Institutional Mechanisms for the Resolution of Trade Disputes in the East African Community

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Abstract: The paper delves into the institutional mechanism for resolving trade disputes in the EAC. It identifies and discusses various mechanisms set up by the founding Treaty and Protocols to resolve trade disputes that arise in the integration process. The central thesis of this paper is as a Regional Trade Agreement (RTA) that is fast growing, trade disputes are bound to occur with the EAC. It is on this basis that the East African Court of Justice (EACJ), the EAC Committee on Trade Remedies, Partner States judicial, administrative and legislative organs as well as other voluntary mechanisms have been established to handle trade disputes. Basically, the institutional framework as well as regulations for settling trade disputes in the EAC embodies elements of diplomacy and adjudication. The combination is desirable for administrative convenience and flexibility in terms of speedy and efficiency in the resolution of trade disputes.

Key words: East African Community, Trade Dispute, Settlement Mechanisms

1.0 Introduction

The East African Community is a sub-regional Regional Trade Agreement (RTA) that brings together six East African countries that are geographically proximate. Members of EAC are Tanzania, Kenya, Uganda, Rwanda, Burundi and South Sudan which has been recently admitted. 1 Basically, it is an economic zone with an intention of spearheading and accelerating economic growth of the EAC inhabitants. Normatively speaking, the Community is established by the Treaty for the Establishment of the East African Community of 1999 together with various Protocols and Annexes. 2 As a founding instrument, the Treaty put in place a coherent regional economic and political framework for the East African sub-region. It is the rock on which the EAC integration process is built. The Treaty also creates a number of organs and institutions to carry various functions for the attainment of its objectives. 3 The objectives of the EAC are multidimensional. Principally, the Community aim to widen and deepen co-operation among Partner States in political, social, economic, cultural fields, research and technology, defence, security and legal and judicial affairs for mutual benefits. 4 The EAC integration is to be realised gradually and incrementally. Hence, Customs Union and Common Market have been established as the transitional and integral part of the Community. The aforesaid stages have been followed up by the Monetary Union and ultimately the Community intends to establish a political federation. 5 Since, its inception in 1999, the EAC has achieved tremendous progress in regional cooperation. The EAC Customs Union and Common Market Protocols were concluded by the Partner States on the 2nd March, 2004 and on 20th November 2009 respectively. In 2013, the Protocol for the Establishment of the EAC Monetary Union was approved and signed by the 15th Ordinary Summit of Heads of State of EAC. On the political front, efforts for the establishment of the political federation have started, at least on paper.

Admittedly, despite the multidimensional character of the EAC objectives, trade promotion remains one of the significant objectives of the EAC. Partner States views trade as an essential goal of their

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1 South Sudan signed the Accession Treaty to officially join the EAC on 16th April, 2016.  
2 See, the Treaty for the Establishment of the East African Community of 1999 as amended on 30th November, 1999 and 14th December, 2006 respectively.  
3 Ibid., Chapter three.  
4 Ibid., Article 5 (1).  
development strategy and an important ingredient in stimulating foreign direct investment. It is on this basis that Partner States pursuant to article 74 of the EAC Treaty have adopted the sub-region trade regime designed to pursue the goals of trade promotion through liberalisation.

2.0 Trade Disputes

A dispute has been defined as a “specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with refusal, counterclaim or denial by another. At the outset, it is noteworthy that trade disputes do not always carry a negative connotation. Occurrence of disputes can give an impression of the effectiveness and usefulness of the EAC trade regime. The deepening and widening of cooperation is likely to generate trade disputes in. For instance, the operationalisation of the Customs Union and Common Market Protocols within the EAC has produced a number of challenges. These includes Non Tariff Barriers (NTB’s), retention of internal borders, non-harmonisation of tax and trade related regimes and restrictions on the free movement of labour, services and capital. As a consequence, there have been a number of trade disputes reported in media. Trade quarrels have emerged between Partner States, investors and Partner State and traders themselves. In the context of Partner States, a dispute may arise when one Partner State feels that the other member is breaching trade negotiations contained in various Community legal frameworks. This normally occurs when one country adopts a trade policy measure or takes some action that one or more Partner States considers to be breaking the EAC trade rules, or to be a failure to live up to obligations.

