or institution.

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<sup>338</sup> Article 127 (1) of the Treaty Establishing the East African Community

<sup>339</sup> EAC Development Strategy 2006-2010 at p 40

<sup>340</sup> Article 9 of the Treaty Establishing the East African Community - The current EAC organs are the Summit, Council of Ministers, Coordination Committee, Sectoral Committees, East African Legislative Assembly and the East African Court of Justice.

<sup>341</sup> Article 16A of the Amended SADC Treaty, copy of which accessed at <http://www.sadc.int> on 21<sup>st</sup> March 2009

<sup>342</sup> The Treaty makes provision for a Coordination Committee and Sectoral Committees. The Coordination Committee’s membership consists only of the relevant permanent secretaries from the partner states. The membership of the sectoral is at the discretion of the Council of Ministers upon recommendation by the Coordination Committee.

With the critical role that the private sector and the civil society play in the integration process and the enormous challenges they are faced with as enunciated above and further with the undertaking by the partner states in the Treaty, it is indeed crucial that a development strategy for both the private sector and civil society be formulated that sets out the structures of engagement with the community, objectives, vision, mission, priority sectors to be addressed and the implementation framework. This will ensure the “creation of an enabling environment for the private sector and civil society to take full advantage of the community.”<sup>343</sup>

### **3.5. Conclusion**

The private sector and the civil society as key stakeholders in the EAC integration process are central to achieving a market centred and people driven integration process. The role of the private sector and the civil society are enormous and revolve around, ultimately, assisting in the realization of the core objectives of the community.

In the attempts to play their respective roles in the integration process the private sector and civil society are confronted with daunting challenges ranging from administrative and legal inadequacies to infrastructural constraints both at the national and regional level. There are attempts at both national and regional levels to address these challenges but the process is slow due to a combination of factors ranging from slow pace of enacting the necessary legislative amendments by the partner states to insufficient resources to push forward certain programmes like infrastructure development and capacity building both at the EAC Secretariat and the relevant national institutions.

There is also need to actualize the undertaking by the partner states in the Treaty to formulate a private sector development strategy and also to consider doing the same for the civil society. This will go a long way in setting up structures and implementation timelines for addressing the challenges confronting the private sector and the civil society so that they can play their roles effectively in the integration process.

The prospects, in spite of the challenges, of a deeper role for both the private sector and the civil society remain bright although a lot still needs to be done.

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<sup>343</sup> Article 127 (1) of the Treaty Establishing the East African Community



## **Chapter 4**

### **Framework for the Participation of the Private Sector and Civil Society in Regional Integration in East Africa**

#### **4.1 Introduction**



The EAC partner states are under an undertaking to “provide an enabling environment for the private sector and civil society in the region to develop and take full advantage of the community.”<sup>344</sup> The partner states through the EAC therefore intends, by providing an appropriate conducive environment for the private sector and the civil society to operate, to play facilitative and regulatory roles in the integration process. An example of the facilitative role could be the provision of law and order and the protection of property rights and the securing of human rights.

The EAC Treaty states clearly that the integration process must be people-centred and market-driven<sup>345</sup> but it would appear that it deals only briefly and peripherally with any measures that can make this a practical or legal reality. Effective participation requires that the private sector and indeed the civil society possess sufficient leverage to influence policy choices.<sup>346</sup> The integration process has so far therefore not been as people-centred and market driven as envisaged in the treaty or as inclusive of all the stakeholders as would have been expected. Factors that could influence the ability of the private sector and the civil society to influence policy formulation and implementation include financial resources, good organization, size of membership, commonality of purpose, transparency and of course the prevailing structures in place to enable such participation.<sup>347</sup> The private sector and the civil society must therefore have the requisite capacity to negotiate not only among themselves but with the partner states both at the national and regional levels in order that they may be in a position to participate effectively in influencing policy formulation and implementation and thereby assisting in deepening and accelerating regional integration.

Almost a decade after the formal re-launch of the EAC, governments are still the main drivers of integration in the region in spite of the clear statement in the EAC Treaty that the integration process will be private sector driven and people-centred. The private

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<sup>344</sup> Article 127 of the Treaty Establishing the East African Community

<sup>345</sup> Article 7 (1) (a) of the Treaty Establishing the East African Community

<sup>346</sup> Kimenyi, S.M., (2001), “Effective Private Sector Representation in Policy Formulation and Implementation,” KIPPRA Occasional Paper Series No. 2, at p 10 available at <http://www.kippra.co.ke> and accessed on 24<sup>th</sup> March 2009

<sup>347</sup> Kimenyi, S. M., (2001), “Effective Private Sector Representation in Policy Formulation and Interpretation,” KIPPRA Occasional Paper Series No.2 at p 10

sector follows the governments in driving the integration process followed by the civil society whose involvement especially at the regional level is severely limited.<sup>348</sup>

This chapter looks at both the regional and national frameworks for the participation of the private sector and the civil society in the integration process and assesses whether the institutionalization of both the private sector and the civil society as part of the EAC institutional framework will place them in a better place to participate in the integration process or not.

#### **4.2 Regional Framework for Private Sector and Civil Society Participation**

The EAC Treaty makes provision for the inclusion of the private sector and the civil society in the integration process and indeed at the outset resolved to “allow the private sector and civil society to play a leading role in the socio-economic development activities”<sup>349</sup> of the community. Whether sufficient allowance has been made for the private sector and the civil society to thrive is what is debatable. The EAC seeks, in furtherance of its objectives, to ensure the “enhancement and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development.”<sup>350</sup> The EAC is yet to put in practice any empowerment measures or modalities on how such partnerships shall be entered into with the private sector and the civil society and how they shall be cultivated and nurtured. The partnership with the private sector has been by and large ad hoc and consists mainly of the participation of the EAC Secretariat and in certain cases some organs of the community like the East African Legislative Assembly participating in conferences, seminars and workshops organized by the private sector and civil society or in some cases the EAC Secretariat jointly conducts such seminars, workshops or conferences with the private sector.<sup>351</sup> To a large extent the partnership although strengthening slowly is not structured in any way and is rather out of the goodwill of the EAC Secretariat.

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<sup>348</sup> Braude, W., (2008), “Regional Integration in Africa: Lessons from the East African Community,” Johannesburg, South African Institute of International Affairs (SAIIA), at pp 1-3

<sup>349</sup> This resolution is made in the preamble to the EAC Treaty at paragraph 11. This shows recognition by the partner states of the private sector and the civil society in the socio-economic development of the community.

<sup>350</sup> Article 5 (3) (g) of the Treaty Establishing the East African Community

<sup>351</sup> “EABC-EAC Energy Conference,” available at the EABC website at <http://eac.info> – The EABC together with the EAC Secretariat will host the First East African Energy Conference at Dar es Salaam

The partner states are committed to take steps to “encourage the development of indigenous entrepreneurs”<sup>352</sup> by taking a series of proactive measures such as promoting industrial research, preparing an East African Industrial Development Strategy and the harmonization of regional standards. Measures aimed at developing domestic entrepreneurial capacity to improve the performance of the industrial sector are welcome. Save for the passing of the East African Community Standardization, Quality Assurance, Metrology and Testing Act in 2005,<sup>353</sup> very little has been done by the community to assist in the development of the indigenous entrepreneurs in the industrial sector. The aforesaid Act was assented to on 10<sup>th</sup> September 2006 and came into force on 1<sup>st</sup> August 2007 but its provisions are yet to be implemented in the region.<sup>354</sup> The East African Industrial Development Strategy has been developed but is yet to be reviewed and implemented.<sup>355</sup> In the industrial sector, the partner states and the community are not moving fast enough to put the necessary measures in place to ensure that the development of the domestic private sector and the improvement of its competitiveness becomes a practical reality as quickly as possible. This is against the backdrop of a poor industrial sector that still relies heavily on traditional technology that is no longer competitive at all.<sup>356</sup> The community and the partner states need to do more to ensure there is an enabling environment for the private sector to participate effectively in the industrial development of the region through the implementation of timely and appropriate strategies.

