

Regulatory Capacity Review

EAST AFRICAN COMMUNITY



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Regulatory Capacity Review

East African Community

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Foreword

The Regulatory Capacity Review of the East African Community focuses on the capacities of the EAC institutional framework to develop, implement, and sustain the efficient, transparent, and market-based regulatory system that is needed to achieve the economic benefits of the EAC Common Market. This report argues that the EAC institutions will be successful in implementing the common market only if they safeguard the quality of regulatory practices.

This is a highly pragmatic and operational agenda. Quality principles can be applied only if they are defined and institutionalized into the machinery of policy making. The idea is that, just as fiscal management can increase social welfare by better allocating resources, so can regulatory governance.

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Executive Summary and Recommendations

The signing of the East African Community (EAC) Common Market Protocol (CMP) and its annexes on 20 November 2009 by the EAC Heads of State was momentous. Now that it has been ratified, the CMP will set the stage for substantial economic restructuring and market differentiation in the region that should, over the medium-term, increase economic opportunities and income for the 120 million citizens of the five Partner States of Kenya, Tanzania, Uganda, Rwanda, and Burundi.

This report focuses on the capacities of the EAC multi-institutional framework to develop, implement, and sustain the efficient, transparent, and market-based regulatory system that is needed to achieve the economic benefits of the EAC Common Market. This report argues that the various EAC institutions will be successful in implementing the common market only if they safeguard the quality of their regulatory practices. This is a highly pragmatic and operational agenda. Quality principles can be applied only if they are defined and institutionalized into the machinery of policy making. The idea is that, just as fiscal management can increase social welfare by better allocating resources, so can regulatory governance.

Good regulatory practices are

vital to the EAC market because implementation of a common market is mostly a process of regional regulatory convergence based on common principles of regulatory quality. A common market is based on “common rules of the market” which implies common understandings of how rules are designed and enforced. The European Single Market, for example, is a regulatory construction that goes beyond common rules into regulatory quality, institutions, capacities, and practices.

Active political leadership in the Community and additional institutional development, such as in the regulatory bodies and the judiciary, at the level of the Partner States are critical to success, but are largely beyond the scope of this report. It is certain that the EAC Common Market cannot succeed without sustained efforts at regional level to improve regulatory practices by the Partner States in parallel with improvements at the center. Comparative indicators and views on the ground suggest that businesses across the EAC region face high regulatory costs and risks in many policy areas. This pattern is clear in the numerous specific regulatory constraints facing the Customs Union and the Common Market Program. Businesses are caught in a web of red tape, regulations, and cumbersome enforcement efforts stretching across

every border and transport corridor. That web will have to be unwound and kept unwound if the common market is to produce concrete and visible benefits. The EAC can play its part, but Partner states will have to play theirs, as well.

The framework of “good regulation” capacities used in this report to assess the EAC is the regulatory reform tools and principles (the so-called “regulatory governance” agenda) developed and implemented over 30 years to help governments improve the effectiveness, efficiency and transparency of complex regulatory systems. These tools are in active use at local, national, and regional levels to roll back regulatory barriers to the free movement of goods, services, people and capital. There is substantial evidence that these kinds of regulatory reforms, if systemic and sustained, can boost the benefits of the common market by accelerating integration, reducing business operating and setup costs, and reducing policy risks that drive out long-term investments.

The regulatory capacities of the EAC institutions are not yet ready to meet the needs of the Common Market. The current institutional setup is inefficient and vulnerable to national interests, reducing the quality of regulatory activities:

- The current regulatory system in

the EAC is top-heavy in both decision authority and expertise, funneling regulatory decisions upward into the political institutions dominated by the national ministries. This slows down action and promotes national policies based on strategic advantage rather than regional policies based on common market principles. Top-down control by the Partner States at every stage of policy development poses a threat to implementation of the common market, because there is no “regional voice” speaking out in protection of the common market versus national interests. A stronger “regional voice” is needed to implement the Customs Union and common market reforms. The highly centralized and political nature of regulation is less and less feasible as the EAC workload expands under the Customs Union and the common market.

- The EAC Secretariat in its present form is unable to carry out the essential market functions required by the common market. The development of draft regulations inside the Secretariat is not governed by any quality control procedures except for reviews of the quality of legal drafting. There are no requirements for impact analysis, consideration of alternatives, or consultation with stakeholders. There are no clear quality principles to guide the selection of options or to reject bad options.

- Too many bodies at EAC level are working without procedures to ensure quality, regional interests, transparency, and consultation. There seems to be a proliferation of bodies in the EAC that is fragmenting

policy and increasing regulatory costs.

- There is no overall regulatory strategy consistent with the common market; instead, regional regulation is being developed through slow, negotiated, and inefficient harmonization efforts. The EAC system is still more a negotiating forum for treaties than a dynamic regulatory system meeting the needs of the common market.

- Consultation is today limited to selected private interests with little structure or transparency in how consultation is done. Most decisions are not made with an adequate understanding of needs on the ground for businesses.

- The lack of analysis of impacts of options for EAC regulation is a major gap in the EAC procedures, because policy officials are unable to base decisions on a clear understanding of the consequences of their actions. Even a light assessment of the likely costs and benefits of proposed EAC actions would be useful.

- There is little attempt to communicate the rights and obligations of the common market to its key participants – businesses and consumers – who will determine if the common market succeeds.

- The weakest part of the EAC arrangements is the link between regional policies and implementation on the ground, the mechanisms of monitoring and enforcement of compliance by Partner States with EAC regulations, and other incentives for compliance.

- The Sectoral Committees do not operate with any established procedures with respect to mandates, analysis, consultation, documentation, quality of work, preparation of meetings, or transparency. There is no evaluation of their performance. The technical expertise of the Sectoral Committees is highly variable, expertise in the national ministries is sometimes unavailable, and preparation is sometimes insufficient.

As the Common Market is implemented, regulatory quality issues will become an even larger constraints on results for businesses and consumers. Indeed, the EAC now risks becoming just another regulatory constraint rather than a market promoter. For example, the focus of attention in EAC regulatory activities today is on the production of harmonized, top-down rules rather than on market-oriented mutual recognition that promotes consumer choice. Little attention is being paid to the quality and transparency of those rules, to their implementation, and to the enduring capacities of the regional regulatory system to perform according to international standards of good regulatory practice.

This review has identified strengths and weaknesses of the EAC system that reduce the economic benefits of the Common Market. The weaknesses should not obscure the tremendous progress made in developing the legal framework and policies of the EAC over the past 10 years. A basic package of reforms should be considered in light of experiences so far in the EAC and

of international experiences. These reforms are equally relevant to the free movement of products, services, labor, businesses, and capital.

Some of these reforms can proceed within the current institutional setup at the discretion of the Secretariat. Many deeper institutional reforms can proceed within the authorities of the current treaty at the decision of the Council. Other problems cannot be fixed without structural changes and changes to the treaty itself by the Partner States. Each reform is summarized below, and further summarized in the following table.

Reforms that the Secretariat can implement within the current institutional setup:

1) Prepare a regulatory strategy for the EAC.

The EAC institutions need a unified regulatory reform strategy that presents a regional view of regulatory reform and its interaction with national regulatory practices. The strategy should also include mechanisms for monitoring the impact of better regulation to demonstrate tangible benefits. An efficient way to do this is to use the existing regional Network of Reformers to create an EAC Group on Better Regulation to draft, with the Secretariat, a report that proposes an Action Plan with deadlines, comprising an overall approach to improving regulatory practices in line with regional integration. A similar report done for the European Union by the Mandelkern group of national experts in 2001 was a turning point in the creation of better regulation

strategies at regional and national levels. The new EAC Group on Better Regulation could continue as an advisory body to the EAC institutions to monitor, promote, and support regulatory reforms.

2) Create in the Secretariat a dedicated mechanism, with adequate resources, expertise and authority, to assist the EAC to develop the regulatory strategy; for managing and coordinating implementation of the regulatory reform strategy; and monitoring and reporting on outcomes. This small team - perhaps in the Office of the Legal Counsel or the Secretary-General's Office -- would work with the directorates in building capacities and strategies to improve regional regulatory practices needed for the Common Market.

3) Initiate a training program in good regulatory practices to build awareness and skills among Secretariat staff and other EAC institutions. The Secretariat staff comes from national governments and other sources. There is no shared understanding of how good regulatory practices support the mission of the Common Market and other regional initiatives. Building skills in stakeholder consultation, regulatory design, implementation, and analysis of regulatory options will greatly increase the capacity of the Secretariat to lead and safeguard the regulatory framework needed for the CMP to operate.

4) Take low-cost and concrete steps to increase communication and awareness of the requirements

of the common market among businesses and citizens. As part of communication efforts, the Secretariat and other institutions should seek opportunities to enlist civil society organizations in communicating with citizens. Preparing a major report on the expected benefits of the Common Market for citizens and businesses would be a useful step, as shown by the 1995 Cecchini Report that provided valuable political support for completing the European Single Market.

5) Create a public registry of EAC laws, regulations, and instructions, including standardized forms to be used in commerce. There is already a good website by the EAC institutions, but the legal information available is not complete and is restricted to legal text. Rights and obligations are not described clearly, and standard forms are not available. Access by users to legal instruments and interpretations is a basic condition defining compliance and the effectiveness of a regulatory framework.

6) Adopt a basic form of RIA inside the Secretariat as the basis for proposals provided to the Council and to the Legislative Assembly. The Secretariat should play a greater role in initiating legislation, and should take greater care in the quality of its drafts, particularly emphasizing low-cost regulatory solutions. The Secretariat should lead the way in this important reform.

Institutional changes that the Council can implement within the current treaty

7) Mandate stakeholder consultation for all significant regulatory changes.

A systematic consultation process for all regulatory drafts will at a stroke increase the transparency of the EAC structure and bring in new voices whose views are important to the success of the common market.

8) Put consumers at the center of the common market.

The regulatory initiatives at regional level are focused far too much on harmonization across five countries. This slows down progress and reduces diversity in the EAC. It will actually increase EAC regulatory costs if the harmonized approach replaces more appropriate local solutions. The strategy should move from the current top-down harmonization approach to a market and innovation-oriented regulatory approach based on mutual recognition. This will reduce the cost of regulatory framework for the common market, speed up and increase economic benefits, and reward innovation and consumer choice in the common market. In Europe, the shift to mutual recognition was the key to creation of the common market.

9) Adopt and implement the regulatory principles needed for the functioning of the Common Market. This can be done by adopting substantive regulatory quality principles such as proportionality, efficiency, and simplicity to complement the legal principles in the treaties and the CMP, and creating procedural safeguards to implement those quality principles. It is also necessary that the Council precisely define in empirical terms

the important Treaty criteria of appropriate, reasonable and justified in order to prevent damaging loopholes for legal non-tariff barriers.

10) Give the Secretary authority to make routine regulatory decisions implementing policy decisions of the Council. Many routine regulatory decisions can be made by the Secretariat under delegation from the Council. This would speed up actions and reduce national pressures on regional policies.

11) Simplify and re-order the regulatory process so that the EAC Secretariat is responsible to the Council for initiating and drafting regulatory texts, consulting with the Partner States through the Sectoral Committees. The current regulatory system in the EAC is too top-heavy in decision authority and expertise, funneling regulatory decisions upward into political institutions dominated by the national ministries. The Sectoral Committees should advise the Secretariat, rather than the other way around.

12) Replace the consensus principle in the Partner State institutions with a more flexible definition of consensus. Consensus by five countries on every detail of the regulatory framework greatly strengthens the powers of special interests and national positions in the negotiation of the regulatory framework for the common market. The Court of Justice has called for the Council to define consensus more flexibly. Some kind of qualified majority will ease the grip of national interests on regional policy.

Reforms that require changes to the treaty

13) Give the EAC Secretariat authority over its staffing, its procurement, and the spending of its budget. These resources are essential to the quality of its work. Current controls do not permit the Secretariat to function effectively.

14) Expand the East African Court of Justice's jurisdiction from interpretation of the Treaty to cases of non-compliance with the Treaty, and particularly to the review of administrative actions and lack of administrative actions by the public administration of the Partner States. Judicial review of compliance with EAC policy will greatly increase the transparency, credibility, and predictability of the legal framework for the common market, and thereby boost economic benefits. Building capacities in Partner State courts to review non-compliance with the Treaty would be beneficial.

15) Amend the Treaty or the CMP to include a legal requirement for stakeholder consultation by the EAC institutions when policies are developed, and develop systematic methods so that consultation is earlier, more consistent, more structured, and more effective in permitting genuine discussion.

16) Develop a multifaceted strategy for monitoring and enforcement of EAC policies. A reporting mechanism for implementation is needed to track compliance. The judicial system must be developed more fully as part of the system of compliance. The

jurisdiction of the EAC Court of Justice should be expanded to include cases of noncompliance brought by citizens of the Partner States. The Secretariat must be given more authorities for monitoring and for reporting offenses to the Court of Justice for action. These 16 actions will transform the regulatory practices of the EAC. Similar regulatory reforms must spread to the five Partner States to

sustain the Common Market. The EAC institutions can also promote beneficial regulatory reforms in the Partner States through a range of “soft” approaches, including various kinds of coordination, leadership, demonstration affects, peer review and peer pressure, and even competition for quality driven by scorecards and comparative indicators. The EAC Secretariat can

deploy a flexible menu of reform strategies to promote good regulatory practices across the Common Market. A series of options is presented in this report in a “pyramid” organized in descending order from the “softest” form of leadership based on information and persuasion, to the “hardest” based on use of legal authorities.

Summary Table: Steps to create an effective common market regulatory framework

Steps	Reforms at discretion of EAC Secretariat	Reforms under the authority of the Council	Reforms requiring changes to the Treaty
<i>Set the strategy</i>	Prepare a regulatory strategy for the EAC		
<i>Articulate the principles behind the Common Market regulatory framework</i>	Adopt a basic form of RIA inside the Secretariat	Put consumers at the center of the common market by moving from the harmonization to mutual recognition. Adopt and implement the regulatory principles needed for the functioning of the Common Market Replace the consensus principle in the Partner State institutions with a more flexible definition of consensus	
<i>Reorganize the institutional framework</i>	Create in the Secretariat a dedicated mechanism for managing and coordinating implementation of the regulatory reform strategy	Give the Secretary authority to make routine regulatory decisions implementing policy decisions of the Council. Simplify and re-order the regulatory process so that the EAC Secretariat is responsible to the Council for initiating and drafting regulatory texts, consulting with the Partner States through the Sectoral Committees.	Give the EAC Secretariat authority over its staffing, its procurement, and the spending of its budget
<i>Build capacities for better regulation</i>	Initiate a training program in good regulatory practices among Secretariat staff and other EAC institutions EAC institutions can promote regulatory reforms in the Partner States through “soft” approaches		
<i>Communicate with the public</i>	Take low-cost and concrete steps to increase communication and awareness of the requirements of the common market among businesses and citizens Create a public registry of EAC laws, regulations, and instructions, including standardized forms to be used in commerce	Mandate stakeholder consultation for all significant regulatory changes	Amend the Treaty or the CMP to include a legal requirement for stakeholder consultation by the EAC institutions
<i>Monitor and enforce EAC rules</i>			Expand the East African Court of Justice’s jurisdiction from interpretation of the Treaty to cases of non-compliance with the Treaty Develop a multifaceted strategy for monitoring and enforcement of EAC policies

The Common Market Protocol: A momentous step

2.1 Introduction

1. The signing of the East African Community (EAC) Common Market Protocol (CMP) and its annexes on 20 November 2009 by the EAC Heads of State was momentous.

Now that it has been ratified, the CMP will set the stage for substantial economic restructuring and market differentiation in the region that should, over the medium-term, increase economic opportunities and income for the 120 million citizens of the five Partner States of Kenya, Tanzania, Uganda, Rwanda, and Burundi. It is widely agreed that the sustainability of EAC integration depends on the production of concrete benefits visible to citizens.

2. This report focuses on the capacities of the rapidly developing EAC institutional framework to develop, implement, and sustain the efficient, transparent, and market-based regulatory system that is needed to achieve the economic benefits of the common market.

There are three main challenges in developing such a regulatory system, in order of priority and timing:

- 1) the “negative” task of eliminating existing rules and preventing new rules at EAC and domestic levels that violate the principles of the common market,
- 2) the “positive” task of completing a regional regulatory framework at EAC level that enables the free circulation of goods, services, capital, labor, and business establishments, and
- 3) the “quality control” task of reducing the costs and risks of doing business by embedding regulatory quality principles into regulatory mechanisms at the EAC level and promoting them at domestic levels.

3. These are familiar challenges. A range of regulatory reform tools and instruments (the so-called “regulatory governance” agenda) has been developed and implemented over 30 years to help governments improve the effectiveness, efficiency and transparency of growing regulatory systems, both the stock (the pool of existing rules) and the flow (development of new rules). These tools were highly relevant to East African development and democracy before the Common Market Protocol was agreed, and, this report argues, are now even more relevant to the success of the EAC in delivering the economic benefits to consumers and workers that are promised. This report concludes that EAC institutions can, with the right approaches implemented flexibly across a broad front, stimulate faster adoption of good regulatory practices across the region, and so speed up and sustain important economic benefits for 120 million people.

BOX 1:

LEGAL MANDATE FOR THE EAC COMMON MARKET PROTOCOL

The Treaty for Establishment of the East African Community was signed on 30th November 1999 and entered into force on 7th July 2000 following its ratification by the original 3 Partner States – Kenya, Uganda and Tanzania. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18th June 2007 and became full Members of the Community with effect from 1st July 2007. Article 76, paragraph 1 of the Treaty states that “there shall be free movement of labour, goods, services, capital, and the right of establishment.” The Common Market Protocol that implements this article is now undergoing the process of ratification by each Partner State.

4. Good regulatory practices are vital to the EAC market because implementation of a common market is essentially a process of far-reaching regulatory convergence based on common principles of regulatory quality. The common market means common rules of the market that have similar meanings across borders. The European Single Market, for example, is a regulatory construction that goes beyond common rules into regulatory quality, institutions, capacities, and practices. The Common Market Protocol and its Annexes imply a wide range of regulatory reforms needed to implement the commitments of the CMP. These regulatory reforms are needed both at the EAC level, and at the domestic level in the five Partner States. This report maps out steps that can be taken to promote better regulatory practices at both levels.

2.2 Current policies for regulatory reform in the EAC

5. Regulatory reform is not new to the region. All five Partner States have initiated some kind of regulatory reform program, although the speed and success of these programs are variable. These programs are sorely needed. It is widely recognized and documented that the cost of doing business is relatively high in all five Partner States largely due to poor regulatory practices. These regulatory costs increase sharply as commerce crosses borders in the Community.

6. Today, goods, services, money, people, and business establishments in the five EAC Partner States are trapped inside their national borders by a web of paperwork, rules, standards, red tape, corruption, and uncertain enforcement practices. This web of non-tariff barriers to free trade must be systematically unwound to free up the movement of

goods, services, people, capital, and businesses across these borders. That is the core regulatory reform agenda of the CMP, and it is a very difficult one indeed. The current problem, a Secretariat official said during this review, is not the content of EAC regulations, but that “Partner States are not implementing the decisions of the Council.”

7. The CMP is a critical component of a series of linked political decisions that are increasing, large step by large step, the economic and political integration of a new East African Community. The EAC countries established a Customs Union in 2005, and are aiming for a monetary union by 2012 and ultimately a political federation of the East African States. More bodies are being set up almost monthly, the most recent being the East African Community Tourism and Wildlife Management Bill that establishes a commission to coordinate the sector and harmonize national policies, regulations and standards on tourism and wildlife management. Political decisions to deepen the EAC integration process in so many spheres are coming so quickly that some worry that top-down political commitments have far surpassed institutional capacities and acceptance by citizens. This review finds that achieving even the commitments in the Customs Union and the Common Market Protocols require strengthening of the regulatory capacities of EAC institutions. Many of the longer-term steps have important implications for the nature of the regulatory system needed to achieve the region’s development goals. Within this fast moving political vision, the institutional context for policy development and implementation is changing quickly.

8. The EAC reforms are part of an even larger market reform vision: a proposed Free Trade Area (FTA) between the East African Community (EAC), the Common Market of Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) was agreed to in a Memorandum of Understanding (MOU) signed in Kampala in October 2008. Ultimately, the various regional arrangements, the so-called Regional Economic Communities (RECs), are seen as building blocks of a unified African Economic Community. This supposes a regulatory construction stretching across the entirety of Africa.

9. The focus now, however, is pragmatic implementation of the EAC on the ground in the five countries so that concrete and visible benefits are delivered to citizens in the region. The first priority is reducing the costs and risks of doing business across borders. There are substantial difficulties to improving regulatory practices. Implementation of the EAC Customs Union, for example, has been greatly hindered by significant non-tariff barriers rooted in regulatory policies and practices that must be addressed by deeper regulatory, institutional, and governance reforms. The experience of the EAC is similar to those of other African regional arrangements: the regulatory reform agenda is relatively difficult to implement because it touches on a vast array of institutions and interests with incentives, habits, and capacities that are not necessarily supportive of regional integration. Progress cannot be achieved by marginal changes to a few procedures. Reversing deep-seated regulatory practices requires a systemic approach that embeds new regulatory practices across the EAC region.

10. Sustainability of these reforms is a special challenge. Alarm is high in some countries due to concerns about job losses, cultural erosion, and even loss of language. Some Annexes have been delayed, for example, because of fears of free movement of workers across borders:

“Tanzania argues that Kenya has more qualified manpower and will dominate the local market.” Private sector representatives said in this review that, for many companies, “The word competition sends shivers through the back.” In economic terms, these market reforms will have asymmetric impact across countries, sectors, and businesses, and are already generating “back pressure” for measures that protect producers in some sectors in some countries. One of the core roles of the EAC institutions is to continually push back against these protectionist pressures. To some extent, the Secretariat is playing this role. The EAC Director General in charge of customs and trade, Peter Kiguta, appealed to Partner States in 2010 to “show their commitment to the Customs Union” by refraining from activities that are protectionist, such as imposition of taxes and levies of equivalent effect to tariffs. The CMP will generate many more tensions as competition for markets and jobs increases across much of broader economic territories. It is possible that the CMP will be whittled away piece by piece as interest groups protect their turf. Sustainability of the common market will depend on a mix of citizen support, institutional design, convergence of regulatory practices, and political commitment.

11. The latter – political commitment – is a critical element that is not addressed in detail in this report. It is clear that, as in Europe, the

progression to a true Common Market is as much a political evolution as a technical one. However, many of the recommendations made to create the institutional and technical regulatory capacities for the Common Market will simultaneously support a political economy supportive of further change. This “momentum for reform” was described in the IFC report *Lessons for Reformers: How to Launch, Implement and Sustain Regulatory Reform*. That report noted:

...well-designed reform programs do not work only within existing limits, but work actively to expand opportunities by exploiting reform drivers, relying on good design, and building allies to weaken drivers for the status quo.

12. The recommendations made here are based on that principle of using reforms to building the political consensus to sustain and expand the Common Market and a stronger EAC Secretariat. For example:

- Providing better information on the benefits of the Common Market is a common and effective method to energize allies of reform and undermine opponents. A famous 1988 report by a group of experts, chaired by Paolo Cecchini, examined the benefits and costs of creating a single market in Europe. This report emphasized the consumer benefits from a common market and was a major pillar in the arguments used by political leaders to justify moving ahead.
- The recommendation for monitoring and performance standards by the EAC Secretariat parallels efforts in Australia to create entirely new incentives for quality regulation in the public sector. National performance targets were set and reported

against during the economy-wide microeconomic Hilmer reforms of the 1990s. Likewise, the slogan of “EU 92” was a public commitment to complete the building blocks of the European Single Market by a fixed deadline.

- Strengthening the regulatory authority of the EAC Secretariat parallels the strategy in South Korea, which explicitly attacked the public choice foundations of regulation. Reforms took an institutional approach that sought to reduce incentives for capture and rent-seeking behavior.

13. As expected for these enormous reforms, it will take several years to implement the Customs Union and Common Market protocols. The CMP recognizes that the common market infrastructure will be put into place over time. Article 2 states, “The establishment of the Common Market shall...be progressive.” To compare, the Single European Act, signed in 1986, outlined a timetable for the implementation of measures to create a true single market by the end of 1992. These six years were not enough, because the EU Single Market required continued regulatory and implementation efforts for many years, and is still uncompleted. The free movement of goods was the easiest and fastest of the “freedoms” to implement, but in other areas, such as services and financial markets, the EU regulatory framework still has major gaps. The EAC institutions should also plan for a medium-term strategy of several years to create a new standard of regulatory quality that can be implemented on the ground across the five Partner States. That is the time period covered by this report.

14. To draw from international experiences and lessons learned about regulatory practices in effective common markets, this report compares the EAC CMP design and institutional framework with other regional trade and investment arrangements aimed at creating common markets. The EU arrangements are used as the main benchmarks for the EAC CMP, with other examples from Africa and North America:

- The European Single Market is the most successful common market in the world, and has pioneered a range of regulatory governance and quality safeguards that far exceed any other common market. Many of the elements of the EAC Treaty and the CMP parallel similar elements in the European legal framework. Like the EU Single Market, the EAC Common Market can be seen as an investment in new economic value. Pelkmans has written that “The internal market is by far the greatest economic asset of the European Union.”

- Other examples are used from the Common Market for Eastern and Southern Africa (COMESA) which covers 19 countries (including all of the EAC countries except Tanzania). Its legal instruments and institutions are quite similar to those of the EAC. Some examples are used from ECOWAS. The North American Free Trade Agreement (NAFTA) which removed most barriers to trade and investment among the United States, Canada, and Mexico is also cited. The reason why NAFTA is relevant to the EAC experience is that the implementing institutions for both are relatively weak, and work through co-ordination, implementation, and enforcement issues in ways different from either COMESA or the EU. Like NAFTA, the EAC is based on the

principle of national sovereignty.

3. The importance of good regulatory practices in the common market

15. It is useful to discuss how good regulatory practices contribute to the economic benefits of the common market, but it is not possible to provide monetized estimates of either the baseline (the CMP without further investment in good regulation) or the regulatory reform scenario (the CMP with more investment in systemic reform). Unfortunately, there are no detailed studies of the potential economic impacts of the Common Market in the EAC region. Even the economic impacts of the 5-year old Customs Union are not yet fully assessed, although more studies are planned.

3.1. Summary of the potential economic benefits of the CMP

16. Three arguments are needed to justify further investment in good regulatory practices at the level of the EAC as part of the common market reforms: 1) the common market itself will deliver economic benefits; 2) more regulatory reform in the region will bring economic benefits; and 3) the common market will deliver more benefits in combination with regulatory reform.

17. The potential benefits of the EAC common market (actually benefits of regulatory reform) are well elaborated, both in theory and in practice across many other regional arrangements. The benefits of the EAC common market should come through increased inter-regional trade of goods, services, labor, and capital. The benefits should be realized through static and dynamic channels:

1) On a static level, reducing the costs

and risks of all aspects of production, including transport, which will increase business productivity and expected Return on Investment (ROI);

2) On a dynamic level, increasing market competition in previously fragmented markets, which will stimulate dynamic effects such as incentives for innovation and market entry;

3) On a longer-term dynamic level, restructuring as countries specialize, and as upward and downward linkages and economies of scale and scope are strengthened across the region. This will promote production efficiency that will in turn reduce prices and increase competitiveness. One EAC analyst noted, correctly, that “The extent of such effects is difficult to forecast as it will largely depend on private sector investment responses and on governments’ non-interference with economic adjustment processes.” The degree to which Partner States can resist such interference has yet to be proven.