Generally, the sources of trade disputes may include the non-implementation of Treaty obligations and failure to honour various commitments agreed by Partner States. In a similar vein, increased competitive pressure due to the operationalisation of the Customs Union and Common Market Protocols makes some domestic producers to seek national protection. Domestic industries may exert political pressure which leads to violations of trade agreements. Also, other disputes relate to the failure to correctly interpret various agreements and legal instruments on the EAC trade regime. Thus, trade disputes within Regional Trade Arrangement such as the EAC are inevitable due to conflicting interests in trade relations.

More significantly, the need for trade dispute settlement mechanism in the EAC cannot be overemphasized. As argued before, the concept of dispute has also a positive face. On that account, proper and efficient handling of disputes may be an indicator of a sound economic management. Settlement of disputes ensures that Partner States acts in conformity with the Treaty, Protocols and numerous agreements on trade matters. Similarly, it prevents retaliation through unilateral actions which are injurious to the goal of trade liberalisation. In the main, resolution of trade disputes is important for ensuring smooth flow of trade between Partner States and hence promotion of intra-regional trade. Therefore the overriding function of a trade dispute settlement mechanism is to foster an environment of accountability, stability and predictability that are essential for all market participants in order to participate fully in the integration process. Moreover, sound governance and trade remedial measures are necessary for economic development of any RTA. As Siziba correctly pointed out, clarity around trade rules breeds a culture of trust which is significant for facilitation of greater trade.

On the flip side, trade wrangles among East African Community partner states may frustrate efforts of regional integration. This may have a disastrous impact on the progression and attainment of the Community objectives.

3.0 The EAC Trade Dispute Settlement Mechanism

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The EAC has set up a dispute settlement mechanism to enforce negotiated commitments. Broadly, mechanisms for resolution of dispute in a regional integration arrangement may take different forms such as diplomatic, power-based forms of resolution to more judicial and rules based procedures. Notably, one of the fundamental principles that govern achievement of the objectives of the Community by the Partner States is peaceful settlement of disputes. Peaceful settlement of disputes is always the desirable option when a trade dispute arises. It is only when there is a continuous breach of trade rules leading to negative impacts on the flow of trade that contentious mechanisms are called into action.

In light of this, the EAC provides for institutional mechanisms to handle trade frictions. However, the EAC institutional framework provides for different dispute settlement mechanisms under the Treaty, Customs Union Protocol and the Common Market Protocol.

3.1 East African Court of Justice (EACJ)

The Court is established by article 9 (1) (e) of the EAC Treaty as one of the key primary organs of the Community. In addition, Protocols and Annexes are an integral part of the founding Treaty. As a primary dispute resolution body, the EACJ is empowered to “ensure the adherence to law in the interpretation and application of and compliance” with the EAC Treaty. Basically, the Court is the final adjudicator on all disputes arising under the Treaty, Protocols and Annexes. However, the jurisdiction of the Court pursuant to article 27 of the founding Treaty is limited. Incrementally, it is expected that the Court will acquire original, appellate, human rights and other jurisdiction when Partner States concludes a Protocol to operationalise extended jurisdiction. Despite the above limitations, the Treaty confers upon the Court jurisdiction to hear specific disputes between the Community and its employees, disputes arising out of an arbitration clause contained in a contract or agreement to which the Community or any of its institution is a party, dispute between Partner States regarding the Treaty if the it is submitted to it under a special agreement between the Partner States concerned and disputes arising from an arbitration clause contained in a commercial contract or an agreement in which the parties have conferred jurisdiction on the Court.

Additionally, EACJ has been vested with powers to settle any dispute between Partner States that arises in the interpretation or application of the Common Market Protocol. Furthermore, EACJ has powers over any dispute between Partner States arising from the interpretation or application of the Monetary Union Protocol. Since its establishment in 2001, the Court has actively carried out its adjudicative function by hearing a significant number of cases on human rights related matters. However, despite unending trade disputes in the sub-region due to the progressive operationalisation of the Customs Union and Common Market Protocols, the Court has not yet made a determination on a reference made by a Partner State with regard to a breach of a Treaty obligations in the area of trade.