It would appear that the partner states are just committed to “encouraging” the private sector and the civil society to participate in the socio-economic development of the community but not putting in place and implementing concrete measures and strategies to translate the said encouragement into practical realities. For example, the partner states “shall encourage private sector participation in livestock multiplication and

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Tanzania between June 7<sup>th</sup> -June 10<sup>th</sup> 2009. This is just an example of the many conferences, workshops and seminars organized jointly by the EABC and the EAC Secretariat.

<sup>352</sup> Article 79 (c) of the Treaty Establishing the East African Community

<sup>353</sup> A complete version of the Act is available at the website of the Ministry of East African Community, Kenya at <http://www.meac.co.ke> and accessed on 24<sup>th</sup> March 2009

<sup>354</sup> EAC Development Strategy 2006-2010 at p 43

<sup>355</sup> EAC Development Strategy 2006-2010 at p 43

<sup>356</sup> Most factories and industries in the region especially sugar factories are heavily reliant on obsolete machinery that makes them costly and uncompetitive to run and have to rely on state protection through import quotas and sometimes financial bail out to save them from total collapse.

distribution.”<sup>357</sup> The partner states are yet to for example, develop a common regulatory framework in livestock multiplication and distribution within the region. It would appear that in spite of the clear statements and undertakings in the treaty to ensure the participation of the private sector and the civil society in various sectors of the community, nothing much has been done to make such undertakings a reality.

Although the private sector development strategy is yet to be implemented by the community<sup>358</sup> the EAC has promoted continuous dialogue with the private sector and the civil society at the regional level to help create an enabling business environment.<sup>359</sup> Such continuous dialogue at the national levels has been maintained by the partner states with respect to the private sector.<sup>360</sup> However, active and continuous dialogue cannot be said to exist between the civil society and among all the partner states. The civil society participation in the integration process has been low both at the national level and the regional level due to various reasons ranging from their lack of cohesion and organization to lack of access to adequate financial resources to conduct their activities.

The partner states undertake at Article 127 (1) (b) of the EAC Treaty “to provide opportunities for entrepreneurs to participate actively in improving the policies and activities of the institutions of the community that affect them so as to increase their confidence in policy reforms and raise the productivity and lower the costs of the entrepreneurs.” This undertaking is significant in that it does not confer on the private sector sufficient latitude to participate in the formulation of the policies at the initial level but the private sector only come in to contribute to improve on the ideas already formulated. The EAC therefore in the area of formulation of policies does not give the private sector much room to participate and their participation can therefore be deemed to be at the goodwill of the EAC. There is in existence no provision in the treaty that empowers the private sector to participate in the formulation of policies by the EAC. This should be contrasted with the provision of Article 122 (a) of the EAC Treaty which is

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<sup>357</sup> Article 107 (c) of the Treaty Establishing the East African Community

<sup>358</sup> The preparation of a Private Sector Development Strategy has been done but is awaiting review and national consultations before it can be finally compiled and approved for implementation by the community. This is envisaged to take place during the 2006-2010 EAC Development Strategy.

<sup>359</sup> This is evident in the many meetings, conferences, seminars and workshops jointly conducted and attended by the EABC and EAC in the region.

<sup>360</sup> For instance the Kenya Association of Manufacturers routinely organize conferences jointly with the government.

explicit that “the partner states undertake to increase the participation of women in business at the policy formulation and implementation levels.” Women are expressly granted sufficient recognition in the treaty to participate in policy formulation and implementation. The same treatment is not given to the private sector or the civil society yet the treaty is expressed to be people-centred and private sector driven. The treaty gives different treatment to different stakeholders hence making it not inclusive enough. The same contrast can be drawn at Article 121(a) where the partner states commit themselves through appropriate legislative and other measures to “promote the empowerment and effective integration and participation of women at all levels of socio-economic development especially in decision-making”. The private sector and the civil society are not accorded in the treaty the same treatment to participate in the decision-making process of the community at any level. The EAC partner states, in terms of the treaty provisions, are therefore keen on ensuring that the private sector is provided with opportunities to operate but not enough space to participate in the formulation of any policies that may give rise to those opportunities.

Under Article 127 (2) (a)-(f), the partner states undertake to implement various measures whose overall effect is to provide an enabling environment for the private sector to operate. No reference whatsoever is made to the participation of the private sector in the formulation and implementation of those measures. For example, the partner states at Article 127 (2) (a) undertake to “improve the business environment through the promotion of conducive investment codes.” It should be noted that the EAC is yet to develop a regional investment code<sup>361</sup> and the active participation of the private sector as the stakeholder to be most affected by the envisaged investment code are not recognized in the formulation and even implementation process.

Under Article 127 (4) the Secretary General of the community is under an obligation to “provide the forum for consultations between the private sector, civil society organizations, other interest groups and appropriate institutions of the community.” This provision makes a serious omission when it comes to the opportunity of the private sector and civil society to influence the policies of the community or to participate in the

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<sup>361</sup> EAC Development Strategy 2006-2010 at p 43 – A regional investment code is envisaged to be implemented during the 2006-2010 Development Strategy but no active measures have been taken towards actualizing it.

formulation of such policies in that it excludes the private sector and the civil society from being availed a forum where it matters most which is with the organs of the community. Article 14 (1) of the EAC Treaty provides that “the council shall be the policy organ of the community.” So policy decisions of the community are made by the council of ministers, an organ of the community. The policy recommendations start with the sectoral committees, to the coordination committee and then to the council of ministers. Had the treaty provided a forum for consultations between the private sector and civil society on the one hand and the two committees and the council of ministers, however minimal and in whatever form then at least it could be safe to say that the private sector and the civil society have an opportunity to participate in the formulation of policies of the community. Consultations with the institutions of the community that are few and also limited in their scope and mandate as set out in the protocols establishing them does not accord the private sector and the civil society sufficient space to participate in policy formulation. To this end, any participation by the private sector and the civil society at the regional level in policy formulation and implementation is basically at the discretion of the community organs.

The partner states commit at Article 128 of the EAC Treaty to adopt programmes geared towards strengthening the private sector and to promote the role of the private sector as an effective force in the development of their respective economies. This provision does not enjoin the partner states in including the private sector in the formulation of such programmes and therefore any invitation to the private sector to so participate in any such formulation would be purely discretionary and a matter of courtesy and goodwill from the partner state governments.

At Article 129 of the Treaty the partner states undertake to “co-operate in promoting common measures to ensure the strengthening of linkages among their business organizations, employees’ and employers’ organizations and professional bodies.” The EAC has actively encouraged the work of the private sector through EABC and indeed there is a strong linkage as evidenced by its membership that includes apex business organizations like national chambers of commerce and industry and employers’ associations. However the commitment by the partner states through the council of ministers to “establish modalities that would enable the business organizations or

associations, professional bodies and the civil society in the partner states to contribute effectively to the development of the community”<sup>362</sup> is yet to be realized as no such modalities either in the form of a comprehensive and inclusive private sector and civil society development strategy or even just rules and regulations as appears in ordinary cases pursuant to statute have been put in place.

