

A CASE FOR EFFICIENT LEGAL AND INSTITUTIONAL FRAMEWORKS FOR
CROSS-BORDER RAILWAY DEVELOPMENT IN THE EAST AFRICAN
COMMUNITY

BY

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Title of dissertation

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Declaration

I declare that this Mini-Dissertation which is hereby submitted for the award of Master of Laws (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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Date

Dedication

I dedicate this work to my parents, **Stephen Lumbuye and Eve Tsubira** who have believed in my strength and encouraged me, with enduring patience through all stages of my life thus far. To you, I shall forever be grateful.

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Abstract

The East African Community (EAC) suffers from a critical lack of cross-border railway networks that, if remedied, could improve regional connectivity and boost intraregional trade. The region would also become more investor friendly. Cross-border railway connectivity is particularly important owing to the challenging geographical location and small, uncompetitive and inefficient Partner States. The EAC Partner States have embarked on an ambitious programme to jointly revamp the region's railways to address the transport deficits. Joint implementation of transport infrastructure projects offers economies of scale. However, joint efforts are constrained by inefficiencies of the region's legal and institutional frameworks. The region is characterised by inefficient legal and institutional frameworks. This research argues that it is critical to first address the legal and institutional bottlenecks which will in turn constitute the backbone to support EAC's efforts towards development and sustainable management of cross-border railways in the EAC. The research reviews effectiveness of the existing legal and institutional frameworks, identifies gaps and, using Southern African Development Community (SADC) as a benchmark proposes solutions for improvement.

List of Acronyms

AfDB	African Development Bank
AU	African Union
COMESA	Common Market for East and Southern African
CTTCA	Corridor Transit Transportation Coordination Authority
DRC	Democratic Republic of the Congo
EAC	East African Community
EARA	East African Railways Authority
EACJ	East African Court of Justice
EARHC	East African Railways and Harbours Corporation
EU	European Union
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
KRC	Kenya Railways Corporation
NCTTCA	Northern Corridor Transit and Transport Coordination Authority
NEPAD	New Partnership for Africa's Development

PIDA	Programme for Infrastructure Development in Africa
PPP	Public Private Partnership
PTCM	Protocol on Transport, Communications and Meteorology
RECS	Regional Economic Communities
RDF	Regional Development Fund
RISDP	Regional Indicative Strategic Development Plan 2003
RIDMP	Regional Infrastructure Development Master Plan
RVR	Rift Valley Railways
SADC	Southern African Development Community
SATCC	Southern Africa Transport and Communications Commission.
SATCC-TU	Southern Africa Transport and Communications Commission Technical Unit
SDIs	Spatial Development Initiatives
UNCTAD	United Nations Conference on Trade and Development
USAID	United States Agency for International Development
URC	Uganda Railways Corporation

Case reference

East African Law Society and others –vs- Attorney General of the Republic of Kenya and others,
In the East African Court of Justice Reference No. 3 of 2007. Judgment of 8 September 2008.

List of Treaties and Instruments

Constitution of the Republic of Kenya 2010
Constitution of the Republic of Uganda 1995
East African Community Development Strategies (2001-2006, 2006-20011, 2011-2016)
East African Community Model Investment Code 2006
East African Community Railways Master Plan Study 2009
Kenya Land Policy 2007.
Kenya Railways Corporation Act (Cap 397) (Laws of Kenya)
Kenya Railways Corporation Act Cap 397 (as amended)
Kenya Railways Corporation (Vesting of Lands) Orders 1986
Land (Amendment) Act, 2010 (Laws of Uganda)
Northern Corridor Transit and Transport Agreement 2007
Procurement Law of Burundi No. 1/01 of 4 September 2008
Procurement law of Rwanda No 63/2007 of 30/12/2007
Protocol for the Establishment of the East African Common Market 2010
Protocol for the Establishment of the East African Customs Union 2005
Protocol for the Establishment of the East African Monetary Union 2013
Public Enterprises Reform and Divestiture Act Cap 98 (Laws of Uganda)
Public Private Partnership Act, 2010 (Laws of Tanzania)
Public Private Partnership Act of Kenya, 2013 (Laws of Kenya).
Public Procurement and Disposal Act (Revised Edition) 2010 (Laws of Kenya)
Public Procurement and Disposal of Public Assets (Amendment) Act, Act No. 11 of 2011
Railway Concessions Interface Agreement between Kenya and Uganda 2006
Regional Indicative Strategic Development Plan (RISDP) 2003
SADC Protocol on Transport, Communications and Meteorology 1996
SADC Regional Indicative Strategic Development Plan 2009

SADC Regional Infrastructure Master Plan (2012 -2027)
SADC Protocol on Transport, Communications and Meteorology 1996
SADC Regional Infrastructure Development Master Plan 2012 -2027
Standard Gauge Railway Agreement between Uganda and Kenya 2012
Treaty for the Establishment of the East African Community 1999
Treaty of the Southern African Development Community, 1992.
Tanzania Railways Corporation Act, 1977
Uganda Land Regulations, 2004
Uganda Railways Corporation Act (Cap 331), of 1992 (Laws of Uganda)

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CHAPTER ONE

GENERAL BACKGROUND AND INTRODUCTION TO THE RESEARCH

1.1 History of Integration in the East African Community

Regional integration of the East African Community - EAC (comprising Uganda, Kenya, Tanzania, Rwanda and Burundi herein 'Partner States') started with the construction of the Kenya-Uganda Railway between 1897 and 1901.¹ This resulted in the establishment of the first EAC, which had been regarded as a model for regional economic integration on the continent.²

However, it collapsed in 1977 due to, among other things, political differences and unequal distribution of benefits.³ Its revival was sealed in 1999 with the signing of the Treaty for the Establishment of the EAC⁴ (herein 'the EAC Treaty') by Kenya, Tanzania and Uganda. The EAC Treaty came into force in 2000.⁵ Membership of the EAC was enlarged when Burundi and Rwanda acceded to the EAC Treaty in 2007.⁶

The vision of the EAC is to create *inter alia*, a competitive and prosperous unified region.⁷ Its mission is aimed at widening and deepening socio-economic and political unity to improve the welfare of its citizens. These are to be achieved through producing competitive products, adding value on production and increasing cross-border trade and investment. Similarly, objective of the

¹Preamble to the Treaty for the Establishment of the East African Community 1999. Available at: <http://www.worldtradelaw.net/fta/agreements/eacfta.pdf> (accessed 9 November 2013).

²Institute for Global Dialogue. Available online at:

http://www.igd.org.za/index.php?option=com_content&task=view&id=66&Itemid=92 (accessed 17th November 2013)

³AU Secretariat. <http://www.africa-union.org/root/au/RECs/EAC.htm>. (accessed 10 November 2013)

⁴Official website of the East African Community intergovernmental organisation. <http://www.eac.int/> (accessed 10 November 2013)

⁵Oluoch, W. 'Legitimacy of the East African Community' (2009) 53 *Journal of African Law* 2, 194-221, at 194 *Cambridge Journals*, <http://journals.cambridge.org> (accessed on 10th November 2013).

⁶Membership of Rwanda and Burundi was accepted in 2006 but they acceded to the EAC Treaty in 2007. See Braude, W. 2008 "Regional Integration in Africa – Lessons from the East African Community" at 63 *Southern African Institute of International Affairs (SAIIA)*

⁷See http://www.eac.int/index.php?option=com_content&id=Itemid=53 (accessed 10 November 2013)

EAC is to widen and deepen co-operation among the Partner States for their mutual benefit.⁸ Thus far, the EAC has established a Customs Union⁹ and the Common Market is being implemented.¹⁰ The Protocol for the Establishment of the EAC Monetary Union has also been signed to introduce the use of a common currency across the region. But, it will only come into force upon ratification and implementation of the roadmap for a single currency, over a ten year period (following its signature) by the Partner States.¹¹

The principal objectives of the EAC Customs Union are *inter alia*: enhancement of economic gains through tariffs liberalisation and elimination of non-tariff barriers (NTBs) in the Partner States; improving conditions of investment within the region and promoting economic growth and development.¹² Similarly, the objective of the Common Market is to promote trade and investments within the region to make it more productive and prosperous.¹³

The EAC has since made tremendous progress in implementing the objectives of the Customs Union. The Customs Union Protocol established among the Partner States; a duty-free trade regime (with the successful reduction of intra-regional tariffs), common customs procedures among the Partner States and a common external tariff.¹⁴ However, the implementation of the Common Market protocol is still taking effect. As such, freedoms for movement of goods, people, and capital across all Partner States are yet to be fully realised for many EAC citizens.¹⁵ The EAC's objectives will only be achieved through guaranteeing and operationalising these

⁸ Article 5 of the Treaty for the Establishment of the EAC. See also http://www.eac.int/index.php?option=com_content&id=1&Itemid=53 (accessed 10 November 2013)

⁹ The Protocol for the Establishment of the East African Customs Union; entered into force on January 1, 2005. Available: www.eac.int (accessed 7 February 2014)

¹⁰ The Treaty for the establishment of the East African Community came into force in 2000. The Treaty was followed by the signing of the EAC Customs Union Protocol in 2004 which came into force in 2005 and the Protocol on the Establishment of the EAC Common market in 2010 respectively.

¹¹ Source: Official website of the Ministry of East African Community of the Republic of Rwanda. <http://www.mineac.gov.rw/index.php?id=37> (accessed: 7th February 2014)

¹² Articles 2 (2) and 5(2) of the Protocol for the Establishment of the East African Customs Union 2005. The Customs Union was created pursuant to Article 75 of the Treaty for the Establishment of the East African Community 1999.

¹³ Article 4 (2) of the Protocol on the Establishment of the EAC Common Market 2010. See also EAC Secretariat 2014 <http://www.eac.int/commonmarket/objectives.html>

¹⁴ Kiraso, B. 2009. 'EAC Integration Process and the Enabling Peace and Security Architecture'. A paper presented at the EAC Peace and Security Conference - Kampala, Uganda, 5th October, 2009. See official website of the EAC, http://www.eac.int/news/index.php?option=com_docman&Itemid=78&limitstart=5

¹⁵ *Ibid*

freedoms.¹⁶

As a result of market integration, the past two decades have witnessed tremendous increase in intraregional trade and foreign direct investment. For instance, a study has found that:

‘...when the EAC Treaty came into force in 2000, the region received a total of US\$574 million worth of foreign direct investment... With the signing of the Protocol for the Establishment of the East African Customs Union in 2005, the amount increased significantly to USD\$895 million. By 2009, investments had reached US\$1585 million. The region received an average of US\$1242.65 million worth of FDI between 1990 and 2009, the minimum being US\$90 million while the maximum received was US\$4030 million...’¹⁷

Despite the tremendous progress achieved through market integration and trade liberalisation, the EAC is yet to optimally achieve its desired objectives.¹⁸ The region has concentrated primarily on elimination of tariff barriers to trade and dedicated less effort to addressing supply side factors. Yet, market integration alone will not propel the region to the desired levels of economic development.¹⁹ This is because the region still grapples with various supply side constraints which derail full enjoyment of all the benefits of integration.²⁰ Most of the constraints to cross-border trade and investment are considered to be related to the limited development of transport.²¹ The surface transport bottlenecks are exacerbated by geographical disadvantage facing some Partner States.

¹⁶ Article 2 of the Protocol for the Establishment of the East African Common Market. The EAC Common Market was established pursuant to Article 76 of the Treaty for the Establishment of the East African Community.

¹⁷ Otieno, M., Moyi, E., Khainga, D & Biwott, P. ‘Regional Integration and Foreign Direct Investment in East African Countries’ (2013) 2 No.4 *Journal of World Economic Research*, pp. 67-74. doi: 10.11648/j.jwer.20130204.11 Available at:

<http://article.sciencepublishinggroup.com/pdf/10.11648.j.jwer.20130204.11.pdf> (Accessed 17 January 2014)

¹⁸ Mwapachu, J. 2011. ‘The EAC Experience: Achievements, Challenges and Prospects’. A paper presented at the 2nd EAC Symposium, Arusha -Tanzania, 28th-29th April 2011. Source: official website of the EAC, http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=183&Itemid=78. (Accessed: 25th November 2013)

¹⁹ Mbundu, F. ‘The Non-Tariff Barriers in Trading within the East African Community (EAC)’ BIEAC No. 3/2010, CUTS Geneva Resource Centre, 37-39, Rue de Vermont, 1202 Geneva, Switzerland. Source: http://www.cuts-grc.org/pdf/BIEAC-The_Non-Tariff_Barriers_in_Trading_Within_the_EAC.pdf (accessed 20th January 2014).