3.2 The EAC Committee on Trade Remedies

Apart from the EACJ, the Custom Union Protocol establishes the East African Community Committee on Trade Remedies as another mechanism for resolution of disputes. To a greater extent, it reflects provisions of the Dispute Settlement Understanding of the World Trade Organisation (WTO) to which the Partner States are signatory. Essentially, the Committee is a mechanism for resolving disputes relating to customs union issues. It is composed of three members from each Partner States. The members are required to be qualified in matters of trade, law and customs. Overall, the Committee is charged with administering and managing the dispute settlement mechanism as provided for under the East

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11 Frankel, S., and Lewis, M., Trade Agreements at Crossroads, Routledge, 2013, p.11.
12 See, article 6 (c) of the EAC Treaty.
13 Ibid., Article 151 (4).
14 Ibid., Articles 23 (1) and 27.
15 Ibid., Article 27 (2).
16 Ibid., Article 31.
17 Ibid., Article 32 (a).
18 Ibid., Article 32 (b) and (c).
21 See, Articles 24 and 41 of Custom Union Protocol, 2005.
22 Ibid., Article 24 (a) (b).
African Community Customs Union (Dispute Settlement Mechanism) Regulations.\textsuperscript{23}

The aforesaid Regulations, embodies the procedures for settlement of trade disputes on customs union issues as specified in Annex IX to the Protocol.\textsuperscript{24} Basically, the Regulations operationalise article 41 of the Protocol which relates to dispute settlement. The scope of applicability of the Regulations cover disputes relating to subsidies and countervailing duties; safeguard measures; anti-dumping measures, rules of origin and any other matter under the Customs Union Protocol.\textsuperscript{25} It is worthy to note that the Regulations only apply for a dispute between Partner States.\textsuperscript{26} As hinted above, this occurs when one State adopts a trade policy measure that one or more other Partner States consider to be inconsistent with the obligations set out in the custom union Protocol. In this case, the aggrieved Partner state can invoke provisions of the DSM Regulations to challenge the measure before the Committee. When a dispute involves Partner States and a foreign country or countries, the WTO Dispute Settlement Understanding apply and the complaint must be made to the relevant WTO authorities.\textsuperscript{27} In similar vein, the DSM Regulations provides that in the resolution of disputes, Partner States should adhere to principles such as accountability, fairness, predictability and consistency.\textsuperscript{28} The decision of the Committee with respect to the settlement of disputes is final.\textsuperscript{29}

Further, the DSM Regulations set up a step-wise dispute settlement procedure. The overarching goal is the understanding that the use of the dispute settlement procedures should not be intended or considered as contentious. This is consistent with the principle of peaceful settlement of disputes which is significant for the attainment of the Community objectives. Thus, Partner States to a dispute are expected to engage in these procedures in good faith in an effort to resolve the dispute amicably. Broadly, the steps for resolution of customs issues include two different phases. Firstly, the Regulations make provisions for amicable settlement by consultations through the use of good offices, conciliation and mediation. Failure of consultations leads to establishment of a panel.

\subsection*{3.2.1 Consultation Phase}

The DSM Regulations oblige the disputing parties to conduct consultations amongst themselves before resorting to binding dispute settlement procedures. This is the initial stage for resolution of any dispute between or among Partner States. The intention is to find an amicable resolution of the dispute through the use of means such as good offices, conciliation and mediation.\textsuperscript{30} The DSM Regulations are emphatic that in the course of consultations and before resorting to further action, Partner States shall attempt to obtain satisfactory settlement of the dispute. In order initiate the process, the aggrieved Partner States should request consultation by notifying the Committee on Trade and Remedies in writing through the Secretary General of the EAC. It is also required to assign reasons for the request, including identification of the issues and an indication of the legal basis for the complaint.\textsuperscript{31} Consultations are confidential and are without prejudice to the rights of any Partner State in any further proceedings.\textsuperscript{32}