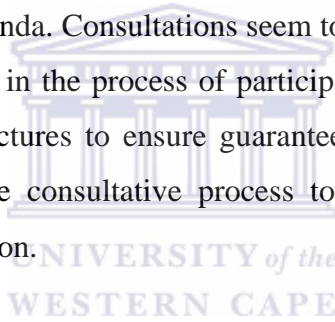
From the foregoing it is evident that the partner states put a lot of emphasis on the private sector and the civil society being one of the major drivers of regional integration but does not put in place the necessary measures to ensure that the private sector and civil society are in a position through appropriate channels anchored in the treaty to participate in the formulation and implementation of the strategies and policies of the community. Indeed what emerges from the treaty is that the partner states are under an undertaking to create an enabling environment for the private sector and civil society to merely participate in the development of the community in whichever way they can. The EAC Treaty does not specify the modality and extent of the participation of stakeholders in community activities at all. Absolutely no provision is made by the treaty on the modality or extent of the participation of the private sector and the civil society in having a say or input in the creation of that conducive environment. There need to be in place formal structures for engagement between the EAC and the private sector and civil society and not mere goodwill.

However, in spite of the absence of modalities, a precedent is emerging on the participation of the private sector and the civil society and indeed in respect of the people in the community activities. This is in the form of consultations, in certain cases, of the key stakeholders in the community activities. This is also in line with the provisions of Article 127 (4) of the Treaty which provides that “the Secretary General shall provide the forum for consultations between the private sector, civil society organizations, other interest groups and appropriate institutions of the community.” The EAC seem to have adopted consultations as the way to ensure the participation of the people in the community activities. For instance, the private sector and the civil society participated in the negotiations that led to the conclusion of the treaty among the partner states and the

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<sup>362</sup> Article 129 (2) of the Treaty Establishing the East African Community

negotiations that led to the protocols on the customs union and the rules of origin.<sup>363</sup> These consultations seem to take the form of workshops, seminars, conferences and in certain cases arranged meetings with for example head of states. The concept of a people-centred and market-driven cooperation together with the principle of subsidiarity<sup>364</sup> entails the participation and consultation of a wide range of stakeholders. The conducting of such consultations through workshops, seminars and conferences to which only few people are allowed access and which people cannot be said to be wholly representative of the length and breadth of the private sector and civil society in the region presents a challenge to wider participation and making the process as inclusive as possible. At the end of the day such consultations leave out a majority of the people and make the process akin to an elite gathering of technocrats. It would be proper in the future to set clear modalities and extent of the participation of the private sector, civil society and the people generally through referenda. Consultations seem to be the preferred method by the EAC in engaging stakeholders in the process of participating in the integration process. What is lacking are clear structures to ensure guaranteed representation of the private sector and civil society in the consultative process to avoid a situation where their participation is by mere invitation.



#### **4.3 National Frameworks for the Participation of the Private Sector and Civil Society**

The partner states are conferred with the responsibility of ensuring the implementation of the community policies and decisions at the national level. To this end, the partner states are under a general undertaking to “plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the community and the implementation of the provisions of this treaty.”<sup>365</sup> The private sector and the civil society therefore expect the national governments to have in place and pursue policies that are deliberately designed to provide an enabling

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<sup>363</sup> The concept of participation by the people generally and the private sector and civil society through consultations in community activities has been adjudicated and pronounced upon by the East African Legislative Assembly. See n 12 above at pp 30-31

<sup>364</sup> Article 7 (1) (a) & (d) of the Treaty Establishing the East African Community

<sup>365</sup> Article 8 (1) (a) of the Treaty Establishing the East African Community



environment for their operation in the development both of the respective partner states and the community.

The partner states are further under a duty to designate a ministry to deal with matters pertaining to the implementation or application of the treaty.<sup>366</sup> All the partner states have complied with that undertaking and there are in existence in each of the partner states individual ministries dedicated to East African Community affairs. The ministers from the partner states who are in charge of those ministries are members of the council of ministers of the community,<sup>367</sup> the policy organ of the community and are ex-officio members of EALA.<sup>368</sup> The ministries provide a forum for presentation and consideration of issues relating to the community at the national level by stakeholders like the private sector and the community and also coordinate policy issues that pertain to the community at the national level. They also serve to decentralize the community affairs at least at the policy level.

The partner states regard the private sector and civil society as key stakeholders in the delivery of their socio-economic development plans and strategies and have directed their policies towards creating an enabling environment for the overall participation of the private sector and civil society.<sup>369</sup> All the partner states pursue the consultative approach in the participation of the private sector and civil society in the formulation of socio-economic policies and are committed to regional integration in their development plans. The divergence among the partner states is in the field of implementation of those policies and representation of the private sector and civil society in the institutions tasked with implementing, monitoring and evaluating the outcomes of such policies.

Burundi prepared its Development Vision 2025 and The Poverty Reduction Strategy Paper (PRSP-2006-2010)<sup>370</sup> after wide consultations involving a variety of stakeholders

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<sup>366</sup> Article 8 (3) (a) of the Treaty Establishing the East African Community

<sup>367</sup> Article 13 of the Treaty Establishing the East African Community

<sup>368</sup> Article 48 (1) (b) (i) of the Treaty Establishing the East African Community

<sup>369</sup> Rwanda, Government of, (2000), "Rwanda Vision 2020," Kigali, Government Printer at p 15. The Government of Rwanda regards a viable private sector as the principal growth engine of the economy. The short term and long term development strategies are therefore geared towards creating a conducive environment for the private sector to thrive. This is the position taken by all the other partner states in their short term and long term development strategies.

<sup>370</sup> Burundi, Government of, (2006), "Poverty Reduction Strategy Paper," which is also available online at [http://siteresources.worldbank.org/INTPRS1/Resources/Burundi\\_PRSP\(Sept-2006\).pdf](http://siteresources.worldbank.org/INTPRS1/Resources/Burundi_PRSP(Sept-2006).pdf) and accessed on 30<sup>th</sup> March 2009

including the private sector and the civil society. The PRSP in Burundi aims to make the private sector the engine of growth<sup>371</sup> and the civil society organizations as essential to the success of the strategy.<sup>372</sup> It ensures that the private sector and civil society participates at all stages of the strategy so that they can own it and make it a success. This participation is by way of consultations and direct representations in the institutions driving the process save at the cabinet level.<sup>373</sup> The private sector and civil society have been mainstreamed in the entire process to an extent that they are participants in the formulation, implementation, monitoring and evaluation of the entire strategy all the way from the local level to the national level.<sup>374</sup> At the national level for example the private sector and civil society have representatives in the Technical Oversight Committee (CTS) which has ten (10) members also drawn from government and development partners.<sup>375</sup> It is the CTS that among other functions monitors and evaluates the process to ensure that it is participatory and involves all development stakeholders. Burundi not only ensures in its development policy that the private sector and the civil society have an enabling environment to participate but makes them part and parcel of the policy formulation, implementation, monitoring and evaluation. This representation by the private sector and civil society in public bodies tasked with implementation of government policies accords the private sector and civil society a better opportunity to influence policies as they are made part and parcel of the decision-making process.

The Rwanda Vision 2020 and the Economic Development and Poverty Reduction Strategy (2008-2012) are products of wide consultations that drew heavy participation of both the private sector and civil society. The Rwanda Vision 2020 considers regional economic integration as a key element in realizing sustained economic growth<sup>376</sup> over time with the private sector as the principal growth engine of the economy with the government only acting as a catalyst for economic growth and private investment.<sup>377</sup> The Government of Rwanda encourages the strengthening of the participation of the civil

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<sup>371</sup> Burundi, 2006 at p 59

<sup>372</sup> Burundi, 2006 at pp 92-93

<sup>373</sup> Burundi, 2006 at pp 87-88

<sup>374</sup> Burundi, 2006 at pp 2-3 & 89-94

<sup>375</sup> Burundi, 2006 at p 89

<sup>376</sup> Rwanda, Government of, 200 at p 19

<sup>377</sup> Rwanda, 2000 at p 15

society in the designation, implementation and monitoring of its strategies,<sup>378</sup> public-private partnerships, decentralization and citizen participation.<sup>379</sup> The private sector and the civil society are represented in the Rwanda Economic and Social Council, a government institution that provides a platform for the government, business and other stakeholders, through regular consultations, to contribute in policy-making, implementation and review.<sup>380</sup> This inclusion of the private sector and the civil society in the formulation, implementation and review of government policies and strategies affords the private sector and the civil society valuable opportunity to make positive interventions.