18. One way to estimate the potential gains, and limits, of the CMP is to look at the results of the EAC Customs Union (CU), which has been implemented for five years, on inter-regional trade.

- The effect of the CU internal and external tariff reductions on inter-regional trade seems to be positive, although analysis for 2009 has not been published. From 2005 to 2008, EAC intra trade rose by 49%.

- There is also anecdotal evidence that inter-regional investment is increasing.

- An evaluation of the customs union prepared for the Secretariat found that “The analysis shows a

mixed picture – with both positive developments and challenges, arising from the implementation of the CU. The positive developments far outweigh the challenges. There are improvements in trade and revenue performance, there is predictability in the policy environment, there is confidence in the region, etc and a lot of potential is yet to be exploited.” The challenges include many issues relevant to the quality of the common market regulatory system.

19. Another distributional issue of enormous importance to the sustainability of the EAC is its relative impact across the five Partner States. Tensions about the distribution of benefits are a key political-economy factor for the pace of regulatory reform. Since regulations are the primary government tool used to protect domestic producers, regulatory simplification and convergence will reflect the degree of agreement that the (political) benefits of the EAC CMP justify the (political) costs. The more balanced are the benefits, the faster regulatory reform will go.

20. The cost of doing business in the EAC merits attention, but the risks of doing business are probably much more important to long-term benefits. Policy risks are incorporated into anticipated ROI for any investment project, and hence increase the cost of capital in the region. This in turn drives out long-term investment in favor of short-term and speculative investment. Today, businesses in the EAC region confront high regulatory risks due to nontransparent and captured policy processes, and unpredictable and corrupted enforcement on the ground. Progress in increasing the predictability and transparency of regulations affecting businesses would

be enormously beneficial to investors. The importance of driving down regulatory risks is the main reason for the emphasis in this report on improving regulatory transparency in the EAC.

21. Regulatory reform would seem to offer huge economic benefits to the East African Community. This is true in part because there is much room for improvement. Currently, business costs and risks are high in each of the five countries, and jump hugely as goods, services, and people move across borders. Regulatory costs in the region are documented in several international indicators. Curiously, these costs do not seem to be declining. The Doing Business rankings have, relatively with other countries, steadily declined for three of the five countries since 2006, and were stagnant for the fourth. Only Rwanda improved significantly, through a Herculean effort in 2009. Other indicators show a similar picture.

22. During the period of implementation of the Customs Union, trading across borders became generally harder, not easier (in relative terms). These indicators confirm what is generally thought to be the case: moving across borders is just as difficult in 2010 as it was in 2005 when the Customs Union began. This is because, even though tariffs fell, the five Partner States made little progress in simplifying and shortening the time needed to comply with non-tariff requirements such as health checks. One Secretariat official noted:

People expected the costs of doing business to go down with the tariffs, but they did not. Weigh stations, lack of tax harmonization, numerous documents to export, 10 different offices at the borders, no improvement in government

efficiency. Every border post is still operative, and every post has the same gamut of checks – governments have not given up any border controls.

These indicators, and others, considered together, suggest a pattern across the EAC region of high regulatory costs and risks facing businesses in many policy areas. This pattern is clear in the numerous specific regulatory constraints facing the Customs Union and the Common Market Program. The systemic “regulatory governance” approach taken in this review addresses many of the root causes of high regulatory costs and risks in the EAC region. There is substantial evidence that such regulatory reform, if systemic and sustained, can lower costs and reduce policy risks for businesses, while increasing competitive pressures, all of which change the commercial environment to induce better performance of firms in markets.

23. An extensive and expanding program of regulatory reform seems inescapable in the EAC CMP. The regulatory issues are pervasive. Implementation of the Customs Union since 2005 has demonstrated that the success of economic integration across the borders of the five Partner States depends on a larger, more systematic, and more institutional effort to improve the domestic regulatory practices of the Partner States. The Customs Union greatly reduced tariffs, but an early analysis of the Customs Union found that: The success of the CU will largely depend on the elimination of non-tariff barriers (NTBs) on intra-EAC trade. This is strong support for the notion that the common market will not produce the expected benefits unless EAC institutions are more capable of promoting and protecting the

necessary regulatory framework.

3.2. Where are the consumers?

24. An important missing group in the EAC regulatory strategy is consumers, a group whose informed participation in the common market is critical to success. Many of the benefits of a common market should accrue to consumers in the form of more choice, higher quality, and lower prices. These benefits will be an important contribution to reducing poverty by increasing household income. It is also important to the demonstration of concrete benefits needed to sustain the common market against powerful opposing interests. As discussed later in the section on harmonization versus mutual recognition, consumers will be the final arbiter of success in the common market because they will choose the products and services in the market, and their preferences for goods and services will define the scope of integration.

25. Yet consumers are not included in the EAC legal framework or the CMP strategy. The EAC strategy has been focused entirely on producers. “Where are consumers? The forgotten group,” said an officer with the Kenya Private Sector Alliance. The EAC treaty does not mention consumers until page 58, and then only in the context of consumer protection. The CMP mentions consumers briefly when Partner States agree in Article 5 to “co-operate to ensure fair competition and promote consumer welfare,” and then in Article 36, which focuses on the need for regulation to protect consumers. Indeed, this article includes text that could have guided the drafting of the entire CMP:

The Partner States shall promote the interests of the consumers in the Community by appropriate measures that:

(a) ensure the protection of life, health and safety of consumers; and
(b) encourage fair and effective competition in order to provide consumers with greater choice among goods and services at the lowest cost.

26. Consumer choice, information, and rights are not mentioned anywhere else in the CMP and are not part of the current discussion in the Secretariat. Consumer issues are given lower priority, said an official from an EAC Ministry: “We don’t look at the issues from the point of view of the consumer. For the customs union, we ask what is the effect on revenues, not the consumer.”

27. The EAC Secretariat has held a few sensitization workshops to explain to citizens in East Africa their rights under the CMP, but nothing beyond that is planned to mainstream the common market in the lives of people. “You will not see the appreciation of the quality marks in the field by consumers or producers or governments. There is need for consumer awareness – need to make them real,” said an official from an EAC Ministry. Without that, the market role of consumers is absent from the regulatory strategy of the common market. Some Secretariat officials explain that consumers are too weak in the EAC, and that they have too little information to make decisions, but this seems a curious argument in light of the fact that EAC consumers already make many choices in the market, for example, among competing cell phone services. By contrast, the EAC Ministry in Burundi has planned “a campaign on the protocol throughout the country

to explain the details of the protocol. We want to address all national partners.”

28. The EAC instruments are not alone in this curious neglect. The COMESA Treaty, too, ignores consumers except in the context of consumer protection (Article 112). Contrast this with the central and growing attention to consumer welfare and acceptance by the European Commission in the European Single Market :

It is in their role as consumers that most of our citizens experience the single market on a daily basis. Their consumer experience therefore influences their views on the single market and the EU as a whole. Better outcomes for consumers are the ultimate goal of all single market policies and the litmus test for their success. In an increasingly consumer-oriented, globalised economy, a single market that responds more efficiently to consumer demands also helps to deliver an innovative and competitive economy.

29. Including consumer choice more explicitly in the regulatory strategy has substantial implications for the strategy itself. A regulatory framework that emphasizes consumer choice and welfare favors diversity and mutual recognition, rather than harmonization based on top-down regulation. A mutual recognition regulatory framework is easier to construct, politically and institutionally, and cheaper to enforce than is a harmonization framework. The importance of this balance between diversity and harmonization for the regulatory reform strategy of the EAC institutions is discussed later in this report.

4. The EAC institutional and legal framework

30. This report does not review the substantive quality of regulatory policies adopted by the EAC (except as examples). For example, it does not review the completeness of the Common Market Protocol or the levels of Common External Tariffs. Those are outputs of the political process and the EAC institutions.

31. Rather than focusing on outputs, this report reviews the capacities of the EAC institutions to develop, adopt, and implement the regulatory policies needed for the Common Market to work effectively. These regulatory policies include the Treaty, the Common Market Protocol and its growing body of regulations in Annexes and Schedules, and implementing Acts of the Legislative Assembly. The idea is that, if these institutions are improved, including their skills, incentives, and procedures, so will the quality of their outputs -- the regulations and implementation efforts.

32. Regulatory reform cannot be implemented without mapping out the regulatory system. While the complexity of the legal framework for the EAC goes beyond the scope of this review, two main issues addressed here: the legal competences assigned to various institutions, and the regulatory instruments, and the procedures used by each to implement the Treaty and the CMP.

4.1 The legal framework for the CMP

33. Every legal system uses a defined set of legal instruments, called “regulations” in this review, that are developed using defined procedures. The procedures define the quality of the regulations by building in various levels of expertise, quality control,

transparency, administrative and judicial review, and accountability for results. Although much of this review focuses on the procedures used to develop the EAC regulations, this section focuses on defining the instruments themselves.

34. The primary source of EAC law is the Treaty for Establishment of the East African Community, which was signed on 30th November 1999 and which entered into force on 7th July 2000 following its ratification by the original 3 Partner States – Kenya, Uganda and Tanzania. The Republic of Rwanda and the Republic of Burundi acceded to the EAC Treaty on 18th June 2007 and became full Members of the Community from 1st July 2007. The mandate for the Partner States to adopt the EAC Common Market is derived from Article 5(2) of the Treaty states “the Contracting Parties shall establish an East African Customs Union and a Common Market as transitional stages to and integral parts of the Community,” and specifically from the following articles:

- Article 76(1) states, “There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital, and the right of establishment”;
- Article 76 (4) states, “For purposes of this Article, the Partner States shall conclude a Protocol on a Common Market.”
- Article 104 (2) of the Treaty states that “For purposes of paragraph 1 of this Article, the Partner States agree to conclude a Protocol on the Free Movement of Persons, Labour, Services and Right of Establishment and Residence at a time to be determined by the Council.”

35. Under the Treaty, the legal framework for the East African community is based on the principle of sovereignty for the Partner States. The legal framework provides for consensus by the five Partner States on all meaningful policy issues, meaning that each State can veto any detail of regulations implementing the Treaty. Supra-regional authority is vested to a small extent in the Court of Justice, which has tested the limits of its authority. The Legislative Assembly and the EAC Secretariat have no supranational authority. All of their actions are approved or adopted by Partner States.

36. The interpretation of sovereignty as consensus on all issues is under pressure for practical reasons. In a 2009 case referred by the Council of Ministers for the EAC on whether consensus was needed on every decision or whether the principle of variable geometry could be used, the EAC Court of Justice decided that consensus does not necessitate unanimity of the Partner States. In other words, under the Treaty, no Partner State need have a veto power when it comes to decision-making at the EAC. This means that the EAC Council must define a more flexible view of consensus for purposes of policy-making, which it has not yet done. Regulatory quality and speed will improve when the Council takes this step.

37. There is a tension here. Sovereignty might be politically necessary at this stage of integration. However, the common market might require a formal reduction of sovereignty over regulatory matters. This step was taken in the EU. The Treaty of Nice signed in 2001 facilitated regulation relating to free movement and residence by introducing qualified majority

for decision-making in Council. The adoption in Europe of qualified majority voting (QMV) for decision-making was intended to speed up decision-making at the European level, and also to ensure that the common market was not held hostage to the most protectionist of the Member States. Qualified majority has been considered a key to the success of the EU Single Market, and indeed the areas of QMV were expanded under the Lisbon Treaty, including even the EU budget.

38. The EAC system rests on several kinds of regulations developed through different procedures. The regulations developed by the Partner States – the Treaties, Protocols, Annexes, and Schedules – regulate the Partner States. That is, those instruments establish requirements between the EAC and the Partner States. The Acts of the Legislative Assembly are different – they regulate private individuals and businesses. Acts are traditional forms of regulation in that compliance is carried out by civil society, not governments. Typically, an EAC policy requires both kinds of instruments to regulate both the behavior of Partner States, and to set requirements for market activities.

1) The Treaty for the establishment of the East African Community (As amended on 14th December, 2006 and 20th August, 2007) is the guiding legal document for the EAC, the Customs Union, and the CMP. It lays out the framework for the African Economic Community and Political Union. The Treaty is ratified by each Partner State under the procedures of that country.

2) Protocols. Protocols are the main regulatory documents of the EAC. They lay out the policy commitments binding on the Partner States. The

three protocols most important for economic integration that have been negotiated and adopted are those on standardization, quality assurance, metrology, and testing; on the customs union, and on the common market. Since the Protocols are considered to be part of the Treaty, the Protocols are also approved by the Council and the Summit and are ratified by each Partner State. The operational parts of the Protocols call for development of more detailed annexes as the basis for implementation.

The process of preparation of the protocols is lengthy, going through each step of the process described in the following section. Typically, the Secretariat prepares a draft, sometimes at the request of the Ministerial Council, or on its own initiative. The protocols are then proposed to the relevant Sectoral Committee. If the Committee does not agree, by consensus, on the need for a protocol, because, for example, the text of the treaty is sufficient, then the protocol is blocked. The same consensus approach also holds at the Ministerial Council, the Summit, and the ratification steps.

3) Protocol Annexes and Schedules.

These documents elaborate the protocols by adding operational details, just as subordinate forms of regulation do in governmental regulatory systems. Like European Directives, the Annexes are addressed to national authorities, but like European Regulations, as soon as they are adopted by ratification, they have binding legal force throughout every Member State, on a par with national laws. Partner States might have to take administrative action to implement Annexes, but no further legal action is needed, since the Annex has direct legal effect. For

example, Annex III to the CMP is titled, “The EAC Common Market (Right of Establishment) Regulations” and contains requirements for Partner States such as:

The competent authority of the host Partner State shall within thirty days of successful application for a work permit, issue a work permit to the self-employed person for an initial period of up to two years.

The schedules add even more detailed implementation schedules, reform commitments, and tariff rates. Not all schedules are ratified, but are considered part of the Treaty even so.

The CMP Annexes were negotiated by an EAC High Level Task Force whose members were nominated by Partner States, and the Annexes were finalized and adopted by a Multi-sectoral Ministerial Council of Partner States. Negotiations on the outstanding annexes began in May 2010 and are likely to be concluded in 2010. These annexes are: Annex on harmonization and mutual recognition of professional and academic qualifications; Annex on Social Security benefits; Schedule on Trade in Services in the Community; and Schedule on the Free Movement of Workers.

Secretariat officials believe that the Protocols and Annexes are a limited and incomplete form of regulation. Their content is inconsistent due to the extensive negotiations and consensus process, which can remove essential pieces of the implementation requirements. Once completed, they are very difficult to change. If an institutional reorganization strengthens the Secretariat, some suggest that the Annexes should be replaced by more detailed regulations proposed by the

Secretariat.

4) Acts of the Legislative Assembly. The East African Legislative Assembly, composed of 9 members selected by the Parliament of each Partner State, is the legislative organ of the EAC. It approves the budget of the EAC, and adopts Acts that are needed to implement the Treaty.

The Assembly has adopted 17 Acts since it began work, or an average of two each year. The Council is authorized to initiate and submit Bills to the Assembly, and the Assembly also has authority to initiate Bills. Any member of the Assembly may propose any motion or introduce any Bill in the Assembly relating to the Treaty. In addition, under Article 59, the Assembly may request the Council to submit any proposals where action is required to implement the Treaty. These acts will be increasingly important vehicles for carrying forward EAC policies. For example, the EAC commissioned a study on the harmonization of commercial laws. The assignment will be carried out in two phases. The first phase is a review and identification of the commercial laws in the Partner States that have a direct bearing and impact on the EAC Common Market and Monetary Union requirements as well as on the common investment regime; a diagnostic analysis of relevant commercial laws identifying the convergences, gaps and differences in these laws in the EAC Partner States and recommendations on the harmonization of the laws. The second phase will be drafting, preparation and elaboration of the EAC legislation and enabling Partner States laws.

The Acts of the Assembly are assented to by each Partner State and are gazetted in the EAC gazette and each

national gazette before coming into force. Publishing in the EAC Gazette is mandatory, but not in national Gazettes, except in Kenya. Article 62 of the Treaty Art provides that:

1. The enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by the Heads of State, ...

An important, but as yet unused, paragraph of the Treaty authorizes Acts to delegate decision powers to the Secretary General of the Secretariat, that is, the Legislative Assembly can act, with the assent of Partner States, to reduce the sovereignty of the Partner States by transferring regulatory authority to the Secretariat.

5) Decisions of the Court of Justice. The EAC Court of Justice has authority to interpret the EAC Treaty, but has not yet developed guiding legal principles for its implementation. By contrast, the European Court of Justice has long played a pivotal role in the development of EU law, principally through the enunciation of legal principles such as proportionality (these are discussed in Section 5 of this report). The EAC Court of Justice could, in future, play a useful role in developing such legal principles, such as the meaning of transparency, subsidiarity, and the role of mutual recognition.

4.2 The regulatory institutions and processes of the EAC

39. The previous subsection focused on the legal framework, while this subsection focuses on the capacities and regulatory procedures used by these institutions to carry out their legal and other policy functions. The policymaking process at the regional level of the EAC involves four sets of institutions, each with different

actors and authorities, and, to a much lesser extent, involvement by civil society actors, mostly business representatives.

40. The main conclusion of this review is that the current regulatory system in the EAC is too top-heavy in both decision authority and expertise, funneling regulatory decisions upward into the political institutions dominated by the national ministries. Too many fragmented bodies are working without procedures to ensure quality, regional interests, transparency, and consultation. Technical expertise is almost entirely held by the national ministries, not by the Secretariat. This arrangement facilitates negotiations based on national interest rather than evidence-based decisions based on adherence to common market principles.

4.2.A. The Partner State institutions

41. The EAC policy system is controlled by the Partner States through a series of bodies at EAC level that, collectively, develop and adopt almost all regulatory policies. These bodies are very similar to the setup in COMESA. The policy process through these various bodies is quite long and time-consuming, and there are increasing concerns that the process is not working as efficiently as is needed to implement the massive regulatory program of the CMP. The EAC bodies are:

- the Summit;
- the Council;
- the Co-ordination Committee;
- the Sectoral Committees;

42. The Summit is the meeting of the five heads of state, which occurs at least once annually. This body, working by consensus, “shall give

general directions and impetus as to the development and achievement of the objectives of the Community...” The Treaty (Article 8) 11 assigns powers of decision and delegation to the Summit:

5. ...the Summit may delegate the exercise of any of its functions, subject to any conditions which it may think fit to impose, to a member of the Summit, to the Council or to the Secretary General.

43. The Council of Ministers is the most important policy body in the EAC, involving many ministers from various ministries. It also operates by consensus. The Council is chaired by a Minister responsible for the EAC from one of the Partner States. It is in function akin to the European Council.

44. The EAC Ministries are, formally, the representatives of the Partner States at Council level. The Treaty (Article 8) states, “Each Partner State shall - (a) designate a Ministry with which the Secretary General may communicate in connection with any matter arising out of the implementation or the application of this Treaty...” The EAC Ministries are intended to perform as the coordinating bodies for EAC matters in their capitals, but their power, capacity, and influence varies greatly from country to country, and from minister to minister. They usually do not have the power or the staff to be deeply involved in negotiations or to instruct the more powerful ministries in their governments or to coordinate between ministries. The EAC Ministry in one large Partner State, for example, employs 240 people, but only 5 are economic experts. The others are support staff. There is not enough staff for policy coordination among the ministries. Only the Deputy Ministry is considered senior

enough to discuss issues with other EAC Ministries, and hence often the delegation from this country is criticized as too junior and too ill prepared. As a result, rather than represent a coordinated EAC policy in their capitals, the EAC ministries follow the lead of other ministries in representing national interests in EAC negotiations.

45. However, the Secretariat, while recognizing the limits of the EAC Ministries, believe that they provide a major advantage in giving access for EAC issues to national cabinets of ministers. Before the EAC Ministries were created, the Ministers of Foreign Affairs were in charge of EAC matters, which had to compete with many other matters. With a full cabinet minister in each country, EAC matters are higher profile, and can reach cabinets more quickly.

46. The Council typically involves other Ministers in its meetings, depending on the subject matters under discussion. EAC Ministers may invite other Ministers to participate as they see appropriate. They may also invite the private sector or other interests to observe the meetings.

47. The Council makes most of the regulatory decisions of the EAC and instructs most other institutions. It has the power to agree on binding regulations for the Partner States under Article 16: “the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly...” Under Article 14 of the Treaty, it shall:

(a) make policy decisions for the efficient and harmonious functioning

and development of the Community;
(b) initiate and submit Bills to the Assembly;
(c) subject to this Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and the Assembly;
(d) make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty....

48. The EAC Council is highly protective of its authority to approve all regulations of a binding nature, even those implementing details that in other regulatory jurisdictions would be approved at lower levels. For example, the CMP states “The implementation of Articles 33 to 36 of this Protocol shall be in accordance with directives and regulations issued by the Council.” This contributes to the highly centralized and political nature of regulation in the EAC institutions. This highly centralized approach is less and less feasible as the EAC workload expands. The increasing volume of regulation required for the customs union and the common market is quickly increasing the workload of the Council. This is reminiscent of the discussions in Europe as the EU expanded. Proposals to reform the European Council reflected the perception that the European Council was too bogged down in detail to provide effective leadership.

49. The Co-ordination Committee works under the Council at a more operational and technical level. Its membership consists of the Permanent Secretaries responsible for EAC affairs in the Partner States and other Permanent Secretaries that are needed. Importantly, the Coordination Committee recommends the creation

of the Sectoral Committees and receives their reports, passing them on to the Council when ready for decision.

50. The Sectoral Committees are established by the Council on the recommendation of the Coordination Committee. About 20 are now working. They are the technical experts of the EAC institutions, composed mostly of experts from the national ministries. Without decision authority, these committees are the functional equivalent of ad hoc regulatory agencies, or the DGs in the European Commission. The Sectoral Committees are responsible for setting priorities, developing new policies and regulations, and monitoring implementation of existing policies and regulations. Under Article 21, they shall:

(a) be responsible for the preparation of a comprehensive implementation programme and the setting out a priorities with respect to its sector;
(b) monitor and keep under constant review the implementation of the programmes of the Community with respect to its sector;
(c) submit from time to time, reports and recommendations to the Coordination Committee either on its own initiative or upon the request of the Co-ordination Committee concerning the implementation of the provisions of this Treaty that affect its sector;...

51. The Sectoral Committees do not operate with any established procedures with respect to mandates, analysis, consultation, documentation, quality of work, preparation of meetings, or transparency. There is no evaluation of their performance. They are financed each year through the general budget, depending on their work program and requests.

52. The work of the Sectoral Committees is critical to the implementation of the CMP. Some sectoral committees work better than others, but observers do not believe that these institutions are operating very well, for several reasons:

- Communications up the ladder do not work very well. The sectoral work is not communicated well to the Council, and the Council is not sufficiently familiar with their work. The technical work of many committees is channeled through a single Council. The recommendations of the committees filter through too many processes, become slowed down, and are highly vulnerable to objections from special interests along the way. The negotiations of the numerous Annexes to the CMP are mentioned as examples of these problems.
- They are too fragmented in policy, and are becoming more fragmented as more committees are created. Indeed, there seems to be a proliferation of bodies in the EAC. A Secretariat officer said, "Everyone is competing now to have his own sectoral committee. Even the line ministries are complaining because they have too many committees. They have been mushrooming." For example, there are separate Trade and Customs Committees, and there are now proposals for a new Investment Committee. These topics are inter-related, and should not be dealt with in separate policy discussions. The dynamic in the EAC is to create more committees, working groups, and meetings. This proliferation of policy groups is contrary to good regulatory practice, since it increases regulatory costs and undermines coherence among competing groups. Simplification is needed to coordinate interactive topics and reduce the

overall transactions costs.

- They are very costly financially to operate. This entire process requires many meetings, each one of which has to be organized and financed. The labor cost to Partner States is large, and the direct costs of this organization are large and growing. Participation poses heavy strains on national ministries, and lack of quorum under the consensus principle means that meetings must be delayed or cancelled. The 2008 Summit "took note of the difficulties faced by the EAC Secretariat in convening and facilitating sectoral meetings due to frequent lack of quorum."

- The quality of work is inconsistent for several reasons. There is no control over who participates from the national ministries, and scarce resources and expertise at the national level often mean that countries are either not represented, which delays the work, or represented at junior levels. There are no quality controls in the Committee procedures. Each Sectoral Committee is served by an office in the EAC Secretariat, but sometimes only a single Secretariat official supports a Committee. Because the technical expertise of the Committees is highly variable, expertise in the national ministries is sometimes unavailable, and preparation is sometimes insufficient, the Secretariat is forced to find information through any means available to produce drafts. Internet research is a common technique.

- The vulnerability to national interests is very high, because the committees are dominated by the national ministries, while the Secretariat has almost no role. Much of the work of the Sectoral Committees consists of negotiations

based on national positions, not development of a regional policy based on regional interests and opportunities.

- Consultation is inconsistent and transparency is poor. Often, the only private sector participation consists of people invited by the national ministries to the meeting, and these interests are often national, not regional, in character. The Secretariat notes that private sector representatives are “can do a good job of bringing in expertise when they are warned in time.” However, sometimes there is short notice of meetings by the Secretariat, and participants are ill prepared.

4.2.B. The EAC Secretariat

53. The EC Secretariat commands nothing like the dominant presence of the European Commission. The Secretariat is a coordinating and supporting body for the Partner States and the Legislative Assembly. The EAC Secretariat serves both the Partner States and the Legislative Assembly, although in practice the lion’s share of Secretariat resources is directed to supporting the Partner States in various regulatory fora (an imbalance that annoys the Legislative Assembly).

54. Its role in the Treaty is vague. Article 66 states that “The Secretariat shall be the executive organ of the Community,” but in reality it does not execute policy. Article 71 contains a long list of Secretariat functions:

- (a) initiating, receiving and submitting recommendations to the Council, and forwarding of Bills to the Assembly through the Coordination Committee;
- (b) the initiation of studies and research related to, and the implementation of, programmes for the most appropriate, expeditious

- and efficient ways of achieving the objectives of the Community;
- (c) the strategic planning, management and monitoring of programmes for the development of the Community;
- (d) the undertaking either on its own initiative or otherwise, of such investigations, collection of information or verification of matters relating to any matter affecting the Community that appears to it to merit examination;
- (e) the coordination and harmonization of the policies and strategies relating to the development of the Community through the Coordination Committee;
- (f) the general promotion and dissemination of information on the Community to the stakeholders, the general public and the international community
- (g) the submission of reports on the activities of the Community to the Council through the Co-ordination Committee;
- (k) proposing draft agendas for the meetings of the organs of the Community other than the Court and the Assembly;
- (l) the implementation of the decisions of the Summit and the Council;
- (m) the organisation and the keeping of records of meetings of the institutions of the Community other than those of the Court and the Assembly;

55. A close reading of these functions shows that the Secretariat holds none of the real authorities or powers of the EAC. It advises, researches, drafts, submits reports, and is supposed to implement decisions that are actually implemented by the Partner States, but over which it has no actual control. Its advice and drafts are filtered upward through the Sectoral Committees and the Coordination

Committee to the Council, which greatly dilutes its voice in the regulatory process. One Secretariat said, “We are puppets of the States. Everything is done by the Council.” A third said, “The best that we can do is identify and kick start or initiate a process of harmonizing regulations. The process is then under the control of the Partner States.”