The Regulations also provide for specific timeframes. Hence, the Partner States to which the request is made should reply within ten days after the date of receiving the request unless the parties mutually agree otherwise. Further, a Partner State is enjoined to enter into consultations in good faith within a period not exceeding thirty days after the date of receipt of the request with a view to reaching a mutually satisfactory solution.\textsuperscript{33} In an event the complained states does not respond within ten days after the date of receipt of the request, or does not enter into consultations within a period of thirty days, or a period otherwise mutually agreed, after the date of receipt of the request as explained above, the aggrieved State that requested the consultations may refer the matter to the Committee.\textsuperscript{34} Further, when consultation fails and dispute remains unresolved

\begin{itemize}
  \item \textsuperscript{23}Ibid., Article 24 (1) (e) and (j).
  \item \textsuperscript{24}Ibid., Article 41 (2).
  \item \textsuperscript{25}The East African Community Customs Union (Dispute Settlement Mechanism) Regulations, 2009, Regulation, 4 (2).
  \item \textsuperscript{26}See, Regulation 4 (3) of the DSM Regulations.
  \item \textsuperscript{27}Ibid., Regulation 4 (4).
  \item \textsuperscript{28}See, article 41 (1) of the Customs Union Protocol and Regulation 2 of the DSM Regulations.
  \item \textsuperscript{29}See, Article 24 (5) of the Customs Union Protocol, 2005.
  \item \textsuperscript{30}See, op.cit., Regulation 5 (1).
  \item \textsuperscript{31}See, Regulations 6 (1) of the DSM Regulations, 2009.
  \item \textsuperscript{32}See, ibid., Regulations, 6 (5).
  \item \textsuperscript{33}See, ibid., 6 (2) of the DSM Regulations; Different time frames applies in respect of perishable goods, Regulation 6 (7) (1) (2) of the DSM Regulations.
  \item \textsuperscript{34}Ibid., Regulation 6 (3).
\end{itemize}
within sixty days after the date of receipt of the request for consultations, the complaining matter may choose to refer the matter to the Committee. A complaining party may also refer the matter to the Committee during the sixty-day period where the consulting parties jointly determine that they have failed to settle the dispute through consultations.\(^{35}\)

Additionally, third party state not a part to the dispute can participate at the consultation stage if it has substantial interest to the matter. For that to happen, that Partner State may, within ten days of the circulation of the request for consultations, request the disputing Partner States to be joined in the consultations. The disputing Partner State shall be so joined where the parties to a dispute agree that the claim of substantial interest is well founded.\(^{36}\)

### 3.2.2 Panel Phase

Panels are quasi-judicial bodies established when the complaining party writes to the Committee in case amicable resolution is not achieved through consultations. Similarly, the complaining party may request the establishment of a panel at any time where it is of the view that the consultations are not productive.\(^{37}\) The request for establishment of a panel by a complaining party should adhere to certain formalities. It shall indicate whether the consultations were held, identify the specific measures at issue and provide a summary of the legal basis of the complaint sufficient to present the problem clearly. The request may include a proposed text of any special terms of reference that a party wishes the panel to discharge.\(^{38}\)

It is the Committee that is mandated to constitute a Panel. The principle function of a panel is to assist the Committee in discharging its responsibilities under the Protocol. Panels are composed of experts from the public and private sectors who are well qualified and experienced in the subject matter of the dispute. To ensure fairness, selection of panelists takes into account independence of members, integrity and diversity of background. The Regulations do not provide for a specific number of panelists. The number is to be determined by the Committee on case by case basis.\(^{39}\) Nonetheless, the EAC Secretariat maintains an indicative of prospective panelists. To that end, each Partner State is required to propose annually not more than twelve names. The names should be approved by the Council of Ministers.\(^{40}\)

As stated previously, panel assists the Committee in a resolution of a dispute, in doing so; it is required to make an objective assessment of the matter before it, facts of the case and the applicability of and conformity with the relevant regulations and make findings to assist the Committee in making recommendations and rulings.\(^{41}\) The Panel decision is issued in the form of a report. In discharging its functions, panel should adhere to certain time-frames and procedures. For instance, it has the maximum of three months to issue the final report from the date of composition. In case of urgency including cases of perishable goods, the period for issuing a final report should not exceed one and a half month. A panel is required to inform the Committee in writing in a determination that the report cannot be issued timely.\(^{42}\) In all cases, the maximum time for panel to issue final report is four months.