In Uganda the Poverty Eradication Action Plan (PEAP),<sup>381</sup> which is also its equivalent of the World Bank preferred Poverty Reduction Strategy Paper (PRSP) was prepared through a consultative process involving the civil society, donors, private sector and government both at the local and national level. It advocated for private sector-led growth and the involvement of the private sector in investment, provision of housing and infrastructure development. The PEAP also advocated for productive partnerships between the government and the civil society. The general framework involves providing a conducive environment for the private sector and the civil society to participate.

The Kenya Vision 2030, the successor to the Economic Recovery Strategy for Wealth and Employment Creation (2003-2008), was developed through a consultative process involving the private sector, public service, civil society, media, non-governmental organizations and the general public through workshops.<sup>382</sup> The National Social and Economic Council, an advisory body formed by the President and drawing its membership from the government, private sector and civil society and chaired by the President himself was instrumental in the formulation of the Kenya Vision 2030. The private sector and the civil societies were also involved in the actual preparation thereof. It advocates for a private sector-led growth and the development of strong partnerships

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<sup>378</sup> Rwanda, Government of, (2007), "Economic Development and Poverty Reduction Strategy, 2008-2012," Kigali, Government Printer, at page 27

<sup>379</sup> Rwanda, 2007 at p 42

<sup>380</sup> Rwanda, 2007 at p 111

<sup>381</sup> This ran from 2004-2008 and Uganda now is in the process nation-wide consultations in preparation of 30-year, 10-year and 5-year National Development Plans.

<sup>382</sup> Kenya, Government of, (2007), "Kenya Vision 2030," Government Printer, Nairobi at p 3 (Abridged English version)

between the government and the private sector in achieving its objectives. The government seeks to work closely with the civil society, private sector and other relevant stakeholders in the implementation of the Vision 2030.<sup>383</sup> The First Medium Term Plan (MTP) (2008-2012)<sup>384</sup> towards realization of the Vision 2030 was prepared with the active and consultative participation of government officials, private sector players, civil society representatives and development partners. The MTP adopts the PPP policy in the financing of the proposed infrastructures and programmes by the private sector through both local and Foreign Direct Investment (FDI). The participation of the private sector and civil society is therefore deemed as crucial to the success of the MTP. Kenya has in place a Private Sector Development Strategy (PSDS) which was arrived at after thorough consultations between the government, private sector and development partners. It was launched in January 2007 and covers the 2006-2010 period. Its overall goal is to provide an enabling environment that will in turn enhance the growth and competitiveness of the private sector. The PSDS is complete with a functioning secretariat in Kenya under the Ministry of Trade charged with the role of coordinating and reviewing work plans among others.<sup>385</sup>

The medium-term National Strategy for Growth and Reduction of Poverty (NSGRP) (2005-2010) and the long-term Development Vision 2025 in Tanzania were developed and prepared after extensive consultations involving the private sector, public service, civil society and all other stakeholders. Consultations took the form of questionnaires, meetings, workshops, symposia and meetings. The NSGRP strives to widen the scope and space for effective participation and country ownership by the private sector and civil society and other stakeholders.<sup>386</sup> Partnerships between the government and the civil society and private sector among other stakeholders are encouraged to ensure policy dialogue, implementation and evaluation of the impact of development initiatives.<sup>387</sup> The private sector and civil society are mainstreamed in the preparation and implementation

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<sup>383</sup> Kenya, 2007 at p 26

<sup>384</sup> A complete copy of the MTP is available at the government website at <http://www.planning.go.ke> and accessed on 31<sup>st</sup> March 2009

<sup>385</sup> For more on the PSDS see its website at <http://www.psds.go.ke>

<sup>386</sup> Tanzania, Government of, (2005), "The National Strategy for Growth and Reduction of Poverty," at p 1

<sup>387</sup> Tanzania, 2005 at p 25

with the private sector regarded as the engine of growth.<sup>388</sup> The private sector and the civil society are therefore recognized in the Tanzanian development strategy as stakeholders whose participation in the process is critical.

So at the national level in all the partner states the private sector and civil society have been accorded space to participate in consultations leading to the formulation of socio-economic development strategies. Burundi offers the deepest form of participation compared to the rest given the representation of both the private sector and the civil society in the collation, preparation, formulation, implementation and monitoring and evaluation process. In all the partner states the private sector is regarded as the engine of growth and the civil society as a critical partner to the realization of socio-economic objectives who must participate at least at some stage in the policy process.

However it should be noted that the partner states, in spite of their stated intentions in their development policies, especially Kenya, have an antagonistic and intolerant attitude towards the civil society especially those involved in governance and human rights issues. This can be attested to by the arrests and harassment of civil society activists in the country.<sup>389</sup> It therefore cannot be said that the civil society has sufficient room to operate faced with intolerant regimes. It is therefore clear that not all the partner states are implementing their policies on good governance, respect for human rights and the rule of law as expressed in the EAC Treaty.

#### **4.4 Institutionalization of the Private Sector and Civil Society in the EAC: The Case of EABC & Civil Society Organizations**

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<sup>388</sup> Tanzania, 2005 at p 57

<sup>389</sup> In Kenya for instance, civil society activists critical of the government's human rights record are routinely threatened, harassed, intimidated and some have been mysteriously killed with no one brought to book. This finding, among other was made by Professor Philip Alston, the United Nations Special Rapporteur on Extra-Judicial, Arbitrary or Summary Executions. His report is available at <http://www.eastandard.net/downloads/pressfinal.doc> and accessed on 31st March 2009

EABC is a company limited by guarantee<sup>390</sup> and was registered in Dar es Salaam, Tanzania in 1997 under the provisions of the Companies Act of the United Republic of Tanzania. EABC prides itself as the voice of the private sector in East Africa and has enjoyed observer status at the EAC since 1997 when it was founded.<sup>391</sup> EABC was therefore granted observer status at the EAC during the currency of the Permanent Tripartite Commission for East African Co-operation and before the coming into force of the EAC Treaty on 7<sup>th</sup> July 2000. It is not clear under what provisions the observer status was granted to EABC as the rules of procedure and criteria for granting observer status to the EAC were put in place on 15<sup>th</sup> January 2001.<sup>392</sup> The EAC can grant observer status to a foreign country, inter-governmental organization or civil society.<sup>393</sup> Although the EABC allegedly represents the private sector, it is basically a civil society organization in character as it is a not for profit, voluntary association of corporate bodies and other apex national associations like national chambers of commerce and industry from the partner states.

It has been argued that “for the integration to fully function and progress, institutionalization is also needed to guarantee coherent and consistent progression towards effective and unified integration.”<sup>394</sup> The Head of States of the partner states of the EAC at their 9<sup>th</sup> Summit held in Kigali, Rwanda on 26<sup>th</sup> June 2008 received a report from the EABC containing proposals for improvement of the business environment within the EAC which report also made a case for the institutionalization of the EABC in the EAC’s institutional framework.<sup>395</sup> Article 9(2) of the EAC Treaty provides that “the institutions of the community shall be such bodies, departments and services as may be

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<sup>390</sup> A company limited by guarantee is one without share capital, not for profit and the liability of the members is limited to the amount of their individual guarantee as set out in the Articles of Association and the Memorandum of Association.