56. The EAC Secretariat’s role differs in key respects from the European Commission:

- Unlike the EAC Council, the European Council has delegated legislative authority to the Commission. Depending on the area and the appropriate legislative procedure, both institutions can make laws. There are Council regulations and Commission regulations, of equal legal value.
- The European Commission executes regional policy, which means managing the day-to-day business of the European Union: implementing its policies, hiring its staff, running its programs and spending its funds.
- It is responsible (jointly with the Court of Justice) for monitoring compliance with the Treaties (including taking legal action to ensure compliance).
- It also represents the EU in trade negotiations and in making agreements with international organisations and non-Member States.
- The European Commission has the exclusive right of initiative as regards legislation: no one else may put forward draft legislation. This has been defended as allowing Europe to overcome sectional interests and as protecting the interests of the

smaller Member States. A majority of Member States, especially the smaller ones, strongly supported the Commission's sole right to initiate legislation, seeing the Commission as "a vital safeguard of their interests, because otherwise they would see a European Union de facto dominated by the large Member States." The UK Prime Minister explained in 2000 that:

We need a strong Commission able to act independently, with its power of initiative: first because that protects smaller states; and also because it allows Europe to overcome purely sectional interests. All governments from time to time, Britain included, find the Commission's power inconvenient but, for example, the single market could never be completed without it.

When the European Commission puts forward draft legislation, it is accompanied by an impact assessment, has been reviewed by an Impact Assessment Board, and has undergone a thorough consultation process under clear principles adopted in the consultation policy of the Commission. The quality control process is thorough, rigorous, and mandatory. Training programs and management oversight provide some assurance that the quality procedures are followed.

57. The EAC Secretariat in its present form is unable to carry out the critical functions required by the common market. There is wide agreement that the EAC Secretariat must be re-conceptualized to enable it to carry out the CMP agenda. Secretariat officials believe, not surprisingly, that "It is critical to empower the Secretariat to be able to have some teeth." One official said, "If the Partner States want the benefits of the Common Market, they must agree

to change." An official of the EAC Ministry in Burundi agreed that "it is time to reform the Secretariat, and we should go for a totally new kind of organization." A review of the Treaty, intended to make the community a more effective organization, began in 2009 by the Sectoral Council on Legal and Judicial Affairs (made up of Ministers of Justice and Constitutional Affairs, and the Attorneys General of the Partner States). The Council considered amending the rules of procedure for the summit of Heads of state, Council, and the Coordination Committee to "enhance decision making processes and delivery of the regional agenda."

58. One of the key tasks of the Secretariat is drafting regulatory documents for the Sectoral Committees and Bills for the Legislative Assembly. The development of draft regulations inside the Secretariat is not governed by any administrative procedure, or quality control procedure except for legal drafting review carried out by the Office of the Counsel to the Community. There are no requirements in the CMP, the Annexes, or Secretariat procedures for impact analysis, consideration of alternatives, or consultation with stakeholders. There are no clear quality principles to guide the selection of options. Drafts are presented from Secretariat staff to Sectoral Committees or other institutions such as the Legislative Assembly, at the discretion of the Secretariat and with accompanying information at the discretion of the Secretariat.

- By contrast, the European Commission has a range of quality control procedures and capacities for regulatory initiatives that can be compared to the EAC Secretariat:

59. Article 70 of the Treaty states that the staff shall be determined by the Council and that "The salaries, job design and other terms and conditions of service of the staff in the service of the Community shall be determined by the Council."

- Every staff position is individually approved by the Council, which reduces the flexibility and skills acquisition of the Secretariat. Most staff positions are informally allocated to Partner States, who rotate ministerial staff to the Secretariat. This approach reduces the ability of the Secretariat to hire on the basis of merit, and increases the national perspective within a body that should develop a regional perspective. The quality of ministerial staff is often judged to be low. Meanwhile, the Secretariat has few analysts able to assess trade, economic impacts, and use modeling and other analytical tools. The executive authority of the Secretariat to recruit competitively and employ its own staff, rather than just borrowing people from line ministries, is considered by the staff as the single most important issue for improving performance and "breaking the national hold on regional policy."

- Every procurement by the Secretariat must be approved by each of the five Partner States. This delays procurement of expertise, research, and other essential inputs into the Secretariat's capacities.

- Financing is based on annual budget agreed by the Partner States, as is normal. But recurrent labor costs are about 80% of the budget, leaving little for research, skills acquisition, and other tasks requested of the Secretariat. Another problem is that around 40% of the Secretariat's financing comes from donors, who impose their own conditions on the

use of the money. Requests from the Council for studies on investment policy, harmonized curricula, and other areas are not financed. New commissions and authorities created by the Legislative Assembly are not financed. The proliferation of new tasks and new bodies in the EAC is draining resources from the core task of implementing the customs union and the common market.

60. Professional incentives inside the Secretariat are problematic. The financial gains of per diem payments paid for travel can greatly enhance annual salaries. The powerful financial incentive to attend meetings outside of Arusha contributes to the fact that many Secretariat officials travel almost constantly. The financial transfers created by travel provide a constant pressure to increase the number of meetings, working groups, and conferences for people to attend. Donors might be part of the problem because they sometimes count a conference or the creation of a new working group as a successful output of their work. The result overall is

a diversion of energies away from Secretariat oversight and analysis into less useful activities.

4.2.C. The East African Legislative Assembly

61. The Treaty states that the purpose of the EAC is “to regulate the commercial and industrial relations and transactions between the said countries and by means of a central legislature to enact on behalf of the said countries laws relevant to the purposes of the said joint organizations.” The East African Legislative Assembly is the second legislative body of the EAC (the other is the Council). Each national parliament elects 9 members for the EALA; these members are mostly professional politicians from national parties. Unlike the bodies of the Partner States, the Assembly does not use the principal of consensus, but rather, the principle of majority. A Bill is adopted by a simple majority of the 45 members.

62. The Legislative Assembly has little contact with national parliaments in

its daily work. There is no legal role for national parliaments to play in the development of EAC Acts. Indeed, ironically, national parliaments might have a bigger role to play in the adoption of protocols through the ratification process.

63. The Legislative Assembly has no role to play in the development of Treaties, Protocols, and Annexes, but, rather, develops Acts almost as a subordinate or implementing instrument. There is some tension in the EAC between regulatory institutions, similar to what is sometimes seen in the European Community. This is particularly seen in the relationship between Protocols and Acts, whose contents can overlap. The Assembly is not, in general, in favor of protocols because they limit its flexibility, while the Council prefers protocols, which are under its control. For the same reason, the Council prefers more detailed protocols, while Assembly Members prefer less detail in the protocols, leaving more flexibility for the Acts. Moreover, the adoption of protocols is more

EUROPEAN COMMISSION	EAC SECRETARIAT
The Commission’s annual Strategic Planning and Programming (SPP) requires that all new regulatory proposals be accompanied by a Roadmap, which should include information on the timing of an impact assessment. It must identify clearly the problems to be addressed by the initiative and a proper justification of EU action. It should also outline the consultation plan.	The EAC Secretariat produces annual workplans in conjunction with the budget for individual programs, but these contain no quality control requirements to ensure that regulatory initiatives are justified, well understood, and consulted.
Regulatory proposals are also required in the Commission to be accompanied by an impact assessment justifying need, and comparing the consequences of various options for action.	There is no RIA requirement in the Secretariat process. RIA is not requested by the Sectoral Committees, the Council, or the Legislative Assembly.
All regulatory proposals must meet the Commission's standard for public consultation, including at least 12 weeks of consultation.	There is no consultation requirement in the Secretariat process.
Regulatory proposals in the Commission must be reviewed by the impact assessment unit in the Directorate and the Impact Assessment Board in the Secretary General’s Office before and after consultation.	Review by the Office of the Legal Counsel is the only quality control

cumbersome than Acts because of the ratification process. That was why the Customs Union Management Protocol became an Act, instead. This tugging and pulling between the institutions is probably good for regulatory quality, because it provides some competition in the process and mutual oversight. One Assembly official said that the activities of two institutions – the Secretariat and the Assembly – are needed “to overcome the veto paralysis of the Sectoral Committees.”

64. The role of the Legislative Assembly begins after ratification of the CMP. After ratification, the EALA will begin drafting Bills to implement the four freedoms. As noted, when a Bill passes the Assembly and is assented by the Partner States, it is automatically enforceable in the Partner States.

65. The Assembly adopts an average of two acts per year, but expects a busier schedule after ratification of the CMP. The process of drafting is mostly carried out by the Secretariat’s Office of Counsel, at the request of the Assembly or the initiation of the Secretariat. This provides some measure of legal quality control. Discussion of the Bill is carried out mostly by the seven standing committees, supported by 13 professional staff, including the Research Department, which is charged with researching and assessing the issues. In most cases, though, the Assembly has been too understaffed to do very much research on its own. Instead, the Assembly depends on the Secretariat for expert input. No analysis of the impact of Bills is done by the Assembly or the Secretariat.

66. The quality of the Assembly’s work is often criticized. The Secretariat’s

view is that the Assembly often drafts without a good understanding of the content or of the implementation problems. The private acts, in particular, are seen as poor quality and difficult to implement.

67. There is no legal requirement for consultation by the Assembly, but the general practice is that a Bill cannot become an Act without consulting stakeholders. All bills have public hearings before the responsible standing committee. Sometimes workshops or seminars are held for deeper discussions. For some bills, such as the Lake Victoria Management Bill, members traveled to the capitals to consult with major stakeholders, including the national ministries and the private sector.

68. The standing committees are also responsible for monitoring implementation of the Acts by the Partner States. But in practice there is little monitoring. Giving more power to the Assembly for oversight is now under discussion. The Speaker proposed to the 2009 Summit the creation of a new organ – a Speakers Bureau – that would consist of all Speakers of national parliaments. The idea is that lack of a platform to share information between national parliaments and the Assembly is a missing link in implementation of Acts. The Assembly now hosts inter-parliamentary seminars (once a year), in which parliamentary members are invited to debate a specific theme relevant to the EAC.

4.2.D. Civil society institutions.

69. The Preamble to the Treaty states frankly that “.... in 1977... the main reasons contributing to the collapse of the East African Community being... lack of strong participation of the

private sector and civil society in the co-operation activities...” There is a broad agreement that the lack of involvement by civil society in the first Community was a major weakness in its sustainability, and a contributing factor to the suspicions and fears that the Community was enriching some at the expense of others.

70. Given this history, one would expect that the Treaty and the CMP would greatly expand and institutionalize the role of the civil society, particularly of the private sector, in the policy processes of the CMP. This has not been done in the formal terms of the Treaty or in practice. EAC integration is entirely a government-led process, a decision deliberately made by the Partner States.

71. The Treaty contains in Article 127 general requirements for a “strategy,” “dialogue,” and “opportunities” for participation, but does not create any civil society advisory bodies or mandate their involvement in the policy process:

the Partner States under take to:
(a) promote a continuous dialogue with the private sector and civil society at the national level and at that of the Community to help create an improved business environment for the implementation of agreed decisions in all economic sectors; and
(b) provide opportunities for entrepreneurs to participate actively in improving the policies and activities of the institutions of the Community that affect them...

72. In practice, a range of civil society organizations are invited on an ad hoc basis to participate in various forums. These include various private sector organizations and other interests, such as the East African Trade Union

Confederation.

73. The concepts in the Treaty were developed institutionally by the 2006 Private Sector Strategy, which laid out for the first time the leading role of the East African Business Council (EABC) as the representative of the private sector:

Business associations should be structured so that they can act on a regional scale, with EABC playing a leading role in promoting regional integration. Actions that will be taken include: ensuring that the legal framework facilitates regional linkage of national apex bodies; taking measures to ensure that EABC represents all private sector interests, including smallholders and the informal sector, and that its representation can be adapted to changing private sector structure over time. Private sector organizations at all levels (local, national, regional) require an effective mechanism to ensure coordination of their activities and working relationships which ensure that various interests at all levels are reflected and accommodated in the stance and operations at the level of apex bodies at national and regional level.

74. The role of the EABC as a regional advocate for a business-friendly environment in the EAC has developed over time, but the EABC has not yet developed into the coordinator of national apex bodies that was envisioned in 2006.

75. On one side, some in the Secretariat believe that the EABC has been a constructive partner for policymaking for the Secretariat. The Trade Committee, for example, worked well with the EABC, inviting its representatives to its meetings, co-financing consultancies, staffing joint

missions to the borders to investigate compliance, and developing strategies together through workshops. An officer in the Secretariat noted that, “They had their associations and members, so it was easy to access them and also to give them our information for dissemination.” This kind of role for the EABC is in the best tradition of a regional body that is able to rise above the sectoral and sectional interests of its members to create a truly regional and “big picture” vision of reform.

76. However, the EABC role has been eclipsed by the tendency of the Partner States to bring their own private sector representatives to negotiations and meetings. For example, in the common market protocol negotiations, the only private sector representatives who were involved with those who accompanied Partner State delegations. The EABC was not involved. This kind of involvement of the private sector has not been seen as positive by some in the Secretariat, who believe that the private sector has been part of the problem of negotiating exemptions and taking special interest positions that are detrimental to the customs union and the common market.

77. The EABC itself is not satisfied that it is sufficiently included in the policy process. The Council is an observer in many fora (“We are observing everywhere,” an EABC official said wryly), but its observation is only noted, without opportunity for genuine debate or discussion. Its observer status does not allow it, for example, to have input into the agenda or even to see documentation before the meeting. In some cases, the EABC does not see the agenda until it has arrived at the meeting itself. This lack of preparation and involvement at early stages of

policymaking effectively sabotages the ability of the EABC to collect information, to analyze, and present reasoned arguments and options in front of EAC institutions. The EABC official said that it has never been involved in development of Acts in the Legislative Assembly.

78. These issues prompted the EABC Chairman to deliver, in 2009, a frank and critical assessment of its opportunities to participate in EAC policy:

A formally recognised relationship, or mechanism if you will, between the EABC and the EAC is needed to ensure that our role as EABC especially in policy formulation is institutionalised in the operations of the EAC, irrespective of the holder of the EAC Secretary General’s Office. Our current ‘Observer Status’ does not enable us to generate Agenda on behalf of the private sector and we can only comment on policy issues with no guarantee that our comments will be taken on board in the eventual policies. We have aggressively tried to have this issue resolved during to last 15 months, but with no success.

79. No change has yet occurred in the role of the EABC in the EAC.

80. The EABC shares the blame for its performance. It is the largest and most representative private sector in the region, but has been damaged by perceptions that it is not sufficiently representative of businesses in the region and that it, rather, represents large businesses (many of them foreign investors) able to pay the annual fees. EABC officers admit that “there is some truth that we are not as representative of private sector as we wish.” Although the EABC membership includes the five national apex bodies of business associations,

the EABC does not represent small businesses and informal businesses very well. One reform being considered by the EABC is moving from seeking a single consensus or “business view” to more focused clusters that work on specific issues of interest: women-owned businesses, for example. This might give more opportunity to smaller businesses to ensure that their interests are represented in the EABC. It would also greatly improve consultation abilities because the EABC would be working directly with interested experts rather than asking umbrella organizations to develop opinions on every technical issue.

81. One of the weaknesses of private sector advocacy at the regional level is that private sector advocacy at the national level is still quite weak and incentives are not clearly in favor of regional policy. The EABC and other institutions cannot compensate for organizational weaknesses that the national level, nor for the occasional unwillingness of national organizations to advocate for regional policy.

82. One of the points made by the EABC officials is that its position as an advocate would be stronger if it had credible evidence to back up its positions. The organization would like to move to more empirical analysis that allows it to present evidence and options to the EC institutions. If the EAC institutions move toward adoption of regulatory impact assessment, the EABC is a likely supporter and even joint analyst, using its access to information in the business community as a valuable asset.

4.2.E. East African Court of Justice

83. The role of a regional Court in

a common market is to ensure that the rules and rights of citizens are respected consistently across the market. When the EAC CMP goes into effect, the freedoms for free movement will go into effect, that is, will become part of national law, and national courts can enforce the freedoms directly. The EAC relies almost entirely on national courts to enforce these freedoms, and gives the East African Court of Justice a very limited role. This is a major constraint on the emergence of a genuine common market. The COMESA Court of Justice has stated that:

The Common Market will be properly realized if Member States abide by those rules and expeditiously implement decisions collectively taken. The system will, therefore, endure only if the implementation of those rules is supervised by an independent court hence the establishment of the Court of Justice. The stronger the Court of Justice, the stronger the foundation upon which the Common Market is built.

84. The East African Court of Justice is established under Article 9 of the Treaty. The Court’s major responsibility is to ensure adherence to law in the interpretation and application of and compliance with the Treaty. However, the EAC Court’s jurisdiction is limited to interpreting the treaty, rather than dealing with cases of non-compliance with the treaty. The national courts are responsible for dealing with complaints by businesses and citizens to protect their rights under EAC regulations. The EAC Court is somewhat more limited in function than the COMESA and ECOWAS Courts, and much more limited than the European Court of Justice:

- The COMESA Court adjudicates on

disputes between member States against one another, or on references by the COMESA Council or the Secretary General against a member State for infringement of or failure to fulfill a Treaty provision. The COMESA Court can also hear a reference from a member State or any legal and natural person resident in a member State, concerning the legality of any act, regulation, directive, or decision of the COMESA Council.

- In the ECOWAS Court of Justice, individuals and corporate bodies do not have direct access to the Court. Member States may, however, institute proceedings on behalf of its nationals before the Court on the interpretation and application of the Treaty after attempts to settle the dispute amicably have failed. The failure to allow access by individuals has been criticized in ECOWAS as a denial of a fundamental right to ECOWAS citizens.

- The European Court of Justice carries out a broader range of reviews that signal a willingness by Member States to give up much more sovereignty than EAC Partner States. These reviews include are described in more detail in Annex 2, and include actions for failure by Member States to fulfil obligations; actions for annulment of a measure adopted by an institution, body, office or agency of the European Union; actions for failure of the institutions, bodies, offices or agencies of the European Union to act; and appeals on points of law. Individuals and businesses cannot normally lodge complaints directly with the European Court, but the European Commission can bring before the Court of Justice a complaint that a Member State has failed to fulfil an obligation under the Treaty, and this has happened very frequently. It is one of the key

protections of the Single Market.

85. There is widespread agreement that the East African Court's jurisdiction should expand from interpretation of the Treaty to cases of Partner State non-compliance with the Treaty, and particularly to the review of administrative actions and lack of administrative actions by the public administration of the Partner States. Indeed, the Court could strengthen the rule of law in the entire region. Legal security in the five Partner States is not sound, and the EAC provides an opportunity to establish a regional court that is stronger than the national courts. This was the case for the ECOWAS Court of Justice, for example, which has been called by ECOWAS Chief Justices "a positive factor in the rule of law in our sub-region." This would particularly be the case if individuals have the right to access the Court to challenge Partner State actions. Allowing individuals access to the Court could be a way to involve citizens of EAC countries directly in the common market project. This would be a

86. The Court should also review EAC regulations against clear principles of quality such as proportionality, just as the European court does. Judicial review of compliance with EAC regulations is a missing link in the overall structure of interlocking institutions that together establish the incentives and pressures for the common market. In most OECD countries, the ultimate check on administrative abuses, such as regulations that violate Treaty principles, is the potential for review and reversal by the courts. Such deterrence must be credible to be effective. It is particularly important in a common market for an independent court to provide an effective and practical judicial infrastructure for

dispute settlement between citizens and governments.

87. There are also proposals that the court develop more expertise in specific areas such as trade policy and competition policy, perhaps through specialized units or tribunals that can take on specific issues.

4.2.F. Domestic regulatory institutions working at domestic level

88. The institutional involvement of national institutions in EAC regulation is much more important than in the European Single Market, but similar to COMESA, for two reasons. First, because the EAC Secretariat lacks the substantive expertise to determine the content of technical regulations, most of the expertise comes from the national ministries. Second, because of the principle of consensus carried out through the Councils and working bodies, the EAC Ministries negotiate and agree on content, with minimal control and input by the Secretariat.

89. For those reasons, regulatory practices at national levels are replicated at EAC level. Unreconstructed national regulators cannot be expected to be reconstructed once they arrive in Arusha. Adoption of the EAC acquis in itself has not changed how the domestic regulators of the Partner States carry out their regulatory functions. In fact, even as the regulatory stock is being updated to reflect EAC policies, the capacities of regulators in the five Partner States to produce new regulations -- consistent with the quality standards of Europe -- are lagging behind. One donor said that "Dialogue at political level is flying at hyper drive, but implementation at national level is hugely different between Partner States and sectors." The regulatory

function reflects a broader need to upgrade the policy and institutional frameworks across many areas to meet expected EAC performance under the Treaty and the CMP.

90. The other major role of regulatory institutions at domestic level is implementing the EAC regulations. This process of compliance is meant to be overseen by the EAC Ministries. Yet there is a serious gap between legal decisions and implementation. Because there are no consequences of non-compliance, and inconsistent attitudes toward compliance among domestic ministries, some kind of compliance mechanism is needed. This is discussed in more detail in Section 5.

4.3. Conclusions about the EAC legal framework and regulatory institutions

91. The legal framework and regulatory processes in the EAC are highly centralized in a multi-stage political system based on consensus. The control by the Partner States over every detail of CMP regulation is nearly absolute. There is no independent regional body, no independent expertise, and no supranational regulatory authority to promote or adopt regional policies. This top-down control by the Partner States at every stage of policy development poses a threat to implementation of the common market, because there is no "regional voice" speaking out in protection of the common market versus national interests.

92. By contrast, legislative power is spread out among the institutions of the European Union, although the principle actors are the Council of the European Union (or Council of Ministers), the European Parliament and the European Commission.

The relative power of a particular institution in the legislative process depends on the legislative procedure used, which in turn depends on the policy area to which the proposed legislation is concerned. In some areas, they participate equally in the making of EU law, in others the system is dominated by the Council. Which areas are subject to which procedure is laid down in the treaties of the European Union.

93. In sum, the EAC system is more a negotiating forum for treaties than a dynamic regulatory system meeting the needs of the common market. The process is based on multiple institutions working through negotiations and consensus, without stakeholder involvement and with multiple levels of political action needed for adoption. The Protocols are clearly political documents that require political approval, but the Annexes are the living regulations of the common market and will require frequent updating and changes that seem impossible with the current arrangements. Particularly with respect to the Annexes, this process seems costly, time-consuming, vulnerable to special interests, and unresponsive to changing needs of the common market.

94. What capacities are needed to develop this process into a more efficient and regional regulatory system? The following section deals with specific capacities needed to safeguard the quality of regulatory decisions, but from an institutional perspective, it seems that a different arrangement will be needed to:

- Develop a strong regional voice that can protect the interest of the common market against national and special interests that could easily delay and reduce its benefits;
- Increase the level of expert inputs

into regulation;

- Increase the efficiency and reduce the cost of the system;
- Increase the responsiveness of the system to changing needs of the common market during the implementation stage;
- Increase the transparency and civil society participation in policy process.

95. The upcoming study requested by the EAC Secretariat on the institutional arrangements of the EAC will presumably propose revisions to the existing institutions. From the perspective of building the capacities and institutional incentives to carry out the massive regulatory agenda of the common market, some changes should be considered. The changes proposed here preserve the sovereignty of the Partner States in approving the regulatory requirements that warrant consensus, but greatly improve the expertise and speed of the regulatory system. These suggestions are adapted from the regulatory relationships in the European Community.

96. The basic change needed is to simplify the approval process and switch the position and role of the Secretariat and the Sectoral Committees. The Sectoral Committees are not functioning well in producing timely, regionally-oriented, and high quality regulation. The Secretariat is not functioning well in supporting the common market.

97. Figure 5 illustrates what a different kind of arrangement might look like. This arrangement is intended to streamline and simplify the policy process, boost the professionalism of the Secretariat and the Council, and open up the process with more transparency and systematic

participation by civil society. Its essential features are:

- The Council would maintain its role in discussing and approving all important regulatory matters affecting the Partner States.
 - The Secretariat would take on the primary function of initiating and drafting regulations for the consideration of the Council. This role would shift from the Sectoral Committees and the Coordinating Committee to the Secretariat. In this new role, the Secretariat would be responsible for the content of proposals submitted to the Council. It would act as the “voice” of the common market in ensuring that draft regulations effectively carry out the intent and requirements of the treaty and the CMP in freeing up movement across borders. This would obviously require that the staffing and technical skills of the Secretariat be built up, not to replace the expertise of ministries in the Partner States, but to add the regional views and expertise needed for the common market to operate.
 - The Sectoral Committees would continue to be relied on to supply expertise and the views of the Partner States in the drafting process. They would act as advisory bodies to the Secretariat, convened at the request of the Secretariat.
 - Serious consideration should be given to giving the Secretariat the right of initiation of implementing regulation under the Protocols.
98. This arrangement would preserve the sovereignty of Partner States for all important regulatory decisions. It would make the best use of the expertise in the ministries of Partner States. It would streamline and reduce the cost of EAC institutions. Most important for the purpose of this

review, it would greatly improve the quality and effectiveness of regulation produced by EAC institutions to implement the common market.

99. Some decision-making authority should be granted to the Secretariat for minor implementation issues for which consensus is not necessary. For example, Annex III on the rights of establishment states that “The Council shall issue a directive for the removal of the restrictions identified in paragraph 3 of this regulation.” This

kind of decision could easily be taken by the Secretariat at much lower cost and with much less delay, with no reduction in national sovereignty. A paragraph by paragraph review of the Common Market Protocol and its Annexes could identify many areas where the Secretariat could take implementing decisions of this kind. 100. Another procedural key to higher-quality regulation is better preparation of meetings and agendas. The rather chaotic nature of the policy process today is partly due

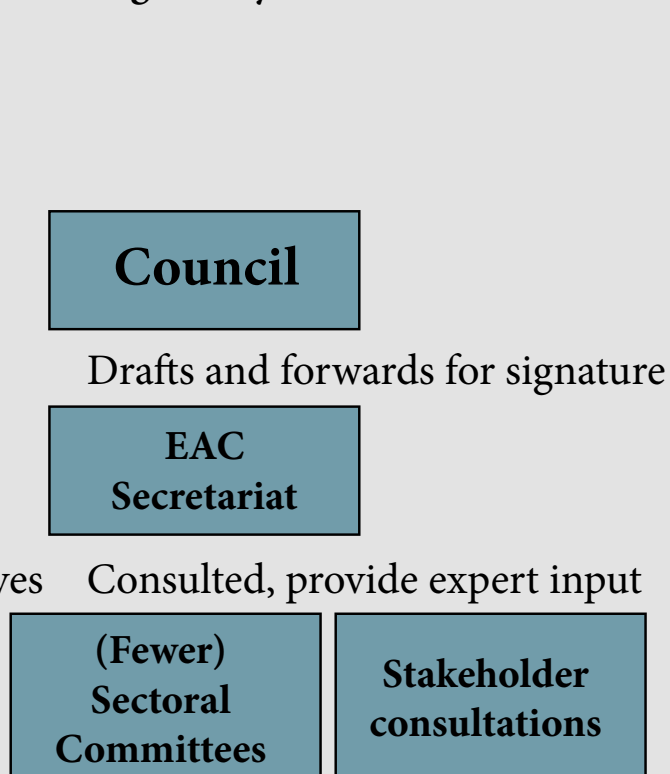
to the fact that there are so many Sectoral Committees, so many meetings and workshops, that proper preparation is extremely difficult for the under-resourced Secretariat. The streamlined and simplified approach suggested in Figure 5 would permit more investment in meeting preparations, higher-quality discussions, and higher-quality output, that is, regulations.