Initially, a panel is required to issue an interim report to the parties containing its descriptive sections, findings and conclusions. The parties to a dispute, interested and third parties can submit their comments on the draft report in writing to the panel, within a period set by the panel. According to the Regulations, where no comments are received within the period set for the receipt of comments on the interim report, the interim report shall be deemed to be the final report of a panel and it shall be promptly circulated to the parties to a dispute and any interested parties and then forwarded to the Committee for consideration.\(^{43}\)

Notably, final report is adopted by the Committee and parties are accorded sufficient time to consider it. Parties having objections are required to give written reasons to the Committee, explaining their objections. Further, parties have the right to participate fully in the consideration of the panel reports by the Committee, and their views shall be fully recorded. Furthermore, within 60 days from the date the final panel report is circulated to the parties and notified to the Committee, the report shall be considered, adopted and signed at a meeting of the

\(^{35}\)Ibid., Regulation 6 (6).
\(^{36}\)Ibid., Regulation 6 (8).
\(^{37}\)Ibid., Regulation 8.
\(^{38}\)See, Regulation 8 (2) of the DSM Regulations
\(^{39}\)See, Regulation 8 (2-6) of the DSM Regulations
\(^{40}\)See, Regulation 8 (7) of the DSM Regulations
\(^{41}\)See, Regulation 10 of the DSM Regulations
\(^{42}\)See, Regulation 12 (4-7) of the DSM Regulations
\(^{43}\)See, Regulation 15 of the DSM Regulations
Committee convened for that purpose. The decision of the Committee shall be final.  

On the aspect of remedial measures, a panel can give orders for compensation and administrative costs that a party to the dispute may be required to put in place to reverse the injury or remedy the wrong the subject of the dispute may have caused. 46 Generally, Partner States have a duty to implement fully the recommendations and rulings of the Committee. Thus, compensation and the suspension of concessions or other obligations are temporary measures available to the aggrieved party in the event that the accepted recommendations and rulings of the Committee are not implemented within a reasonable period of time. They are required to be consistent with DSM Regulations and shall subsist until breach or inconsistency is removed, or that the Partner State implements recommendations or provides a solution to the injury caused or occasioned by the non-compliance or that a mutual satisfactory solution is reached. 47

The Committee is enjoined to inform the Council of Ministers about the status of decisions. It is the Council which is empowered to keep under surveillance the resolutions of the dispute and the implementation of adopted recommendations and rulings of the Committee under the DSM Regulations. In essence, it is the Council that has been entrusted with mandate to enforce compliance with the recommendations and rulings. 48

3.3 Other Mechanisms

Despite the above bodies, there are other organs that have a role to play in resolution of trade disputes. For instance the Council of Ministers has powers to enforce compliance with the recommendations and rulings of the Committee of trade remedies. 49 As the second most powerful political organ of the Community, the Council is expected to give a political push to the enforcement of the Committee decisions.

Furthermore, resolution of trade disputes in the EAC is not the monopoly of the Community organs. The Common Market Protocol grants an opportunity for individuals whose rights and liberties recognized under the Protocol have been infringed upon to seek redress before their judicial, administrative or legislative authorities within Partner States. 50 The EACJ sees these mechanisms as “practical alternative dispute resolution (ADR) mechanisms meant to facilitate easy and speedy implementation of the Protocol and hence realization of the Common Market objectives.” 51 Thus, they can be established as tribunals and other quasi judicial bodies to handle specific common market aspects. According to the Court, granting jurisdiction to national courts over disputes arising out of the implementation of the common market is desirable due to the fact that Partner States are the main users of the Protocol on a daily basis. Similarly, as long as the common market confers rights onto the individuals within the EAC, then it seems reasonable and practical that they should be entitled to invoke them before their national courts. On the relationship between the Court and Partner State, the Court acknowledge that the latter undermines its supremacy as the judicial body responsible for ensuring adherence to law in the interpretation of the Treaty. However, the Court maintains that its jurisdiction is ousted by the said dispute settlement mechanisms. 52

3.4 EACJ and Committee of Trade Remedies & Partner States organs: Complementary or Competitive Relationship?

There have been concerns that trade settlement mechanisms established under the Customs Union and Common Market Protocols deny the EACJ jurisdiction to deal with disputes arising from the implementation of the Protocols. Further, parallel mechanisms are feared to jeopardize the attainment of the Community objectives. As the primary dispute resolution organ established by the Treaty, granting concurrent jurisdiction to other bodies and organs of the Partner States seems to erode the supremacy of the Court. This is buttressed by the fact that article 24 (5) of the Custom Union Protocol provides that the decisions of the Committee with respect to the settlement of disputes shall be final. A scenario under