<sup>391</sup> Makoffu, M., (2007), “The Role of Civil Society Organizations in the East African Integration and Development Process,” at p 18

<sup>392</sup> The Council of Ministers is mandated to prescribe the procedure for granting of observer status to the EAC under Article 3 (6) of the EAC Treaty. A complete version of the Procedure for Granting Observer Status as approved by the Council of Ministers on 15<sup>th</sup> January 2001 is available at <http://www.eac.int> and accessed on 23rd March 2009

<sup>393</sup> Article 3 (5) of the Treaty Establishing the East African Community

<sup>394</sup> South Centre, (2008), “Mercosur’s Experience and Progress towards True Regional Integration,” Analytical Note SC/AN/GGDP/GPG/5 which is also available online at <http://southcentre.org/index.php?option=com.docman&task> and accessed on 31<sup>st</sup> March 2009

<sup>395</sup> Background paper to the 17<sup>th</sup> Meeting of the Council of Ministers at pp 21-22 available at <http://eabc.info> and accessed on 24<sup>th</sup> March 2009

established by the summit.” So the summit, which is an exclusive club of the partner states’ head of states, has the discretion and prerogative to set up EAC institutions. There are, however, still not in existence criteria and procedures for the establishment of EAC institutions although a draft of such criteria and procedures has been prepared and is awaiting comments by the partner states.<sup>396</sup> The private sector and the civil society’s participation in the identification, formulation and implementation of the programmes and activities of an intergovernmental body like the EAC can only have an impact if they are mainstreamed in the policy-making process and this can be achieved by increasing the participation of the EABC in the relevant council and sectoral meetings as appropriate but without involving EABC in the mainstream legislative and budgetary processes.<sup>397</sup>

The institutionalization of EABC in the institutional framework of the EAC is however riddled with several questions that require answers. The mission of EABC is to promote private sector’s regional and global competitiveness in trade and investment.<sup>398</sup> However, this mission statement is diluted by the membership into EABC of purely state corporations or public bodies like Export Promotion Council in Kenya, Uganda Investment Authority in Uganda and Board of External Trade in Tanzania among others. These are state bodies established by Acts of Parliament in the respective partner states. The inclusion of public as opposed to private entities in the membership of the EABC changes its character from being the voice of the private sector per se but to one representing both private and public interests. Being part and parcel of the partner states’ governments the contribution of the public bodies to deeper regional integration should ideally be within the existing channels of government through their line ministries. With the involvement of state corporations into the general membership of EABC it is no longer driving the interest of the private sector alone but also government agenda. Its mission has clearly shifted with the changed membership. The private sector connotes that part of the economy of any nation that is not owned or controlled directly by the

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<sup>396</sup> The EAC Secretariat has been at the forefront in pushing for the institutionalization of the EABC in EAC. The partner states do not seem to be that enthusiastic and that is why the draft criteria and procedures sent to the partner states are yet to be commented on.

<sup>397</sup> Background paper to the 17<sup>th</sup> Meeting of the Council of Ministers at p 21 available at <http://eabc.info> and accessed on 24<sup>th</sup> March 2009

<sup>398</sup> The mission and vision of the EABC is available at its website at <http://eabc.info> and accessed on 24<sup>th</sup> March 2009

state.<sup>399</sup> The membership into the EAC of those public bodies that are wholly owned by the member states of the EAC changes the character of the EABC as the voice of the private sector in East Africa. To be a truly private sector representative, the EABC need to reconsider the membership of government entities in its ranks, sever such memberships and remain true to its mission of being the voice of the private sector in East Africa.

The EABC actively seeks to be institutionalized in the EAC and to be recognized in the EAC as one of its institutions. The question that therefore comes to mind is: Who does EABC represent? As noted above, the membership of EABC consists also of purely public bodies. It therefore does represent the interests of sections of the governments of the partner states in its activities. As noted earlier the private sector in the East African region consists mainly of MSMEs. These are mainly small and medium sized businesses. A look at the membership of EABC indicates a list of large corporations. Where then is the place of the small businessman? Further EABC has a present membership of 121<sup>400</sup> entities that include companies, national chambers of commerce and industry, employers' associations, manufacturers' associations and of course the public bodies. Granted that some of the bodies are representative, it still does not carry on board the critical mass of the small businessmen who are the majority in the region. One would therefore be right to advance the argument that EABC is just a front for big business in the region and advances the interest of big business while the small business is largely left to its own design. Although there is nothing legal that could prevent the small businesses from joining together and also seeking representation at the EAC, the same is not possible due to a number of reasons such as their small sizes, being highly fragmented and lacking the financial resources or capacity to enable them to organize. EABC is therefore not inclusive of the entire private sector in the region and is by and large a club for big business.

The other challenge to the EABC quest comes in the form of the provisions of Article 9 (4) of the EAC Treaty which provides that “the organs and institutions of the community shall perform the functions, and act within the limits of the powers conferred upon them

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<sup>399</sup> See the interpretation section of the EAC Treaty, Article 1.

<sup>400</sup> This information is obtained from the online membership list available at the EABC website at <http://eabc.info>



by or under this treaty.” This provision will set a limit to the functions of EABC and will definitely restrict its ability to operate as it does now especially in the area of funding as it will have to rely on the EAC budget or seek approval from the relevant organ to source for external funds. Further Article 14 (3) (c) grants the council of ministers the power to give directions to all other institutions and organs of the community except the summit, court and assembly. This provision places all institutions of the community under the operational direction of the council of ministers. So by treaty provision no institution within the EAC is independent and must take instructions whenever any is given from the council of ministers. EABC will therefore be bereft of the requisite independence to operate under the present circumstances in the event that it is institutionalized.<sup>401</sup>

Unlike the private sector that is generally represented by the EABC regionally and specifically in engagements with the EAC, the civil society in the region does not have one representative body. The civil society in the region is quite diverse and includes but is not limited to human rights groups, farmers’ organizations, labour unions, women groups, youth groups, environmental organizations, religious bodies, professional associations, media organizations, academic community and research institutions. There is less organization and unity among civil society institutions and this has partly contributed to them not forging a common front in spite of their fight to be institutionalized in the structures of the EAC. As a demonstration of the incoherence and absence of unity many of them have applied for and enjoy observer status in the EAC while some still have their applications pending. For example the East African Law Society and the East African Magistrates’ and Judges’ Association were granted observer status in 2006 and 2004 respectively.<sup>402</sup> Others already granted observer status are East African Trade Union Council (1997), East African Book Development Association (2006) and East African Centre for Constitutional Development (Kituo cha Katiba)

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<sup>401</sup> The EABC seeks to be an independent collaborative institution of the EAC. The treaty makes provision only for institutions and they are not strictly speaking independent as they are subject to the overall policy direction of the community. Besides it is not clear how an inferior institution, in this case the EABC, can collaborate with the more dominant institution. Collaboration presupposes partnership or association or coercion. This is possible among equals or separate and distinct entities with none having a supervisory role over the other. Under the EAC Treaty, the EABC, once an institution of the EAC will have to operate under the general policy direction of the Council of Ministers. It can therefore not, strictly speaking, be in a collaborative position with the EAC but an inferior position.