²⁰ 20EAC Development Strategy (2011/12 – 2015/16). ‘Deepening and Accelerating Integration’. Available at: <http://mineac.gov.rw/index.php?id=106> (Accessed 24 February 2014)

²¹ Tanzania Transport Sector Overview on the Institutional, Legal Regulatory Framework. Available at: http://www.un.org/esa/dsd/dsd_aofw_ni/ni_pdfs/NationalReports/tanzania/transport.pdf (accessed 10 November 2013)

1.2 Geographical disadvantage of Burundi, Rwanda and Uganda.

The EAC's transport deficits are exacerbated by the geographical disadvantage of Burundi, Rwanda and Uganda, which are landlocked.²² Moreover, these countries are also designated as Least Developed Countries (LDCs).²³ Despite railway transport being cheaper than road transport, the region's railway capacity has declined due to infrastructure deterioration and unreliable operations caused by fragmentation of rails and sluggishness.²⁴

The collapse of the regional railways increased the burden on the regional road networks as all traditional railway freight shifted to roads. Road transportation constitutes approximately 70% of transit movements for these countries.²⁵ This has resulted in limited competition for roads and has helped to keep road transport costs very high.²⁶ Yet road networks remain in poor shape with severe missing links along national borders. A connection built up to one country's border without extending into another country's side causes transport problems, for example, diversion of traffic to longer routes which increases costs and delays.²⁷

The combination of poor transport infrastructure, and the fact of being landlocked by neighbours with inefficient transport infrastructure, can make transport costs many times higher for developing countries than for developed countries.²⁸ For example, transport costs are higher in the EAC than other regions of Africa where, costs average 14% of the value of exports compared

²² Source: About.com Geography, Available: <http://geography.about.com/library/faq/blqzafricalandlocked.htm> (Accessed 20 September 2013)

²³ World Bank (2014). Least developed countries: UN classification. Available at: <http://data.worldbank.org/region/LDC> (Accessed 10 January 2014)

²⁴ See http://eac.int/infrastructure/index.php?option=com_content&id=110&Itemid=130 (Accessed 10 January 2014)

²⁵ InfraAfrica. 'Review of Progress in the Development of Transit Transport Systems in Eastern and Southern Africa'. Report of the Fifth Meeting of Governmental Experts from Land-locked and Transit Developing Countries and Representatives of Donor Countries and Financial and Development Institutions' 30 July - 3 August 2001. UNCTAD New York, UNCTAD/LDC/115 Available at: <http://unctad.org/en/docs/polddcd115.en.pdf> (Accessed 10 May 2014)

²⁶ UNCTAD. (2007). 'Improving Transit Transport in East Africa: Challenges and Opportunities' Report by Mbuli, E.V. 'Contribution to the Mid-term Review of the Almaty Programme of Action' UNCTAD/LDC/2007/2. Available: http://unctad.org/en/docs/ldc20033_en.pdf (Accessed 20 January 2014)

²⁷ *Supra* note 20

²⁸ Venables, A. and Limao, N. 1999. 'Infrastructure, Geographical Disadvantage, and Transport Costs'. Policy Research Working Paper no. 2257. The World Bank, Washington, D.C. Available at: http://siteresources.worldbank.org/EXT/EXPCOMNET/Resources/2463593-1213975515123/09_Limao.pdf (Accessed 10 October 2013)

to 8.6% for all developing countries.²⁹ For landlocked countries, transport costs can rise, on average, to 58% higher than their coastal neighbours.³⁰ Yet, since most exports from the EAC are suffer from price fluctuations because they are not processed,³¹ transport costs should be kept as low as possible. This would enable the region to sell its products at lower prices and therefore compete favourably on the world market.

In order to ameliorate the transport deficits on a regional level, the EAC recently intensified integration of cross-border transport infrastructure development into its plan of action. Five transport corridors have been earmarked for rehabilitation and upgrading.³² There are also concerted efforts to revive the East African Railways. The East African Railways Master Plan (EARMP) has been adopted.³³ The EARMP provides a framework for rejuvenating existing railways serving Kenya, Tanzania, and Uganda, and eventually, extending them to Burundi, Ethiopia, Rwanda and South Sudan.³⁴

Despite all the efforts, there exists challenges which if not addressed will invariably constrain the development of sustainable cross-border transport infrastructure. This research argues that maximum gains from EAC integration will only be fully harnessed if the supply side constraints, *inter alia* transport bottlenecks are surmounted. Importantly, developing cross-border infrastructure transportation projects usually presents several legal and institutional challenges.³⁵

²⁹ Biau, C., Dahou, K. and Toru, H. (2008). 'How to increase sound private investment in Africa's road infrastructure: Building on country successes and OECD policy tools. Available at: <http://www.oecd.org/investment/investmentfordevelopment/42380108.pdf> (Accessed 12th November 2013)

³⁰ See *Supra* note 25

³¹ Berger, L. (2011). 'Northern Corridor Infrastructure Master Plan Study: Final Report'. Available at: <http://www.ttcanc.org/documents/The%20Northern%20Corridor%20Infrastructure%20Master%20Plan.pdf> (Accessed 13 December 2013)

³² EAC Secretariat http://infrastructure.eac.int/index.php?option=com_content&view=article&id=109&Itemid=129 See also Final report (2003) "Transport and Trade Facilitation: East and Southern Africa." Available at: http://www4.worldbank.org/afr/ssatp/Resources/RegionalDocuments/Corridor_Coetzee_voll.pdf (Accessed on 14 November, 2013) Some of the Corridors mapped out include; Dar es Salaam – Kigoma – Bujumbura – Bukavu, Dar es Salaam – Isaka – Kigali-Goma, Dar es Salaam – Mwanza – Kampala and Mombasa – Kampala – Kigali – Bujumbura.

³³ EAC Secretariat (2011).

http://www.eac.int/infrastructure/index.php?option=com_content&view=article&id=113&Itemid=134 (Accessed 12 November 2013)

³⁴ 'East Africa: Countries move to upgrade railway network', Business Daily (South Africa) Tuesday, 29 April 2008. Available online at: <http://www.afrika.no/Detailed/16610.html> (accessed on 12th November 2013)

1.3 Research problem

This research argues that the EAC's legal and institutional frameworks governing railway development, may not, in their current form, promote the development of regional railways. Yet, a robust legal and institutional framework is an essential condition for developing sustainable and efficient railways. The smooth operation of the laws and institutions governing railway development in the EAC is affected by various factors, inherent within them. These include *inter alia*; weak institutional capacity, inefficient legal frameworks and disparate legal systems.

This research identifies inefficient legal frameworks as the major constraint to the EAC's efforts to develop and manage cross-border railways. The problem is in two-fold:

First, in some cases, there is hardly any law on a regional level, to regulate certain aspects of joint cross-border transport projects which are not regulated by national laws of the individual Partner States; and where such laws exist on a regional level, there are manifest significant gaps which render them inefficient. Both situations leave regulatory gaps which cause problems to infrastructure developers.

Secondly, in other instances, the laws lack clarity regarding rights and obligations of different players in the implementation of cross-border transport infrastructure projects. The EAC Treaty which is the basis for cooperation in infrastructure development does not provide clearly, how cooperation in infrastructure development should be executed in practice, nor, how breach of obligations by partners involved in the development of joint cross-border infrastructure projects should be sanctioned.³⁶ It is common for a country to violate its regional obligations and not be sanctioned.³⁷ Yet, successful implementation of cross-border transport infrastructures requires countries to observe commonly agreed positions.

³⁵ Ibid

³⁶ Article 89(a) of the Treaty for the Establishment of the East African Community. See also Article 91 which requires partner states to develop their railway networks.

³⁷ Ioannis, N. K. and Nancy, C. 2012. 'Regionalizing Infrastructure for Deepening Market Integration: The Case of East Africa' World Bank Policy Research Working Paper 6113, Available online: http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2012/06/29/000158349_20120629161416/Rendered/INDEX/WPS6113.txt (Accessed 17 November 2013)

The above legal inefficiencies are exacerbated by disparities in legal systems applied in the EAC. Kenya, Tanzania and Uganda operate a common law system, while Burundi and Rwanda operate the civil law system.³⁸ These legal systems contain conflicting procedures and legislative practices which invariably constrain the development of regional infrastructure. A developer of a project which transcends more than one national border has to contend with a plethora of conflicting procedures, standards, rights as well as obligations from country-to-country.

Weak institutional capacities coupled with fragmented operations also constrain transport infrastructure development on a regional level. Regional institutions governing cross-border transport railways in the EAC lack sufficient authority and independence to execute their objective. Moreover, national railways of each State operate independently of others without proper cross-border linkages. Moreover, the national institutions are characterised by inadequate human resources inadequate funding rendering them inefficient.³⁹

1.4 Research questions

This research gives answers to questions regarding the nature of legal and institutional framework that should be designed to govern the development and management of cross-border railway infrastructure in the East African Community. The research addresses the following questions:

1. To what extent are the current legal frameworks regulating cross-border railway development in the EAC effective?
2. How can the legal frameworks be strengthened?
3. What lessons can the EAC draw from the Southern African Development Community (SADC) in developing seamless and efficient cross-border railways?
4. What legal difficulties is the EAC likely to encounter in designing a legal framework for cross-border transport infrastructure development? How can they be addressed?

³⁸ Kosar, W 'Rwanda's Transition from Civil to Common Law' (2013) 16 *The Global Trotter, International Law Section*. No. 3. Available online: http://www.oba.org/en/pdf/sec_news_int_jul13_Rwanda_Kosar.pdf at p2. (Accessed 12 November 2013)

1.5 Thesis statement

The lack of efficient legal and institutional framework critically constrains the efforts of the East Africa Community in addressing deficits in cross-border transport infrastructure. This research is premised on the assumption that creating efficient legal and institutional frameworks to regulate cross-border transport infrastructure projects will enable the EAC to surmount these deficits.

1.6 Significance of the research

Owing to the dismal performance and continued deterioration of railway infrastructures in the EAC; and in view of various previous studies indicating the gravity of transport infrastructure bottlenecks on trade and development in the EAC, and in view of the EAC's realisation that regional railway development is a major catalyst to regional trade and development, it became pertinent to assess the role of efficient legal and institutional frameworks for railway development in the EAC.

The research is significant because it establishes why despite enormous donor funding of infrastructure projects, and the renewed efforts by the EAC to revamp its infrastructure; the EAC still grapples with acute transport infrastructure bottlenecks particularly those that national cross borders..

The research also contributes to existing literature on the subject particularly, the factors constraining the development of cross-border railways in the EAC. It will help future researchers in this field of study.

The findings in this research apply to other infrastructure projects of a cross-border nature. The research is not only exclusive to the railways subsector. Scholars in other fields regarding cross-border infrastructures can use principles generated in this research as benchmark to engage in further studies in those subsectors.

It also guides policy makers on the role legal and institutional frameworks can play to stimulate

³⁹ See <http://www.transportworldafrica.co.za/2012/08/13/high-transport-costs-cargo-theft-east-africa-headed-for-ruins/> (Accessed 17 December 2013)

cross-border railway development in the EAC. The research benchmarks SADC to provide useful lessons to the EAC to use legal and institutional frameworks to develop its railways.

1.7 Literature review

This paper emerges amidst scanty literature regarding the role of legal and institutional frameworks for cross-border railway development in the EAC. It therefore represents a real value addition to scholarship in this area of study.

Recent studies on the topic have concentrated on regionalising transport infrastructure but little on the role that efficient laws and institutions can play to support the development of seamless and efficient cross-border railways in the EAC.

The most direct literature on the subject is by Ioannis, N. *et al.*⁴⁰ The authors argue that the existence of technical, regulatory, institutional, and legal obstacles constrain the development of regional transport infrastructure projects in the EAC. They contend that achieving a policy framework at the national level and/or, wherever necessary, at the regional level that can support the development of such projects and ensure that they operate properly and reliably, requires, *inter alia*, well-functioning institutional and legislative/legal frameworks with clear lines of oversight. The authors correctly identify the EAC's problem in efforts to develop efficient and integrated regional transport networks, and also propose credible solutions. But, they fall short of providing steps on how the proposed solutions can be achieved. This research builds on their study by indicating how strong legal and institutional framework governing cross-border railways in EAC can be created.

The other important literature on the subject is by Arnold, J.⁴¹ The author argues that the performance of a transport corridor is often determined by the standards and these pertain to: i) the physical infrastructure, among other things; ii) regulations on their use; and iii) the

⁴⁰ Ioannis, N. K. and Nancy C. *op cit*

⁴¹ Arnold, J. (2006). 'Best Practices In Management of International Trade Corridors' The World Bank, Transport Papers TP-13. Available: <http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1227561426235/5611053-1229359963828/itc-1-11-07.pdf> (Accessed 28th January 2014)

procedures followed for enforcing these standards. He argues that it is at border crossings that standards are mostly needed because of complex procedures resulting from persistent disparities in standard and regulations of different countries. He vouches for creation of a corridor management authority if the duties include coordinating activities of public agencies, for example, for upgrading infrastructure, contracting for construction and/or concessioning. The author clearly identifies the key elements to achieving an efficient transportation corridor. However, he does not provide criteria for achieving these results.