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44 See, Regulation 16 of the DSM Regulations, 2009.
45 Ibid., Regulation 17 (1).
46 Ibid., Regulation 17 (3).
47 Ibid., Regulation 21 (3) (4).
48 Ibid., Regulation 21 (3) (4).
49 See, article 54 (2) of the EAC Common Market Protocol, 2010.
51 The East African Centre for Trade Policy and Law vs. The Secretary General of the East African Community, EACJ, Reference No.9 of 2012, p.25 at para.57.
which the decision is not final and binding is where a party challenges it on grounds of fraud, lack of jurisdiction or other illegality. The aggrieved party in such a case may refer the matter to EACJ for review in accordance with article 28(2) of the Treaty and any other enabling provision of the Treaty.  

Fortunately, in two occasions the issue of EACJ jurisdiction vs. parallel organs for settlement of trade dispute has been a subject of litigation before the EACJ itself. In both instances, the Court was categorical that it has the role and jurisdiction to interpret and apply the provisions of the Protocols. In the Court view, the parallel dispute settlement mechanisms are not courts. They are merely alternative dispute resolution mechanisms intended for the speedy and effective resolution of trade disputes by experts in technical and specialized areas. They are mechanisms for the administration of the Customs Union and the Common Market Protocols that saves the Court time to deal with specialized and technical disputes that may arises daily due to implementation of the Protocols.

With regard to the finality of the Committee decisions, the EACJ is adamant that article 24 of the Customs Union Protocol does not by implication or directly takes away its interpretative jurisdiction. Accordingly, if an issue arises before the Committee that requires interpretation of the Treaty, an aggrieved party can refer such a dispute to EACJ.

Therefore, the relationship between the EACJ on one hand and Committee of Trade Remedies and national organs with respect to trade dispute resolution is complementary rather than competitive. As discussed above, the Court accepts that some disputes due to their special and technical nature need expert institutions to ensure speedy and efficiency resolution which are critical for trade promotion. Similarly, as long as realisation of the common market objectives touch everyday lives of the people, Partner States judicial, administrative and legislative mechanisms need powers to settle disputes arising out of the implementation of the Common Market Protocol. Nevertheless, the Court remains the supreme and final authoritative body in matters of interpretation and application of the Treaty. As long as they are integral parts of the Treaty, the Court has powers to hear disputes arising out of the interpretation and application of Customs Union and Common Market Protocols. Above all, the Treaty makes it clear that Community organs, institutions and laws take precedence over similar ones on matters pertaining to the implementation of the Treaty. Additionally, article 33(2) establishes the supremacy of the decisions of the Court on questions of interpretation and application of the Treaty.

4.0 Conclusion

It is clear that presence of an orderly legal framework on trade dispute settlement that defines and protects the interests of all those involved is very significant. In light of this, the EAC set up an institutional mechanism for the resolving trade disputes that arise in the process of integration. As shown in this paper, the legal design of dispute settlement provisions in trade issues in the EAC features diplomatic and rule-based forms. Partner States are expected to amicably settle disputes before the adjudication process by ad hoc panels. In essence, the mechanism balances between national sovereignty and the objective of trade promotion amongst the Partner States. However, the dispute settlement provisions of contained in the Treaty and the two protocols have yet to be seriously invoked. This can be explained by relatively small number of Partner States in the EAC compared to other RTAs such as the European Union (EU) or the North American Free Trade Agreement (NAFTA). Another reason is the Partner States preference to resolve trade disputes diplomatically through direct negotiations. Further, business community and Partner States alike prefer the use of voluntary mechanisms like the Non-Tariff Barriers reporting, monitoring and eliminating mechanism for resolving trade disputes.

52 See, article 5 (7)
55 East African Law Society Case, op.cit.,p.27
56 See article 30 (1) of the EAC Treaty.
57 East African Law Society Case, op.cit.,pp. 27-30
58 This power emanates from article 23 read together with Article 27 (1) of the Treaty.
59 Article 8 (4) of the EAC Treaty.
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Books


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