Implementing the Regulatory Framework for the Common Market Protocol

Current Regulatory Process



Revised Regulatory Process



5. Capacity of the EAC institutions to safeguard regulatory quality

101. This report argues that the EAC institutions will be successful in implementing the common market only if they safeguard the quality of regulatory practices. This is a highly pragmatic and operational agenda. Quality principles can be applied only if they are defined and institutionalized into the machinery of policy making. The idea is that, just as fiscal management can increase social welfare by better allocating resources, so can regulatory governance. There is also a strong dynamic element to good management. As society, technology, and market conditions change, the benefits and costs of any particular regulation change over time, sometimes very rapidly. Successful regulatory governance adapts the regulatory function to produce maximum net social benefits over time.

102. Achieving a regulatory system that is as efficient as possible over time and within the constraints of other social values requires actions on many levels. The main challenge facing the EAC is ensuring that regional institutions and incentives support the standards of regulatory quality. The “regulatory governance” toolbox has developed a range of methods for systematically building regulatory quality capacities into administrative and political institutions. Good regulatory governance rests on a system of institutions and processes, driven by supporting incentives, that sets transparent goals for regulation, and then applies, advocates, and monitors regulatory quality. The relevant objects of reform are the:

- Regulatory institutions – the administrative and political bodies through which regulations are made, implemented, and adjudicated.
- Regulatory quality tools and processes – the administrative and political procedures through which regulations are developed, adopted, implemented, monitored, and reviewed. Such procedures include use of Regulatory Impact Analysis (RIA), consultation mechanisms, and benchmarking and review tools.
- Regulatory policy instruments and outcomes – the legal instruments through which regulatory policy objectives are reached. They include the stock of existing regulations and the flow of new regulations adopted each year, and can include regulatory as well as alternative, non-regulatory policy instruments used to reach regulatory policy objectives. The policy instruments are outputs of the policies, institutions, and procedures.

103. As we saw, the European Commission deploys various means to protect regulatory quality, both at the development and implementation phases, and in institutions, processes, and instruments. The Mandelkern report, which addresses many of the same regulatory problems seen in the EAC today, recommended that the European Commission and European countries move forward in seven areas to apply the recommended quality principles (the full recommendations are in Annex 3 to this report).

5.1 Regulatory governance tools: Transparency

104. The EAC common market will be more easily sustained if its practices are transparent and participative, increasing compliance with its policies, confidence in its work, and awareness of its role in increasing economic wealth. As discussed above in the section on civil society and the East African Business Council, the Treaty of the EAC places great emphasis on the need for participation by civil society in EAC policy. Lack of participation by civil society is one of the reasons given for the collapse of the first Community in 1977.

105. Transparency and predictability are major regulatory reform issues in most countries, but in the EAC region, they are especially prominent. Concern over lack of transparency and predictability is a central issue in the regulatory reviews carried out by the IFC in four of the five Partner States.

106. More precisely with respect to the goals of the EAC common market, transparency of the regulatory system is essential to establishing a stable and accessible regulatory environment that promotes competition, trade, and investment, and helps ensure against undue influence by special interests. Transparency also reinforces legitimacy and fairness of regulatory processes. Transparency is a multi-faceted concept. It involves a wide range of practices, including standardised processes for making and changing regulations; consultation with

Box 3: Evolving consultation practices in Kenya

According to the Kenya Private Sector Alliance (KEPSA), the Kenyan government is becoming more open and consultative. One notable innovation is that, since 2005, a series of Ministerial Stakeholders Forums have been held around specific issues, such as the Lake Victoria Basin Stakeholders' Forum and the Tourism Stakeholders' Forum. The Kenya EAC Ministry is launching an MSF on EAC issues. Participation is by invitation. Another platform is the Prime Minister's Roundtable, held three times a year, for invited business representatives, on issues such as trade and investment and ICT. A third forum at the Parliamentary level is the Speakers Roundtable in which the private sector engages with parliamentary committees, who then report back to the full parliament on the business perspective.

affected parties; plain language in drafting; publication, codification, and other ways of making rules easy to find and understand; controls on administrative discretion; and implementation and appeals processes that are predictable and consistent.

A legal system committed to the rule of law is based on principles of predictability, transparency, and fundamental fairness (due process).

107. Reducing legal uncertainty and regulatory risk enhances business opportunities. Every business evaluates not only potential profits, but also the commercial and legal risks of entering a new market. Such risks arise from:

- The difficulty of being fully aware of the regulatory requirements with which a business must comply.
- Changes in regulatory requirements without adequate advance notice.
- Uncertainty about the regulatory process and the means to comment on and participate in changes to regulatory requirements that affect a business.

108. Across the five Partner States, efforts to strengthen the rule of

law have already led to greater transparency in government regulatory procedures. Based on these experiences and those from other countries, the EAC institutions can strengthen the rule of law and increase the legal security of business by using three tools to boost transparency: 1) stakeholder consultation based on more systematic use of modern methods; 2) affirmative steps to communicate the new regulatory requirements to those must comply; 3) Create a public registry of EAC laws, regulations, and instructions, including standardized forms to be used in trade.

5.1.A. Stakeholder consultation

109. A strong trend toward expansion of public consultation in regulatory development is underway in many countries. Much has been invested in efforts to make more information available to the public, to listen to a wider range of interests, to obtain more and better information from affected parties, and to be more responsive to what is heard. A well-designed and implemented consultation program can contribute to higher-quality regulations, identification of more effective alternatives, lower costs to

businesses and administration, better compliance, and faster regulatory responses to changing conditions. It can also reduce the risk of capture and undue influence from special interests.

110. Consultation with stakeholders is inherently difficult for EAC institutions, as for the European Commission, because the diversity and number of stakeholders across the region is very large. The questions inevitably arise: who should the EAC consult with, and how? Another problem is that the traditions of policy consultation in the Partner States are not well developed, although they are improving (see Box 3). The private sector in the region, particularly the larger businesses, still works mostly through personal relations with government officials. Representative bodies are improving as a channel for consultations, and this is having a positive effect on the quality and frequency of consultation between the private sector and government in particular.

111. There is as yet no legal mandate for consultation in the EAC institutions, or any systematic method used to consult during the policy process. However, consultation

with stakeholders is common in EAC policy processes. The frequency of consultation has apparently increased over the life of the EAC. The PSD Strategy for the EAC places stakeholder consultation in the area of “Private Public-Private sector Partnership (PPP)”, and states that it “has grown considerably in recent years in the areas of policy dialogue, advocacy and participation in consultations and conferences.”

112. Consultation in EAC policies occurs through a variety of means.

- The most common consultation method is that Partner States often invite private sector and other civil society representatives to accompany them to meetings of the Sectoral Committees to discuss specific issues under their mandate. In effect, the EAC Ministries take on the responsibility of consulting with national stakeholders in developing the national position on a particular policy. Kenya, for example, used this approach to develop its negotiating positions on the CMP. This approach can be effective in bringing stakeholder views into the policy process at an early stage, and in generating a dialogue around options and policy design. Yet the risks and costs of this approach are high.

- This approach is vulnerable to capture and bias, since the stakeholders are pre-selected and might not represent all important views.
- Including selected stakeholders in meetings tends to be ad hoc and high cost, requiring extensive preparation and participation.
- The consultation is unstructured and the quality of information is uncertain.
- The consultation is controlled by Partner States, which can exclude

regional interests and comments from the process. It is biased toward national interests rather than regional interests.

- Representatives of stakeholders such as the East African Business Council are invited as observers to Summit meetings.
- This is a highly formal kind of consultation, at the very end of the policy process, which has more ceremonial value than value in generating information that can be used in developing new policies.
- Documents are circulated for comment to organized stakeholders.
- This approach is seldom used, and there is no organized system of circulating documents, or of collecting comments. IT approaches such as online publication of draft document are not used by EAC institutions.
- Seminars and workshops on specific issues, organized by the Legislative Assembly and occasionally the Sectoral Committees, involve stakeholders in discussions on documents. For example, after the protocol on the extension of the jurisdiction of the Court of Justice, was tabled in the Legislative Assembly, it was circulated for discussion to workshops and symposia in the five capitals, with about 40-45 participants in each country. The Legislative Assembly thought the information received was useful, and also provided the Assembly with an opportunity to dispel fears about some issues. Submissions were both oral and in writing.
- Seminars and workshops are a more open approach, and can generate a rich discussion among stakeholders about policy options. Such opportunities should be part of the long-term consultation strategy. However, such events cannot work alone. It is ad hoc and costly, and the

number of stakeholders participating is low. The quality of documentation and preparation is essential if the discussions are to be focused and meaningful to the policy.

113. In general, consultation is still unorganized and ad hoc in the EAC policy process. Views of the private sector about EAC consultations are not very positive:

- Consultations on the draft CMP, an important document for the private sector, were seen as sporadic and more ritualistic than genuine. An umbrella confederation of private businesses in one partner state stated that “The input of the private sector was not taken seriously at the beginning” and was not structured to account for the fact that the “private sector is very wide and diverse.... Most of the time we get involved at the last minute, not in the development of rules.”

114. As discussed earlier, the most important consultation body for the EAC now is the East Africa Business Council (EABC). National umbrella confederations get involved with the EAC mostly through the EABC channels, which, at its best, acts as a funnel to collect comments from across the region and channel it to the policy processes of the EAC. An officer of a national umbrella confederation explained that, “Most of our information on EAC consultations comes from them. We get various documents from them, summarize that information for our members, and send it to them. We ask for comments, and what we get we send back to the EABC.”

- One problem is that there is no feedback anywhere along the chain. The EAC institutions do not provide feedback on how they use information from stakeholders. An EABC officer

said, “Even when they do involve the private sector, they do their own things. When the policy comes out, we don’t recognize it. No feedback at all.” The EABC also does not provide feedback to national associations on how they use the information. One national confederation said “we don’t know what position the EABC takes.”

- Another problem is that the quality of private sector comments tends to be low, for two reasons. First, private businesses still focus in their comments mostly on how they would personally be affected, rather than the broader policy issues. Second, for much of the private sector, the technical capacity to understand the process of integration and interpret that information is low. “When this information comes, it is hard for them to understand what the options are, what the policy issues are, and so forth.” This problem suggests that the clarity of consultation documents still does not meet the needs of stakeholders.

115. The EAC institutions need a better consultation system. There is a general view in the Secretariat and among private stakeholders that the consultation process should be earlier, more consistent, more structured, and more effective in permitting genuine discussion. The EAC now wishes to build on its experience and construct a more systematic means of early and effective stakeholder dialogue and consultation during policy and regulatory development. This is consistent with the actions of many governments who are seeking more open and flexible methods of consultations to include a greater variety and number of interest groups.

116. There is a clear legal mandate to develop a formal consultation policy similar to the consultation policy

adopted in the European Commission. As noted, Article 7 in the Treaty states that the EAC shall be guided by the principle of subsidiarity, which means, for the EAC, “multilevel participation of a wide range of participants in the process of economic integration.” Article 127 elaborates this principle as follows:

....the Partner States under take to formulate a strategy for the development of the private sector and to:

- (a) promote a continuous dialogue with the private sector and civil society at the national level and at that of the Community to help create an improved business environment for the implementation of agreed decisions in all economic sectors; and
- (b) 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.

4. The Secretary General shall provide the forum for consultations between the private sector, civil society organisations, other interest groups and appropriate institutions of the Community.

117. The consultation strategy and forum under paragraph 4 has not yet been developed, although the Office of the Counsel is reportedly tasked with drafting rules of procedure for such a forum.

118. One possible benchmark for a consultation policy for the EAC (although a fully fledged consultation system will take some years to accomplish) is the European attempts to push consultation to occur sooner, more systematically, and more transparently in the regulatory

process. The European Commission published in 2002 a consultation communication that lays out minimum standards of consultation, and in 2004 it reported that “Efforts to consult widely before proposing legislation reached record levels.” The 2009 IA guidelines in the European Commission cite the following minimum standards, adapted from the Commission’s 2002 consultation principles :

- Minimum consultation standards during RIA development
- Provide clear, concise consultation documents that include all necessary information.
- Consult all relevant target groups. Ask yourself who will be affected by the policy and who will be involved in its implementation?
- Ensure sufficient publicity and choose tools adapted to the target groups - open public consultations must at least be publicised on the Commission’s single access point for consultation, ‘Your Voice in Europe’.
- Leave sufficient time for participation (minimum eight weeks for written public consultations; 20 working days notice for a meeting).
- Publish the results of the public consultation on the website ‘Your Voice in Europe’.
- Provide – collective or individual – acknowledgement of responses.
- Provide feedback: report on the consultation process, its main results and how you have taken the opinions expressed into account in the RIA report and in the explanatory memorandum accompanying the Commission proposal.

119. There is broad agreement that it is time to elaborate a more formal consultation strategy for the EAC institutions. Under Article 127 of the Treaty, the Secretariat should elaborate a consultation strategy

for all the EAC policy processes. The consultation strategy should provide a flexible menu of options for consultation, but should set out minimum standards for consultation which could include the following elements:

- All draft regulatory documents -- protocols, annexes, schedules, Bills, or treaties – should be posted on a central web portal managed by the Secretariat for all EAC institutions.
- The web portal should permit interested parties to sign up and be notified whenever a document is posted for consultation
- There should be a minimum time period for the submission of comments. 30 days is the international norm for such minimum consultation periods.
- There should be a requirement for feedback to consultation, whether it is by posting feedback on the web site or by including a document with the final instrument.
- There should be a standardized consultation request form for all consultations that contains such information as the office responsible for the consultation, the time allowed for consultation, the permissible means of submitting comments, the reason for the draft document, the key questions and issues in the policy, and a contact person in the EAC institutions who can answer more questions.
- These minimum standards should be supplemented by additional consultation such as hearings, workshops, conferences, meetings, and other fora as needed to reach all major stakeholders in the time period and with the resources that are available.
- When documents are circulated through the EAC institutions, such as from the Secretariat to the Council

or to the Legislative Assembly, a plan for future consultation or a summary of completed consultation should accompany the document. This will ensure that everyone in the policy process knows when and how consultation will be done or has been done.

5.1.B. Communication of new regulatory requirements to those who use them

120. There are two different dimensions of communication. One dimension is communication to the general public of the benefits of regional policy. This is particularly important where the general public is skeptical of the benefits of regional policy, as in some of the Partner States of the EAC. The EAC institutions have made considerable efforts to communicate the EAC, through the meetings of the Summits, through media campaigns, and through information campaigns by ministers and staff of EAC ministries. This is an effort that clearly must continue to sustain public support of the common market and other regional policies.

121. The second dimension is more technical. Upon publication in a gazette, regulators should take affirmative steps to communicate new regulatory requirements to those who must comply or use them, both public and private sectors and consumers. The APEC-OECD Checklist emphasizes the principle that “channels for information dissemination and notification should be widely accessible.” Publication in the EAC and national gazettes is essential, but is not sufficiently clear and accessible to the 120 million people in the EAC region. Much more work is needed to provide information in the right way to the people who need it.

122. Awareness of EAC regulations is low among both the private and public sectors, and particularly among consumers. Communication is a widespread problem in all common markets, but low awareness is very costly to a common market because it reduces overall compliance with the requirements of the common market, increases corruption, increases the cost of enforcement, and slows the emergence of the benefits of the common market.

123. This review and many others have noted occasions where awareness of the requirements of EAC policies and regulations is low both in the public and private sectors:

- The 2009 evaluation of the customs union previously cited found pervasive problems of lack of awareness of UTC requirements that reduced the benefits of the CU. These included “Limited understanding of the Rules of Origin (ROO), especially in the business community (also among customs officials)” and “Lack of awareness of standards especially by the private sector (particularly, companies producing for the local markets).”
- In April 2010, the Director of the Southern and Eastern African Trade Information and Negotiations Initiative (SEATINI) said that awareness of the Customs Union is still lacking among the Partner States and implementation should therefore be given more time. “People out there don’t know what is happening. If you don’t give people information, then they will get it from the grape vine,” she said, recommending that civil society organizations should take on the role of advocacy at national levels.
- In April 2010, the permanent secretary of Uganda’s EAC Affairs Ministry urged journalists to

increase awareness and active public participation in community affairs by better coverage. She noted the challenge of low public knowledge on the integration agenda: “We want the EAC to become a household issue.”

- A journalist writing about the customs union reported that “A recent visit to Rwanda brought to fore the fact that many traders are confused by the types of goods that are supposed to attract levies and taxes” and recommended, “Any future implementation of new measures should likewise take into account the enhancement of the capability of the stakeholders to implement such measures. Special interventions may be needed to support the SMEs to be able to fully comprehend the laws...”
- The EABC officials interviewed for this review believe that communication with businesses about their rights under the common market is generally poor. One said, “It seems to be that the Secretariat thinks that it is an EABC responsibility to translate their actions into business friendly language. They use legal language that cannot be understood.” They noted that no website is yet devoted to communication of legal texts.

124. The European Commission neglected public communication for many years, and only since 2000 has it invested in communication. Today, EU institutions have created many channels through which they communicate the activities of the single market and EU institutions to the population of Europe. Many of these communication initiatives are described in Annex 4 below.

125. Similarly to the EU, the EAC institutions should take low-cost and concrete steps to increase communication and awareness of the requirements of the common market.

Specific steps can include:

- Evaluation of the range of services offered by the European Commission to businesses and citizens to determine which would be the most useful value for money in the EAC,
- Develop web site services at low-cost, supplemented by published guides and contact points in each Partner State,
- Use networks of organizations such as business associations to deliver information to businesses in each country;
- Accompany each major regulatory change by a communication plan. The Secretariat, upon publication of a new regulatory requirement by the Council or the Legislative Assembly, should help those affected find the actual text and understand the content of the new regulatory requirement. This should not occur ad hoc. The Secretariat should develop, in advance, a strategy to publicize regulatory changes before adoption. This would include a plain language guide to each legislative document that would function as a substitute for the legal text for most citizens and businesses.
- Cooperate with civil society organizations so that they take some of the responsibility for communication. For example, an EABC website (eabc.info) contains information on the integration process and the opportunities for businesses; information on the challenges and EABC activities; relevant documents on the EAC Customs Union, and Common Market, among others. The site is linked all members’ websites and to other relevant links including EAC and key ministries in the Partner States. Such assets can be an effective and low-cost way to get information out to businesses across the region.

5.1.C. Public registry of EAC laws, regulations, and instructions

126. The aspect of regulatory transparency most closely related to the rule of law is having the text of regulatory requirements reliably accessible by the regulated entities. As noted, the flow of new regulations at EAC level is adequately notified through publication in the EAC and national Gazettes. The East African Community Gazette is the official journal published by the East African Community Secretariat, containing Legal notices as well as other significant documents. All legal documents are gazetted not only in the EAC Gazette, but in the national Gazette each of Partner State.

127. While the Gazette is an essential component of the rule of law, fulfilling the requirement for publication and public notice of legal commitments, it is not a sufficient tool for access to the body of EAC regulations, the so-called stock. It is necessary to assemble the growing stock of EAC regulations into a single authoritative site – a regulatory “registry” -- that is accessible to anyone who needs it. The need for such registries is already recognized in EAC law. Section 17 of the Standardization, Quality Assurance, Metrology and Testing Act states that the EAC Secretariat shall be responsible for maintaining a catalogue of East African Standards and normative documents in hard and electronic copies to be made available to the public..

128. The website of the EAC contains a page of “Documents and Publications” that is generally excellent. It contains, under various topics, legal documents and a range of other documents such as press releases and reports. However, this

page is not a regulatory registry. It is not easy to see at a glance the regulatory requirements of the EAC, and it is not authoritative, that is, the user does not know what is missing and cannot use it as a legal source. This page does not seem updated regularly. A more formal and consolidated registry of legal documents is needed that can be used as authoritative reference by users across the region.

129. An increasing number of countries are adopting electronic registers for laws and lower-level rules, including the subset of regulations called formalities and forms. International best practice is for a government to create and update on a continuing basis public registries of consolidated regulations and business formalities. The goal is to collect and publish in a single site all regulatory requirements, updated often enough so that the registry is reliable. A variety of registries currently in use are designed to accomplish a range of public policy objectives:

- improving access to regulatory information and reducing transaction costs for regulated entities,
- boosting legal security,
- improving accountability of regulators by fighting discretionary abuses,
- anchoring efforts to simplify regulations such the regulatory guillotine approach used in Kenya, and
- setting the basis for continuous monitoring of a regulatory system or regime.

130. In the European Union, the EUR-Lex (<http://eur-lex.europa.eu/en/index.htm>) provides direct free access to European Union law. The system makes it possible to consult the

Official Journal of the European Union and it includes treaties, legislation, case-law and legislative proposals. It offers extensive search facilities. Its website states that, as Community legislation is evolving, due to frequent publications of new, amending, legal acts, the collection of consolidated legislation in the database is not complete and it cannot be guaranteed that a text represents the up-to-date state of the legislation in force. However, each consolidated text contains a list of all legal documents taken into account for its construction. Therefore a comparison with the data in the Directory of Community legislation in force allows an easy check on the current state of consolidation.

131. The EAC Secretariat should consider establishment of an online registry that:

- publishes, consolidates, and continuously updates all regulatory requirements of general application This site should also include Acts, judicial rulings, and other documents with any legal value such as instructions.
- contains all unified forms agreed to at EAC level for easy access by users.
- contains the plain language guides to each legal text.
- permits a search function for easier access to legal texts.

132. This registry could be maintained by the office of the East African Community Gazette, which could use the texts in the gazette to enter the full text of new laws and regulations in a computer database, structure this electronic database to be user friendly, and provide modern computer search engines, indexed by subject and topic.

133. Obviously, it would be extraordinarily beneficial to businesses in the EAC if each Partner State also created a regulatory registry of the regulations and forms affecting business setup and operation in its jurisdiction. This is an area where the EAC institutions, particularly the Secretariat, can play a leadership role. For example, the software used by the EAC could be provided free of charge to the Partner States. The EAC website could link to regulatory registries and regulatory information in the Partner States. The Secretariat could lead an initiative among the Partner States to create such registries.

5.2 Regulatory governance tools: Training and capacity building

134. There is no training program in the EAC related to regulatory reform or good regulatory practices. If quality is to improve, regulators across the EAC institutions – those who develop and adopt new regulations and those who implement and monitor existing regulations -- should be more skilled in the principles and methods of better regulation.

135. In general, like the EAC, governments invest far too little in training of civil servants in better regulation to rules and principles. The OECD found in 2002 that “The lack of skills reflects the fundamental disregard, found in almost all country reviews to date, for the need for large scale, sustained and detailed training to be provided by co-ordinating bodies.” Jacobs (2006) found the same situation four years later.

136. The COMESA Secretariat has implemented an e-learning platform for the delivery of training in various areas of expertise which is accesible via a web interface to the Secretariat staff members, but this training

does not yet have any topic related to regulatory reform. COMESA also organizes ad hoc training on specific regulatory topics for Member States which is also useful to Secretariat members. For example, in 2010, COMESA in collaboration with African Union Inter-African Bureau for Animal Resources (AU/IBAR) organized a Regional Training of Trainers Workshop for 8 Member States to train Sanitary and Phyto-sanitary (SPS) experts from animal health, plant health and food safety on science-based methods and development of scientific arguments in standard-setting. This is a useful evidence-based approach that would support a more general RIA program.

137. A specific program of training, with financing, is needed in the EAC regulatory strategy. In its mandate, the EAC regulatory reform unit could be responsible for operating training programs to build skills in the Secretariat and other EAC institutions such as the staff of the Legislative Assembly. The Secretariat has related training needs in policy analysis, such as trade analysis and market modeling, that could be integrated into the RIA training.

138. There are no agreed performance standards for “better regulation” training that could be used as a benchmark by the EAC. Suggested standards could include:

- Training should be given as early as possible in a professional career once someone has joined an EAC institution.
- There should be common training across EAC institutions to build a shared view of regulatory quality.
- All regulatory divisions should have a core group trained in the principles and tools of good regulation, as contained in the EAC regulatory

strategy.

- A core group should have RIA training and be able to design and carry out basic RIA.
- All managers at the level of Director should have at least 4 hours training in the EAC regulatory strategy.
- Once reaching these targets, the EAC institutions should maintain the standard of a fully trained Secretariat.

5.3 Regulatory governance tools: Regulatory impact assessment and compliance planning

139. One of the hallmarks of the current EAC policy process is the rather chaotic nature of policy discussion through many layers and bodies. There are few quality checks in this process. In fact, the emphasis on consensus and controlled by national governments increase the risk that regulatory instruments will be inefficient, incomplete, or adopt the wrong solutions. The risks of regulatory failure will increase as the volume of EAC regulation increases during the implementation of the CMP.

140. Better empirical analysis of regulatory proposals is a safeguard against such problems that is used around the world. One of the most important capacities of a market regulator is the ability to assess the market impacts of a regulation before it is adopted. Regulatory impact assessment or analysis (RIA) is a tool now used in around 50 developed and developing countries to improve understanding of the impacts of a law and other forms of regulation on business costs and opportunities. The European Commission develops over 100 impact assessments each year, and considers those assessments as critical to the development of a business friendly and efficient regulatory framework for Europe.

RIA can contribute to the quality of legal reforms and support other good governance goals; and RIA can be implemented step-by-step by building on existing practices and investing in skills and training.

141. Enhancing the capacities of regulators to choose efficient regulatory solutions consistent with market needs will reduce the risks of costly mistakes and market failures. The many methods used in RIA – including benefit-cost, cost-effectiveness, and least-cost tests, and partial tests such as administrative burden and small-business tests – are means of ordering complex qualitative and quantitative information about the potential effects of regulatory measures. The methods used in RIA are highly adaptable to a wide range of administrative capacities.

142. The European Commission reported in 2008 that RIA was inducing a cultural change as well as reducing unjustified regulations:

As part of a more general culture change, impact assessment has become embedded in the working practices and decision making of the Commission, and has changed how policy is shaped. Commission decisions on whether and how to proceed with an initiative are based on transparent evidence, stakeholder input and thorough analysis of options....

143. The use of RIA is in its infancy in the EAC institutions. Proposals for new legal instruments are accompanied by some background information on the reasons why this bill should be enacted and its expected impacts, but analytical tools have not been developed. There is no requirement for regulatory impact assessment in any of the

legal instruments – the Treaty or the CMP – or any requirement for evidence-based policy-making. As noted below, substantive principles that could be evidence-based, such as reasonable and justified, have not been defined to require evidence-based conclusions.

144. The lack of analysis of impacts or options for EAC regulation is a major gap in the EAC quality control procedures, because policy officials are unable to base decisions on a clear assessment of the costs and benefits of proposed EAC actions, such as impacts on economic activity. In moving to a market-led growth strategy such as the CMP, such impact assessments become all the more important in ensuring that government actions are consistent with market-oriented principles of quality regulation.

145. It is proposed above that the Secretariat take on primary responsibility for drafting new regulatory instruments, using the Sectoral Committees for advice and expert input rather than as drafters and approvers of drafts. A significantly enhanced role for the Secretariat in overseeing quality of regulation would create a new opportunity to institute a basic form of RIA inside the Secretariat as the basis for proposals provided both to the Council and to the Legislative Assembly. Some of the Partner States have built up some expertise and resources on RIA, and this expertise could be brought into the Secretariat processes through the Network of Reformers, through the EABC, and through national consultants. Indeed, given the support of the EABC for more empirical work on business impacts, an initial RIA program might conduct pilot RIAs jointly between the EABC and the Secretariat.