The study by Mattli, W⁴² discusses the formation and role of strong institutions which can be vested with sufficient authority to enforce countries' obligations on a regional level. The research argues that regional blocks should create supranational Institutions. That through these institutions, members may learn to share and cooperate to gain consensus on their otherwise different positions that would prevent implementation of regional objectives on a national level. H argues that the institution should be granted sufficient authority over states. The study properly advances creation of supranational institutions as a solution to regulatory failure on a regional level. However, it is restricted to the European Union. It does not draw comparison with other regional economic communities which may be operating in different circumstances, and therefore render it inapplicable to them. Furthermore, the research does not draw a clear link between this theory to any particular sector to test its applicability. This research draws lessons from and also builds on his writing by showing the role supranational laws and Institutions can play in promoting sustainable cross-border transport infrastructure development in the EAC.

1.8 Research methodology

This research is both desk and Library based. It reviews primary and secondary sources of literature related to railway development. The Treaty for the Establishment of the East African Community is analysed as the key legal text. Other protocols and agreements relating to railways in the EAC are also examined. Text books, scholarly articles and publications of recognised authors and those of International organisations are used as secondary resources. The internet is

⁴² Mattli, W 'The Vertical and Horizontal Dimensions of Regional Integration: A Concluding Note' in Laursen F. (ed) (2003) 'Comparative Regional Integration: Theoretical Perspectives' Ashgate: London

also widely used as a source of information.

The research carries out a comparative analysis of SADC's legal and institutional frameworks governing railways with those of the EAC for purposes of benchmarking. Although SADC region is faced with its own weaknesses in the regional railways subsector (for example members' inequalities in terms of railway distribution, dilapidated railways in some Partner

States and delayed crossings along some borders),⁴³ it is nevertheless used as a benchmark for EAC for various reasons.

The SADC is chosen as a benchmark for EAC's cross-border railways development for three major reasons namely: i) despite SADC's railways being poor when compared with those of the developed world, they are considerably superior to the EAC' railways; ii) SADC's geopolitics are similar to those of the EAC; and iii) despite SADC's railway subsector facing challenges relative to those faced by the EAC, it has managed to achieve better levels of railway development and inter-country connectivity than the EAC.⁴⁴

1.9 Limitations of the research

The research analysed the legal and institutional framework governing railway development in the EAC. It studies the SADC's legal and institutional framework governing railway development as a benchmark for the EAC. The major constraint to the study was limited timely access to the laws and policy documents needed for the research on time. Save for SADC and EAC secretariats, most government agencies with custody of the legal texts and instruments needed for the research do not operate websites. Moreover, some countries' laws (for example Burundi and Rwanda) were not in the English language in which this research was conducted.

Furthermore, the research did not analyse the non-legal aspects that also have some bearing on

⁴³ See chapter three for a detailed discussion of SADC's challenges in the railways subsector.

⁴⁴ See chapter three for a detailed discussion of the rationale for choosing SADC as a benchmark for EAC's railways development.

the development of railways in the EAC. This is because the research mainly focussed on legal and institutional framework. In addition, Burundi and Rwanda which do not operate any railway lines were not studied. There is therefore a need for a comprehensive study of conditions that prevented the development of railways in those countries.

1.10 Overview of chapters

The paper has four chapters. Chapter one gives a brief historical development and successes of regional integration of the EAC. It explains the problem (i.e. lack of a legal framework for cross-border infrastructure development in the EAC) which has made this research necessary. It explains the significance of the study, the questions that the research seeks to answer and an overall review of selected literature which is relevant to the problem.

Chapter two which is the main theme of the research assesses the efficacy of the current legal and institutional framework in facilitating sustainable cross-border railway development in the EAC. With specific reference to the railway subsector, the chapter explains that the lack of sound legal and institutional framework has constrained the development of sustainable cross-border railway networks in the EAC.

Chapter three draws lessons from the SADC. It explains the rationale for benchmarking SADC. The legal and institutional frameworks for railway development in SADC region are examined to determine whether they can be adapted to the circumstances of the EAC. Mistakes that have constrained SADC's progress are also studied to enable EAC to be better prepared to avoid them. Challenges that the EAC may face in benchmarking best practices from SADC are studied and possible solutions to the challenges are proposed.

Chapter four which is the last chapter concludes by providing a summary of the main findings, conclusions and policy recommendations from the research.

CHAPTER TWO

CRITICAL ANALYSIS OF THE EFFICACY OF LEGAL AND INSTITUTIONAL FRAMEWORKS GOVERNING RAILWAY DEVELOPMENT IN THE EAC

2.1 Introduction

This chapter first analyses the efficacy of ongoing initiatives to address the cross-border railway deficits in the EAC is discussed. It analyses the efficacy of the legal and institutional frameworks governing railway development of efficient and sustainable cross-border railways in the EAC. It argues that the prevailing legal and institutional frameworks are inefficient and therefore constrain the ongoing initiatives for railway development in the EAC. It underpins the need to benchmark best practices from the SADC region which has been more successful in developing integrated railways.

2.2 Initiatives for regional railway development in the EAC.

The consolidation of the EAC Customs Union and the ongoing implementation of a Common Market have rendered development of integrated regional transport systems necessary.⁴⁵ The EAC has realised the significance of efficient transport infrastructures as a backbone for a successful regional integration process.⁴⁶ This research argues that cross-border transport is particularly important. This is because cross-border transport-links affect the movement of factors of production, people and goods on a regional level.⁴⁷ Having realised this, the EAC established various initiatives to address its cross-border transport deficits.

⁴⁵ Sezibera, R. (2011). 'The Future of East African Integration: Priorities over the Next five years.' Address to the 16th Biennial Ambassadors/ High Commissioners' Conference. Mombasa 2011. Available at: http://www.eac.int/news/index.php?searchword=The+Future+of+East+A&ordering=&searchphrase=all&Itemid=70&option=com_search (Accessed 18th January 2014)

⁴⁶ EAC Secretariat (2012) 'EAC and Infrastructure. Available at: http://infrastructure.eac.int/index.php?option=com_content&view=article&id=116&Itemid=78 (Accessed 18th January 2014)

⁴⁷ Srinivasan, P.V. (2012). 'Regional Cooperation and Integration through Cross-Border Infrastructure Development in South Asia: Impact on Poverty' ADB South Asia Working Paper Series. No. 14. Asian Development Bank, Metro Manila Philippines. Available at: <http://www10.iadb.org/intal/intalcdi/PE/2012/10683.pdf> (Accessed 18th January 2014)

Initiatives for regional infrastructure development are not new phenomena in the EAC. Since the establishment of the EAC in 1999, development of integrated regional transport infrastructure has been at the heart of the EAC's development agenda, at least on paper.⁴⁸ In recent years, there have been renewed efforts towards co-operation in developing seamless, efficient and integrated transport systems in the EAC. For instance, three joint infrastructure Summits of Heads of State and Government of EAC Partner States (except Tanzania) and Sudan have been held. All these are geared towards accelerating joint infrastructure development.⁴⁹ More efforts to improve performance of transport infrastructure are seen in proposals to rehabilitate and upgrade five existing transport corridors on a regional level.⁵⁰ Revamping of regional railways is core in all these efforts.

Furthermore, various regional treaties, protocols, agreements⁵¹ as well as policy documents⁵² have long identified regional transport infrastructure as a strong pillar for achieving deeper integration in the EAC.

Those treaties, agreements, protocols and policies place the regional transport infrastructure agenda at the heart of the region's development programmes.⁵³ For example, in its 2nd, 3rd and 4th development strategies for the years 2001 to 2005, 2006 to 2011 and 2012 to 2016 respectively,

⁴⁸ Article 89 of the Treaty for the Establishment of the East African Community enjoins Partner States of the EAC to cooperate in development of regional transport infrastructures.

⁴⁹ See the Joint Communiqué of the Second Infrastructure Summit, 2013. Available at: <http://www.scribd.com/doc/163903818/JOINT-COMMUNIQUE-2nd-Infrastructure-Summit-of-Heads-of-State-and-Government> See also Joint Communiqué, 3rd Integration Projects Summit of Heads of State and Government. Available at: <http://www.scribd.com/doc/179655014/Joint-Communique-%E2%80%93-Integration-Projects-Summit> (Accessed 14th February 2014)

⁵⁰ The East African Community Secretariat. 'Road and Railway sectors'. Available at: http://infrastructure.eac.int/index.php?option=com_content&view=article&id=109&Itemid=129 (Accessed 18th January 2014)

⁵¹ The Treaties, Protocols and Agreements include, but are not limited to: the EAC Treaty 1999, the Northern Corridor Transit and Transport Agreement 1985 and Protocols thereto and the Concession Agreements.

⁵² The Policy documents include, *inter alia*: the East African Railways Master plan Study 2009 and the East African Community Development Strategies (1996-2001, 2001-2006, 2006-2011 and 2011-2016).

⁵³ The first 5-year Development Strategy (1997-2000) for the EAC was enacted in 1997. See 'Implementation of Projects and Programme in EAC'. Available at: <http://www.tpsc-tz.com/eapc07/pdfs/IMPLEMENTATION%20OF%20PROJECTS%20AND%20PROGRAMME%20IN%20EAC.pdf> (Accessed 24th March 2014)

the EAC underpins completion and rehabilitation of existing regional transport infrastructure.⁵⁴ New transport infrastructure is also earmarked for development in a sequential manner.⁵⁵ Similarly, the EARMP places the revamping of railways on the EAC agenda.⁵⁶

There have been similar efforts on an international level, with various programmes designed to boost infrastructure development as well as to improve performance in the EAC's transport corridors. Several development partners (for example the African Development Bank – AfDB, the European Union – EU, the United States Agency for International Development - USAID, and the World Bank) have sunk funds into the development of infrastructures. These efforts have also yielded minimal results.⁵⁷ For instance, one of the studies which reviewed the progress of transport infrastructure development in Eastern and Southern Africa concluded that despite increased funding to revamp the railways in those regions, they remain in poor state of repair.⁵⁸

The question to be answered here is: why have all those efforts not enabled the EAC to surmount the transport infrastructure bottlenecks, especially in the railways subsector? Various institutional and legal constraints account for this. These are discussed in detail below.

2.3 Institutional and legal constraints to EAC railway development

This research argues that the development of efficient and sustainable railway transport systems in the EAC requires efficient legal and institutional frameworks. However, various legal and institutional factors have combined to constrain the effectiveness of the EAC's initiatives to

⁵⁴ EAC Development Strategies are five-year regional plans intended to direct the systematic development of the region, in order to achieve the goals of regional integration. Available at: http://www.eac.int/index.php?option=com_docman&task=cat_view&gid=155&Itemid=163 (Accessed 10 January 2014)

⁵⁵ See for example, the Second EAC Development Strategy 2001 – 2005 pp 21-22, Available at: http://www.eac.int/index.php?option=com_docman&task=cat_view&gid=155&Itemid=163 (Accessed 18th January 2014)

⁵⁶ The East African Railways Master Plan Study: Final Report 2009. Available at: http://www.eac.int/infrastructure/index.php?option=com_docman&task=doc... (Accessed 18th January 2014)

⁵⁷ See the 3rd EAC Development Strategy (2006-2011) and the 4th EAC Development Strategy (2011-2016). Available at: http://www.eac.int/index.php?option=com_docman&task=cat_view&gid=155&Itemid=163 (Accessed 18th January 2014)

⁵⁸ UNCTAD (2001). 'Review of Progress in the Development of transit transport systems in Eastern and Southern Africa.' UNCTAD/LDC/115 20. Available: <http://unctad.org/en/docs/poldcd115.en.pdf> (Accessed 18th January 2014)

develop seamless and sustainable cross-border railways in the EAC. Various studies have identified different factors. For instance, as seen earlier, one study which reviewed various donors' investment in railways in the East and Southern Africa found that more concentration was on logistics, with less attention towards measures for efficient and sustainable usage and maintenance.⁵⁹

In addition, a study by Ioannis *et al*⁶⁰ found that divergent country attitudes towards regional integration, inefficient laws and weak institutions also, invariably, constrain EAC's efforts to revamp its cross-border railways.

The objective of this study therefore is, to explore ways in which the various efforts both on a regional and international level can be creatively linked to promote development of seamless and integrated cross-border railways in the East African Community. But, first, the factors which constrain the renewed efforts towards integrated railway development (as identified in the preceding chapter) are discussed. These factors mainly include: i) Weak institutional capacity; ii) lack of judicial enforcement and iii) inefficient laws.

2.3.1. Weak institutional capacity

This research argues that weak institutional capacity in the EAC has grossly affected the overall implementation of railway projects. Weak institutions cannot adequately neither execute their regional mandates; enforce laws; sanction violations, nor integrate their operations.

