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The role of private parties in enforcement of regional agreements - lessons from EAC and COMESA (Part 1)

The private sector has an important role to play in ensuring effective implementation of regional trade agreements. They are the intended users and beneficiaries of these agreements. The enforcement of agreements through litigation where obligations undertaken in regional agreements are not upheld by State Parties is an important aspect of such implementation. This is particularly so in a context where African states seem averse to litigating against each other over trade issues.

In recent years, the private sector has brought cases before national courts claiming their rights emanating out of regional agreements. Cases have also been brought to regional courts. This development – as observed in Eastern and Southern Africa – is constructive. From a community law perspective, the results of such litigation in different regions provide some insights for rules-based governance of trade and integration in Africa.

Community law is a unique field of international law, one that consists not only of contractual obligations between member states of a 'community', but includes legislative and administrative measures deriving from institutions of the community, as well as legal rules developed by its judicial bodies. At the crux of community law is the vertical and horizontal interaction between regional and national laws and institutions.

One of the key features of community law is the possibility for natural and legal persons to bring cases before regional courts. It highlights the extent to which such persons can obtain redress on allegedly infringed rights beyond their national jurisdictions. This was previously possible in the Southern African Development Community (SADC), before the SADC Tribunal was suspended and subsequently reinstated albeit with its jurisdiction limited to disputes between Partner States. There have been some positive developments in the Common Market for Eastern and Southern Africa (COMESA) in recent years. A landmark ruling was made by the COMESA Court in a matter between Polytol Paints (a company incorporated in Mauritius) and the Government of Mauritius. The imposition of a 40% duty on products imported by the company contrary to the tariff liberalisation commitments undertaken by the Government within the COMESA Free Trade Area was at issue in that case.

More recently, the COMESA Court has found that it has jurisdiction to hear a case between Malawi Mobile (a company incorporated in Malawi) and the Malawi Government. This latter case concerns the setting up of a mobile company in Malawi based on a license issued prior to the company. An appeal by the Government of Malawi is still to be decided.

There have been a significant number of cases brought to the East African Community (EAC) Court by natural and legal persons. Matters brought before the Court have varied greatly and highlight further what matters can be considered by the Court, and the redress that can be obtained.

There have been a significant number of cases relating to the fundamental and operational principles of the EAC as provided for in the EAC Treaty, particularly regarding the undertakings by Member States to uphold the principles of good governance including democracy, human rights and the rule of law. The court has mostly taken a cautious approach in its handling of such matters, with three trends emerging albeit with mixed outcomes.[1]

There will of course be other provisions in the Treaties based on which regional Courts can make clear orders on. In the Polytol case, there was a clear obligation on the removal of tariffs under the COMESA FTA. More will be understood from the Malawi Mobile case as it enters the next stage on merits of the case. In the EAC context, there are also clear provisions on tariff liberalisation and non-tariff barriers that the EAC Court would be expected to make clear orders on where violated. There is no case that has been decided on these types of provisions to date. An example of a case brought before the court on a non-tariff barrier that could have tested this aspect is Modern Holdings v Kenya Ports Authority (KPA). This case concerns the alleged loss of a consignment of perishable goods due to the delay in releasing the goods by the defendant. Due to how it was brought before the court, this case was rather focused on whether a natural or legal person could stand as a defendant before the court, just as they could bring cases as applicants to the court. The court ruled that it is only Partner States and institutions of the community that can stand as defendants in the court. This is another important aspect on private parties' involvement in the litigation process particularly on who the subjects of community law are.

Other important considerations for private party participation in enforcement of Treaty obligations are the long durations of court litigation and the specific nature of some issues that could be hampering trade. Apart from the EAC Court of Justice, a Panel process for the resolution of some NTBs is provided for in the Customs Union Protocol of the EAC. Such Panels could potentially dispose of matters faster than the courts - an aspect that is important for producers and traders. However, the current establishment of these Panels by the Committee on Trade Remedies has both positives and negatives. On the one hand, the Committee is established to oversee implementation and dispute settlement regarding rules of origin, anti-dumping, subsidies and countervailing measures, and safeguard measures. Hence the Panels would comprise experts in these fields, making them potentially more effective given the highly technical nature of such issues. On the other hand, however, the Panels cannot be established for other more prominent NTB sources such as customs and border regulation matters.