146. A RIA training program for Secretariat staff and development of a feasible RIA framework that is suited to the resources and capacities of the Secretariat could be the next steps. A progressive plan of implementation for a new RIA system is needed. Decisions on the pace of introduction of RIA are critical, since it is impossible to implement the entire system overnight. The EAC institutions will produce an increasing number of regulatory projects, and adding the RIA workload to already overloaded institutions should be carefully managed. A possible transition plan might look like this:

Enable RIA to perform effectively

- Adopt a Council implementing decree requiring RIA, setting up the Unit and elaborating its functions
- Link RIA to the work of the Sectoral Committees, the Council and the Legislative Assembly
- Develop a RIA method and manual suitable for the Secretariat's work. This should be a light-handed approach that can be implemented within the context of scarce data and skills. The World Bank's RIA Light approach, which contains a set of minimum requirements for a well-functioning RIA Light system, might be a benchmark for such a method.

Build a network of supporting units

- Build small RIA units in each Secretariat directorate
- Ensure that units maintain good skills and adequate staff to stay effective as workload expands

Train, train, train

- Launch a phased training program focused on implementing the RIA policy
- Maintain training program on regular cycle
- Expand training as needed to ensure that regulatory skills in the Secretariat

match the CMP needs

Other supporting tools

- Develop eGovernment tools to help implement the policy, such as a central web portal

Sustaining support

- Build awareness in the national ministries and regulators through seminars, conferences, cases and presentations

147. Regulators must have the skills to do high quality economic assessments, including an understanding of the role of impact assessment in assuring regulatory quality, and an understanding of methodological requirements and data collection strategies. There are currently no formal training programs in place in the Secretariat in relation to impact assessment.

148. It will be important to develop and implement data collection strategies. Even for research currently carried out by the Secretariat, data are very hard to collect, and data collection strategies have not been developed. Since data issues are among the most consistently problematic aspects in conducting research such as RIA, the development of data strategies and guidance for the Secretariat is essential if a successful programme of RIA is to be developed. The involvement of the private sector in collecting information will be essential, and an agreement with the EABC and other private sector organizations will be an important part of such a data collection strategy.

149. The RIA activities should involve the public extensively. Public involvement in RIA has several significant benefits. The public, and especially those affected by regulations, can provide the

data necessary to complete RIA. Consultation can also provide important checks on the feasibility of proposals, on the range of alternatives considered, and on the degree of acceptance of the proposed regulation by affected parties. The Secretariat's quality control procedures have not previously contained any organized program of public consultation. However, the recommendations above for more systematic consultation based on low-cost methods such as publication of drafts on websites provide the opportunity to integrate regulatory impact assessments into public consultation. As the new consultation program is implemented, attention to links between the two quality control procedures should be developed.

150. The RIA process also gives the EAC an opportunity to pay more attention to implementation issues. Many RIAs contain a discussion of the implementation plan for any new regulations, including who will implement it, how they will do so, and the resources needed. Much of the European Commission impact assessment guidelines are not suitable for the EAC, but one section is highly relevant to EAC needs – the requirement to assess compliance issues:

IAAs must deal with issues of implementation, management and enforcement... When you consider compliance issues, you need to remember that EU rules are in general implemented and enforced by Member State authorities, often at regional or local level. Your compliance analysis therefore needs to take account of possible variations in how Member States implement the rule. ... A realistic time should be given for transposition in the light of the obligations involved.

Detailed requirements, leaving little or no discretion to Member States, can often be adopted through regulations which should be used to the greatest extent possible for technical implementing measures. Consulting the target population and the Member States will help you with your compliance analysis.

151. The IA guidance provides a set of questions to help identify potential obstacles to compliance by the group who must implement the regulation:

Are the requirements of the options simple and easy to understand? Inaccessible and incomprehensible rules will reduce compliance, particularly for SMEs, which may lack time and resources to deal with large volumes of complex rules. Would the target group be able and willing to comply?

This may depend on the following:

- Compliance costs, including administrative burdens, may affect overall compliance rates, in particular for SMEs.
- Overly complicated and technical regulation may not be properly understood. Moreover, it may appear not to have any clear purpose, leading to a loss of confidence in the regulators and a tendency to evasive behaviour.
- Coherence with existing market practices or cultural norms may help raise compliance rates.
- Prior consultation builds in a sense of 'ownership', or at least understanding, of the rule and can ease compliance concerns.
- Co-ordinating implementation with regulatory authorities can improve awareness and understanding.
- Networking and co-ordination between Member State authorities can be required for the effective application of the law.
- Rigorous monitoring arrangements,

appeal mechanisms and sanctions for non-compliance can be expected to increase compliance rates...

- Providing information and other support measures can affect the ability of the target group to comply with the rule.

152. These kinds of questions are extraordinarily relevant to the experience of the EAC in implementing the customs union.

5.4 Regulatory governance tools: Regulatory reviews

153. Regulations that are efficient today may become inefficient tomorrow, due to social, economic, or technological change. Most OECD countries have enormous stocks of regulation and administrative formalities that have accumulated over years or decades without adequate review and revision. The OECD Report on Regulatory Reform recommends that governments "review regulations systematically to ensure that they continue to meet their intended objectives efficiently and effectively."

154. The EAC institutions have created no systematic or regular review schedule for EAC regulatory instruments. In part, this is because most of these instruments are so new that it makes little sense to review them. However, as time goes on, and as more instruments are created, a review process will be necessary to ensure that EAC instruments are actually designed to achieve the results that were intended. Even the European Commission has found that many of its directives and regulations were badly written, inefficient, unduly burdensome and costly to businesses, unnecessarily impeding innovation, or were creating other negative effects.

155. The EAC does have mechanisms in several Annexes to the CMP for the review of regulations adopted by the Partner States. These mechanisms are intended to identify and remove restrictions on business activities that violate the four freedoms of the Treaty. For example, the Right of Establishment Regulations, Annex III, Regulation 10, Removal of Restrictions, states that:

Each Partner State shall identify all the administrative restrictions on the right of establishment and shall remove the restrictions immediately after the coming into force of the Protocol.

The Partner States shall identify the restrictions on the right of establishment in the national laws and submit a list of restrictions to the Council within one year of the coming into force of the Protocol.

The Council shall issue a directive for the removal of the restrictions identified in paragraph 3 of this regulation.

156. However these review mechanisms for restrictions imposed by Partner States are one-off mechanisms and are not intended to be carried out periodically.

157. Some governments have tried to institute a comprehensive review program every year, but this is highly unrealistic given the extraordinary commitment of resources that it would require. The approach taken by the European Commission is more sensible: a rolling program of simplification that generates proposals for simplification every year that can be consolidated into an omnibus simplification project or law.

- In October 2005, following the Commission communication 'Better Regulation for Growth and Jobs in the EU', the Commission launched

a new phase for the simplification of existing EU law by setting out a rolling program, initially covering the years 2005-2008. This program draws extensively on stakeholder input and focuses on sectoral simplification needs. It initially listed some 100 initiatives affecting about 220 basic legislative acts, to be reviewed over three years. In January 2009 the Commission presented its Third Strategic Review on Better Regulation and updated its simplification rolling program. The Simplification rolling program currently covers 185 measures of which the Commission has already adopted 132. The Commission's simplification initiatives are integrated into the Commission's Annual Legislative and Work Programme. The Commission also reports on a monthly basis on what has been achieved and what is planned as regard these initiatives.

158. The European Union approach to review and simplification is one that should be considered by the EAC Secretariat for EAC regulatory instruments. It is highly flexible and so can be upscaled or downscaled according to resources, and can reflect annual priorities for action. Steps to implementing this approach include:

- Adopt, by Council action, a rolling program, initially covering three years;
- Use stakeholder input to identify simplification priorities. The EABC could coordinate the effort to identify priorities for businesses;
- Set out the review schedule for the priorities over the three year period;
- Develop a public-private mechanism to carry out the reviews and submit recommendations to the Council;
- Report monthly on what has been achieved.
- Evaluate the first three-year program to develop the second three-

year program.

5.5 Capacities to co-ordinate regulatory reform throughout the EAC Institutions and with Partner States

159. The regulatory reform agenda can be sped up by the right regulatory management structure. The EAC institutions, still relying on legal instruments as the main driving force for regulatory reform, have not yet developed a management structure that can promote good regulatory practices across the institutions and certainly not across the five Partner States. Yet there is great opportunity to make progress by improving the management capacities of the EAC institutions, perhaps even more opportunity than producing more legal instruments.

160. The EAC Council, which manages the EAC apparatus, has worked through a series of management mechanisms for production of regulatory instruments:

- Creation of ad hoc mechanisms for negotiation and production, such as the EAC High Level Task Force that negotiated the CMP Annexes.
- Instructions to the Sectoral Committees about their tasks and the timing of the work;
- Instructions and requests to the Secretariat to support the work such as by preparing drafts of regulatory instruments;
- Oversight of the annual budget and associated workplans.

161. National regulatory systems are complex constructions. A rich array of legal instruments are developed and implemented through dozens of institutions at national and local levels. Multinational regulatory systems such as the EAC Common Market are even more

complex, introducing another layer of complexity and new issues of consistency, accountability, and performance. Developing a common policy such as regulatory quality based on good regulatory practices across such a complex structure is a difficult management challenge. The question posed in this section is whether the EC institutions, in particular the EAC Secretariat, are capable of carrying out such a task across the EAC institutions and across the Partner States.

162. Because they are themselves regulatory institutions, and because they work across levels of government with many other regulatory institutions under the control of sovereign governments, the EAC institutions face two quite different management challenges with respect to promoting, implementing, and sustaining good regulation practices across the community.

163. The first challenge is somewhat similar to the challenge faced by national governments when they are organizing a cross-governmental regulatory reform program that cuts across dozens of regulatory institutions working in different policy fields. In developing a management capacity, it is possible to use the experience of national governments as a rather flexible benchmark to determine if the EAC is itself capable of implementing a common regulatory reform policy at EAC level.

164. The national context for regulatory management is well known, and has been assessed and documented at the OECD for two decades. The dominant strategy at the national level is creation of a dedicated mechanism at the center of government to oversee, guide,

and promote regulatory reform within the formal hierarchy of powers and relationships. This mechanism can carry out not only strategic but operational functions.

165. In a regional context, however, management strategies for the promotion of regulatory reform should include a whole range of approaches, including various kinds of coordination, leadership, demonstration affects, peer review and peer pressure, and even competition for quality driven by scorecards and comparative indicators. In a regional context, where different levels of government are involved, the hierarchical relationship of a single government is not relevant. What is needed, rather, is a broad consensus across the five Partner States that regulatory reform is essential to achieve the economic growth objectives of the region. That shared consensus then provides the basis for coordinated action across the region.

166. Regional management of a regulatory reform program across the EAC institutions in the five Partner States could involve a range of tasks carried out presumably by the EAC Secretariat if it takes on a stronger role after institutional reform:

- strategic leadership: assessment of regulatory challenges and new initiatives on regulatory reform and prioritization of initiatives under the CMP;
- advising the government on all matters relating to business regulation, regulatory institutions, the enabling environment, and related reforms generally; In the longer term, regulatory management should be responsible for continuing adaptation

and improvement of regulatory systems as external conditions change, information becomes available and new problems arise.

- organizing high-level groups of experts and advisors from across the region, perhaps representing the member governments. The Network of Reformers may be a good start for a more institutionalized approach. The High Level Group of National Regulatory Experts organized by the European Commission is an example of this kind of initiative. This kind of high-level group can have the moral authority and credibility to recommend actions to the governments.

- reviewing proposed EAC and national policy on business regulation and advising the EAC and national governments when regulatory practices interfere with the goals of the East African Community;

- operating training programs to build skills in the regulatory authorities. The European Commission does not operate such training programs, but instead relies on the national governments to offer such training as may be needed for civil servants. COMESA, on the other hand, does organize training in technical areas of regulation for civil servants from its member states.

- monitoring and reporting on the activities of the regulatory authorities related to regulation reform, quality, or related issues particularly compliance with the national regulatory policy. This is done annually by the European Commission in the annual country assessments of the implementation of the Lisbon Strategy Structural Reforms. These assessments provide a detailed

overview of progress made with the implementation of the Lisbon Strategy reforms in Member States. Similarly, the EAC could produce at least once a year a report on the quality of regulation in the EAC, and proposing as needed any actions necessary to improve the business environment so as to support the development policies of the Government;

- organizing forums, and bringing together the regulatory authorities and stakeholders with a view to getting the views of these groups on the regulatory environment for business activity.

167. Within the EAC institutions, regulatory coordination can be much more operational in nature, because these institutions are working within a common legal framework and hierarchical management structure, overseen by the Summit and the Council who can mandate a regulatory reform process. In addition to the tasks listed above for the regional level, which can also be carried out at EAC level, an EAC regulatory reform program could also include the following tasks:

- program oversight: central coordination of delivery and implementation of regulatory reform, with monitoring and challenge to ministries on performance
- reviewing all proposals for new regulatory requirements against the standards established by the regulatory policy;
- issuing guidance and standards for regulatory impact analysis to be applied by the regulatory authorities;
- issuing guidance and standards for the manner of public consultation to be applied by the regulatory

authorities, promoting more accessible and systematic public consultation strategies, developing a website portal for public consultation, and consulting regularly with stakeholders on issues of business regulation and its reform;

- providing help-desk services to regulatory bodies at EAC level.

168. Tasks require some kind of organization in the EAC, and probably within the EAC Secretariat given its mandate to support EAC policies. This would require a dedicated mechanism, with adequate resources, expertise and authority, for assisting the EAC to develop a regulatory strategy; for managing and co-ordinating implementation of a complex regulatory reform strategy; and monitoring and reporting on outcomes. Of course, in carrying out its tasks, such a mechanism would be accountable to the Secretary General and the Council. The Council would be able to charge it with new tasks beyond its core mandate to support EAC policy.

169. Such a mechanism should be supported by a network of allies through the public and private sectors such as the Network of Reformers already operating in the EAC. Jacobs has found that the best-performing countries create a rich network of supporting institutions on regulatory reform. Such a network might include:

- Political and minister-level bodies for regulatory reform (such as special ministers for regulatory reform in UK, Special Committee of Council in Canada);
- Activist committees and bodies of the parliament (such as Committees of the European Parliament);
- High level commissions (such as

the Competitiveness Council in the European Commission);

- Inter-ministerial working groups that coordinate and advise on major regulatory initiatives (such as the Implementation Group of Secretaries General in Ireland);
- Ad hoc inter-ministerial working groups that coordinate and advise on major regulatory initiatives (such as Inter-service coordination groups for regulatory development in the European Commission)
- Ministerial regulatory reform units who are responsible for carrying out the regulatory policy and quality oversight at the level of the Ministry (such as, in United Kingdom, a Minister for Regulatory Reform is appointed to each key regulatory department to be responsible for the quality of regulation within the department. Departmental Better Regulation Units are established in each department)
- Private sector groups, advisory bodies, think tanks, or other research bodies who support the regulatory reform agenda (such as the UK Better Regulation Task Force, Sweden's Board of Swedish Industry and Commerce for Better Regulation (NNR))

170. The recommendations to this review pick up a number of these options for improving regulatory reform management capacities in the EAC institutions, both at the level of the EAC and across Partner States.

5.6 Regulatory quality principles in the EAC

171. This section considers whether the regulatory quality principles developed in the EAC legal framework meet the regulatory needs and priorities of the CMP. As already noted, the two main tasks ahead for the EAC institutions are to remove

existing regulatory constraints on the development of the common market, and to create the regional regulatory framework that is necessary to facilitate the free movement of goods, services, labor, capital, and business establishment. Successful completion of these tasks requires that clear quality principles be defined and applied.

172. The performance of a regulatory system is mostly determined by the quality of its outputs. What do we mean by “quality”? Quality standards for regulation are the principles that determine whether a regulation is justified and implemented well in light of goals of economic, social, and environmental development. OECD countries have adopted general quality standards for government regulation (see Box 2). Far from being abstract principles, these principles constitute a burden of proof that must be implemented explicitly through a process of quality control. Most “regulatory governance” tools are designed to test whether regulations meet that burden of proof.

173. Such quality standards are crucial to the operation of a common market, because these principles are the safeguards against the kind of regulations that will impede free movement. It is impossible to imagine that the European Single Market could have been sustained against non-tariff barriers without several crucial quality principles with legal value. These EU principles are not only enforced by the regulatory institutions, but by the courts. That is, the regulatory quality principles are part of the economic Constitution of Europe, not merely a political statement of vision. What are these EU principles against which regulations in the Single Market are judged?

- The first is the principle of mutual recognition. Established by the Court of Justice in 1979 in the “Cassis de Dijon” case, this principle states that the legislation of one member state is equivalent in its effects to domestic legislation in another member state. More specifically, this principle states that in those areas not subject to harmonization at the EU level, every member is obliged to accept on its territory products and other factors of production that are legally produced and marketed in another member state. To make the mutual recognition principle fully operational, that is, reduce risks to businesses, the European Parliament and the Council adopted Regulation (EC) No 764/2008 which applied from 13 May 2009. This regulation makes life easier for businesses by creating an online Product List that provides a list of products not subject to Community harmonization requirements, and requiring Member States to designate “Product Contact Points” to provide businesses with information on any non-harmonized regulations that apply in those Member States. Member states may challenge the application of the mutual recognition principle only where public health, safety, or environmental protection are at stake. However, in those cases, two other principles must be met: necessity and proportionality.

- The principle of necessity states that member states have to prove the need for any measure that violates the principle of mutual recognition.

- The principle of proportionality states that any policy measure has to be proportional to its goal, that is, achieve a clear and stated goal with minimal distortions to the free movement of goods and other factors of production. This principle is stated in Art 5, and a protocol on its

application is annexed to the TEC by the Treaty of Amsterdam.

- The principle of nondiscrimination (Article 12) states that no citizen of any member state should be discriminated on the basis of nationality. The European Commission considers this “a cornerstone of the whole construction” of the Single Market.

- The principle of subsidiarity (Article 5) states that the European Community should, in areas that do not fall within its exclusive competence, take no action better performed by Member States. It is intended to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made as to whether action at Community level is justified. A protocol on the application of the principle of subsidiarity, annexed to the TEC by the Treaty of Amsterdam, sets out the criteria for applying this principle. The principle is enforced in two ways: it is under the review of the Court of Justice, and the Commission is mandated as follows, “Before proposing European legislative acts, the Commission shall consult widely.”

- The principle of transparency. Article 255 of the Treaty states that “1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents...” Protocol (N° 7) on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty, require widespread consultation as new rules are being developed. Legal requirements for consultation were made operational by General principles and minimum standards set out in a European Commission

Communication of 11 December 2002, “General principles and minimum standards for consultation of interested parties by the Commission” COM(2002)704.

- The principle of simplicity (of regulations so that people can understand them). The Treaty requires that any action be as simple as possible. This principle was adopted by European Commission policy in 2007: “Maximum effort should be made to ensure the clarity, simplicity, operability and enforceability of legislation.”

174. In line with the OECD 1997 guidance, European countries adopted a wider set of quality principles for European regulation in the 2001 Report of the Mandelkern Group on Better Regulation. These principles focus less on legal rights and efficiency standards and more on user issues, such as clarity and accessibility, and also to relations between regional and national powers. In addition to necessity, subsidiarity, proportionality, transparency, and simplicity, other core principles widely accepted by the international community and included in the 2001 report are:

- Accountability (for results)
- Accessibility (by all citizens to legal obligations)

175. These are not simply vague ideals. The Mandelkern Report and the European Commission developed specific steps to apply them, in addition to legal review, a safeguard of the last resort. As part of the 2005 renewed Lisbon Strategy, refocused on growth and jobs, the Commission announced its intention to launch a comprehensive initiative to ensure that the regulatory framework in the EU meets the requirements of the

21st century. The current initiative has three main strands:

- By further promoting the design and application of better regulation tools at the EU level, notably in so far as impact assessments and simplification are concerned.
- By working more closely with Member States to ensure that better regulation principles are applied consistently throughout the EU by all regulators.
- By reinforcing the constructive dialogue between all regulators at the EU and national levels and with stakeholders.

176. For its own regulatory actions, the Commission has announced a range of initiatives aimed at pursuing the Better Regulation objective: screening pending legislation, simplification, revised Impact Assessment guidelines and creation of an Impact Assessment Board, application of the Standard Cost Model to administrative costs, and the appointment of a High Level Better Regulation group to advise on the regulatory reform strategy. These strategies to safeguard the quality of regulation are discussed in more detail in later in this section.

177. A more general set of quality standards for regulatory systems was proposed for developing countries in a report soon to be published by the IFC. These system principles are identified as achieving a regulatory system that is:

1. Effective: The relationship between the goals of public policy and the results of the regulation. The closer the results of the regulation to clear goals, the more effective is the regulation. This principle is not mentioned in any specific EU instrument, but is included in the

guidelines for Impact Assessment. Policy proposals in the European Commission must be accompanied by an impact assessment that demonstrates that the proposal is effective in reaching the stated policy goals.

2. Efficient: A scale representing the relationship between benefits and costs at any moment in time. Regulation that is efficient one day can be inefficient the next as effectiveness, valuation of benefits, and opportunity costs change. Any reform that increases benefits while holding costs constant, or that reduces costs while holding benefits constant, increases efficiency.

This principle is not mentioned in any specific EU instrument, but is included in the guidelines for Impact Assessment. Policy proposals in the European Commission must be accompanied by an impact assessment that demonstrates that the proposal reaches its goal efficiently, that is at minimum cost.

3. Transparent and accessible: The capacity of stakeholders to understand the entire cycle of regulation through problem and goal definition, development, adoption, implementation and adjudication. The more easily and thoroughly a stakeholder can get information about the regulatory activities of a government, the more transparent are those activities. Among the transparency tools are consultation/engagement methods that provide opportunities for stakeholders to participate in the development, monitoring, and revision of regulations. Opportunities should be “meaningful.” That is, the information and views of stakeholders should be obtained in a way that is relevant, timely, and responsive to policy development.

178. The regulatory challenges faced by the EAC are similar to the European single market, and the EU standards offer a good benchmark for assessing the EAC principles. How does the EAC measure against these standards of regulatory quality? Progress has been made towards establishing a set of market-based principles to guide EAC regulatory powers, but there are still gaps and incomplete application of these general principles at the EAC and national levels.

179. The Treaty establishes some important regulatory quality principles in Article 7, paragraph 1:

- (d) the principle of subsidiarity which emphasizes multilevel participation of a wide range of participants in the process of economic integration. This use of the term “subsidiarity” is different from the term used in the European Union. The EAC term means “stakeholder consultation”, while the European term limits the power of the regional institutions in favor of national institutions.
- (e) the principle of variable geometry which allows for progression in co-operation among groups within the Community for wider integration schemes in various fields and at different speeds;
- (f) the equitable distribution of benefits accruing or to be derived from the operations of the Community and measures to address economic imbalances that may arise from such operations;

180. Three other important regulatory principles for common markets, similar to the EU standards, are established in the CMP (Art 3, para 2). The Partner States are directed to:

- (a) observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality;
- (b) accord treatment to nationals of other Partner States not less favourable than the treatment accorded to third parties;
- (c) ensure transparency in matters concerning the other Partner States... (This is a limited view of transparency, because it relates to relations between States, not between the EAC and citizens.)

181. Similar to the EU “Cassis de Dijon” case, the CMP provides for exceptions to the common market regulatory quality standards. For example, Article 25 states that “The free movement of capital may be restricted upon justified reasons related to: ... (b) public policy considerations;” Subpara (b) is so discretionary that it permits almost any restriction at all. However, the Article limits these exceptions by stating that:

- “Where a Partner State adopts a restriction under paragraph 1, the Partner State shall inform the Secretariat and the other Partner States and furnish proof that the action taken was appropriate, reasonable and justified.”

182. The appropriate, reasonable and justified requirements are critical, because they create the burden of proof for Partner States to meet in creating non-tariff barriers that might interfere with free movement. Unlike the EU system, though, the EAC institutions have not endorsed any particular reform approach or quality method to safeguard these principles. There is no definition of appropriate,

reasonable or justified nor how can they be assessed. These kinds of safeguards must be strengthened to ensure that the exemptions in the CMP do not become loopholes for legal non-tariff barriers.

183. The critical principle of mutual recognition merits additional scrutiny. The EAC relies too much on harmonization to the neglect of mutual recognition, contrary to the lessons learned from the EU experience. Regulations can be seen as statements of performance necessary for goods, services, capital, people, and businesses to enter markets. Regulations define the qualities needed to enter the markets of the five Partner States. The process of convergence of regulatory quality required in a common market operates on the basis of three strategies :

- 1) Harmonization, or the adoption by all jurisdictions of identical regulations;
- 2) Mutual recognition, or the recognition of regulations in another jurisdiction as meeting the requirements in a second jurisdiction;
- 3) Gradual convergence based on common principles where, over time, regulations and various jurisdictions approach each other in content and goals.

184. As noted, the European Union moved from the principal of harmonization to the principle of mutual recognition, driven partly by Court of Justice cases, but also by the recognition that harmonization is a time-consuming and costly strategy that empowers special interests in the member states. The regulatory strategy that was developed in 1985 was called the “New Approach”, a legislative technique that consists of

defining mandatory essential product requirements to ensure public protection, while leaving the choice of technical solutions up to businesses. The New Approach is considered to be a highly efficient technique for promoting industrial competitiveness, product innovation, and the free movement of goods across the EU. The main elements of the New Approach are,

- definition of mandatory essential requirements to ensure a high level of protection of the public interest at issue, such as health, safety, consumer protection or the protection of the environment. Essential health and safety requirements are at the heart of the New Approach Directives. They are mandatory, legally binding obligations, and they are enforced.

- manufacturers are free to choose any appropriate technical solution that meets the essential requirements. Products that comply with harmonized standards are presumed to meet the corresponding essential requirements.

185. Mutual recognition based on the New Approach creates highly efficient regulatory competition among the Members in which the market can choose among regulatory approaches.

186. However, harmonization is the preferred regulatory strategy in the EAC. The Treaty calls for Partner States to harmonize numerous fields of regulation relating to economic integration, but does not mention mutual recognition. Harmonization is mentioned many times in the CMP, but without reference to the “minimum” harmonization that is the hallmark of the EU single market. For example, the CMP calls for Partner States to:

Article 5, para 2(e): (e) harmonise their labour policies, programmes and legislation including those on occupational health and safety;

Article 5, para 2(e): “Remove measures that restrict movement of services and service suppliers, harmonise standards to ensure acceptability of services traded....”

Article 5, para 3(f): coordinate and harmonise their transport policies.

187. These are crucial statements of strategy for the Common Market. Yet little has been done in these areas to enable mutual recognition to work on the ground, even where the Treaty prefers mutual recognition, such as in education and standards.

- The EU efforts to facilitate mutual recognition by, for example, providing lists of products that can be traded across borders have, as yet, no parallel in the EAC.

- To make the mutual recognition principle fully operational, the European Parliament and the Council adopted Regulation (EC) No 764/2008. It defines the rights and obligations of, on the one hand, national authorities and, on the other, enterprises wishing to sell in a Member State products lawfully marketed in another Member State, when the competent authorities intend to take restrictive measures about the product in accord with national technical rules. In particular, the Regulation concentrates on the burden of proof by setting out the procedural requirements for denying mutual recognition. This also has, as yet, no parallel in the EAC, but might be a very useful safeguard.