This study concentrates on institutions governing cross-border railways in the EAC. The institutions can be classified into regional and national institutions. It is important to note that under the EAC Treaty, organs are separate and distinct from institutions. The organs include, *inter alia*, the Summit of Heads of State and Government,⁶¹ the Council of Ministers,⁶² the East

⁵⁹ *Ibid*

⁶⁰ *Supra* note 37

⁶¹ Established under Article 10 of the Treaty for the Establishment of the East African Community 1999

⁶² Established under Article 23 of the Treaty for the Establishment of the East African Community

African Legislative Assembly, the East African Court of Justice⁶³ and the Secretariat.⁶⁴ Institutions are created under various agreements and protocols and their specific mandates are conferred by the incorporating instruments. The capacity of these institutions is discussed below.

The EAC has a rich history of regional institutions. The original EAC (1967 – 1977)⁶⁵ had made tremendous progress in establishing strong regional institutions. Those institutions included,

among others, the East African High Commission; the East African Railways and Harbours Corporation (EARHC); the East African Common Services Organisation and the East African community.⁶⁶ Moreover, important service facilities, for instance the EARHC and East African railways were decentralised.⁶⁷ The breakup of the original EAC, culminated in the dissolution of those institutions due to lack of capitalisation.⁶⁸

The EARHC was one of the casualties of the breakup of the EAC. The dissolution of the EARHC resulted in fragmented railway systems governed by three distinct national institutions (Uganda Railways Corporation, Kenya Railways Corporation and Tanzania Railways Corporation).⁶⁹ However, all the states (Kenya, Tanzania and Uganda) failed to operate an efficient and commercially viable railway network.

The prevailing political will for railway development and integration on a regional level⁷⁰ is yet to be turned into concrete action. Goals and objectives have been set to revamp regional

⁶³ Established under Article 9(1) of the Treaty for the Establishment of the East African Community

⁶⁴ Established under Article 66 of the Treaty for the Establishment of the East African Community 1999

⁶⁵ The EAC was originally founded in 1967 but it collapsed in 1977

⁶⁶ See the Preamble to the Treaty for the Establishment of the East African Community 1999.

⁶⁷ Busse, M and Shams, R. 'Trade Effects of the East African Community' (2005) 6 The Estey Centre Journal of International Law and Trade Policy No. 1, p.62-83. Available at: <http://www.tzonline.org/pdf/tradeeffectsoftheeastafrikancommunity.pdf> (Accessed 20 January 2014)

⁶⁸ Maruping, M. 2005. 'Challenges for Regional Integration in Sub-Saharan Africa: Macroeconomic Convergence and Monetary Coordination' In 'Africa in the World Economy - The National, Regional and International Challenges' Fondad, The Hague, December 2005, www.fondad.org (Accessed 17 December 2013)

⁶⁹ *Ibid*

⁷⁰ Three Joint Infrastructure Summits of Heads of State and Government of the EAC have been held with the objective of fast tracking implementation of joint infrastructure projects. These summits held on 25 June 2013 in Entebbe; 28 August 2013 in Mombasa and 25 October 2013 in Kigali.

railways.⁷¹ But the various institutions created to execute the infrastructure agenda lack the requisite capacities.

The factors account for the failure of the EAC's institutions to execute their mandates. These include *inter alia*: a) inadequate enforcement authority; b) disparate legal and operational frameworks; c) inadequate technical capacity; and d) inadequate funding. These are discussed in detail below.

a) Insufficient decision making powers

Insufficient decision making authority by institutions mandated to govern cross-border transport infrastructure development in the EAC constrains their ability to execute their mandates. For example, the EAC Treaty vests all decision making powers on the Council of Ministers. The Council of Ministers is empowered to make all policy decisions for the efficient and harmonious functioning and development of the Community.⁷² Yet, the main institutions charged with execution of the goals of the EAC do not have powers to independently make decisions. The lack of decision making authority is exacerbated by the fact that the EAC lacks supranational institutions to enforce commonly agreed decisions.⁷³

It is therefore not uncommon for countries to violate commonly agreed positions and remain unsanctioned.⁷⁴ Although the EAC Treaty provides for the sanction of expulsion of a Partner State that is in breach of its provisions,⁷⁵ the sanction of 'expulsion' leaves room for political manipulation due to lack of strong independent institutions to enforce it.

In order to make provisions of the EAC Treaty enforceable, and ameliorate the inefficiencies of their institutions, Partner States provided for supremacy of regional laws (passed by the EAC Legislative Assembly) over Partner States' national laws regarding the similar subject matter. Accordingly, such regional laws would have the force of law in the respective Partner States

⁷¹ *Ibid*

⁷² Article 14(3) (a) of the Treaty for the Establishment of the East African Community 1999

⁷³ Ioannis N. K. and Nancy C. 2012 *op cit note 37*

⁷⁴ *Ibid*

⁷⁵ Articles 146 and 147 of the Treaty for the Establishment of the East African Community 1999

once published in the EAC Gazette.⁷⁶ The EAC Treaty further provides that decisions of the EACJ must also be adopted and applied by partner States.⁷⁷

The importance of supranational powers of the EAC organs has been emphasised by the EAC Court of justice. In the case of *The East African Law Society and others –vs- The Attorney General of the Republic of Kenya and others*.⁷⁸ While recognising the principle of sovereign independence of states envisaged in the EAC Treaty, court observed that the EAC's organs should be allowed some powers over the states if they are to effectively execute their mandates. This way, the court observed, the collective objectives of the EAC which Partner States set out to achieve, would be realised. Court therefore called upon states to cede some of their independence to the EAC and its organs.⁷⁹

Although the foregoing decision refers to 'organs' and not 'institutions' of the EAC, this study argues that the principle it establishes applies to EAC institutions. Therefore, EAC Partner States ought to observe the supremacy of regional institutions if they are to effectively enforce its laws and as well as fulfil its objectives.

From the foregoing discussion, it has been established that EAC institutions are not possessed of enough powers to enforce regionally agreed positions. This also gives rise to a lack of enforcement of regional laws. Although the EAC Treaty creates the EACJ, the court is yet to entertain matters particularly in actions pitting one Partner State against another. Similarly, it is not clear whether violations arising out of actions not regulated by the EAC Treaty (albeit falling within the overall objectives of the Community) may be entertained by the court. A plausible conclusion in the circumstances would be that a Partners State in violation of its obligations which are not covered by the EAC Treaty would not be sanctioned.

⁷⁶ Art 8 (4) of the Treaty for the Establishment of the East African Community 1999

⁷⁷ Article 38 of the Treaty for the Establishment of the East African Community 1999

⁷⁸ *The East African Law Society and others –vs- The Attorney General of the Republic of Kenya and others*, In the East African Court of Justice Reference No. 3 of 2007 Judgment of 8 September 2008. Available at: <http://www.saflii.org/ea/cases/EACJ/2008/1.pdf> (Accessed 11 March 2014)

⁷⁹ *Ibid*

b) Legislative and operational disjointedness

The capacity of EAC institutions to execute their mandates is also constrained by disparate laws and the disjointed operation of institutions. These two are espoused below.

First, with regards to disjointed laws, as indicated in the preceding chapter, EAC Partner States operate under disparate legal systems.⁸⁰ There is a lack of harmonisation of laws that govern development of cross-border railways. A fragmented legal framework leads to delays and conflicting interpretations which in turn increases the cost of doing business due to lengthy legal research, legal enquiries and comparisons.⁸¹ For instance, dispute settlement mechanisms applied under the common law system are different from those applied under the civil law system. Different institutions charged with enforcement of these judgments will face difficulties, if a developer obtains judgment from one country in a different legal system which requires enforcement in another country with a different legal system.

Therefore, whereas, the EAC Treaty enjoins Partner States to undertake necessary measures for implementation of the judgment of the EACJ,⁸² this will lead to disparate results due to legal disparities.

Another example of disparate legal frameworks which gravely affect the capacity of institutions to execute their mandates is in the area of public procurements. EAC Partner States operate disparate public procurement practices and standards. Disparities in procurement practices could prove a nightmare for jointly implemented projects, which could see projects slowed down by different states' bureaucratic procedures, disparate procurement periods or lengthy appeal processes arising from tendering disputes.

Public procurement processes in Kenya, Tanzania and Uganda are governed by the Public

⁸⁰ *Supra* note 37

⁸¹ UNCTAD. (2003). 'Multimodal Transport: The Feasibility of an International Legal Instrument'. Available at: <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=1818> (Accessed 23 November 2013)

⁸² Article 38 (3) of the Treaty for the Establishment of the East African Community 1999

Procurement and Disposal Act;⁸³ the Public Procurement and Disposal of Public Assets Act⁸⁴ and Public Procurement and Disposal of Public Assets Act⁸⁵ respectively. Public procurement processes in Rwanda and Burundi are governed by the law N° 63/2007 of 30/12/2007 and Law No. 1/01 of 4 September 2008 Establishing the Investment Code of Burundi, respectively.

Major areas of conflict among the procurement laws include: threshold levels; technical specifications; administrative specifications such as time limits, contract splits and the number of bidders treatment of local companies. Whereas Kenya and Tanzania provide a 15% preferential treatment for local companies, Burundi and Rwanda are yet to make such provisions. On its part, Uganda amended its Public Procurement and Disposal of Public Assets (PPDA) law in 2014 to provide for promotion of local businesses under the preference and reservation schemes,⁸⁶ and efficiency to fast track public procurement.⁸⁷ The new law will bring in harmony Uganda's public procurement practice with those of Kenya and Tanzania. However, disparities with Burundi and Rwanda persist.

Secondly, fragmented institutional operations equally account for the inefficiency of institutions that govern railway development in the EAC. EAC's institutions governing railways continue to operate as distinct national systems despite their intended regional perspective.

As indicated earlier, the existing railway systems namely; Kenya Railways Corporation (KRC), Tanzania Railways Corporation (TRC) and Uganda Railways Corporation (URC) operate independently and distinct from each other.⁸⁸ Consequently, proposals to operate them as a single integrated network tend to fail to achieve the desired impact because they continue to be enforced with independent national biases rather than focussing on the overall collective goal of

⁸³ Chapter 412 C, of the Public Procurement and Disposal Act Revised Edition 2010 (2005) (Laws of Kenya) Available at:

http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicProcurementandDisposalAct_Cap412C_.pdf (Accessed 14 February 2014)

⁸⁴ Act No. 9 of 2011. Available at:

http://www.unpcdc.org/media/389145/tanzania_public_procurement_act_2011.pdf (Accessed 10 January 2014)

⁸⁵ Act No. 1 of 2003 as Amended. (The Amendment Act, No. 11 of 2011 came into force on the 3rd day of March, 2014. Available at: <http://www.ppda.go.ug/> (Accessed 12 May 2014)

⁸⁶ See S. 59 B (2) (a) of the PPDA Act No. 1 of 2003 (Amended) (Laws of Uganda)

⁸⁷ S. 48 of the PPDA Act No. 1 of 2003 (Amended) (Laws of Uganda)

the region as a whole.⁸⁹

The fragmentation of operations has been exacerbated by the uncoordinated nature of donor funded programmes. Donor supported work in transport infrastructure development in East and Central Africa has predominantly focused on national efforts (rather than collective regional efforts).⁹⁰ The result has been regionally fragmented systems that are unfortunately unable to neither operate seamlessly nor effectively share information.⁹¹

Institutional fragmentation results in wasteful competition for resources. It can also result in different approaches for different railway networks along the same transport route, thereby constraining railway connectivity. In order to achieve greater levels of cross-border railway development, coordinated institutional operations which look at the transport in a sufficiently broad way to avoid inconsistencies, are needed.⁹² This has also been the view of the World Bank - that interconnectedness is needed if railways are to compete effectively with the road sector.⁹³

In order to try to address the problem of disjointed operations, the Governments of Kenya and Uganda after concessioning their railways concluded a bilateral agreement for the Kenya-Uganda standard gauge railway in 2012 (herein ‘the Standard Gauge Railway Agreement’). Under the agreement the governments agreed to jointly develop and operate a standard gauge railway between Kampala and the coastal city of Mombasa.⁹⁴ The Republic of South Sudan has

⁸⁸ The collapse of the East African Railways and Harbours Corporation led to disintegration into three separate national railways.