<sup>402</sup> Makoffu, 2007 at p 18

(2004). Several have also applied for observer status such as East African Youth Forum, Legal and Human Rights Centre (Tanzania), East African Youth Forum (Kenyan Chapter), East African Youth Development Association, International Council of Social Welfare, East African Fine Coffees Association, Association of Professional Societies in East Africa, East African Confederation of Informal Sector Organizations and The East African Sub-Regional Support Initiative for the Advancement of Women.<sup>403</sup> The seeking of observer status for example by three youth groups just goes to show the lack of unity and coordination among the civil society in the region. However in a communique at the end of the 3<sup>rd</sup> East African Civil Society Forum (EACCSOF), an annual gathering of civil society representatives, held between 20<sup>th</sup> and 21<sup>st</sup> March 2009 at Arusha, Tanzania, the participants called for the involvement of the civil society in the formal structures of the integration process and their full participation and institutionalization in the various levels of discussions and negotiations of the community.<sup>404</sup> The civil society in the region sought from the EAC Secretariat an opportunity to be represented in the formal structures of the community charged with the integration process. This appears to be a near impossibility since the formal structures of the community that deal with the integration process are the organs of the EAC such as the Council of Ministers or the Coordination Committee whose membership as set out in the EAC Treaty consists of purely government functionaries. The representation of the civil society in those organs or structures would therefore necessitate an amendment to the EAC Treaty which is not guaranteed in the present circumstances as borne out by the reluctance of the member states to cede sovereignty even to the EAC Secretariat itself. The quest by the civil society in the region to be accorded representation by the EAC in its formal structures is therefore hampered by the treaty provisions that do not make provision for such representation. The participants further called that they be involved in the ongoing EAC Common Market negotiations and EAC-EU EPA negotiations. The call for institutionalization with a view to achieving effective representation of the civil society is a daunting task given the diversity, disorganization and multiplicity of civil society

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<sup>403</sup> Makoffu, 2007 at pp 19-20

<sup>404</sup> Ssakhalo, E., (2009), "Complement EAC Efforts, Dr. Rotich Tells Civil Society," a press release available at <http://www.eac.int/the-news/232-complement-eac-efforts.html> and accessed on 31st March 2009

bodies even within one field. The quest for the institutionalization of the civil society in the formal structures of the EAC might remain a mirage so long as they are divided and do not portray a coherent, unified and integrated approach.

The criticisms aside, experience shows that it is crucial and indeed critical that the private sector and the civil society be mainstreamed into the decision-making process of a regional integration arrangement like the EAC. The lessons from the European Economic and Social Committee (EESC) are a case in point. The EESC was founded in 1957 under the Treaty of Rome.<sup>405</sup> The EESC is an advisory body that draws its membership from employers that include for example private sector including small and medium-sized businesses, farmers, trade unions representing employees from manual labourers to executives, professional occupations, consumer and environmental organizations, cooperatives and non-profit organizations among others.<sup>406</sup> The membership of the EESC is diverse and inclusive of almost all stakeholders of the European Union (EU).

The EESC is an integral part of the decision-making process of the EU and must be consulted before any decisions are taken on economic and social policy by the European Council and the European Commission and it has the mandate to give opinions either on its own or upon request by any other EU institution.<sup>407</sup> The EESC and its members are completely independent in the performance of their duties.<sup>408</sup> So from the foregoing it is clear that the EESC that represents the private sector and civil society within the EU has operational independence and is mainstreamed in the decision-making process on matters social and economic and must be consulted and its opinion taken before any decision is made. The EESC is expressed by the treaty as an advisory body and therefore plays its role of advising the Council, Commission and the European Parliament either at their request or on its own motion. This enables it to promote a more participatory, more inclusive and more democratic integration process within the EU.

The EESC, which is composed of the private sector and the civil society bodies among others within the EU, therefore enjoys a higher profile in that it is not subordinate to any

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<sup>405</sup> The Treaty of Rome was signed on 25<sup>th</sup> March 1957 and it created the European Economic Community that has evolved over time to the European Commission today

<sup>406</sup> Article 257 of the consolidated version of the Treaty Establishing the European Community. This information is also available from the European Union website at <http://europa.eu/> and accessed on 31<sup>st</sup> March 2009

<sup>407</sup> Article 262 of the Treaty Establishing the European Economic Community

<sup>408</sup> Article 258 of the Treaty Establishing the European Economic Community

other institution of the EU as it enjoys operational independence and it is involved in the decision-making process. Its existence and functions are clearly set out in the treaty and guaranteed by the treaty. It is therefore in a position to participate and to present the views and defend the rights of its members in policy discussions with the Commission, Council and the European Parliament.

Drawing lessons from the long European experience, the institutionalization of the EABC under the present treaty provisions within the EAC will not empower it in any way to participate more or contribute more towards presenting the views and defending the interests of its members. This is because as an institution under the current treaty provisions it will not enjoy operational independence and will be subservient to the organs of the community especially the all powerful summit of head of states. Further, not being provided for in the treaty, its functions will have to be limited by the operational set-up of the community and the treaty provisions. The EAC treaty vests policy decision-making in the Council of Ministers and the Council of Ministers is not under an obligation to consult any other body or entity and is only subservient to the summit of head of states.<sup>409</sup> The EABC in the present circumstances will therefore not be in a position to participate in decision-making of the community and therefore will have to channel any issues it may have to influence policy through the committees of the community or the secretariat. Presently because of the role the EABC has played it enjoys some leverage and works closely with the EAC Secretariat to hold workshops, conferences, seminars and prepare joint reports. This is not guaranteed in the present circumstances should it be made an institution of the community without amendment of the treaty. So although institutionalization of the private sector and indeed even the civil society can ensure their participation in the community affairs more deeply, the same is only possible within clear treaty provisions that grant such institutions independence and makes it mandatory that they be consulted before decisions touching on their spheres of interest are made.

#### **4.5 Conclusion**

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<sup>409</sup> The wide policy making functions of the Council of Ministers including the giving of directions to the institutions of the community are found at Article 14 of the EAC Treaty

The EAC Treaty has a people-centred and market-driven cooperation as one of its operational principles. It therefore places emphasis on the private sector as the engine of growth and seeks to provide an enabling environment for the development of the private sector and civil society. However, not much has been done to make this a reality and the participation of the private sector in the decision-making process and in the identification, formulation and implementation of community programmes is still not deep or strong enough. A lot still needs to be done to make a people-centred and market-driven integration process a practical reality.

All the partner states have long term socio-economic policies and plans that place the private sector as the engine of growth and the civil society as an integral stakeholder in the achievement of the socio-economic policies. Indeed all the partner states have adopted a participatory approach to the inclusion of the private sector and civil society among other stakeholders in the process of developing and implementing their policies. This participation has taken the form mostly of consultations in all the partner states and an element of representation in certain bodies like the National Economic and Social Council in Kenya, the highest economic and social advisory body chaired by the President that has private sector representation. The national socio-economic and political climates in all the partner states are therefore pro-private sector and civil society but with varying degrees. For example, Burundi has the deepest inclusion of the private sector and civil society in its socio-economic programmes from identification, formulation, implementation, monitoring and evaluation and has private sector and civil society representatives in both national and local structures concerned with the overall performance of its Vision 2025 Development Plan and its PRSP.

The quest for the institutionalization of the private sector and civil society is good as it provides a sense of ownership by the people, coherence and consistency in the process but the present treaty provisions cannot provide a conducive set-up for their participation in the integration process. This is due to the fact that the private sector and the civil society will not be mainstreamed in the decision-making process and will have to rely on goodwill from the relevant decision-making organ of the community, the council of

ministers, to have their views presented.<sup>410</sup> Still the council of ministers is under no obligation to consult them in the decision-making process. The stronger and deeper participation of the private sector and civil society can only be possible if proper amendments to the treaty are made to include them in the decision-making structure of the community. Otherwise such institutionalization will only make them subject to the instructions and directions of the council of ministers under the current treaty with no leverage entrenched in the treaty to effect policy changes.