- The rights of establishment, a critical right for the success of the common market, depend on the ability to access information about businesses from other countries, such as whether it is legally registered, its home address, and whether a contract is signed by someone legally authorized. This means that information in the commercial registries in the five Partner States must be reliable and accessible. This is not now the case. In only two of the five Partner States is the commercial registry in electronic form. In the other three countries, the commercial registry is still held in paper form, that is, almost completely inaccessible. Therefore, basic due diligence tasks in the market, such as credit referencing, are simply not possible. The EAC institutions have made no attempt to standardize or upgrade the quality of commercial registries across the five countries, although this is surely a precondition for the effective use of the rights of establishment.

188. Instead, most regulatory activities of the EAC institutions are today focused on top-down, labor-intensive regulatory harmonization or approximation, with little discussion of “minimum” harmonization.

- For example, in the standards area, the East African Standards Committee (EASC) has approved more than 1,000 harmonized standards for the region. These standards must be adopted by each national standards committee to become effective, and only around 20-30% have been adopted by all five Partner States. Yet the work needed to recognize national quality marks and to accredit national testing laboratories is hardly underway. As a result, national quality marks are still not recognized in other EAC countries, and even products with quality marks

must still undergo all of the health and sanitation checks as they cross borders.

- In the tourism area, of critical importance to the region, the much-discussed single tourist visa for East Africa is still delayed as Partner States try to harmonize their tourism policies and laws. Tourists visiting the region often spend many hours when crossing borders from one EA state to another because they had different visas for each country. Mutual recognition of each other's tourist visas could be a simple step with great benefits to the region. An official with an EAC Ministry explained that the single tourist visa has also been delayed because of national concerns: "When you go into details, trivial matters begin to dominate and the big picture is lost. Governments focused on lost visa revenues rather than increased tourist revenues."

- In education, the EAC Partner States have delayed the mutual recognition of professions pending the harmonization of the education curricula, standards, assessment and evaluation of education programs. Harmonization is an enormous challenge, given differences between the five countries, and the reasons for harmonization are unclear. In 2010, harmonization was even underway for Technical and Vocational Education and Training (TVET) in the EAC, areas that could easily be left to the market. A Secretariat official explained that "Education standards are too different [among the Partner States] for mutual recognition." But harmonization is failing to produce any benefits. After 10 years of work with little progress on harmonization, the EAC Ministries of Education are reportedly now mapping out a more flexible strategy to interface the education systems by

sharing information regarding syllabi content in all areas and determining qualification equivalencies. This seems to be evolving more toward the EU system.

- By contrast, the European Single Market works without harmonization of educational systems, instead, recognizing them as "equivalent" and letting the market decide who to hire. Like the CMP, the EU Single Market permits "nationals of the Member States...the right to pursue a profession, in a self-employed or employed capacity, in a Member State other than the one in which they have obtained their professional qualifications." But no harmonization of educational curricula is needed. To define the mechanism of recognition, the various national education and training schemes are grouped into five levels, ranging from a training course not forming part of a certificate or diploma to a diploma certifying that the holder has successfully completed a post-secondary course of at least four years' duration. Automatic recognition of qualifications based on "coordinated minimum conditions for training" such as time of training and subject matter is used for doctors, nurses, dentists, veterinary surgeons, midwives, pharmacists and architects. A Member State can require that they declare their presence, but these declaration requirements "should not lead to a disproportionate burden on service providers nor hinder or render less attractive the exercise of the freedom to provide services." Where there are questions about competence, "requiring the migrant to choose between an aptitude test or an adaptation period offers adequate safeguards..."

- In a meeting in February 2010, agriculture experts from the EAC Partner States met to identify areas

of policies, laws and regulation for harmonization which included among others; veterinary drugs, vaccines and equipments; animal and fish feeds; animal seeds including fish; and plant seeds. Others include; fertilizers; crop and animal protection products and substances; farm implements; agricultural mechanization; and water for agricultural production (crops, animals and fisheries). There is no clear need for harmonization in all of these areas, and some such as farm implements and water seem better suited to national or local regulation.

189. There seem to be several reasons for the preference for harmonization in the EAC system:

- Harmonization is more labor intensive and requires more meetings and working groups. The incentives in the Secretariat and Partner State ministries are to maximize meetings and groups, as discussed above, due to financial transfers to participants. Each harmonization initiative produces many meetings, and multiple working groups and sub-working groups who work for years.

- Harmonization allows more negotiation on behalf of national interests. Simply throwing open borders on the basis of mutual recognition – so that countries' regulatory systems compete with each other -- creates fears of losses. For example, the discussions of harmonization of education standards that has lasted for years, without a single agreement, was described by a Secretariat officials as "a battle over control of who enters, and what countries will win and lose."

- Mutual recognition is more market-based. For example, under mutual recognition, employers decide which

country's educational system is better suited to their needs, rather than relying on an EAC standard. This seems consistent with the Treaty's first principle in Article 7 "that shall govern the practical achievement of the objectives of the Community....(a) people-centered and market-driven co-operation..." However, there is substantial suspicion of the market among regulators in the region. The regulatory habits of the region are based on regulatory controls.

- Another reason for over-emphasis on harmonization is that consumers are almost absent from the common market strategy. One of the key reasons for mutual recognition is to maximize consumer choice in the market, based on good consumer information of country of origin, accurate labeling, and any applicable quality marks. EAC consumers should be seen as all downstream users of goods and services and labor, such as employers, downstream businesses, and individual consumers in the home. Harmonization replaces consumer choice by providing only one choice to consumers. A more consumer oriented regulatory system would inevitably move toward mutual recognition supplemented with minimum harmonization of health, safety, and environmental protection standards.

190. The interviews done for this review suggest that the EAC Secretariat is increasingly aware of the drawbacks of over-harmonization. There seems to be a movement toward what is called "approximation", which is a more flexible form of harmonization, and a growing appreciation of the need for mutual recognition as a practical approach to realizing the common market. The actual tools needed

to implement mutual recognition, such as recognition of quality marks and country of origin labels, have run into implementation problems, whose resolution requires much higher profile at the political and administrative level.

191. This section has discussed the issue of the quality principles guiding the use of EAC regulatory powers. The crucial question facing the EAC common market is this: what principles shall be used in setting quality standards for the common market? The table below summarizes this section by comparing the current regulatory principles of the EAC to those of the European Commission and COMESA.

5.7 Monitoring and enforcement

192. One of the important issues in this review is how compliance with EAC legal decisions is ensured, and the mechanisms in place to ensure that regulations are enforced. The role of regional institutions in monitoring and enforcement is not to enforce EAC rules on the ground against individual businesses and citizens (this is the role of inspectorates in Partner States), but to monitor and enforce the application of EAC rules by the responsible authorities in the Partner States. Consistent and reliable application of EAC rules is crucial to the reduction of regulatory costs and risks that will stimulate business activity.

193. This review has found that the link between regional policies and implementation on the ground, and the mechanisms of monitoring and enforcement of compliance by Partner States with EAC regulations, and other incentives for compliance, are the weakest part of the EAC

arrangements. The EAC common market desperately needs a "guardian of the treaty," the role jointly played in Europe by the European Commission and the Court of Justice.

194. There are two aspects of compliance: First, are the Partner States implementing the requirements of EAC legal instruments? Second, are the Partner States imposing new limitations that violate the requirements of EAC legal instruments?

195. Many cases of the first kind of noncompliance by the Partner States have been reported in the media and by Secretariat officials. For example, in March 2010, journalists found that businesses were "still paying duty on goods that were supposed to be zero-rated from January 1, this year," and EAC confirmed that some Partner States had delayed implementation of resolutions and protocols. The EAC Deputy Secretary General said lack of a central political authority was one of the biggest hurdles facing the regional integration scheme. "We don't have an enforcement mechanism other than to ask the individual countries themselves to report to one another what they have done about the agreements they signed," she said.

196. The original concept of the EAC was that implementation of EAC instruments should rely on the commitment of the Partner States, that is, on the good will of each government. Such an approach would preserve the full sovereignty of each state. The CMP, Article 16, Free Movement of Services, also places responsibility for compliance by local governments, local authorities and nongovernmental bodies with the Partner States, not the EAC institutions.

Box 3: OECD standards of regulatory quality: a new level of quality

The OECD regulatory quality principles accepted by Member countries read:

Good regulation should: (i) be needed to serve clearly identified policy goals, and effective in achieving those goals; (ii) have a sound legal basis; (iii) produce benefits that justify costs, considering the distribution of effects across society; (iv) minimise costs and market distortions; (v) promote innovation through market incentives and goal based approaches; (vi) be clear, simple, and practical for users; (vii) be consistent with other regulations and policies; and (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.

197. With respect to the second kind of compliance, good communication between the Partner States and EAC institutions on regulatory actions are a necessary part of monitoring and enforcing the common market. The EAC, however, relies exclusively on notification of limitations as the enforcement mechanism. Notification requirements of a range of actions are common throughout the EAC legal framework:

- CMP, Article 10: “The free movement of workers shall be subject to limitations imposed by the host Partner State on grounds of public policy, public security or public health. A Partner State imposing a limitation... shall notify the other Partner States accordingly.”

- CMP, Article 13: “The right of establishment shall be subject to limitations imposed by the host Partner State on grounds of public policy, public security or public health. A Partner State imposing a limitation under paragraph 8, shall notify the other Partner States accordingly.”

- CMP, Article 19, Notification:

- “Each Partner State shall promptly notify the Council of all measures of general application affecting the free movement of services at the entry

into force of this Protocol....

- The Partner States shall notify the Council of any international agreements pertaining to or affecting trade in services with third parties that they are signatory to, prior to and after the entry into force of this Protocol....

- Where a Partner State submits a notification to the Council under paragraph 2, the Secretariat shall transmit a copy of that notification to the other Partner States....

- Each Partner State shall, promptly and at least annually, inform the Council of the introduction of any new national laws or administrative guidelines, or any changes to existing laws or administrative guidelines which affect trade in services provided for in this Protocol.

- Each Partner State shall respond promptly to any request by another Partner State for specific information on any of its measures of general application or international agreements.

198. The concept of reliance on the Partner States to monitor each other is changing very fast. There is widespread understanding in the EC institutions that monitoring and enforcement are critically weak. The mainstream thinking in Arusha

now is that the EAC should build a compliance mechanism that empowers the Secretariat to take action against non-compliant States.

199. The first line of defense is the judicial system in the form of the national courts. Because the regulations of the EAC are considered national law, any citizen in the EAC has the right to take a government to a national court for failure to implement the laws. But the national courts have not considered any cases of non-compliance, and there is some skepticism that a national court will take action against its government on behalf of other nationalities.

200. The second line of defense is the EAC Court of Justice. The Treaty provides for “adjudication” by the Court of Justice of failure to comply by any Partner State, upon referral by another Partner State, the Secretariat, or the Council. Curiously, the Secretariat cannot refer a matter directly to the Court, but must wait for the Council to decide to refer the matter. This is identical to how such referrals are handled in COMESA. This further weakens the capacity of the Secretariat to act as the regional “voice” in protecting regional policies.

ARTICLE 28

Reference by Partner States

1. A Partner State which considers

that another Partner State or an organ or institution of the Community has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court for adjudication.

ARTICLE 29

Reference by the Secretary General

1. Where the Secretary General considers that a Partner State has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the Partner State concerned for that Partner State to submit its observations on the findings.

2. If the Partner State concerned does not submit its observations to the Secretary General within four months, or if the observations submitted are unsatisfactory, the Secretary General shall refer the matter to the Council which shall decide whether the matter should be referred by the Secretary General to the Court immediately or be resolved by the Council.

3. Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary General to refer the matter to the Court.

201. No referral under these articles has been made. Secretariat officials suggest that the culture in the EAC is to solve problems behind closed doors, which reduces transparency and increases investment risks.

202. The Treaty is silent about what the Court might do if it finds a case of non-compliance. No remedy is suggested. The EAC Court of Justice has limited its own jurisdiction to consider such cases. In 2009, it decided that it holds no jurisdiction in a commercial case in which a

company named Modern Holdings Ltd, sued the Kenya Ports Authority (KPA) for losses of over \$ 24 million on imports due to inefficiencies at the port of Mombasa. The Court “stated that the obligation to promote the development of efficient and profitable seaport services enumerated under Article 93 of the EAC Treaty, lay squarely on the shoulders of the Republic of Kenya.”

203. For its part, the Secretariat has no authority to enforce compliance. It has the authority to adopt a monitoring system to verify compliance, but has not done so. It is not clear what to monitor – legal compliance, or results. For example, even when EAC standards are adopted at national levels, countries may retain their procedures such as getting a certificate, which can maintain the high costs of the original standard. Compliance perhaps should be seen in its full dimension of actually producing results visible to businesses in the form of lower costs and risks, rather than narrow measures of legal compliance.

204. Some administrative compliance strategies and monitoring mechanisms are being implemented in the EAC Secretariat:

- A Secretariat official explained that, “Once an issue is identified, we ensure that these issues are followed up with actionable plans. To ensure compliance, we hear complaints, go out in field and monitor compliance, and if we find problems, we take it up with the relevant ministry. The whole thing is implemented smoothly.”
- Another official in the trade area explained that, “We monitor delays but our work depends on complaints from the private sector. We go to the border and check, and if we see delays, we call the capitals. It is kind

of a gentleman’s agreement.”

205. The enforcement authorities of the European Commission and the European Court of Justice are much stronger:

- The Commission acts as ‘guardian of the Treaties’. This means that the Commission, together with the Court of Justice, is responsible for making sure EU law is properly applied in all the Member States.
- In 1997, the Commission developed a monitoring mechanism called the Internal Market Scoreboard. The Council emphasized “the crucial importance of timely and correct transposition of all agreed legislation into national law; the need fully to inform citizens and business about the Single Market and the need for active enforcement of Single Market rules in the Member States.” The purpose of the six-monthly scoreboard is to offer a picture of the current state of the Single Market and second to gauge the degree to which Member States, the Council and the Commission are meeting the targets laid down in the Action Plan. The Scoreboard compares the overall rate of non-transposition for each Member State.
- If it finds that an EU country is not applying an EU law, and therefore not meeting its legal obligations, the Commission takes steps to remedy the situation.
- First it launches a process called the ‘infringement procedure’. This involves sending the government an official letter, saying why the Commission considers this country is infringing EU law and setting it a deadline for sending the Commission a detailed reply.
- If this procedure fails to put things right, the Commission must

then refer the matter to the Court of Justice, which has the power to impose financial penalties. The Court's judgments are binding on the member states and the EU institutions.

206. NAFTA takes an arbitration approach to settling disputes between a country and an investor from another country.

Under Chapter 11, when an investor from one country claims losses due to the failure of another government to respect its investment obligations, the investor and the offending government must first try to reach an agreement before bringing the case to a Panel. The investor, with a view to recovering damages, has the option to invoke arbitration under three possible sets of rules:

- the World Bank's International Centre for the Settlement of Investment Disputes (ICSID);
- ICSID's Additional Facility Rules; and
- the rules of the United Nations Commission for International Trade Law (UNCITRAL Rules).

207. The proceedings are conducted in accordance with the rules chosen by the investor.

The complaining investor and the government in question are in charge of constituting the Panel. The Panel is formed by three arbitrators. Each disputing party appoints one arbitrator and the third one is appointed by negotiation between the disputing parties.

When a Panel decides on a final award against a Party, it can award, separately or in combination:

- monetary damages and any applicable interest;
- restitution of property.

208. Monitoring and enforcement of the legal requirements of the EAC common market can only be done

through a multifaceted strategy, involving multiple institutions at EAC and national levels. Clearly, several steps are crucial to creating an effective system of incentives for Partner States to fully comply even when compliance is inconvenient, or contrary to the interests of some producers in that country.

- First, the EAC institutions, meaning the Council and the Secretariat, must develop a reporting mechanism to track compliance. Such a reporting mechanism should, in the first instance, focus on the implementation by Partner States of the legal requirements. For example, are unified forms being used? Are tariff rates the CET rates? In the second instance, reporting mechanism might focus on the desired results of compliance in the Partner States. For example, are police blocks reduced? Are trucks passing through border crossings with less delay? Are national quality marks being recognized in other countries?

- Second, the judicial system must be developed more fully as part of the system of compliance. The jurisdiction of the EAC Court of Justice should be expanded to include cases of noncompliance brought by citizens of the Partner States. Some kind of credible enforcement mechanism should be provided, such as financial compensation by offending Partner States to affected businesses.

- Third, the Secretariat must be given more authorities for monitoring and for reporting offenses to the Court of Justice for action. The scoreboard and infringement procedures used by the European Commission are a good benchmark for the kinds of authorities that could be given to the Secretariat.

- Fourth, awareness of EAC requirements in the relevant ministries and agencies of the Partner States has to be a priority. A regional training program might be launched for customs officials, for example, or a mandatory professional test of EAC regulations might be required for customs officials.

- Fifth, civil society organizations such as business associations or the EABC could play more formal roles in monitoring compliance and bringing problems to the attention of the Secretariat in the Court of Justice. The EABC might, for example, be requested to prepare an annual report on compliance, focusing on the performance issues of importance to businesses. Is compliance actually producing improvements in the business environment?

209. Given the strong emphasis on sovereignty in the Partner States, which will likely continue for several years, the enforcement mechanism should be set up largely on the basis of soft instruments, such as transparency, independent review by the regional court, and political pressure from business associations who support the regional approach.

6. Conclusions: Prioritization of Initiatives to Improve Regulatory Reform Capacities in EAC Institutions

210. Development of the EAC common market is largely a regulatory reform agenda. As noted, the three main regulatory reform challenges facing the EAC institutions are:

1) the "negative" task of eliminating existing rules and preventing new rules at EAC and domestic levels that violate the principles of the common market,

2) the “positive” task of completing a regional regulatory framework at EAC level that enables the free circulation of goods, services, capital, labor, and business establishments, and 3) the “quality control” task of reducing the costs and risks of doing business by embedding regulatory quality principles into regulatory mechanisms at the EAC level and promoting them at domestic levels.

211. Success will be determined by the extent to which the new regulatory framework, by reducing costs and risks for businesses, induces new behaviors of value of consumers, such as competition, innovation, and investment. The policy content of specific regulations in areas such as trade facilitation, standardization, and sectors is important, but just as important is the regulatory strategy (based on consumer choice or top-down regulation) and the quality of the regulatory system in protecting values such as effectiveness, efficiency, and transparency.

212. This review has identified many strengths of the EAC system and many weaknesses that will impede achievement of the intended result of the common market. These weaknesses are not fatal, and indeed should not obscure the tremendous progress made in developing the policies and capacities of the EAC over the past 10 years. As noted in the first section of this report, this agenda will take several years to implement. The period suggested by this report to create a new standard of regulatory quality that can be actually implemented on the ground across the EAC institutions and the five Partner States is at least five years.

213. We have seen in this report that the focus of attention in the

EAC regulatory strategy today is the production of harmonized rules. Much less attention is being paid to the quality of those rules, to their implementation, and to the enduring capacities of the regional regulatory system to perform according to international standards of good regulatory practice. Many of the “better regulation” initiatives underway at the level of the five Partner States have no parallel at the level of the EAC institutions.

214. Recognition is growing of the need to re-examine the regulatory practices of the EAC. Implementation is now a priority, and results are expected. Already, there is disappointment in the private sector that practical problems and implementation of the customs union have not produce the improvements and benefits expected.

215. Fortunately, the EAC institutions do not approach the challenge of regulatory reform alone. There is at least three decades and experience at national and regional levels with programs of regulatory reform, and many of these lessons are already incorporated into the design of EAC institutions and the policy content of EAC legal instruments.

216. The rest of this section is divided into two subsections. The first subsection summarizes the most important recommendations of this report, and represents a basic package of reforms that should be considered in light of experiences so far in the EAC, and of international experiences. The second subsection presents a flexible menu of reform strategies that the EAC secretariat can adapt to specific circumstances to address the three main regulatory reform challenges. This “pyramid of options”



is organized in descending order from the “softest” form of management based on information and persuasion, to the “hardest” based on use of legal authorities.

6.1 Recommendations for a basic package of reforms to build capacities for good regulatory practices

217. This section summarizes the 15 most important recommendations made in this review. These recommendations are intended to be flexible because the institutional design of the EAC is likely to change. Hence, these recommendations are intended to be more functional in nature than to be based on a specific institutional design or set up.

Reforms that the Secretariat can implement within the current institutional setup:

1) Prepare a regulatory strategy for the EAC. The EAC institutions need a unified regulatory reform strategy that presents a regional view of regulatory reform and its interaction with national regulatory practices. The strategy should also include

mechanisms for monitoring and evaluating the impact of regulatory reform to demonstrate tangible benefits of regional reforms. An efficient way to do this is to use the existing Network of Reformers, composed of middle to senior officials in the Partner States responsible for regulatory reforms together with other stakeholders, to create an EAC Group on Better Regulation. This Group could draft, with the Secretariat, a report that proposes an Action Plan with deadlines, comprising a comprehensive overall approach to improving regulatory practices in line with regional integration. It should recommend, among other reforms, a common standard for regulatory transparency and quality. A similar report done for the European Union by the Mandelkern group of national experts in 2001 was a turning point in the creation of better regulation strategies at regional and national levels. The EAC Group on Better Regulation could continue as an advisory body to the EAC institutions to monitor, promote, and support regulatory reforms.

2) Create in the Secretariat a dedicated mechanism, with adequate resources, expertise and authority, to assist the EAC to develop a regulatory strategy; for managing and coordinating implementation of a complex regulatory reform strategy; and monitoring and reporting on outcomes. This small team in the Office of the Legal Counsel or the Secretary-General's Office would work with the directorates in building capacities and strategies to improve regional regulatory practices needed for the Common Market.

3) Initiate a training program in good regulatory practices to build awareness and skills among

Secretariat staff and other EAC institutions. The Secretariat staff comes from national governments and other sources. There is no shared understanding of how good regulatory practices support the mission of the Common Market and other regional initiatives. Building skills in stakeholder consultation, regulatory design, implementation, and analysis of regulatory options will greatly increase the capacity of the Secretariat to lead and safeguard the regulatory framework needed for the CMP to operate.

4) Take low-cost and concrete steps to increase communication and awareness of the requirements of the common market among businesses and citizens. There is little attempt to communicate the rights and obligations of the Common Market to its participants – businesses and consumers. As part of communication efforts, the Secretariat and other institutions should seek opportunities to enlist civil society organizations in communicating with citizens. It would be useful to consider the range of services offered by the European Commission to communicate the Single Market to businesses and citizens to determine which would be the most useful value for money in the EAC. Preparing a major report on the expected benefits of the Common Market for citizens and businesses would be a useful step, as shown by the 1995 Cecchini Report that provided valuable political support for completing the European Single Market.

5) Create a public registry of EAC laws, regulations, and instructions, including standardized forms to be used in commerce. There is already a good website by the EAC institutions, but the legal information available is

not complete and is restricted to legal text. Rights and obligations are not described clearly, and standard forms are not available. Access by users to legal instruments and interpretations is a basic condition defining the effectiveness of a regulatory framework.

6) Adopt a basic form of RIA inside the Secretariat as the basis for proposals provided to the Council and to the Legislative Assembly. The Secretariat should play a greater role in initiating legislation, and should take greater care in the quality of its drafts. The lack of analysis of impacts of options for EAC regulation is a major gap in the EAC quality control procedures, because policy officials are unable to base decisions on a clear assessment of the costs and benefits of proposed EAC actions, such as impacts on economic activity. The Secretariat should lead the way in this important reform. Institutional changes that the Council can implement within the current treaty

7) Mandate stakeholder consultation for all significant regulatory changes. Consultation is today limited to selected private interests with little structure or transparency. A systematic consultation process for all regulatory drafts will at a stroke increase the transparency of the EAC structure and bring in new voices whose views are important to success. The process should develop systematic methods so that consultation with business interests and other groups in society is earlier, more consistent, more structured, and more effective in permitting genuine discussion. At minimum, all draft regulatory documents -- protocols, annexes, schedules, Bills, or treaties – should be posted on a central web portal managed by the Secretariat for

all EAC institutions.

8) Put consumers back at the center of the common market. Move from the current top-down harmonization approach to a consumer and innovation oriented regulatory approach based on mutual recognition. The basic approach should adapt the New Approach of the EC: mutual recognition for all national standards except basic health, safety and environmental standards that are expressed in performance terms. This will reduce the cost of regulatory framework for the common market, speed up and increase economic benefits, and reward innovation and consumer choice in the common market.

9) Adopt and implement the regulatory principles needed for the functioning of the Common Market. This can be done by adopting substantive regulatory quality principles such as proportionality, efficiency, and simplicity to complement the legal principles in the treaties and the CMP, and creating procedural safeguards for these quality principles. It is also necessary that the Council precisely define in empirical terms the Treaty criteria of appropriate, reasonable and justified in order to prevent damaging loopholes for legal non-tariff barriers.

10) Give the Secretary authority to make routine regulatory decisions implementing policy decisions of the Council. Many routine regulatory decisions can be made by the Secretariat under delegation from the Council. This would speed up actions and reduce national pressure on regional policies, with no reduction in national sovereignty.

11) Simplify and re-order the

regulatory process so that the EAC Secretariat is responsible to the Council for initiating and drafting regulatory texts, consulting with the Partner States through the Sectoral Committees. The current regulatory system in the EAC is too top-heavy in decision authority and expertise, funneling regulatory decisions upward into political institutions dominated by the national ministries. This can be done without amending the Treaty, using existing authorities of delegation. Too many fragmented bodies are working without procedures to ensure quality, regional interests, transparency, and consultation. This highly centralized approach is less and less feasible as the EAC workload expands.

12) Replace the consensus principle in the partner state institutions with a more flexible definition of consensus. Consensus by five countries on every detail of the regulatory framework greatly strengthens the powers of special interests and national positions in the negotiation of the regulatory framework for the common market. The Court of Justice has called for the Council to define consensus more flexibly. Some kind of qualified majority will ease the grip of national interests on regional policy. The adoption in Europe of qualified majority voting (QMV) for decision-making was intended to speed up decision-making at the European level, and also to ensure that the common market was not held hostage to the most protectionist of the Member States.

Reforms that require changes to the treaty

13) Give the EAC Secretariat authority over its staffing, its procurement, and the spending of its budget.

These resources are essential to the quality of its work. Current controls do not permit the Secretariat to function effectively. At the same time, establish a quota on the travel days for each officer to offset the financial incentives to use travel as income generation.

14) Expand the East African Court of Justice's jurisdiction from interpretation of the Treaty to cases of non-compliance with the Treaty, and particularly to the review of administrative actions and lack of administrative actions by the public administration of the Partner States. Judicial review of compliance with EAC policy will greatly increase the transparency, credibility, and predictability of the legal framework for the common market, and thereby boost economic benefits.

15) Amend the Treaty or the CMP to include a legal requirement for stakeholder consultation by the EAC institutions when policies are developed, and develop systematic methods so that consultation is earlier, more consistent, more structured, and more effective in permitting genuine discussion.

16) Develop a multifaceted strategy for monitoring and enforcement of EAC policies. A reporting mechanism is needed to track compliance. The judicial system must be developed more fully as part of the system of compliance. The jurisdiction of the EAC Court of Justice should be expanded to include cases of noncompliance brought by citizens of the Partner States. The Secretariat must be given more authorities for monitoring and for reporting offenses to the Court of Justice for action. Awareness of EAC requirements in the relevant ministries and agencies

of the Partner States is a priority. Civil society organizations could play more formal roles in monitoring compliance and bringing problems to the attention of the Secretariat in the Court of Justice.

6.2 The pyramid of regulatory quality strategies for the EAC

218. Promoting regulatory reform throughout the EAC region, and particularly among the sovereign Partner States, is a challenge. As noted in the preceding section, the EC institutions should use a range of tools, moving from soft tools of information of persuasion to the hardest tools of the exercise of the legal authority. Developing a range of tools will give the EAC Secretariat the capacity to choose the most effective strategy in the context of each specific policy area, and to change strategies over time as the institutional and legal context changes.