⁸⁹ Arnold, J. (2006). ‘Best practices in management of International Trade corridors.’ Transport Papers TP-13. World Bank, Washington, D.C. Available: <http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1227561426235/5611053-1229359963828/itc-1-11-07.pdf> (Accessed 18th January 2014)

⁹⁰ USAID, Transport Corridor Efficiency. Available at: http://www.competeafrica.org/components/reducing_barriers_to_trade/transit/index.php (Accessed 22 January 2014)

⁹¹ *Ibid*

⁹² European Conference of Ministers of Transport. 2003. ‘Fifty years of Transport Policy: Successes, Failures and New Challenges.’ Pp. 16. Available at: <http://www.internationaltransportforum.org/Pub/pdf/0350YrsTrPol.pdf> (Accessed 01 April 2014)

⁹³ Olievschi, V.N. (2013). Railway Transport: Framework for improving railway sector performance in sub-Saharan Africa. SSATP Working Paper No. 94. The World Bank, Washington D.C. Available at: <http://www4.worldbank.org/afr/ssatp/Resources/SSATPWP94-Railway-Performance.pdf> (Accessed 14 February 2014)

⁹⁴ Bilateral Agreement between the Government of the Republic of Kenya and the Government of the Republic of Uganda for the Development and operation of a Standard Gauge Railway between Mombasa and Kampala with

also agreed to accede to the Agreement.⁹⁵

The objective of the agreement is to provide a legal framework under which Kenya and Uganda can promote joint development of an integrated, modern, and efficient railway network as a seamless single railway operation in their territories.⁹⁶ This agreement will be operationalised with the adoption of a Protocol drafted to set out modalities for operationalising it.⁹⁷ The Protocol was yet to be finalised as of May 2014.

This study argues that the Standard Gauge Railway Agreement is a move in the right direction since it provides for a framework integrating different railway networks since it provides for adoption of a common gauge in the territories of the signatories. However, the fact that the agreement is only operational between the signatories (Kenya and Uganda) further complicates the problem of fragmented railway development. Other Partner States may need to accede to the agreement or conclude similar arrangements if they are to synergise their operations.

More importantly, the agreement does not impose mandatory obligations on the signatories to harmonise their policies and laws. It merely requires them to endeavour to maximally harmonise laws, policies, designs and construction.⁹⁸ This creates problems of enforcement as a country in breach may simply claim that they endeavoured to comply with the agreement, yet in practice little was done. Furthermore the agreement does not provide a framework for private sector participation especially in the proposed administrative body, the Standard Gauge Railway Commission.⁹⁹

branch lines to Kisumu (Kenya) and Pakwach/Gulu-Nimule (Uganda). 2012. (Retrieved from Uganda railways Corporation head offices in Kampala, Uganda)

⁹⁵ See Joint Communiqué, 3rd Integration Projects Summit of Heads of State and Government of the EAC (except Tanzania) and South Sudan, October 2013, Kigali. Available at: <http://www.scribd.com/doc/179655014/Joint-Communique-%E2%80%93-Integration-Projects-Summit> (Accessed: 13th January 2014)

⁹⁶ Article 1 of the Standard Gauge Railway Agreement 2012

⁹⁷ Uganda was mandated to draft a Protocol to operationalise the Agreement .See Joint Communiqué of the 3rd Integration Projects Summit of Heads of State and Government, October 2013, Kigali. Available at: <http://www.scribd.com/doc/179655014/Joint-Communique-%E2%80%93-Integration-Projects-Summit> (Accessed 10 January 2014)

⁹⁸ Article 4 (a) of the Standard Gauge Railway Agreement 2012

Suffice to note that the EAC Treaty identifies as one of the reasons for the collapse of the original EAC in 1977, ‘the lack of adequate private sector participation in the cooperation activities’ as one of reasons why the 1967 EAC collapsed in 1977.¹⁰⁰ There is therefore a need to encourage and promote private sector participation in railway development in the EAC. The private sector can be a good partner in efforts aimed at mobilising resources.

c) Inadequate technical capacity

The EAC’s institutions grapple with inadequate technical capacity to undertake thorough policy analysis and to negotiate favourable deals on the international level.¹⁰¹ The EAC lacks in experienced specialists to execute complex legal and policy documents involved in infrastructure financing, concessioning and contracting. The community usually relies on expensive expatriates, which affects progress since countries are usually unable to meet the expatriates’ charges.

d) Inadequate funding for institution

Without sufficient financial resources, institutions cannot adequately execute their mandates. The EAC lacks sufficient financial resources to establish new or maintain existing regional institutions. The reason for this, it has been argued, is the fact that Partner States’ contributions to the EAC budget arrive late, yet, they also fall far short of EAC’s demands.¹⁰²

Similarly, donor financing for regional institutions is also becoming inadequate. For example, despite receiving funds for the establishment and operation of the East African Railways Authority (EARA) - which is mandated to implement the EARMP,¹⁰³ the Authority is yet to

⁹⁹ Article 2 of the Standard Gauge Railway Agreement 2012

¹⁰⁰ See the Preamble of the Treaty for the Establishment of the EAC 1999

¹⁰¹ AfDB (2010) *op cit*

¹⁰² Kamala, D.B. (2006). ‘The Achievements and Challenges of the New East African Community Co-operation’. Research Memorandum No. 58. University of Hull United Kingdom. Available at: <http://www2.hull.ac.uk/hubs/pdf/memorandum58.pdf> (Accessed 12 May 2014)

¹⁰³ Mbogo, S., Kabona, E., and Kahoho, T. Trade Mark Southern Africa, 14 January 2014. Available at: <http://www.trademarksa.org/news/eac-railway-network-will-plans-restore-decades-old-facility-finally-take> (Accessed 14 March 2014)

commence operations because it still faces funding shortages and this has been its major bottleneck.¹⁰⁴ In other instances where donor funding arrives on time, some institutions lack absorptive capacities in terms of utilisation due to inadequate human resources and technical know-how.¹⁰⁵

Various methods of mobilising resources on a regional level have been devised but with minimal results. For instance, under the Northern Corridor Transit Transport Agreement (NCTTA), the methods envisaged to raise resources for the Northern Corridor Coordination Authority (NCCA) include, contributions from members states and donors as well as duty levies at ports of entry.¹⁰⁶

Contributions from member states have not always been prioritised because of political considerations.¹⁰⁷ Moreover, the establishment of a partnership fund in 2006 to pool resources from development partners is yet to meet its objectives.¹⁰⁸ The result of all these has been failure by the EAC to raise the resources required to execute improvements in infrastructure along the northern corridor.

2.3.2. Weak and inefficient legal frameworks

The principal legal frameworks governing cross-border railway development and operations in the EAC comprise of treaties, protocols, agreements and national laws of each Partner State. These include, *inter alia*: the Treaty for the Establishment of the East African Community; the East African Model Investment Code;¹⁰⁹ the Northern Corridor Transit Transport Agreement;¹¹⁰

¹⁰⁴ *Ibid*

¹⁰⁵ Unpublished: Akoth, MO 'Organisational Effectiveness of Regional Integration Institutions: A case Study of the East African Community' unpublished MA dissertation, University of South Africa, 2008. Available at: <http://uir.unisa.ac.za/bitstream/handle/10500/1325/dissertation.pdf?sequence=1> (Accessed 14 February 2014)

¹⁰⁶ Article 11 of the Northern Corridor Transit and Transport Agreement 1985 (amended 2007)

¹⁰⁷ Adzigbey, Y., Kunaka, C., and Mitiku, TM. (2007). 'Institutional Arrangements for Transport Corridor Management in Sub-Saharan Africa' SSATP Working Paper No. 86 World Bank, Washington D.C. Available at: <http://siteresources.worldbank.org/EXTAFRSubSAHTRA/Resources/SSATPWP86-Corridor-Management.pdf> (Accessed 24th February 2014)

¹⁰⁸ The Partnership Fund is a basket of annual contributions from Development Partners aimed at supporting the EAC projects and programmes that are geared towards regional integration. See EAC Secretariat.(2012) http://www.eac.int/rmo/index.php?option=com_content&id=165&Itemid=233 (Accessed 14 February 2014)

¹⁰⁹ The East African Community Model Investment Code, 2006. The East African Community Secretariat. Available at: http://www.eac.int/invest/index.php?option=com_docman&task=cat_view&gid=38&Itemid=70 (Accessed 27 November 2013)

¹¹⁰ Available at: <http://www.ttcanc.org/page.php?id=12>

the railway concessionaire agreements¹¹¹ as well as the various transport-related national laws of each Partner State.¹¹²

These legal frameworks are riddled with various inefficiencies which render them weak and inefficient. A weak transport law is one which does not define: (a) the regulatory and licensing controls which should be exercised over transport infrastructure and service operations; (b) clear and respective roles, rights and duties of public and the private sectors in developing transport infrastructure and services; and (c) the extent to which competitive markets in transport infrastructure should be encouraged.¹¹³

This research argues that the major inefficiencies in EAC's laws include: a) regulatory gaps in some regional laws; b) lack of clarity of rights and duties of Partner States and/or private actors; c) unfavourable railway concession arrangements and d) lack of enforceability of some laws. These are discussed in detail below.

a) Regulatory gaps on the regional level

There are regulatory gaps on the regional level in the EAC. The gaps are manifest in different ways. Firstly, on the regional level, there is a failure to regulate certain aspects of a cross-border nature which are not covered by national laws. The national laws of each Partner State are usually restricted to matters within their national boundaries. The result of this is a situation where there is no clear guiding framework on matters originating from a Partner State, with results that affect the development of cross-border railways along common borders.

The major issues that are not clearly regulated by existing EAC railway laws include: environmental activities that have cross-border effects; public private partnerships and displacement of people in 'No-Mans-Land' across shared borders. This research is restricted to

¹¹¹ For example, the Standard Gauge Railway Agreement 2012 was signed by Kenya and Uganda. (a printed copy of the agreement was accessed from the URC head office) and the Northern Corridor Transit Agreement (signed by Burundi, DRC, Kenya, Rwanda and Uganda)

¹¹² The Uganda Railways Corporation Act (Cap 331), of 1992 (Laws of Uganda), Kenya Railways Corporation Act (Cap 397) of the Laws of Kenya and the Tanzania Railways Corporation Act, 1977

the analysis of the two issues namely, those concerning displacement of people along shared borders and public private partnerships.¹¹⁴

There are no laws on a regional level to govern displacement, compensation and resettlement of people who illegally settle in railway reserves in ‘No-Mans-Land’ across shared borders. It is noteworthy that the Partner States’ national constitutions and land Acts which regulate land ownership, provide for rights of ownership and modalities for its confiscation from illegal settlers (only within each Partner’s territories) by the national Governments.¹¹⁵ In the absence of a clear legal framework on a regional level governing resettlement of people along common borders, development of cross-border railways may be disrupted.

Suffice to note that due to several years of neglect, most railway reserves in the EAC that have been conceded to Rift Valley Railways (RVR) through concession arrangements were encroached upon by illegal settlers, the operations of the concessionaire may be adversely affected.¹¹⁶ In order for RVR to redevelop and smoothly operate the railways, it is pertinent that the settlers are evicted. The resettlement exercise may involve destruction of their property which may necessitate compensation. Without a clear law governing displacement of people along shared borders, the operations of a developer may be constrained. For example, displaced settlers may file civil suits for injunctions prohibiting the developer from evicting them, resulting in considerable delays.

Furthermore, three of the Partner States (Burundi, Rwanda and Uganda) do not have public private partnership (PPP) laws to govern private sector the participation in infrastructure

¹¹³ Batalia, J.C. (2001). ‘Enforcement of Laws and Regulations Governing Road Transport Industry in East Africa’ Available at: http://pdf.usaid.gov/pdf_docs/PNACM825.pdf (Accessed 22 January 2014)

¹¹⁴ The research chose displacement of people and public private partnerships because these were identified as the major unregulated challenges. (An interview with the Ag. Managing Director of Uganda Railways Corporation, , at Uganda Railways Corporation offices, 57 Nasser Road Kampala, in January 2014)

¹¹⁵ Legislation governing compensation and resettlement issues in Kenya include: The Constitution of Kenya 2010 (Article 40); Kenya Railways Corporation Act Cap 397 (as amended); Kenya Railways Corporation (Vesting of Lands) Orders 1986 and The Kenya Land Policy (2007). Legislation governing compensation and resettlement issues in Uganda include: The Constitution of the Republic of Uganda 1995 (Article 237); Uganda Railways Corporation Act, CAP 331 (S 34); Land Regulations, 2004 (S 24); and the Land (Amendment) Act, 2010 (S 74).

¹¹⁶ See http://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/RVR%20RAPs%20Exec%20Summary_English%20final.pdf (Accessed 24 February 2014)

development. Only Kenya and Tanzania have PPP laws.¹¹⁷ With the EAC's focus on development of regional infrastructures, there is need to smoothen the use of PPPs as a funding formula.¹¹⁸ Yet, without a regional legal framework for PPP projects, efforts to engage the private sector in joint regional transport projects may be clogged with hefty legal challenges. These will constrain the smooth operation of the projects.

The major existing law on a regional level providing a semblance of a legal framework for PPPs is the NCTTA (discussed in detail below). Under its Article 8 (d), it establishes a Private Partnership Committee to deal with matters of interstate and transit along the Northern Corridor. Indeed the Northern Corridor Stakeholders Consultative Forum (a PPP initiative), for the facilitation of the movement of goods along the corridor has been established.¹¹⁹ The shortcoming with this law is that it is limited in scope. It regulates only those PPP projects along the Northern Corridor. This leaves a regulatory gap in respect of railway developments occurring outside the northern corridor since the agreement does not apply to other transport routes.

b) Lack of clarity of rights and obligations of Partner States

The principal laws governing regional railways development in the EAC are; the EAC Treaty¹²⁰ and the NCTTA of 1985.¹²¹ These laws do not clearly set out the rights and obligations for the Partner States. This affects their effectiveness. For a legislation to be effective, it must have clear and effective enforcement mechanisms.¹²² The salient provisions regarding railway development

¹¹⁷ These include: the Public Private Partnership Act, 2010 (Laws of Tanzania) and the Public Private Partnership Act of Kenya, 2013 (Laws of Kenya).