## **Chapter 5**

### **Conclusions and Recommendations**

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<sup>410</sup> The danger posed by engagement based purely on goodwill is that change of personalities at the helm of the EAC Secretariat or any other relevant regional or national body can deal a fatal blow to the engagement or consultative process and hence the need for clear modalities that guarantee constant engagement and are not dependant on individual modes of operation or on friendships to thrive.

## **5.1 Conclusions**

Regional integration in East Africa traces its origins to the commencement of the construction of the Kenya-Uganda Railway in the late 19<sup>th</sup> Century and has been cemented over time with a rich history of common borders, shared colonial legacy, cross-border trade and investment and memorable cultural heritage.

The colonial and pre-independence integration initiatives were pursued by the newly independent partner states in the 1960s, culminating with the establishment of the first East African Community in 1967 that unfortunately collapsed in 1977 due to the low private sector and civil society participation in its activities among other reasons. The 1967-1977 EAC was therefore not inclusive enough of the key stakeholders such as the private sector and the civil society and that is why the revival of the EAC in the 1990s put emphasis on the participation of all stakeholders in the integration process as a way of ensuring that it is people-centred enough. This involvement of the stakeholders like the private sector and the civil society in the integration process is therefore a product and a lesson learnt from the collapse of the 1967-1977 EAC.

The revived EAC has had several achievements like the establishment of a customs union in 2005 pursuant to the successful negotiation and conclusion of a customs union protocol, the setting up of the organs of the EAC such as the secretariat and sectoral committees, the establishment and setting up of institutions of the EAC like CASSOA and increased intra-regional and cross-border trade among the partner states. Although there are several challenges such as slow pace of implementation of the agreed decisions of the community by the partner states by for example default to enact enabling legislations in time to give effect to those decisions and suspect political commitment,<sup>411</sup> there exist sufficient political will to ensure that the integration process is pushed forward.

The private sector and civil society have important and critical roles to play in the integration process and indeed the partner states, in recognition of this have undertaken in the EAC Treaty to provide an enabling environment for the development of the private sector and civil society. Indeed one of the operational principles of the community is a

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<sup>411</sup> For Instance the current military occupation of Kenya's Mbingo Island in Lake Victoria by Ugandan forces runs counter to the clear objectives and fundamental principles of the EAC Treaty. This is a manifestation of lack of political commitment to the integration process.

people-centred and market-driven cooperation thereby underlying the critical and important place of the private sector and the civil society in the socio-economic development of the community. The private sector and civil society in the region is however confronted with a myriad of challenges ranging from institutional, administrative, and infrastructural to legislative that threatens to derail further the active participation of the private sector and the civil society in the integration process. Although efforts are being made both at the national and the regional levels to solve and mitigate the negative impacts of these challenges like the prevalence of NTBs, the pace of action has been slow. A lot still needs to be done to ensure that the challenges facing the private sector and civil society are confronted and tackled both at the national level and at the regional level so as to secure an enabling environment for the private sector and civil society to operate and realize their full and unimpeded potential. The private sector and the civil society are therefore in a position to contribute towards the realization of the objectives of the community and thereby accelerating, entrenching and deepening the integration process.

There exist both national and regional frameworks for the participation of the private sector and civil society in the integration process. At the regional level, the partner states have undertaken to provide an enabling environment for the private sector and the civil society to take full advantage of the community. However, the private sector and civil society are not properly mainstreamed in the structures of the community so as to be able to have more impact in the identification, formulation, implementation, monitoring and evaluation of community policies, programmes, plans, strategies and activities.<sup>412</sup> The contribution of the private sector and civil society is peripheral and consists mainly of consultations that are limited to workshops, seminars and conferences. Although such consultations are healthy and indeed welcome to the private sector and civil society, they occur in an atmosphere of lack of defined structural modalities and are therefore more of a show of goodwill from the community than a matter of guarantee. This is compounded by the fact that the private sector and civil society do not enjoy any representation in any

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<sup>412</sup> Permanent and guaranteed contribution, membership and representation of the private sector in crucial policy formulation and implementation bodies is the best way to ensure proper mainstreaming of the private sector and civil society in the region both nationally as in Burundi and regionally as happens in the EU.



of the policy organs of the community. The contribution of the private sector and civil society in the policy processes of the community is therefore not secured in the treaty and is not guaranteed. This is in spite of the intention of the partner states to have the private sector and the civil society in the integration process. The integration process at the policy stages is therefore not inclusive enough and this calls for reforms to anchor the private sector and the civil society in the integration process of the community. The private sector in East Africa is represented by EABC which is the umbrella body for the private sector in the region. It has been instrumental in lobbying and advocacy with the EAC and the partner states in matters affecting the private sector and has partnered with the EAC in various projects such as in the monitoring and evaluation of NTBs. One of its drawbacks is that it cannot be said to represent quite effectively MSMEs in the region that form the majority of the private sector. It acts more as a grouping of big business in the region. The granting of membership by the EABC to purely public sector bodies is another drawback. The presence of government corporations in the membership of the EABC obscures its mission, vision and representation as the EABC cannot with a clarity of purpose pretend to be representing the interests of the private sector alone. The EABC as presently constituted therefore also represent public sector interests and this is a radical departure from its vision as the voice of the private sector in the region and also marks a significant deviation from its core objectives at inception.<sup>413</sup>

The civil society in the region although numerous is fragmented and not well organized at the regional level and has not presented a unified approach to issues at the regional level. However, attempts at forging a common stand, though still elusive, is being pursued through the annual conference of the East African Civil Society Forum which has been facilitated by the EAC Secretariat since 2005.

The national situation although common in the stated objective of having the private sector as drivers of the respective economies and the civil society as critical partners in achieving socio-economic development, presents a different picture in terms of approach and inclusiveness of the private sector and civil society in the socio-economic processes. All the partner states have adopted a consultative process with the private sector and civil

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<sup>413</sup> It should be noted that the EABC is a company limited by guarantee. Its objectives from the Memorandum of Association at incorporation are private sector driven. The inclusion of public sector bodies therefore would run counter to its registered objectives unless amended.

society especially in the gathering of views prior to the preparation of their development plans, both long term and medium term. In Burundi the private sector and civil society enjoy representation in the bodies and institutions involved in the preparation, formulation, implementation, monitoring and evaluation of the socio-economic development plans. In Kenya there are already in place regulations to govern PPPs and this is a step in the right direction in nurturing an institutional and structural framework for the PPPs to avoid the same being undertaken in an *ad hoc* and case by case manner as has been the case. So generally speaking, at the national levels, the private sector and civil society are involved in one way or another in the setting up of the policy direction of their respective governments in the socio-economic spheres. However, the representation of the private sector and civil society in the government institutions charged with the implementation, monitoring and evaluation of the policies, strategies and plans of the governments is generally lacking.

## **5.2 Recommendations**

The partner states need to speed up the harmonization of all legislations, codes, regulations and standards among themselves that affect intra- regional trade and investment. There has been some progress in the harmonization in different sectors for example the harmonization of 207 standards and specification of goods and services.<sup>414</sup> Out of these 91 have been adopted and notified to the WTO. There has also been some harmonization of capital market practices and stock exchange practices under the auspices of the East African Securities Regulatory Authorities (EASRA) and the Capital Markets Development Committee (CMDC).<sup>415</sup> However, there are several sectors in which there has been no harmonization at all or the pace of harmonization has been slow. For example, the harmonization of traffic laws has been slow leading to a situation where there is discordance in the axle-load limits, vehicles dimensions etc among the member states hence impacting negatively on road transport.<sup>416</sup> There is therefore urgent need to harmonize all national laws with regional laws to ensure that there is seamless accordance in the application of codes, laws, regulations and standards within the region

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<sup>414</sup> EABC, 2008i at p 9

<sup>415</sup> EABC, 2008i at p 10

<sup>416</sup> EAC Development Strategy 2006-2010 at p 44

both nationally and regionally. Tied to this is the need to ensure that the existing political will for integration is accompanied by the requisite political commitment to harmonize the laws and regulations, which is a political process and to implement the agreed decisions of the community at the national level within agreed and reasonable time frames to move the integration process forward.