219. Figure 6 presents the pyramid of regulatory quality strategies for the EAC. It presents a menu of 10 options for promoting regulatory quality in the EAC, ordered from the softest approach to promoting regulatory quality at the top of the pyramid to the most legalistic and enforceable approach at the bottom of the pyramid. In general, the EAC is most likely to achieve its goals by using the softer approaches first, and moving to the harder approaches as opportunity and situation requires. This approach borrows from the approach taken to enforcement options in the classic book, *Responsive Regulation: Transcending the Deregulation Debate*, by John Braithwaite and Ian Ayres.

220. In the rest of this subsection,

the 10 options in the pyramid are discussed in more detail, with examples given of the kinds of reforms under each option, with references to the experiences of other common markets and free trade areas.

221. Information to Partner States and other stakeholders (regulatory quality tools, EAC “Mandelkern-style” report). The EAC Secretariat can play a very important role in raising awareness among Partner States of the importance and results of regulatory reform and regulatory quality tools. This information can be used to “support credible voices in key constituencies, such as the legislature, academia, private sector (domestic, Diaspora, regional and international) and the media to advocate for regulatory reform,” to cite the communication strategy of the East Africa Network of Reformers.

222. Information can be provided in many forms including conferences and workshops, reports, websites, and study tours. The recommendation that the EAC Secretariat champion the preparation of a Mandelkern type report for EAC institutions is an example of the kind of initiative that marshals the evidence and presents it accessibly to the Partner States. Another example is the use of RIA to show why better regulatory designs pay off. Information is an essential part of any reform. A recent report published by the IFC found that

Information from outside the country in the form of reports, indicators, donor advice, and study tours was a critical input that changed how stakeholders viewed the benefits and costs of current practices. This information also empowered them to compete with prevailing ideas and incentives... [In successful reforms]

Stakeholders were reached through structured communication, such as media campaigns and release of information on the need for and benefits of reform.

223. Diagnostics and Market Monitoring (EU Consumer Market Scorecard, diagnostic role). This review gave several examples of how diagnostics are used to promote reform. Diagnostics and monitoring can be comparative, producing information that allows the Partner States to be compared to each other and to best practices outside the EAC. This can produce a kind of positive competition for quality. If the investment environment in one State is more transparent and more predictable because of better consultation standards, investors will soon realize it. Diagnostics can also focus on particular issues and identify problems that are impeding the realization of benefits from the EAC policies. Monitoring can show change over time, which can demonstrate more clearly the benefits of reforms.

224. Demonstration projects (unilateral adoption of reforms for EAC institutions, such as RIA). The EAC Secretariat can simply move ahead with its own reforms, using them to demonstrate the value of reform to other actors in the common market. Adoption of good consultation practices at the EAC level is one example, as would be adoption of regulatory impact analysis in EAC policy processes. Successful projects of this kind would have a powerful effect on the willingness of the Partner States to adopt similar reforms. Alternatively, the EAC Secretariat can choose good practice reforms among the five Partner States and use that as a demonstration project to promote similar work in the rest of the EAC. For example, the

guillotine reform used to review and simplify licenses in Kenya in 2007-2008 was a “best practice” that could be

225. Active leadership and coordination among wider civil society (self-regulation). The EAC Secretariat could play an important leadership role in encouraging the wider civil society to adopt good regulation practices. For example, the business associations could adopt RIA as part of their advocacy to EAC institutions. Civil society organizations could play a more aggressive monitoring role in the compliance of Partner States with EAC policy. Rather than wait for EAC policy on, for example, education standards, employers could develop their own standards for skilled employees, which would be more market-oriented and flexible than harmonized standards from the EAC.

226. Active leadership and coordination among Partner States (negotiations, discussion, agreement on actions such as business registration). There are many areas

where Partner States could agree to take coordinated action under the leadership of the EAC institutions. Several of them are mentioned in this review. For example, consider business registration. The EAC should agree on a goal of moving to online registries which are linked to each other and to the EAC. This would greatly speed up the movement of establishments across borders by increasing market transparency, permitting market due diligence, and reducing corporate criminality. Such a system would lead to other benefits such as registering across borders. In this case, the EAC Secretariat could lead a working group of all of the registries to develop a strategy, find financing, and coordinate reforms so that the online registries are technically able to link together and communicate.

227. Minimum performance standards from EAC (Transparency of regulation). A slightly more aggressive approach is for the EAC to establish performance standards for the common market that would

create incentives to perform. The benefit is that EAC countries can learn from each other, if information is collected, organized, and presented systematically to enable transfer of experiences and promote faster adoption across the region. For example, in the case of business registration, the performance standard might be to register a business online in two days in all five Partner States. Such a performance standard would permit monitoring and comparison over time, and would encourage the Partner States to reach the standard. Another example is for the EAC Secretariat to set minimum standards for the transparency of regulation, such as creation of a central Web portal for consultation in all Partner States and minimum requirements of 30 days for comment. Another example would be to set a performance standard for border crossings of an average wait of no more than two hours for trucks carrying perishable produce. Many performance standards could be set with respect to the performance of Partner States in adopting good

Figure 6: The Pyramid of Regulatory Quality Strategies for the EAC



Harmonization should be the last option to produce quality regulation for the common market. Unfortunately, today, harmonization is usually the first option considered by EAC regulators.

regulatory practices, and on reducing the costs and risks facing businesses.

228. Minimum performance standards with agreement by Partner States, with monitoring (Transparency of regulation, business registration, border crossings, road blocks). This option is the same as the previous option, except that it is formalized through agreements between all the Partner States and regular monitoring, perhaps by an independent party. Agreement between all the Partner States on the performance standards might provide more incentive and encouragement to reach them, and would speed up learning between Partner States as faster states produce good practices that can be transferred. Another option is to set up a peer review mechanism to judge progress in reaching the minimum performance standards. There is already some implicit peer review among the Partner States. When Rwanda was recognized as the fastest reformer in Africa, it created a tacit competition that is very positive for the Secretariat.

229. In all of these areas, there is a need for opportunism to be used rather than strict formalism. A formal “variable geometry” or “multi-speed” EAC (a means of differentiated integration in which common objectives are pursued by a group of Member States able and willing to move ahead, with the implication that the others will follow later), such as was seen in the EU in some policy areas such as the EMU, is provided for in the Treaty. A variable geometry in which some Partner States reform faster than others could upset the balance of distribution of benefits and costs between the Partner States, and cause political problems. However, there already is a kind of informal multi-speed. Rwanda is moving faster on regulatory reform than other countries. The membership in multiple free trade agreements (such as COMESA and SADC for Tanzania) means that some countries might move faster on initiatives, such as One Stop Border Posts, than the EAC requires. Two of the five countries have already moved to electronic business registries, while the others still use paper registries. Agreed performance standards is a way of incentivizing lagging countries to catch up with the faster performers.

230. Mutual recognition based on assumption of

conformity (most product standards). Another way to improve regulatory quality is to permit regulatory competition. Mutual recognition creates a kind of market competition for regulatory quality in the Partner States. For example, if milk from one State is considered to be safer than milk from other States, due to more careful enforcement of standards, that milk would have an advantage in the common market. If lawyers from one Partner are better trained, they will have an in the job market. Mutual recognition creates incentives for Partner States to improve the quality of their domestic regulatory systems by reducing costs and risks, and increasing effectiveness. That is good for the citizens of the EAC.

231. Mutual recognition with minimal harmonization (all product standards except minimum health, safety, environment, with RIA, consultation). The European approach is to provide minimum standards to manage health, safety, and environment risks, but to permit maximum innovation and flexibility for businesses in implementing those minimum standards. The EAC Secretariat should, in its new role, draft the minimum standards for adoption by the Council.

232. Harmonization (only most important health, safety, environmental issues). The most costly regulatory action is to harmonize across five Partner States. Where consumer choice is not possible, or where risks are very high, harmonization might produce the most effective kind of regulation, where the benefits are highest compared to the costs. Harmonization should be the last option to produce quality regulation for the common market. Unfortunately, today, harmonization is usually the first option considered by EAC regulators.

233. This pyramid of options for regulatory quality permits the EAC Secretariat and other institutions to choose the right strategy depending on the topic, the political context, the capacities of institutions involved, and the benefits and costs for the common market. This pyramid emphasizes information and choice over coercion, and learning over commands. It encourages the EAC institutions to take softer approaches to promote good regulation for the common market, and to use the formal legal powers of the EAC sparingly.

Annex 1:

The potential economic benefits to the EAC of regulatory reform within a common market

1. The potential benefits of the EAC common market (actually benefits of regulatory reform) are well elaborated, both in theory and in practice across many other regional arrangements. The benefits of the EAC common market should come through increased inter-regional trade of goods, services, labor, and capital. The benefits should be realized through static and dynamic channels:

4) On a static level, reducing the costs and risks of all aspects of production, including transport, which will increase business productivity and expected ROI;

5) On a dynamic level, increasing market competition in previously fragmented markets, which will stimulate dynamic effects such as incentives for innovation and market entry;

6) On a longer-term dynamic level, restructuring as countries specialize, and as upward and downward linkages and economies of scale and scope are strengthened across the region. This will promote production efficiency that will in turn reduce prices and increase competitiveness. One EAC analyst noted, correctly, that “The extent of such effects is difficult to forecast as it will largely

depend on private sector investment responses and on governments’ non-interference with economic adjustment processes.” The degree to which Partner States can resist such interference has yet to be proven.

2. One way to estimate the potential gains, and limits, of the CMP is to look at the results of the EAC Customs Union (CU), which has been implemented for five years, on inter-regional trade. A zero tariff regime on most internal trade was adopted in 2005, with a progressive tariff reduction program on some products from Kenya imported into Tanzania and Uganda. These tariffs were scheduled to fall to 0% by January 2010. By contrast, the EAC Common External Tariff (CET) had differential effects on Partner States. An early analysis found that Uganda’s trade-weighted average tariffs rose by 14% points to 6.7% (compared to her 2003 tariffs), while those of Tanzania fell by 36% points to 5.6% and Kenya’s declined drastically by 66% points to 5.9%. For these three States, the reduction of Kenya’s and Tanzania’s average tariffs more than compensated for the impact of the rise in Uganda’s average tariffs. The CU’s net effect was found to be a 40% decline in average tariffs from 10% to 6%.

3. The effect of these internal and external tariff reductions on inter-regional trade, the most obvious indicator of impact, seems to be positive, although analysis for 2009 has not been published. The Director of Customs in the EAC Secretariat said in 2010 that there was a “tremendous increase” in trade. From 2005 to 2008, EAC intra trade rose by 49%. Tanzania and Uganda in particular benefited – their export growth to the region more than doubled since 2005. This is of particular significance given the sensitivity of both countries to the potential economic dominance of Kenya in the common market.

4. The extent to which this is new or diverted trade is unclear. The economic benefits of increased interregional trade would be lower or even negative if trade was diverted rather than generated. For example, in Tanzania, for some sensitive products (used clothing; palm oil), the CET was substantially higher than the 2003 national MFN tariffs, resulting in higher protection of intra-EAC production, higher consumer prices and trade diversion. In January 2010, the Director of Customs wrote that some continuing inter-regional trade effects might actually be the result of trade diversion:

We expect trade to rise higher than 40 per cent in the coming years, especially taking into account that the Uganda list has expired and inputs that were being remitted to zero while imported from outside the region will now attract a CET of 10 per cent while they will attract zero duty if sourced from the region.

5. There is also anecdotal evidence that inter-regional investment is increasing, although ongoing analysis

of the future common market than to the customs union, and is a positive indicator of the potential impacts of the CMP.

6. An evaluation of the customs union prepared for the Secretariat found that “The analysis shows a mixed picture – with both positive developments and challenges, arising from the implementation of the CU. The positive developments far outweigh the challenges. There are

relevant to the quality of the common market regulatory system (see Box 1).

7. Oddly, the awareness of the customs union among government officials was, in 2009, still very low. Figure 1 shows that many of the border officials had limited knowledge of the requirements of the CU. By contrast, the EAC Ministry in Burundi has planned a campaign to inform “the services directly involved -- Ministries, departments” of the CMP requirements before it is ratified.

PUBLIC SECTOR		PRIVATE SECTOR	
Stakeholders	Level of Awareness	Stakeholders	Level of Awareness
1. Customs Officials	High	1. Traders (Exporters / Importers)	High
2. Police	Low	2. Informal Traders	Above Average
3. Immigration Officials	Limited	3. Manufacturers	High
4. Standards Officials	Below Average	4. Clearing Agents	High
5. Health Officials	Limited		
6. Ports Officials	Limited		

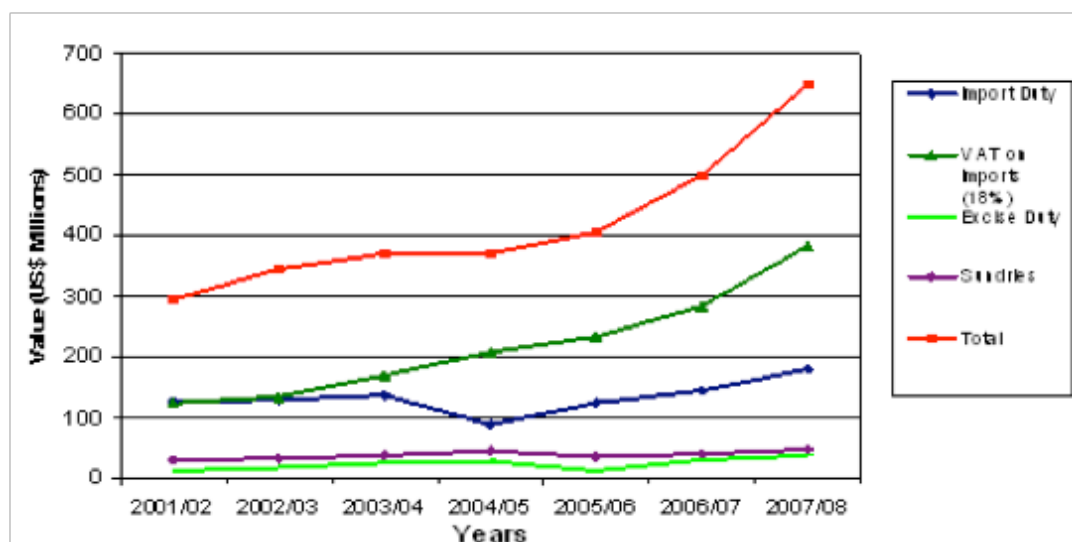
Figure 1: Awareness of the Customs Union in East Africa Community, 2009

Source: Evarist Mugisa (2009) An Evaluation of the Implementation and Impact of the EAC Customs Union, at <http://www.eac.int/customs/>

by the EAC Secretariat is not yet published. A 2009 evaluation found that “Cross-border investments are still low, with most of them coming from Kenya into the other EAC Partner States.” However, the Director of Customs said in 2010 that he was seeing an increase in some services – banking, insurance, grocery stores – due to cross border investments. Others are also seeing increased regionalization of capital markets. This kind of market response is more likely due to the optimism

improvements in trade and revenue performance, there is predictability in the policy environment, there is confidence in the region, etc and a lot of potential is yet to be exploited.” The challenges included many issues

8. What is the likely effect of the CU and CMP on consumers? The distributive effects are unclear. If competition increases due to more intra-regional trade, enterprises will pass cost reductions, quality improvements, and greater choice on



to consumers. If competition does not increase across borders, but, instead, dominant businesses become more dominant regionally, businesses will internalize the benefits in higher profits, and possibly passing on benefits in the form of higher wages in tight (skilled) labor markets.

9. Other distributional issues are important. Governments are, of course, worried about revenue losses. A World Bank study estimated the loss in customs and tax revenues between 2005 and 2009, emanating from the CU, to amount to 16% for Kenya, 4.2% for Tanzania, 2.9% for Uganda and 11% for EAC as a whole. This is equivalent to a modest 1% loss in EAC governments' total tax revenues (of which customs revenues account for about 10%). This is not an economic loss, however, because it represents a transfer of resources rather than an opportunity cost. If the marginal benefits of these monies in the hands of consumers are greater than their marginal benefits in the hands of government, then this transfer back to consumers is a net economic gain to the region. The 2009 evaluation cited above found, in fact, that government revenues had increased, due to growth in trading activities, better collection and tax simplification. Figure 2 below shows the Ugandan revenue performance:

Figure 2. Uganda's Revenue performance (2001/02 – 2007/08)

Source: Evarist Mugisa (2009) An

Evaluation of the Implementation and Impact of the EAC Customs Union, at <http://www.eac.int/customs/>

10. Another distributional issue of enormous importance to the sustainability of the EAC is its relative impact across the five Partner States. Article 4 of the CMP states that the Common Market is intended to “sustain the expansion and integration of economic activities within the Community, the benefit of which shall be equitably distributed among the Partner States....” Sensitivity about the benefits and costs of integration across the EAC are high enough that studies on negative effects such as job losses and market share losses are politically undesirable. Almost every newspaper article on the CMP refers to concerns such as these:

Fears abound that Kenya, the community's economic hub, will reap most of the benefits. In industry, this anxiety is particularly keen for Ugandan producers, who have struggled to overcome the logistical bad luck of being landlocked to increase their market share in recent years.

11. The “distribution of the benefits of cooperation” was “the most important matter” addressed in the original 1967 EAC Treaty, and the failure to distribute those benefits satisfactorily was a major reason for the collapse of the first EAC in 1977:

As time went on, the Partner States increasingly behaved as if they believed it was in fact a ‘zero sum’ game, or even a ‘negative sum’ game. 12. Tensions about the distribution of benefits are a key political-economy factor for the pace of regulatory reform. Since regulations are the primary government tool used to protect domestic producers, regulatory simplification and convergence will reflect the degree of agreement that the (political) benefits of the EAC CMP justify the (political) costs. The more balanced are the benefits, the faster regulatory reform will go.

13. Concerns that some countries will benefit at the expense of others have been obvious in the EAC region for years, such as in the continuing anxiety in Tanzania and Uganda that dynamic and aggressive Kenya producers will dominate the region, replacing producers in other

Table 1: Ease of Doing Business Rankings for 5 EAC Partner States

	2006	2007	2008	2009	2010
Burundi	143	166	174	177	176
Kenya	68	83	72	84	95
Rwanda	139	158	150	143	67
Tanzania	140	142	130	126	131
Uganda	72	107	118	106	112

countries. This critical issue supports the proposals in this report for coordinated and regional regulatory reforms that reduce costs and risks across all five countries. Increasing competition requires that the Common Market equalize competitive conditions across the five regions, so that the internalized policy costs and risks are equal for similar businesses across the region. An inconsistent pattern of regulatory reform across the five Partner States would greatly increase the risks of imbalanced benefits. This is probably the main reason why the EAC Council rejected the possibility of variable geometry in adopting some of the Annexes to the CMP, in favor of waiting for consensus by all five Partner States.

14. The cost of doing business in the EAC merits attention, but the risks of doing business are probably much more important to long-term benefits. Policy risks are incorporated into anticipated ROI for any investment project, and hence increase the cost of capital in the region. This in turn drives out long-term investment in favor of short-term and speculative investment. Today, businesses in the EAC region confront high regulatory risks due to nontransparent and captured policy processes, and unpredictable and corrupted enforcement on the ground. Any progress in increasing the predictability and transparency of regulations affecting businesses would be enormously beneficial to investors. The Director of Customs in the EAC

Secretariat has called attention to the importance of improving stability and predictability in regulatory practices by removing the discretion of Partner States to unilaterally change trading rules:

The uniform East African Custom Act and Regulations have created stability and predictability in the business environment in the region. No Partner State can unilaterally amend the tariff or the law to suit its interest. Any changes are jointly decided on by all the Partner States taking into account the interests of the whole region. This means that discretionary powers that were vested with some authorities at national level have been removed by the regional custom laws. For example, the power of granting exemption was removed from the Ministers of Finance through adoption of a harmonized list of incentives and exemptions which can only be amended by the Council of Ministers.

15. The importance of driving down regulatory risks is the main reason for the emphasis in this report on improving regulatory transparency in the EAC.

Potential economic benefits of regulatory reform in the EAC region

16. Regulatory reform would seem to

offer huge economic benefits to the East African Community. This is true in part because there is much room for improvement. Currently, business costs and risks are high in each of the five countries, and jump hugely as goods, services, and people move across borders. Regulatory costs in the region are documented in several international indicators. Curiously, these costs do not seem to be declining, although the EAC Customs Union has been implemented for five years, and four of the five Partner States have launched regulatory reform programs aimed largely at simplification and cost cutting.

17. Table 1 below shows that the Doing Business rankings have, relatively with other countries, steadily declined for three of the five countries since 2006, and was stagnant for the fourth. Only Rwanda improved significantly, through a Herculean effort in 2009. These rankings are of limited value, because they measure only very small parts of the regulatory system. For example, the massive licensing reform in Kenya in 2007-2008 is not reflected in the Doing Business measures. However, if they represent the larger regulatory environment, these rankings suggest that regulatory practices in the five

Table 2: Ease of Doing Business Rank - Trading Across Borders Rank

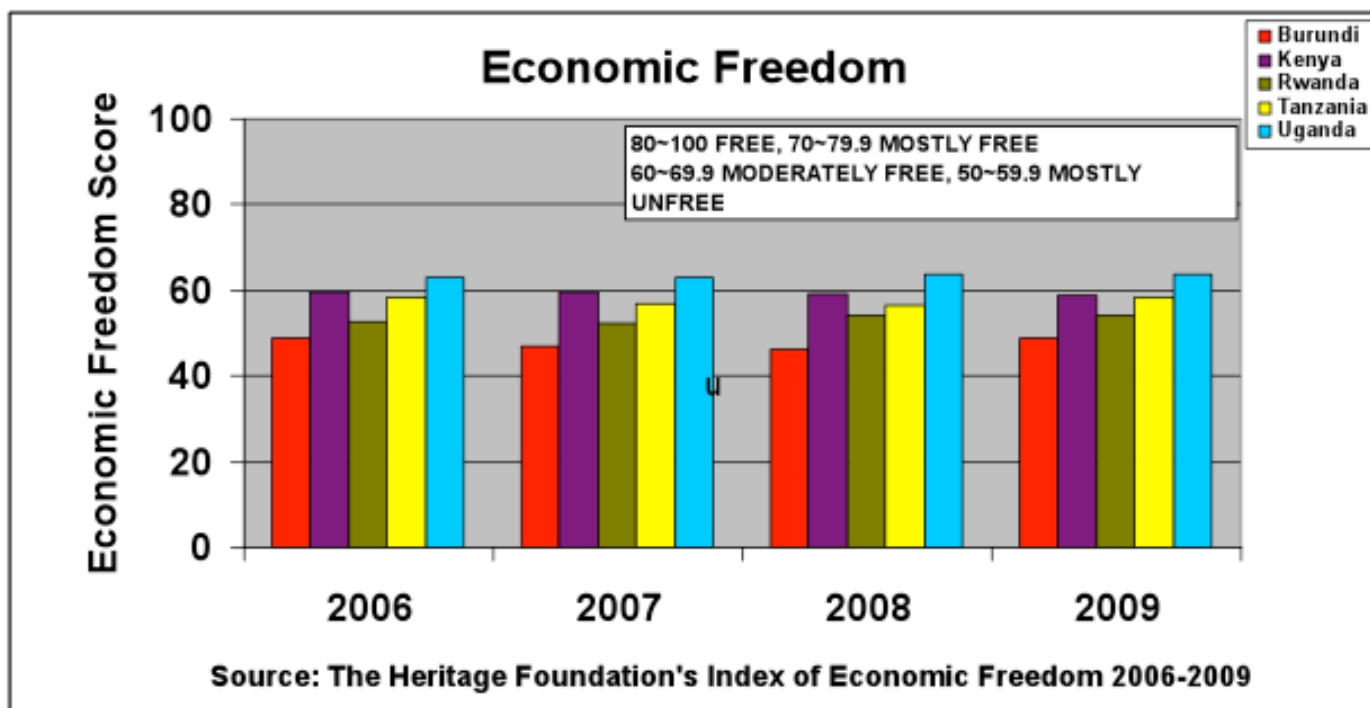
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Partner States are not business friendly, and, in most countries, are becoming less business friendly over time.

18. If we look at an indicator that is more closely associated with the cross-border barriers in the EAC, the Trading across Borders indicator in the Doing Business rankings, we see a similar picture. Article 75 of the Treaty states that one goal of the Customs Union is “Simplification and harmonisation of trade documentation and

inspections and procedures should have been reflected in these general indicators. These indicators confirm what is generally thought to be the case: moving across borders is just as difficult in 2010 as it was in 2005 when the Customs Union began. This is because, even though tariffs fell, the five Partner States made little progress in simplifying and shortening the time needed to comply with non-tariff requirements such as health checks. An official of the East African Business Council confirmed that business managers are unhappy

the borders, no improvement in government efficiency. Every border post is still operative, and every post has the same gamut of checks – governments have not given up any border controls. There is one pilot of a one stop border post. It is easier to do away with borders than for government agencies to cooperate. In fact, the costs of production have gone up under the Customs Union with more costly transport and power. Bringing a finished cement bag from Pakistan to East Africa is cheaper than transporting the same product here



procedures.” Table 2 shows that, during the period of implementation of the Customs Union, trading across borders became generally harder, not easier (in relative terms). Tanzania’s ranking became much worse. This indicator measures trade across all borders, not only inter-regional trade, but improvements to customs

with the lack of progress in reducing border problems and business costs: Countries had 5 years to prepare themselves for reform. People expected the costs of doing business to go down with the tariffs, but they did not. Weigh stations, lack of tax harmonization, numerous documents to export, 10 different offices at

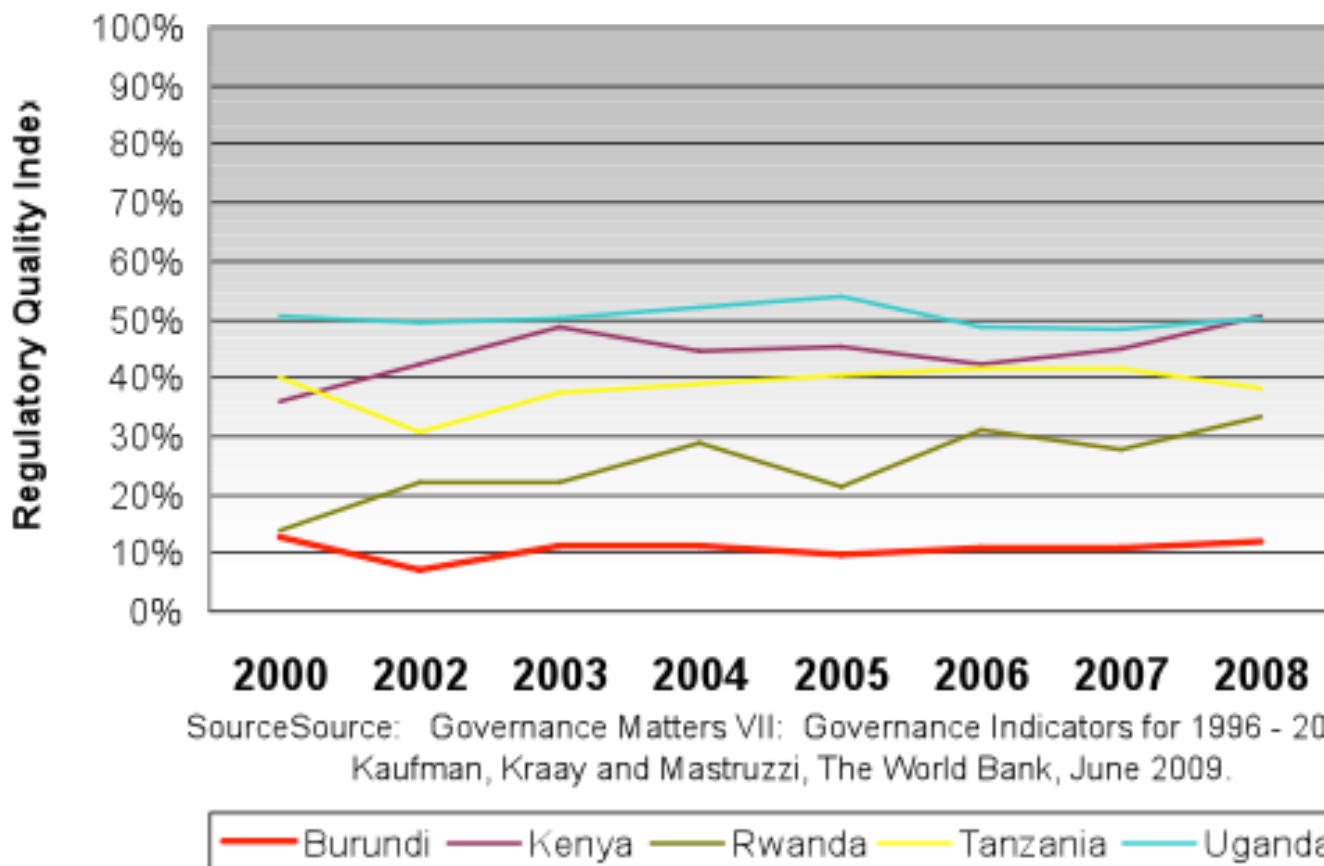
within the region. 19. Secretariat official agreed that compliance by Partner States with the intent of the Customs Union has been poor. Inefficient or unnecessary regulatory enforcement is rampant along the transportation corridors of the region, without clear reasons or benefits for the Partner States.