¹¹⁸ Tulya-Muhika, S. 'PPPs - A Vehicle For Addressing Infrastructural Challenges in the East African Community' A General Presentation at the "3rd EAC Investment Conference" Kampala, 28th -30th April 2010. Available at: http://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fecainvestmentconference.com%2F3rd%2Fdownloads%2Fpresentations%2Fdoc_download%2F34-ppps-a-vehicle-for-addressing-infrastructural-challenges-in-the-eac.html (Accessed 8 January 2014)

¹¹⁹ See Northern Corridor Transit Transport Coordination Authority (NC-TTCA) 'Baseline Survey of key Non-physical barriers along the Northern Corridor and The Establishment of a database at the TTCA Secretariat: Final Report' (2005). Available at: <http://www.worldbank.org/transport/transportresults/regions/africa/ncttca-final-report.pdf> (Accessed 12th May 2014)

¹²⁰ *Supra* note 1

¹²¹ Available at: <http://www.ttcanc.org/documents.php> (Accessed 22 December 2013)

¹²² Gleave S.D. (2009). 'Final Report of Evaluation of the Common Transport Policy (CTP) of the EU from 2000 to 2008 and analysis of the evolution and structure of the European transport sector in the context of the long-term development of the CTP'. Prepared for the European Commission. Available at:

in these laws are discussed below.

First, the EAC Treaty imposes obligations on Partner States. The obligations are derived from Article 1 which sets out the overall objectives of the EAC namely: developing policies and programmes to widen and deepen co-operation frameworks among Partner States.

Furthermore, the EAC Treaty enjoins Partner States, among other things, to: harmonise their laws, regulations and practise: construct and maintain their national and regional transport infrastructure, and revamp with a view to integrating, their railway systems.¹²³ Those obligations are reinforced in Article 7 (b) which obliges Partner States to co-operate in providing basic infrastructure within the EAC aimed at deepening connectivity, easing flow of trade, investment and factors of production.

Similarly, Article 89 (g) of the EAC Treaty obliges Partner States to take proactive measures to jointly use their existing national facilities and programmes to enhance human resource capacities in the transport and communications sectors.¹²⁴

In order to promote an inter-connected and efficient railway, the EAC Treaty provides a framework for a common railway transport system. Under Article 91, Partner States are required to under measures to harmonise transport by rail in the region, revamp the infrastructure as well as restructure their railways to make them more commercially oriented.

From the foregoing discussion, it has been established that the EAC Treaty sets out the basic framework for Partner States regarding integrated railway networks. If properly implemented, regional infrastructures and connectivity would be improved. However, the Treaty provides little guidance on how to bridge the gap between national interest and the overall regional goals.¹²⁵

http://ec.europa.eu/transport/themes/strategies/doc/2009_future_of_transport/20090617_common_transport_policy_final_report.pdf (Accessed 14 February 2014)

¹²³ Chapter 15, Article 89(a) of the Treaty for the Establishment of the East African Community.

¹²⁴ Article 89(g) of the Treaty for the Establishment of the East African Community, 1999.

¹²⁵ Ranganathan, R. and Foster, V. (2011). 'East Africa's Infrastructure: A Regional Perspective' A publication of the World Bank, Washington, D.C. Available at:

<http://infrastructureafrica.org/system/files/library/2012/02/REC%20East%20Africa.pdf> (Accessed 18th January 2014)

Additionally, it does not indicate what type of institutional arrangement should facilitate the harmonisation or cooperation processes for railway development on a regional level.¹²⁶ The lack of an instrument to operationalise the provisions of the EAC Treaty to set out clearly the role and obligations of the Partner States complicates this problem.

Second, the NCTTA; - a multilateral treaty governing transit transport operations in the Northern Corridor¹²⁷ also imposes obligations on member states. The northern corridor constitutes the transport routes from the port of Mombasa in Kenya to the landlocked countries: Burundi, Eastern DRC, Rwanda and Uganda as well as Ethiopia, Northern Tanzania, Ethiopia and Southern Sudan.¹²⁸ The NCTTA was signed by Burundi, Kenya, Rwanda and Uganda, in 1985,¹²⁹ and came into force in 1986. The DRC acceded to the NCTTA in 1987. It was originally referred to as the 'Northern Corridor Transit Agreement' but a 2007 revision led to a change to the current title 'Northern Corridor Transit Transport Agreement'.¹³⁰

The principal objectives of the NCTTA are: to ensure freedom of transit among the member states, and develop integrated regional transport facilities and services.¹³¹ To achieve its objectives, the NCTTA enjoins member states to establish and manage transport systems that are viable, reliable and efficient as well as cooperate in investment planning and development of transport and transit facilities.¹³²

Railway development in the NCTTA is governed by Article 36 which obliges the contracting parties agreed to develop railways and rehabilitate existing ones as well as establish seamless railway services with unbroken block trains. Furthermore, the NCTTA provides for application

¹²⁶ East African Transport Strategy and Regional Road Sector Development Program: Final Report Part II September 2011. Available at: http://www.eac.int/infrastructure/index.php?option=com_docman&task=doc... (Accessed 18th January 2014)

¹²⁷ Available at: <http://www.ttcanc.org/documents.php> (Accessed 05 January 2014)

¹²⁸ OECD (2004) 'Investment opportunities in the Northern Corridor with emphasis on infrastructure' A Paper Prepared by the TTCA Secretariat for presentation at the COMESA Business Summit Kampala, Uganda 7-8 June 2004. Available at: <http://www.oecd.org/investment/investmentfordevelopment/34879173.pdf> (Accessed 14th February 2014)

¹²⁹ See the Preamble to the Northern Corridor Transit and Transport Agreement 1985 (as amended)

¹³⁰ A look at the title of the revised version of the agreement reveals that it added the word 'transport' after 'transit' to read, the Northern Corridor Transit Transport Agreement.

¹³¹ See Article 3 of the Northern Corridor Transit Transport Agreement 1985 (as amended)

¹³² Article 4 of the Northern Corridor Transit and Transport Agreement 1985 (as amended)

of rules made under the Protocol on Transport by Rail of Goods in Transit (the railway Protocol), which is annexed to the agreement.¹³³ The railway Protocol stipulates that detailed rules regarding the administration and operation of rail traffic would be laid down in a railway working agreement between the rail carriers of Kenya and Uganda.¹³⁴ Indeed in 2006, the respective railway carriers of the Governments of Kenya and Uganda concluded an interface working agreement within the framework of the NCTTA to streamline their joint operations.¹³⁵ The agreement is expounded below.

Like the EAC Treaty, the NCTTA lacks provisions that compel member states to enforce decisions through enactment of relevant national policies and legislation. Consequently, the harmonisation of national transport policies, laws and enforcement mechanisms as well as infrastructure development, may not be achieved. For instance, despite the existence of the NCTTA since 1985, the increase in investments and efforts by the EAC to revamp railway infrastructure has not yielded the required levels of railway development in the region.¹³⁶

c) Unfavourable railway concession arrangements

Due to the need to improve performance and attract investment in their railways, Kenya, Tanzania and Uganda restructured their national railways by concessioning them to different private organisations/companies. Kenya and Uganda concessioned their respective railways to the same company, RVR (herein ‘the concessionaire’) in 2006, although *vide* separate concession agreements. Under the agreements, Kenya and Uganda handed over their railways to be jointly managed and operated by RVR for a 25-year period.¹³⁷

¹³³ Article 36 of the Northern Corridor Transit and Transport Agreement 1985. See also Protocol No.5, Transport by Rail of Goods in Transit. Available at: http://www4.worldbank.org/afr/ssatp/Resources/HTML/legal_review/Annexes_fr/Annexes%20V_fr/Annexe%20V-06.pdf (accessed 14rd February 2014)

¹³⁴ Article 2 of Protocol No.5, Transport by Rail of Goods in Transit

¹³⁵ The Railway Interface Agreement between the Government of the Republic of Kenya and the Government of the Republic of Uganda, 2006. See detailed discussion of the agreement in the following sub-section (ii) of this section.

¹³⁶ UNCTAD (2001) Review of Progress in the Development of Transit Transport Systems in Eastern and Southern Africa UNCTAD/LDC/115 20 July 2001. Available: <http://unctad.org/en/docs/poldcd115.en.pdf> (Accessed 22 December 2013)

¹³⁷ The Government of the Republic of Uganda and Nalukolongo Railway Workshop Limited and Rift Valley Railways (Uganda) Limited 2006. See Also Mageria D. 2006. ‘Kenya, Uganda hand over railways to private firm’

The agreements and deeds were signed through the respective legal entities: Rift Valley Railways Kenya Ltd. (RVRK) and Rift Valley Railways Uganda Ltd. (RVRU). On its part, Tanzania concessioned its railway operations and management to Rail India Technical and Economic Services Ltd (Rites) in 2007 for a period of 25 years.¹³⁸ Burundi and Rwanda did not have any existing railways at the time of this study, and there had not been any privatisation of their railway services.

This study concentrates on the Kenya and Uganda concession agreements. Tanzania's concession agreements are not studied because by the time of this study, Tanzania had already terminated its concession agreements following failure by the concessionaire to fulfil its contractual obligations.¹³⁹

Under the Kenya and Uganda concession agreements, Kenya Railways Corporation (KRC) and Uganda Railways Corporation (URC) conceded management, operational, maintenance and investment obligations to the concessionaire.¹⁴⁰ The key objectives of the concessions were to: - standardise infrastructure maintenance and operations, and foster regional economic integration and growth. Therefore, the concessionaire was mandated to rehabilitate,¹⁴¹ maintain¹⁴² and jointly operate the railway networks as a single integrated railway system so as to improve economic efficiency and profitability.

Reuters: Available at: http://www.rmtbristol.org.uk/2006/11/kenya_uganda_hand_over_railway.html (The researcher did not obtain a copy of the concession agreement for Kenya railways)

¹³⁸ Tito, M.B. 'Revitalising the Railways for Enhanced Regional Integration and Economic Growth' A paper presented at a Regional Conference on East African Railways, Dar es Salam, 2010. Available at: http://www.infrastructure.eac.int/index.php?option=com_docman&task=cat_view&gid=64&Itemid=143 (Accessed 22 December 2013)

¹³⁹ Nyangweso, H. 'East African Community: Lessons from Railways Concessions in East Africa' (2010). Available at: http://www.icafrica.org/fileadmin/documents/ICA_2010_Annual_Meeting_Tunis/session_5/EAC_Hosea_Nyangweso_Privatization_of_railways.pdf (Accessed 24 February 2014)

¹⁴⁰ Section B.1 of the Concession Agreement between Uganda and RVR. See also Babbar, S. (2006). Partial Risk Guarantees for Kenya-Uganda Joint Railway Concession, Transport Forum. Available at: <http://siteresources.worldbank.org/INTTRANSPORT/Resources/336291-1152714163458/2744896-1152794646430/fmazhard-babbar.pdf> (Accessed 21 January 2014)

¹⁴¹ Section J:9 of the Concession Agreement between Uganda and RVR 2006

As a step towards regional harmonisation of railway operations and development, Uganda and Kenya signed a joint railway interface agreement aimed at bringing their separate concession agreements together as one business.¹⁴³ As earlier indicated, this agreement had been envisaged by the NCTTA.¹⁴⁴ The joint railway interface agreement was aimed at enabling the concessionaire to optimise efficiency by initiating common strategies and actions to harmonise the operation of the two railways.¹⁴⁵ It also sought to indicate the areas and levels of cross-border rationalisation¹⁴⁶ and provide for establishment of a Joint Railway Commission.¹⁴⁷ The joint Railway Commission was to be established within six months from the date of the agreement.¹⁴⁸ However, the Commission was yet to be established by May 2014.

It is important to note that the introduction of concessions (which was a new phenomenon in the EAC) would require that the legal and regulatory framework for railways had to be substantially changed to facilitate economic management of the railways. Kenya amended its railway law.¹⁴⁹

On its part, Uganda carried out the concessioning under the law that governs privatisation, namely, the Public Enterprises Reform and Divestiture (PERD) Act.¹⁵⁰ This study argues that whereas the PERD Act could successfully govern the privatisation of railways, it does not govern the post privatisation exercise. The operational mandate of the concession is governed by the national railway laws. But these laws were not updated to reflect the changed circumstances of ownership and operation of the Uganda railways, from the public sector to the private sector.