There is need to empower both regional and national institutions in terms of human and capital resources and also legally to ensure that they are in a position to perform their allotted functions adequately. For instance, the EAC Secretariat need to be accorded the human capacity necessary through recruitment of more staff so that it has the requisite personnel to perform its functions adequately under the Treaty. This requires a cadre of professional staff.<sup>417</sup> There is need to ensure that officers from institutions dealing with customs issues such as immigration officials, standard bureau officials, health and sanitary inspectors and even revenue personnel among others are well trained and are available at border points to avoid delays caused to importers and exporters at entry and exit points. Capacity building and empowering of both regional and relevant national institutions becomes even more critical with the expected expansion of the mandate of the community with the coming into force of the common market.

There is still a lot to be done in terms of trade facilitation in the region. The paperwork required is still enormous and the customs declaration forms complex in spite of attempts at harmonization of customs procedures. The use of EAC simplified certificates of origin and customs declaration forms should be expedited by the partner states to ensure that traders and transporters do not continue to delay at exit and entry points due to the complexity of the customs declaration forms and other customs procedures.<sup>418</sup> This will ensure faster movement and transportation of goods within the region.

Improvement of infrastructure within the region should be accorded priority so that there is easier movement of goods, persons and services within the region and also to facilitate communication. The East African Road Network project, which is about 7426 km,<sup>419</sup> should be fast tracked and accomplished in addition to other infrastructure projects both nationally and regionally. This should also involve the restructuring of the railway system

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<sup>417</sup> EAC Development Strategy 2006-2010 at p 20

<sup>418</sup> EABC, 2008i at p 21

<sup>419</sup> EAC Development Strategy 2006-2010 at p 8

and promoting inland waterways transport through Lake Victoria among others. Focus should also be on improving the ICT and energy sectors. The costs of energy has a negative impact on the competitive of products in the region and efforts should be made to improve the energy sector to ensure affordability of cheap, affordable and competitive energy sources that can assist in spurring industrial development.<sup>420</sup>

There should be the development through a consultative and inclusive process of development strategies for both the private sector and the civil society that will identify the challenges they face, the roles they can play and the structures through which they can participate adequately in the integration process. For instance, the EESC has a Members' Statute,<sup>421</sup> the EU's equivalent of a private sector and civil society development strategy, which sets out the duties and responsibilities of the members of the EESC as mandated by the Treaty Establishing the European Community,<sup>422</sup> independence and immunity of the members<sup>423</sup> and financial matters among others.<sup>424</sup> It should be noted that the members' Statute was prepared by the EESC in light of the treaty provisions and therefore the private sector and civil society in Europe through the EESC can be said to be self-regulating and independent. Further, the EESC in its task of issuing opinions on matters of European interest to the European Council, European Parliament or European Commission, is divided into sections with each section dealing with different sets of issues.<sup>425</sup> So the EESC has clear structures to execute its mandate and also under a duty to engage only with the European Council, European Commission and the European Parliament in performing its functions under the treaty. It should further be noted that the roles of the EESC emanate from treaty provisions.<sup>426</sup> The development strategies should ensure that there are in place modalities to ensure active and guaranteed

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<sup>420</sup> EAC Development Strategy 2006-2010 at pp 10-11

<sup>421</sup> The Members' Statute was adopted on 11<sup>th</sup> December 2003 by the EESC and came into force on 6<sup>th</sup> January 2004. A complete copy is available at EESC website at <http://eesc.europa.eu> and accessed on 29<sup>th</sup> April 2009

<sup>422</sup> Articles 7 and 262 of the Treaty Establishing the European Community

<sup>423</sup> Article 258 of the Treaty Establishing the European Community

<sup>424</sup> Article 18 of the Members' Statute makes provision for allowances and insurance for members of the EESC and also budget proposals from the European Council.

<sup>425</sup> "How the European Economic and Social Committee works," available at <http://eesc.europa.eu> and accessed on 30<sup>th</sup> April 2009

<sup>426</sup> Apart from the Treaty Establishing the European Community, the so called Treaty of Rome, subsequent treaties have expanded and reinforced the role of the EESC such as the Single European Act (1986), the Maastricht Treaty (1992), the Amsterdam Treaty (1997) and the Treaty of Nice (2000)

engagement between the community and the private sector and civil society and to provide an enabling environment, as a matter of reality, for the participation of the private sector and civil society in the integration process.

There should be intensified efforts to eliminate NTBs within the region. The NTBs are numerous and manifest themselves in various forms like rampant corruption at police road blocks, complicated and cumbersome immigration formalities and duplicated functions of agencies. It is good news that there is in place a mechanism to monitor and eliminate NTBs within the region. This mechanism should be strengthened and accorded all the necessary support and cooperation by the partner states and their agencies to ensure that the mechanism succeeds and is not bogged down by bureaucratic red tape and lack of cooperation by entrenched corrupt interests and networks especially in the police forces of the partner states that have been accused of demanding and soliciting for bribes.<sup>427</sup>

The community needs to make concerted efforts to market and publicize the community to all the categories of people within the region. This awareness creation is crucial to ensure that the people identify with the community objectives and activities at all levels, enjoy a sense of ownership and support it fully. This will also entail ensuring that as much information as possible on the community is disseminated and available to the people. The private sector and the civil society can complement the community in this initiative.

The partner states should set the pace in their commitment to good governance, democratic practices and public accountability and transparency in the management of public affairs. For example, rampant corruption, which has been identified as one of the major NTBs is a direct product of poor governance structures and lack of accountability and transparency in the management and performance of public functions.<sup>428</sup> It will be imperative to improve on governance and ensure accountability and transparency in the public service to ensure that the integration process is not hampered by a corrupt and bureaucratic public service in the member states. Good governance will also ensure that there is a proper fight against piracy and counterfeiting as the enforcement officers will

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<sup>427</sup> EAC Secretariat & EABC, 2008 at p 20

<sup>428</sup> EAC Secretariat & EABC, 2008 at p 8

not be susceptible to corruption or bribery or collusion with the pirates or counterfeiters for personal gain.

The community and the member states need to exploit the potential for PPP and to put in place modalities and rules or regulations that will ensure that there is a structured and binding engagement with the private sector in the formulation, implementation and undertaking of PPP projects. This initiative could also help plug the shortfall in governments' and community budgets when it comes to implementation of crucial projects such as road developments. It will also ensure that the resources of the private sector are directed towards investment in the region.<sup>429</sup>

The participation of the private sector and civil society in the integration process needs to be guaranteed by way of clear and unambiguous treaty provisions. This should be done with a view to also ensuring operational independence of the private sector and civil society. The institutionalization of the private sector and civil society with the current treaty provisions intact will not enhance their participation as they will remain under the direction and control of the organs of the EAC like the Council of Ministers thereby denying them operational independence. There is need for clear policy, legal and institutional framework anchored in the treaty to ensure active participation of the private sector and civil society in the integration process.

The implementation of the above provisions would ensure that a conducive environment exists for the private sector and civil society to play their rightful roles in the integration process and that the challenges confronting them are tackled. The recommendations would also ensure that the proposed institutionalization of the private sector and civil society in the EAC enhances their capacity to participate in the integration process by way of clear and unambiguous treaty provisions.

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