All in all, there is scope for private party participation in enforcement of Treaty provisions at the national level through litigation in national and regional courts, and lobbying for the enactment of Panel processes to deal with NTBs. What is actually provided for in the Treaty and associated legal instruments is what ultimately matters. This makes the effective design of regional agreements - in terms of coverage and specific provisions - an important prerequisite for rules-based governance of trade and integration processes on the continent.

[1] Refer to Part 2.

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As noted in Part 1, the EAC Court has mostly taken a cautious approach in its handling of cases relating to the fundamental and operational principle of good governance, including democracy, human rights and the rule of law. Three trends have emerged in the court's rulings although a recent Appellate ruling has represented a departure from two of the trends.

First, the Court has found infringements of such Treaty obligations, but has found that it does not have the jurisdiction to make orders for restitution at the national level.

In Venant Masenge v Attorney General of Burundi, the Court found that the failure by appropriate authorities of Burundi to ensure protection of the applicant's land property rights was an infringement of the express obligations in articles 6(d) and 7(2) of the Treaty to observe principles of good governance. However, it also held that it could not grant the requested order of demolition of illegal construction and restitution of full property of land as those fell outside its jurisdiction. As will be seen below, the Appellate Court in Kyarimpa v Attorney General of Uganda has taken a different view on whether it can issue such orders.

Second, the Court has held that there will be instances where it has to look into the national laws of a Partner State and compliance with these in order to establish whether Treaty provisions have been infringed.

This was so in Henry Kyarimpa v Attorney General of Uganda, where the Court looked into provisions of Uganda's constitution and its Public Procurement & Disposal of Assets (PPDA) Act so as to determine whether the signing and execution of a Memorandum of Understanding for construction of a hydropower plant was in line with national law provisions. The Court of First Instance found that the Government of Uganda acted within its executive functions as provided by its national laws vis-à-vis a bilateral agreement that was allegedly in place between the Governments of Uganda and China. In its February 2016 ruling, the Court of Appeal agreed with the First Instance Court's view that the regional court was obliged to consider the national laws of a Partner State to determine whether Treaty provisions had been breached. However, it overruled the First Instance Court's finding that the Government

had complied with its national laws in this particular case (and hence found that it had violated its Treaty obligation to observe the rule of law) because the said bilateral treaty was only an oral and not a written agreement as envisaged by the Constitution and the PPDA Act. It made a declaration to this effect. Related to trend one discussed above, it also disagreed with the Court of First Instance on whether it can make orders for restitution. It held that it in fact could, and did not only because construction of the Dam had proceeded significantly.[1]

Third, the Court has found that it cannot rule on whether national court orders have been complied with or to indeed overturn them.

In Ariviza and Mondoh v Attorney General of Kenya and Secretary General of the EAC, the court held that it could not exercise an appellate function over the judicial decision of the Interim Independent Constitutional Dispute Resolution Court (IICDRC) regarding a referendum and promulgation of a new constitution in Kenya, whether that decision was right or wrong. In the *Kyarimpa* case, the Court of First Instance had initially refused to consider whether national court orders had been complied with. The Appellate Court disagreed with this approach, and held that the court should have considered whether there had been contempt of court and used this to determine whether the Treaty had been breached. It applied this reasoning and found that this had indeed been the case and hence the Government of Uganda had breached its obligation to adhere to the rule of law as provided in articles 6(d) and 7(2) of the Treaty.

With regard to the fundamental and operational principles of the Treaty, the Court has mostly limited itself to interpretation and application of the Treaty provisions and making a declaration where these have been violated depending on the facts of each case brought before it. The sanctions for such a violation are then provided as suspension for failure to observe and fulfil the fundamental and operational principles (article 146) and expulsion for gross and persistent violation of the principles (article 147) by the Summit. The Appellate Court's stance in the *Kyarimpa* case makes the issue of regional court orders for restitution at the national level as well as consideration of national court orders a very live one.

On the fundamental principles, this seemingly prevalent tension between the regional and national laws and institutions, as well as the reach of the regional court to the national domain is not specific to the EAC. It has historically been a feature as the EU has evolved over many years of integration. It will likely become more important as industrial development is pursued in a sustainable development dispensation, for example where States are increasingly designing their investment agreements in a way that ensures reservation of policy space for regulation in the public interest. This calls for careful analysis of existing and new regional agreements on the continent – to determine the extent to which they are or will be able to regulate relations in the course of integration.

[1] In its reasoning, it could provide remedies that included cessation (or 'injunction' in internal law), reparation or similar or other remedies depending on the facts of each case.