¹⁴² Section H:1 of the Concession Agreement between Uganda and RVR 2006

¹⁴³ The Agreement between the Governments of the Republic of Kenya and the Republic of Uganda relating to matters common to the Kenya Freight and Passenger Concession and the Uganda Freight Concession, 2006 (herein 'the Interface Agreement')

¹⁴⁴ *Supra* note 142

¹⁴⁵ Section D of the Interface Agreement

¹⁴⁶ Section A.3 of the Interface Agreement

¹⁴⁷ Section E.2 of the Interface Agreement

¹⁴⁸ *Ibid*

¹⁴⁹ Kenya Railways Corporation Act Cap 397(*as amended*) was amended inter alia, to formally confer powers on the Kenya Railways Corporation to enter into the Concession agreement with the concessionaire.

¹⁵⁰ A criterion for divestiture of public enterprises is set out in S 22 of The Public Enterprises Reform and Divestiture Act Cap 98 (Laws of Uganda). The Act was available at: <http://www.opm.go.ug/assets/media/resources/315/PUBLIC%20ENTERPRISES%20REFORM%20%26DIVESTITURE%20ACT.pdf> (accessed 12 May 2014)

A review of the performance of the railways since the conclusion of the concession agreements reveals minimal improvements. Today in Kenya and Uganda, repair and restoration works are being undertaken by the concessionaire for the Kenya-Uganda railway.¹⁵¹ Despite some achievements, no significant infrastructure improvement has been undertaken by the concessionaire.¹⁵² Several factors emanating from the structure of the agreements have stalled concrete progress. These are discussed below.

The concession agreements conferred monopoly along the concede railway trunks in Kenya and Uganda on RVR.¹⁵³ The agreements prohibit the Governments of Kenya and Uganda from introducing measures (including introduction on new players along the conceded railway trunks) which may affect the profitability of the concessionaire.¹⁵⁴ As a result, even where the concessionaire had failed to comply with its obligations under the agreement the governments would neither terminate the concessions nor allow new service investors along the conceded trunks.¹⁵⁵ The result of this has been creation of an inefficient private monopoly. The study argues that the concessioning processes has since resulted in transfer of ownership and management of railways from inefficient government monopolies to private monopolies.

Furthermore, this study contends, that no thorough feasibility study regarding the capacity of the concessionaire to deliver its obligations under the agreements, was undertaken. A few years after winning the concession, it was discovered that the concessionaire lacked the necessary resources to implement its obligations.¹⁵⁶ For example, at the commencement of the contract period, it was

¹⁵¹ Mbogo S., Kabona E., Kahoho T., Trade Mark Southern Africa, 14 January 2014. Available at: <http://www.trademarksa.org/news/eac-railway-network-will-plans-restore-decades-old-facility-finally-take-NCTTCA>. 'Northern Corridor Infrastructure Master Plan Study: Final Report' 2011 pp 4. Available at: <http://www.ttcanc.org/documents/The%20Northern%20Corridor%20Infrastructure%20Master%20Plan.pdf> (accessed 24 February 2014)

¹⁵² NCTTCA. 'Northern Corridor Infrastructure Master Plan Study: Final Report' 2011 pp 4. Available at: <http://www.ttcanc.org/documents/The%20Northern%20Corridor%20Infrastructure%20Master%20Plan.pdf> (accessed 24 February 2014)

¹⁵³ See for example Section B of the Concession Agreement between Uganda and Rift Valley Railways Ltd.

¹⁵⁴ *Ibid*

¹⁵⁵ PPIAF 'A PPP against the Odds: The Kenya-Uganda Rail Concession fights for survival' http://www.ppiaf.org/sites/ppiaf.org/files/images/4.Case_Study_on_Kenya-Uganda_Railway_Concession.pdf (Accessed 24 February 2014)

¹⁵⁶ Railway Gazette. 2009. 'Struggling concessions under review'. Available at: <http://www.railwaygazette.com/news/single-view/view/struggling-concessions-under-review.html> (Accessed 24 February 2014)

discovered that RVR did not to have sufficient expertise in running a railway operation and they (the concessionaire) did not bring in technical expertise to manage the operation as the governments had expected.¹⁵⁷

There has been no significant improvement in infrastructure because the concessionaire is yet to invest in infrastructure and rolling stock.¹⁵⁸ Additionally, freight volumes have gone down and payment of concession fees has not been effected.¹⁵⁹

d) Weak regional investment law

The principle legal framework governing investment on a regional level in the EAC is the East African Model Investment Code (herein ‘the Code’).¹⁶⁰ The objective of Code is to guide Partner States in pursuing open, liberal and transparent investment policies that provide, *inter alia*, predictability, stability and transparency in their foreign investment regimes.¹⁶¹ Partner States are encouraged to put in place measures that will ensure systematic application of procedures and policies with a view to achieving the overall goal of deeper regional integration.¹⁶²

However, the Code does not impose binding legal obligations on Partner States. Partner States are not obliged to domesticate the Code’s provisions. The Code simply states that Partner States ‘may’ adopt the Code into their national investment policies. To that extent, it remains a guiding instrument without any binding effect on Partner States.¹⁶³ As such the EAC Partner States have not made significant progress in the harmonising their investment laws.¹⁶⁴

¹⁵⁷ *Supra* note 165

¹⁵⁸ *Supra* note 31

¹⁵⁹ Nyangweso H. East African Community: Lessons from Railways Concessions in East Africa. Available at: http://www.icafrica.org/fileadmin/documents/ICA_2010_Annual_Meeting_Tunis/session_5/EAC_Hosea_Nyangweso_Privatization_of_railways.pdf (Accessed 2 April 2014)

¹⁶⁰ The East African Community Model Investment Code 2006. A publication of the EAC Secretariat. Available at: http://www.eac.int/invest/index.php?option=com_docman&task=cat_view&gid=38&Itemid=70 (accessed 24 February 2014)

¹⁶¹ Preamble of the East African Community Model Investment Code 2006

¹⁶² *Ibid*

¹⁶³ Section 3 of the East African Community Model Investment Code 2006

¹⁶⁴ Kitonsa, E. ‘The Status of the EAC Legal Harmonisation Process in Uganda’ A paper presented at a conference on creating a predictable and facilitative legal environment for business in the East African Community,

By and large, the national investment laws and policies of each partner state are generally applied in regulation of investments including in cross-border infrastructure projects (*authors own*). A developer will still have to grapple with disparate investment laws and policy requirements of each Partner State.

2.4 Concluding remarks

Rail transport remains underutilised in the East African Community. Due to low cargo volumes, railway companies make less profits resulting in limited resources to reinvestment in infrastructure. This has led to its deterioration over the years. Efforts to revamp the railway networks are hampered by significant soft infrastructure challenges. The prevailing legal and institutional frameworks in the EAC remain inefficient to support sustainable cross-border railway development. The research therefore argues for benchmarking from a more successful region (SADC) which has attained greater success in building and maintaining sustainable regional railway systems.

CHAPTER THREE

BENCHMARKING SADC'S LEGAL AND INSTITUTIONAL FRAMEWORKS GOVERNING RAILWAY DEVELOPMENT

3.1 Introduction

This chapter draws key lessons from SADC by assessing its legal and institutional frameworks that govern regional railway development. The rationale for benchmarking the SADC is discussed. The research takes cognisance of the fact that there is no-one-size fits all in matters of legal and policy formulation. Therefore, only the legal and institutional frameworks suitable to EAC's circumstances are benchmarked. Similarly, challenges that the SADC faces and how it overcame them were studied to ensure that the EAC is better prepared to overcome them, if encountered. It concludes that due to differences in social, political and economic landscapes between the EAC and the SADC, there may be some challenges that the EAC may face in adapting certain SADC laws and institutions to its circumstances. Proposals for overcoming those challenges are discussed.

3.2 Rationale for benchmarking SADC

The main motivation for benchmarking is to improve the performance of a process.¹⁶⁵ This research uses the 'Best Practice' benchmarking model. Best Practice Benchmarking involves *inter alia*, studying similar processes or activities of best performing organisations and identifying, adapting, as well as implementing the practices that reveal the best performance results.¹⁶⁶ It focuses on learning why other organisations are achieving higher levels of performance and putting into practice the lessons learnt.¹⁶⁷

Uganda Edward-Kitonsa.pdf (Accessed 12 May 2014)

¹⁶⁵ Global Benchmarking Network. 2008. 'Global Survey on Business Improvement and Benchmarking'. Available at:

http://www.globalbenchmarking.ipk.fraunhofer.de/fileadmin/user_upload/GBN/PDF/2010_gbn_survey_business_improvement_and_benchmarking_web.pdf (Accessed 28 February 2014)

¹⁶⁶ *Ibid*

¹⁶⁷ *Ibid*

It is important to note from the outset that SADC and the EAC are heterogeneous when looked at in terms of: economic size, levels of regional railway development and the initiatives established to develop their railways. But there are compelling reasons why the SADC region can provide useful lessons to the EAC. As already observed in chapter one,¹⁶⁸ the two regional economic communities share some common characteristics which may impact their railway programmes in a similar way. Problems faced by member countries of both regions, in their railway subsectors, are of a similar nature. Hence, this research's argument that similar approaches undertaken in SADC's railways can also be undertaken in the EAC.

Furthermore, the two regional economic communities are already engaged in a cooperation framework under the auspices of the Tripartite Free Trade Area regional infrastructure programme.¹⁶⁹ A key objective of the tripartite infrastructure programme amongst the COMESA, the EAC and the SADC is to harmonise and coordinate efforts between national, regional, continental and global stakeholders in infrastructure development.¹⁷⁰ Through negotiations, the COMESA, the EAC and the SADC are able to jointly plan and implement infrastructure programmes and facilitate sharing of information, experiences and best practices.¹⁷¹ Therefore, initiatives employed by the SADC in developing its regional railways can also be easily adapted to the circumstances of the EAC.

This study focused on the various initiatives namely: regulatory, coordination and funding employed by the SADC to achieve greater infrastructure development relative to the EAC. Common factors which affect both the EAC's and the SADC's railway initiatives are also examined. This is intended to guide policy makers in the EAC to creatively apply workable initiatives that were employed by SADC to surmount the infrastructure deficits in the region.

¹⁶⁸ See discussion in subsection 1.8 of chapter one

¹⁶⁹ See <http://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/>

¹⁷⁰ SADC RIIC. (2013). 'COMESA-EAC-SADC Tripartite Regional Infrastructure Projects Database (TRIPDA)'. Version Number: 2013.01. Trade Mark South Africa. Available at: <http://invest-tripartite.org/wp-content/uploads/2013/06/20-TRIPDA-List-of-Projects-2013-06-20.pdf> (Accessed 12 May 2014)

¹⁷¹ UNECA. (2011). Study on the Establishment of Inter-RECs' Free Trade Areas in Africa: Drawing on lessons from the COMESA-SADC-EAC FTA Experience, Final Report 2011. Addis Ababa, Ethiopia. Available at: http://www.uneca.org/sites/default/files/uploaded-documents/CTRCI-VII/tripartite_comesa_eac_sadc_fta-researchresearch-final-report.pdf (Accessed 14 February 2014)

3.2.1 Economic size and geographical disadvantages

In terms of disparities in economic sizes of their Member/Partner States and geographical location (from world markets), SADC and the EAC have several similarities. The SADC regional economic community comprises 15 Member States¹⁷² of varying economic sizes and land masses.¹⁷³ SADC has a mix of low- and middle-income countries.¹⁷⁴ In terms of population size, some countries have large populations while others have small populations.¹⁷⁵ SADC Member States include large countries with large land masses, small isolated economies and island states. SADC is also home to six landlocked countries namely; Botswana, Lesotho, Malawi, Swaziland, Zambia and Zimbabwe.¹⁷⁶

By comparison, the EAC comprises five Partner States also of varying land masses, economic sizes as well as different geographical locations from world markets. The economies are also at varying levels of development. Kenya and Tanzania are coastal-developing countries¹⁷⁷ and they also have the largest land masses and populations compared to other EAC Partner States.¹⁷⁸ As already seen in chapter one, Burundi, Rwanda, and Uganda are landlocked LDCs.¹⁷⁹

SADC's small economies are unlikely to single-handedly develop their portions of regional infrastructure backbone unless some external or regional collective funding arrangements are in place.¹⁸⁰ For instance, it has been estimated that the DRC's spending requirement is

¹⁷² Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe

¹⁷³ *Supra* note 125

¹⁷⁴ Examples of high income countries include; South Africa and Botswana, and some of the low income countries are DRC and Swaziland

¹⁷⁵ Example of countries with the largest populations include among others, DRC and South Africa; while those with smallest populations include Swaziland and Lesotho.