There are too many road blocks due to police checks and weigh bridges. The weigh bridges are not calibrated well – so there is no consistency.

they need health certificates. No standardized procedures are used, although at least the laws are now the same. They are supposed to move

not reduce delays at the borders. 20. Little progress was made even in countries with high-level commitments to reform. In Kenya,

Regulatory Quality: Comparison Across EAC States, 1996-2008 - Percentile Rank



A truck can pass one check and fail another. This adds to cost and corruption. At police blocks, trucks have to wait. When you ask the policy why, they will say it is for security, checking for banned goods. If the trucker pays kickbacks, he can go through.

Customs delays are long. There is no free flow across the borders. Border inspectors always want to check something. For big lorries, they want to do random checks. If you are carrying food and perishables,

faster. If you have all of the papers, border crossing should go fast. But in practice, drivers do not carry everything. Sometimes due to lack of info and knowledge, sometimes because drivers like to stay longer at the border waiting to cross, so they “forget” paperwork.

From 2005, they have to apply the Customs Management Act. The Customs Committee has tried to harmonize procedures. They have harmonized a lot of procedures. But we still need 5 forms, and still does

President Kibaki in 2008 directed his government to take key measures, including turning all border-points into 24-hour service areas; reducing road-blocks along the main trade routes to one-third; and reviewing customs rules and removing duplications and other obstacles to doing business efficiently. Yet there was no improvement by 2010.

21. Other indicators show a similar picture. The Index of Economic Freedom published by the Wall Street Journal and the Heritage Foundation

shows that the business environment is mostly “unfree” in the five countries (see Figure 3) , and very little improvement was seen from 2006 to 2009.

Figure 3: Index of Economic Freedom for the 5 Partner States

22. Another indicator of regulatory quality in the Partner States (Figure 4) also suggests a rather low quality of regulation, with some improvement in Rwanda and Kenya from 2000 to 2008, but not in the other states.

Figure 4: Regulatory quality indicators in the 5 Partner States

23. These indicators, and others, considered together, suggest that a pattern across the EAC region of high regulatory costs and risks facing businesses in many policy areas. A pattern of high regulatory costs and risks can arise from many systemic failures: poor or anti-market regulatory design, slow updating of regulations as needs change, poor coordination of policy across related regulations and policy areas, inconsistent and unpredictable enforcement in the field, lack of understanding of the aggregate costs of regulations, and poor transparency in regulatory processes and implementation, to mention a few. The underlying causes of these failures are mostly institutional and political, reflecting multiple incentives that encourage poor regulatory practices.

24. This pattern is clear in the numerous specific regulatory constraints facing the Customs Union and the Common Market Program. A 2009 study of the kinds of trade facilitation reforms needed to create a free trade area across the EAC, COMESA and SADC identified a long list of reforms involving regulatory policies and practices that are needed to simply free up physical movement of goods across borders. Among them are:

- Reducing duplication between countries of border controls and clearance procedures (such as through the One Stop Border Post where controls are conducted jointly rather than sequentially);
- Simplification and harmonization of customs procedures and legislation, such as documentation, customs classification, VAT systems, exemptions, preshipment inspections, antidumping regulations, temporary admission, etc.
- Single administrative document for customs clearance;
- Harmonized axle loading and other transport regulations such as maximum vehicle dimensions, carriers licenses to permit back-loads, road transit charges, third-party vehicle insurance.

25. The systemic “regulatory governance” approach taken in this review addresses many of the root causes of high regulatory costs and risks in the EAC region. There is substantial evidence that such

regulatory reform, if systemic and sustained, can lower costs and reduce policy risks for businesses, while increasing competitive pressures, all of which change the commercial environment to induce better performance of firms in markets. The overall goal of regulatory governance is to increase net social benefits, which ensures that both benefits and costs are considered in judging the effects of reforms.

26. Regulatory governance is as much about increasing benefits as cutting costs, since markets should have an efficient and sound framework of regulation that protects public interests such as health, safety, the consumer, and the environment. The regulatory reforms in the EAC listed in Annex A include both construction of a regulatory framework that protects health and safety (such as strengthening of the quality marks system), while placing emphasis on cost cutting to free up the flow of goods, services, capital, and labor (such as simplification of border procedures through initiatives such as the One Stop Border Posts along the North South Corridor).

27. Links between various kinds of regulatory reform and economic growth have been explored in numerous studies. This evidence can be described as persuasive that the quality of regulation (measured in various ways) matters for economic performance. Cross-country surveys and assessments point to regulatory risks and costs as factors affecting

firm performance and market incentives, acting through a wide range of influences such as potential return on investment, cost of capital, incentives for innovation, and market opportunities. Other reviews of the evidence have reached four conclusions about the relationship between government regulation and market performance, and the relevance of the “regulatory governance” agenda to economic

European Commission claims that the freer movement of goods in the European Single Market has, over 15 years, increased the EU’s GDP by 2.15% of GDP, or EUR 240 billion per year, created 2.75 million extra jobs. Similarly, liberalizing entry across borders can spur fixed investment. Removing numerous regulatory barriers to entry in South Korea was estimated to boost FDI by over \$26 billion over 5 years. These results are

to businesses of its comprehensive business licensing reform aimed at streamlining and simplifying licensing procedures has been estimated at 0,6 percent of GDP.

30. However, while cost-cutting might be the easiest of reforms, good results are not ensured. Not all attempts to reduce regulatory costs are effective. Cost-cutting goals have driven many reforms, in the hope that lower costs or faster



development.

28. First, government regulations that impose direct business costs can reduce economic performance, measured as business investment, employment generation, exports, and FDI inflows. Reducing direct regulatory compliance costs can create a one-time boost in performance at microeconomic and, depending on scale, macroeconomic levels. The EAC CMP is one such macro reform. The

of direct significance to the EAC CMP. 29. It seems obvious that reducing the costs of regulation, while holding benefits equal, is a good idea, since the resources released can be used for productive investments, higher wages, higher profits, higher quality, or lower prices. All of these are desirable outcomes, particularly in countries with low investment rates and high poverty rates. In Kenya, the potential impact (cost savings)

procedures will change costs, risks, and commercial incentives to such an extent that businesses will become more innovative, competitive, and productive. For most of these reforms, the evidence of results in the market is slim. And, of course, the reduction in regulatory costs would have to be sustained, that is, eliminated costs should not simply be replaced by regulators once the reform is completed. Without such safeguards,

cost-cutting, in itself, is likely to be weak in terms of sustainable effects. The need for sustained reforms as important applications for the role and authorities of the EAC Secretariat, as discussed below.

31. Second, following the previous paragraph, if reform also reduces barriers to entry, increases transparency, reduces regulatory risks, or otherwise increases competitive forces, the positive economic effects are longer-lasting and more powerful. That is, inducing competition is more important than cutting compliance costs. Evidence suggests that a pro-competition policy stance of regulatory regimes can stimulate factor productivity through several channels. Openness and contestability of regulatory processes weakens information monopolies and the powers of special interests, while encouraging entrepreneurialism, market entry, consumer confidence, and the continual search for better regulatory solutions. The increase in the intensity of competition can enhance productivity by improving the allocation of resources and encouraging a stronger effort on the part of managers to improve efficiency. Cross-country evidence suggests that countries that extensively reformed their product market regulations experienced an acceleration of multi-factor productivity over the 1990s, while other countries experienced a productivity slowdown or stagnation. In the EU, 73% of citizens consider

that the single market has contributed positively to the range of products and services on offer, and more competition in national markets has resulted in lower prices for many goods and services.

32. Third, the negative effects of high regulatory costs, risks, and entry barriers seem particularly relevant for developing countries where businesses compete in thin capital markets; face fierce price competition in export markets and pressures from low cost imports; confront competition abuses; face faulty due process with weak property rights; confront high regulatory risks due to non-transparent and captured policy processes; and compete with large informal sectors. These problems have been repeatedly diagnosed in the five Partner States of the EAC. The disproportionate impact of regulatory compliance costs on small and medium enterprises (SMEs) has been repeatedly documented. It is for this reason that many of the benefits of the EAC CMP will likely accrue to medium scale enterprises that have the capacity to expand beyond borders, but not the political clout to negotiate the jungle of regulatory barriers that exist today.

33. Fourth, while straight cost-cutting is likely to produce net benefits where regulatory quality is consistently very low, the “regulatory governance” toolbox seems logically relevant to sustainably cutting business costs and increasing competition by addressing

the critical issues of institutions and incentives. The institutions and procedures of a regulatory system deliver the outputs – the substantive regulatory policies that are felt on the ground by businesses and citizens. The OECD’s principles for quality regulation, for example, go beyond compliance costs to include other quality factors related to efficiency, such as consistency with competition and trade principles, transparency, ease of compliance, and flexibility, that seem likely to affect market incentives in the EAC. Given the enduring and entrenched regulatory cultures in the Partner States, regulatory governance reforms that directly change policy processes seem a necessary step to sustain reforms over time.

34. Tools aimed at increasing regulatory quality by changing how regulation is developed, designed, and implemented are very popular. RIA is now used in around 50 countries, and more are adopting the tool each year. Stakeholder consultation is as popular in regulatory processes as in other policy processes. Transparency in fiscal policy has long been a reform priority, but transparency in the development and content of regulations has also become a common reform, increasingly assisted by information technology (IT) tools. Use of alternative regulatory designs and other kinds of policy instruments to replace traditional “command” forms of regulation is increasing. Quality control processes and

“challenge” institutions in government and outside are breaking down the damaging “information monopolies,” “single-missions,” and “policy silos” that often characterize fragmented regulatory institutions across the government.

35. These procedural reforms are only indirectly related to economic impacts, because they operate within complex policy processes driven by a wide range of incentives, mandates, capacities, and influences. Directly linking policy process reforms to final outcomes in terms of economic impacts of government action is not easy, and there are few good studies showing these links. However, OECD and other work has linked these kinds of reforms to common causes of regulatory failures, and has stated that better procedural safeguards should reduce the incidence of costly regulatory failures. Another frequent argument is that procedural reforms are more sustainable than cost-cutting reforms, because they change the incentives, capacities and cultures of regulation that, without change, would simply make the same mistakes over and over again.

36. While the evidence is slim for the market impacts of “regulatory governance” tools, these reforms are logically linked to sustainable and longer-term changes in the “style” of regulation toward market competition and openness, transparency, and efficiency in reaching policy goals. Available evidence also suggests that,

logically, regulatory governance tools could mitigate important constraints on economic development that have proven resistant to change by other means, including:

- making public policy more efficient by allocating national resources to higher value uses, by reducing the risk of policy failures, and by finding effective policy designs that respect market principles;
- lowering policy costs and barriers to market entry for firms, goods, and services, which in turn boosts foreign direct investment (FDI) and trade, increases the returns on participation in formal markets, speeds the uptake of new technologies and other innovations, and frees resources for other uses;
- reducing policy risks for market actors by increasing transparency in the design and use of policy and by involvement of stakeholders in shaping policies important to them;
- increasing the social benefits of economic activity by safeguarding public interests such as efficient management of environmental, safety, and health risks; and
- improving business security and market neutrality of policy by increasing accountability for policy implementation and results, and lowering corruption and vulnerability to capture of government functions.

37. A reasonable conclusion is that a successful regulatory reform program in economic terms includes a mix of components, including cost-cutting

aimed at one-time reductions in existing costs and enhancement of competition, combined with regulatory governance tools aimed at sustaining lower costs, reducing regulatory risks, improving resource allocation, and building a regulatory framework for socially beneficial growth. The relative ease (if not the economic significance), of creating a supportive political economy for straight-forward regulatory relief and cost-cutting is proven, while the need for sustainable reforms to regulatory practices and cultures is logical.

38. These findings suggest that a pro-competition regulatory style might be more important to long-term economic performance than a low-compliance-cost regulatory regime. The poverty-reducing effects of broad-based pro-competition and market opening reforms is not as well documented, but presumably reforms that increase market competition drive down consumer prices overall, and increase household income. Reforms that increase factor productivity might have negative effects on the poor working in sectors open to more competition, but positive effects on poor who consume those goods or services.

[The importance of good regulatory practices to the EAC CMP](#)

39. An extensive and expanding program of regulatory reform seems inescapable in the EAC CMP. The regulatory issues are pervasive. Implementation of the Customs Union

since 2005 has demonstrated that the success of economic integration across the borders of the five Partner States depends on a larger, more systematic, and more institutional effort to improve the domestic regulatory practices of the Partner States. The Customs Union greatly reduced tariffs, but an early analysis of the Customs Union found that:

The success of the CU will largely depend on the elimination of non-tariff barriers (NTBs) on intra-EAC trade. NTBs resulting from deliberate government policies and procedures, such as cumbersome customs procedures at border crossings, red tape, corruption, administrative delays, police roadblocks can and must be eliminated in order to remove serious barriers to intra-EAC trade.

40. These non-tariff barriers are precisely where there has been the least progress over the past five years. Indeed, observers and comparative indicators suggest that non-tariff barriers may have actually gotten worse over this period. This is strong support for the notion that the common market will not produce the expected benefits unless EAC institutions are more capable of promoting and protecting the necessary regulatory framework.

Annex 2: Powers of the European Court of Justice

The European Court of Justice carries

out a broader range of reviews that signal a willingness by Member States to give up much more sovereignty than EAC Partner States. These reviews are:

- **References for preliminary rulings.**

The Court of Justice cooperates with all the courts of the Member States, which are the ordinary courts in matters of European Union law. To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law, so that they may ascertain, for example, whether their national legislation complies with that law. The Court's judgment likewise binds other national courts before which the same problem is raised. In that way, several important principles of EU law have been laid down by preliminary rulings, sometimes in reply to questions referred by national courts of first instance.

- **Actions for failure to fulfil obligations.** These actions enable the Court of Justice to determine whether a Member State has fulfilled its obligations under European Union law. Before bringing the case before the Court of Justice, the Commission conducts a preliminary procedure in which the Member State concerned is given the opportunity to reply to

the complaints addressed to it. If that procedure does not result in the Member State terminating the failure, an action for infringement of EU law may be brought before the Court of Justice. The action may be brought by the Commission - as, in practice, is usually the case - or by a Member State. If the Court finds that an obligation has not been fulfilled, the State must bring the failure to an end without delay. If, after a further action is brought by the Commission, the Court of Justice finds that the Member State concerned has not complied with its judgment, it may impose on it a fixed or periodic financial penalty.

- **Actions for annulment.** By an action for annulment, the applicant seeks the annulment of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office or agency of the European Union. The Court of Justice has exclusive jurisdiction over actions brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or brought by one European Union institution against another. The General Court has jurisdiction, at first instance, in all other actions of this type and particularly in actions brought by individuals.

- **Actions for failure to act.** These actions enable the lawfulness of the failure of the institutions, bodies,

offices or agencies of the European Union to act to be reviewed. However, such an action may be brought only after the institution concerned has been called on to act. Where the failure to act is held to be unlawful, it is for the institution concerned to put an end to the failure by appropriate measures.

- **Appeals.** Appeals on points of law only may be brought before the Court of Justice against judgments and orders of the General Court. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court.

Annex 3: Main Recommendations for Good European Regulatory Practices, from the Mandelkern Report of 2001

ACTION PLAN

In the context of the Lisbon process and the open method of co-ordination, the European Parliament, Commission, Council and Member States should continue to work to improve the regulatory environment in the EU. To this end, the Group invites them, each in accordance with their responsibilities, to implement an overall strategy for Better Regulation as set out in this report as soon as possible.

General

- As of 2003, the Commission should produce an annual report to the European Parliament and

to the spring European Council on developments in better European regulation by the EU and each Member State, bringing together existing reports in overlapping areas (e.g. Better Lawmaking, better regulation elements of the Cardiff report).

- The Commission, European Parliament, Council and Member States should establish new or improve existing joint training programmes at European level for officials on aspects of better regulation such as impact assessment, use of alternatives, consultation, simplification and codification (and other forms of consolidation).
- Within their respective responsibilities, the Commission, European Parliament, Council and Member States should take further practical steps to ensure their internal co-ordination and the coherence between European regulatory policies by June 2002.
- The Commission to propose by June 2002 a set of indicators of better regulation.
- Recognising their full sovereignty, Parliaments should be invited to take an interest in the process of better regulation, and to contribute to an overall system of regulatory review.

Impact Assessment

- Establishment by the Commission by June 2002 of a new, comprehensive and suitably resourced impact assessment system covering Commission proposals with possible regulatory effects. This system

should be based primarily on the recommendations in this report, including an initial screening process followed by a more detailed, proportionate assessment in appropriate cases.

- Commitment by the Council not to consider proposals for regulation made after December 2002 that have not been subjected to the agreed impact assessment system, except in cases of urgency.
- Commitment by the European Parliament not to consider proposals for regulation made after December 2002 that have not been subjected to this impact assessment system, except in cases of urgency.
- Agreement by all Member States that from June 2002 they will submit the relevant national RIA, where it exists, alongside regulation notified to the Commission and other Member States.
- Agreement by all Member States that from June 2002 wherever possible they will indicate the likely broad impacts of significant and substantial amendments (where appropriate in co-operation with the Commission) they wish to make during negotiation of draft European regulation.
- All Member States to introduce by June 2003 an effective system of impact assessment for national regulation adapted to their circumstances.

Consultation

- Adoption by the Commission of a standard minimum consultation period for its proposals of 16 weeks

from March 2002.

- Adoption by the Commission by March 2002 of a Code of Practice for its consultations, including the relevant key elements of this report.
- Establishment by the Commission by June 2002 of a central, web-based register of all ongoing EU consultations, which should themselves be available online.
- For EU consultations from June 2002, a presumption that, insofar as practicable, all comments received will be made available online unless respondents explicitly request otherwise.
- All Member States should ensure by June 2003 that they have adequate consultation procedures that allow those affected or interested to contribute and the general public to access the comments made.

Simplification

- Launch, by June 2002, of a Commission-led systematic, targeted and preferably rolling programme of simplification of existing European regulation in all areas. This programme should be articulated into annual steps setting out clear priorities and targets and should involve interested parties in setting those priorities.
- Agreement between the Commission, European Parliament, Council and Member States by June 2002 of the conditions under which proposals resulting from the simplification programme will be fast-tracked through the codecision process according to existing Treaty

provisions for agreement after First Reading.

- All Member States should establish by June 2003 a coherent simplification policy (including for regulation transposing European legislation) adapted to their circumstances. This should be implemented through concrete measures, which could include a systematic simplification programme and the innovative use of ICT.
- Adoption by March 2002 of the Inter-Institutional Agreement on recasting.

Structures

- Creation by the Commission by June 2002 of a single, effective better regulation network in all regulatory DGs, supported centrally as appropriate. This network to be charged with carrying out the relevant tasks in this report.
- All Member States to develop by June 2003 the appropriate administrative and institutional structures or bodies in their national administration to support and promote better regulation. In accordance with national circumstances, these structures or bodies should be charged with carrying out the relevant tasks in this report.

Alternatives

- Drawing up by the Commission, in close co-operation with the European Parliament and the Council of general guidelines on the use of alternatives to regulation for the pursuit of

European policies, by June 2002.

- Implementation of these guidelines by December 2002.

Access to regulation

- The Commission, European Parliament and Council to develop, by June 2002, a concerted plan for codifying existing European regulation, to result in a 40% (as compared to 31/12/01) reduction in the number of European acts and in the number of pages of European legislation by June 2004.
- Appropriate resource allocation to codification and recasting of European regulation by the Institutions and the Member States.
- The Commission to present to the European Parliament and Council by December 2002 a review of the effectiveness of the Inter-Institutional Agreement on codification and, if appropriate, proposals for its revision.
- The Commission to present to the European Parliament and Council no later than December 2002 a review of the implementation of the Inter-Institutional Agreement on common guidelines for the quality of drafting of Community legislation.
- Member States and the Commission should each seek to establish by June 2003 a public service (either free or for a reasonable fee) giving access to the texts of laws and regulations in their jurisdiction.

Transposition

- Improvement of the existing online Commission database of regulation requiring transposition by December 2002 and of the current state of play

in each Member State.

- Free access to this database by December 2002.
- Setting up by December 2002 of the necessary processes for Member States to notify their transposition of regulation by electronic means to a single point in the Commission.
- All parties should pay more attention to the precision, clarity and coherence of European legislation during the negotiating process. This should include early and continued consideration of transposition by the Member States and a better balance between detailed and technical regulation on the one hand and national freedom of choice and form on the other.

Annex 4: Communication efforts in the European Single Market

Awareness by public and private sectors of rights and compliance obligations under EAC rules

- Publications such as “Enforcing your rights in the single European market” are published by the Commission and available in its website.
- SMEs are targeted for assistance with the Enterprise Europe Network, organized by the Commission, which consists of 572 member organizations across the EU. They include chambers of commerce and industry, technology centres, universities and development agencies. They offer a range of free services to SMEs, including information about Single Market regulations. The site states, “Do you

need information about how EU laws and regulations affect your business?

The Enterprise Europe Network’s experts can help you find your way through the legal maze and make it easier to sell your product or service in another EU country.”

- A permanent program run by the Commission since 1998 is called “Dialogue with Citizens and Business”. Its aim is to encourage greater awareness of the opportunities offered by the Single Market and to provide an opportunity for people to feed back their experience and to make suggestions directly to the EU. For its link with the public, the Dialogue uses the communication tools of the “Europe Direct” service. Europe Direct provides access to a wide range of information and advice about the EU, and about citizens’ rights in the Single Market. The service can be accessed by Internet and by free phone numbers from all Member States. As part of the launch, a Routemap for Jobseekers to help people when they are looking for jobs in other Member States was published. In addition, a database with over 10.000 job vacancies was made directly available to the public on the Internet. The Dialogue provides factual material about rights which can be exercised in the Single Market, and enables people to explain the difficulties they encounter when using their rights. This feedback will be used by the Commission to help identify means of overcoming the underlying problems. This could include non-legislative actions, such as improving

administrative procedures, better training, and simplifying paperwork.

Europe Direct provides access to following services:

- A Mailbox service for questions about general EU issues.
 - A “EU - Routemap for Jobseekers”. The Routemap contains the key points people need to know when looking for a job in another EU country.
 - Guides which give a general overview of rights and opportunities in the Single Market and also contain lists of useful addresses.
 - A jobs database provided to mobile jobseekers.
 - Factsheets that explain, on a subject by subject basis, how people can exercise their rights in each of the 15 Member States. They include names, addresses and phone numbers of relevant organizations and cover a wide range of topics, for example, how to obtain a residence permit, how to get a diploma recognized, or how to complain about unsafe products.
 - A Signpost Service, which assists people in overcoming practical problems in exercising their rights in the Single Market.
- Awareness of the general population of the benefits of the common market
- The Single Market Award aims to highlight the importance of the internal market and raise awareness of the opportunities associated with the free movement of persons, goods, services and capital in the EU but also of the problems that may arise when the application of the internal market’s regulatory framework does

not function. The prize is a recognition of companies, organisations or people that have helped to improve the internal market.

- The Single Market Scoreboard is published every six months as a tool for citizens, economic operators, Member States and the EU institutions to assess the application of Single Market rules, in terms of implementation of Directives, outstanding infringement procedures and progress with applying the Action Plan for the Single Market.

- Single Market News is published electronically by the European Commission four times a year to report on new developments in the single market. The East Africa Community Magazine could develop into a similar organ, but the most recent version on the EAC website is from 2008.

Annex 5: Mutual Recognition in the CMP

The CMP refers to mutual recognition in several policy areas such as standards, academic and professional qualifications, right of establishment, and product certification marks.

Article 5, para 2: “the Partner States agree to: (a) eliminate tariff, non-tariff and technical barriers to trade; harmonise and mutually recognize standards and implement a common trade policy for the Community;”

Article 5, para 3: “For the purposes

of facilitating the implementation of the Common Market, the Partner States further agree to: (a) cooperate to harmonise and to mutually recognise academic and professional qualifications;”

Article 11, Harmonisation and Mutual Recognition of Academic and Professional Qualifications states:

“1. For the purpose of ensuring the free movement of labour, the Partner States undertake to: (a) mutually recognise the academic and professional qualifications granted, experience obtained, requirements met, licences or certifications granted, in other Partner States; and (b) harmonise their curricula, examinations, standards, certification and accreditation of educational and training institutions.”

Article 13, Right of Establishment, para 7: “For the purposes of undertaking any economic activity in accordance with the provisions of this Article, the Partner States shall mutually recognize the relevant experience obtained, requirements met, licenses and certificates granted to a company or firm in the other Partner States.”

In the East African Community. Standardization, Quality Assurance, Metrology and Testing Act (2006), Section 24 states, “Each Partner State must notify the Council of the product certification marks within

the jurisdiction of the Partner State including the design of the mark. Partner States are bound to recognise as equal to their own, product certification marks awarded by national quality system institutions of other Partner States.”

The EAC Investment Climate Program helps foster increased trade and investments in the EAC region by working with the EAC Secretariat and EAC Partner States to implement reforms to improve their business environments and the common market's legal and regulatory framework.

The EAC Diagnostic Report Series supports the implementation of the EAC Common Market by publishing independent monitoring reports that examine key aspects of the implementation process of the EAC Common Market. This publication is developed in support of the Regulatory Capacity Building pillar of the program, designed to support the EAC Secretariat to develop, assess, and monitor policy measures that meet international standards for regulatory quality.

For more information on the EAC Investment Climate Program and the EAC Diagnostic Report Series, please contact:

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