¹⁷⁶ Bingandadi L. (2013). 'Southern African Development Community Infrastructure and Trade Facilitation Initiatives.' A Presentation at the African Regional Review Meeting on the Implementation of the ALMATY PROGRAMME OF ACTION, 16-18 July 2013, Addis Ababa, Ethiopia. Available at: http://www.uneca.org/sites/default/files/page_attachments/lldc2013_bingandadi-sadc-report-almaty-ten-year-review-conference.pdf (Accessed 16 April 2014)

¹⁷⁷ United Nations Statistics Division, October 2013. Available at:

<http://unstats.un.org/unsd/methods/m49/m49regin.htm> (accessed 2nd March 2014)

¹⁷⁸ See http://en.wikipedia.org/wiki/East_African_Community (accessed 1 May 2014)

¹⁷⁹ *Supra* note 22

¹⁸⁰ Ranganathan, R and Foster, V. 2011. "The SADC's Infrastructure: A Regional Perspective." Policy Research Working Paper No. 5898, World Bank, Washington, D.C. Available at: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/12/05/000158349_20111205143855/Rendered/PDF/WPS5898.pdf (Accessed 27th February 2014)

approximately 14 percent of its gross domestic product (GDP), which is beyond what the national economy could manage on its own unless assisted by external development partners.¹⁸¹

This research argues that this problem equally applies to the EAC's small and poor landlocked economies.

Given the identical geographical and economic factors of both the EAC and the SADC regional economic communities, cooperation particularly through information sharing in the development and operation of their respective regional transport infrastructures is a practical thing to do.¹⁸²

More importantly, the landlocked countries of the respective regions ought to seize the opportunity to encourage concerted regional efforts in infrastructure development. The UN Almaty Programme of Action¹⁸³ already recognises the need for landlocked developing countries and their coastal-transit neighbours to ensure regional cooperation or integration initiatives to facilitate the latter's participation in the global economy.

3.2.2 A comparison between railways in EAC and SADC

SADC's railway infrastructure is superior (in terms of development, efficiency and integration), to that of the EAC.¹⁸⁴ Railways in SADC cover almost all transport corridors.¹⁸⁵ For example one of the most significant international networks on the continent is centred in South Africa and stretches north to Zimbabwe, Zambia, and the DRC.¹⁸⁶

¹⁸¹ *Ibid*

¹⁸² Byiers, B. and Vanheukelom, J. 2014. 'What drives regional economic integration? Lessons from the Maputo Development Corridor and the North-South Corridor.' Discussion Paper No. 157. European Centre for Development Policy Management. Available at:
[http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/C589C0CD785BB059C1257C78003281CD/\\$FILE/DP157_PERISA%20Corridors.pdf](http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/C589C0CD785BB059C1257C78003281CD/$FILE/DP157_PERISA%20Corridors.pdf) (Accessed 27th April 2014)

¹⁸³ United Nations. (2001). Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries. Available at:
http://www.unohrrls.org/UserFiles/File/LLDC%20Documents/almaty_programme.pdf (Accessed 12 January 2014)

¹⁸⁴ Dube, M. (2013). Analysing the development process for infrastructure projects in SADC. (PERISA Case Research 3: Infrastructure). Johannesburg: SAIIA, ECDPM. Available at:
<http://www.saiia.org.za/expertise/memory-dube> (Accessed 14 February 2014)

¹⁸⁵ Bingandadi, L. *op. cit.*

¹⁸⁶ AfDB (2010). Restructuring and Recovery in Railway Services. Zimbabwe Report, Chapter ten. Available at:
http://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/12.%20Zimbabwe%20Report_Chapter%2010.pdf (Accessed 13 March 2014)

In addition, there are approximately 12 operational, mainly government-owned, railways within SADC member states. Eleven of those railways form the Interconnected Regional Rail Network (IRRN) in the mainland SADC countries.¹⁸⁷ This accounts for approximately 43% of the total Railway network in Africa.¹⁸⁸

Although some SADC Member States namely: Lesotho, Mauritius and the Seychelles are not connected to railway networks, the regional network transcends half a dozen countries.¹⁸⁹ This represents a far higher level of regional rail interconnection than can be found in the EAC and other regional economic communities of Africa. As seen in chapter one, in the EAC few binational, fragmented and dilapidated railway systems are what exists specifically, in Kenya, Tanzania and Uganda.¹⁹⁰

In the EAC, railways transcend neither the entire region nor all transport corridors. For example, Burundi and Rwanda are not linked to their neighbours by railway nor do they operate any railways within their territories.¹⁹¹ Though, plans are underway to extend railways to these countries.¹⁹²

In terms of freight volumes, railways in SADC carry more cargo than all other African regional economic communities combined.¹⁹³ They handle approximately 74 percent of Sub-Saharan

¹⁸⁷ Kritzinger-van, L. N and Moreira, E. (2002). 'Regional Integration in Southern Africa: Overview of Recent Developments' Discussion Paper 33107. The World Bank, Washington, DC. Available: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/07/26/000160016_20050726093932/Rend ered/PDF/33107a10PAPER0AFR0Regional1Integration.pdf (Accessed 1st April 2014)

¹⁸⁸ UNECA. (2009). 'Africa Review Report on Transport: Final Draft' Available at: <http://www.uneca.org/sites/default/files/publications/africanreviewreport-on-transport.pdf> (Accessed 2nd May 2014)

¹⁸⁹ SADC. (2010). 'Formulation of SADC Regional Infrastructure Development Master Plan: Sector Diagnostic Report, Rail Sector'. Available at: <http://www.sararail.org/wp-content/uploads/2010/07/Rail-Diagnostic-Preview.pdf> (Accessed 14th February 2014)

¹⁹⁰ Since the collapse of the East African Railways and Harbour Corporation in 1977, the different national railways in the EAC namely Kenya Railways Corporation, Tanzania Railways Corporation and Uganda Railways Corporation independently and isolation of each other. See http://en.wikipedia.org/wiki/East_African_Railways_and_Harbours_Corporation

¹⁹¹ EAC Secretariat. 2011. The East African Railways Master Plan Research: Final Report 2009. Pp.33. Available at: http://www.eac.int/infrastructure/index.php?option=com_content&view=article&id=116&Itemid=68

¹⁹² *Ibid*

¹⁹³ Foster V., and Briceño-Garmendia, C. (2010). 'Africa's Infrastructure: A Time for Transformation.' The World Bank, Washing D.C. Available at:

Africa's total freight traffic and more than 80 percent of the total net tonne-kilometres.¹⁹⁴ SADC's railways also have a superior passenger turnover of more than 70% of the total in Sub-Saharan Africa, with significantly lower freight tariffs than in East and West Africa.¹⁹⁵ SADC is also home to Mauritius, the best performing African country with regards to state of its transport infrastructure.¹⁹⁶ This makes SADC particularly very important for best practice benchmarking.

Additionally, SADC's transport policies are more harmonised than those of the EAC. The cooperation framework under the SADC Protocol on Transport, Communications and Meteorology (herein 'the transport protocol') legally binds member States to harmonise all their policies, institutions, standards, and practices in transport.¹⁹⁷ Through the transport protocol, SADC member states have rolled out a comprehensive railway programme to: separate railway operations from regulations; promote commercialisation of operations and allow enhanced operational synergy, and allow participation of the private sector.¹⁹⁸

As indicated in the introduction to this chapter, challenges faced by the SADC are also studied to better prepare the EAC to avoid or surmount them when they arise. Thus, one of the major challenging facing the SADC is the prevailing country differences regarding the state of railways in the SADC region.

3.2.3 Railway differences among SADC member states

Although commonly cited as an example of a successful story in regional infrastructure

<http://infrastructureafrica.org/system/files/Africa%27s%20Infrastructure%20A%20Time%20for%20Transformation%20FULL%20TEXT.pdf> (Accessed 14 February 2014)

¹⁹⁴ *Ibid*

¹⁹⁵ Logistics Performance Index (LPI) 2010: Southern and Eastern Africa. World Bank, Washington D.C. Available at: http://siteresources.worldbank.org/INTTLF/Resources/515003-1276029788910/LPI_Brochure_SADC_East_AFR.pdf (The Logistics Performance Index is a tool used by the World Bank to measure the perceptions of a country's logistics based on inter alia, efficiency of customs clearance process, quality of trade- and transport-related infrastructure. It is measured on a scale of 1 – 5 (1being the worst and five being the best)

¹⁹⁶ *Supra* note 125

¹⁹⁷ Chapter 7 of the SADC Protocol on Transport, Communications and Meteorology in the Southern African Development Community (SADC) Region. Available at: <http://www.unctadxi.org/sections/DITC/SADC/docs/SADC%20Regional/SADCPROTOCOLONTRANSPORT.pdf> (Accessed 26 April 2014)

development on the continent, the aggregates for the SADC as a whole do not reflect a clear picture of individual country variations. Over the years, railway networks in some SADC member state for instance Angola, DRC and Madagascar, have been deteriorating as a result of devastating wars, poor maintenance and lack of funding.¹⁹⁹ Yet, railway conditions in other members, for example, Malawi, Mozambique and Tanzania have been improving due to the construction, rehabilitation and maintenance of inter-country regional corridors.²⁰⁰

In addition, almost half of the sub-region's rail network is in South Africa. As a result, more benefits accrue to South Africa. For instance, a study of the benefits of the Maputo Development Corridor to firms operating there has concluded that most benefits accrue to large South African firms and large inward investors in Mozambique.²⁰¹

SADC has faced and continues to face several challenges some of which are similar to those faced by the EAC, For example, there is delayed inter-connection along some Member States' borders due to poor coordination and disparities in railway gauges used among different national rail systems.²⁰² This is caused by human weaknesses such as distrust, fear of ceding national sovereignty and failure to incorporate regionally agreed plans into national development plans.²⁰³

Despite all the challenges, SADC has still managed to achieve better levels of regional infrastructure development than the EAC. This leads to the question: How has SADC managed to attain better levels of railway development and integration of the different national railway networks than the EAC?

¹⁹⁸ SADC Secretariat <https://tis.sadc.int/english/tis/documents-and-resources/resources-by-sector-and-topic/transport-services/> (Accessed 28 April 2014)

¹⁹⁹ Mutambara, T 'Regional transport challenges within the Southern African Development Community and their implications for economic integration and development'. In Anton Bösl., Willie Breytenbach., Trudi Hartzenberg., Colin McCarthy and Klaus Schade (Eds.) 'Monitoring Regional Integration in Southern Africa Yearbook Volume 8 (2008). Available at: <http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/MRI2008IntroBiosOther.pdf> (Accessed 30 April 2014)

²⁰⁰ *Ibid*

²⁰¹ Byiers, B and Vanheukelom, J. *Supra* note 182

²⁰² *Supra* note 23.

²⁰³ Hagerman, E. (2012). 'Challenges to Regional Infrastructure Development.' A Paper prepared for the Development Bank of Southern Africa. Available at:

The answer lies in the fact that the SADC has a better legal and institutional framework as well as its enforcement. Similarly, SADC has for long recognised that development of integrated transport systems is a major stimulus for regional economic development.²⁰⁴ To this end, it has earmarked regional infrastructure development as a key pillar of its development agenda.²⁰⁵ Indeed the transport sector has the largest number of projects that have been earmarked for implementation.²⁰⁶

In order to ensure efficient execution of its programmes, SADC established various legal and institutional frameworks to govern the development of its railways. These are discussed in detail below.

http://www.tips.org.za/files/report_on_regional_infrastructure_development_in_africa_tips_-_ellen_hagerman.pdf
(Accessed 1st April 2014)

²⁰⁴ See Article 21 (1) and (3) (b) of the Treaty of the Southern African Community 1992. Available at:

http://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf (Accessed 16 March 2014)

²⁰⁵ Ngwawi, J. 'Infrastructure development top priority for regional integration' (2006) 9 SADC TODAY, No. 1.

Available at: <http://www.sardc.net/editorial/sadctoday/documents/v9n1.pdf> (Accessed 1 May 2014)

²⁰⁶ Ngwawi, J. 'Infrastructure investment SADC seeks US\$64 billion' (2005) 15 SADC TODAY No 5. Available at:

<http://www.sardc.net/editorial/sadctoday/documents/v15n5.pdf> (Accessed 1 May 2014)

3.3 SADC's legal and institutional frameworks governing railway development

3.3.1. The SADC Protocol on Transport, Communications and Meteorology 1996

The SADC Protocol on Transport, Communications and Meteorology (PTCM)²⁰⁷ is an offshoot of the SADC Treaty of 1992.²⁰⁸ Articles 22 and 23 of the SADC Treaty enjoin Member States to conclude a Protocol to facilitate the expansion and deepening of their co-operation, among others, in the areas of infrastructure to establish viable and sustainable transport systems. Pursuant to this duty, SADC Members States enacted the Protocol on Transport, Communications and Meteorology (herein 'the transport protocol').

The transport protocol is a legally binding multilateral cooperation framework governing among others, transport infrastructure development in each SADC Member State and the region.²⁰⁹ Its major goal is establishing economically viable and efficient transport operations and systems.²¹⁰

In order to achieve the objective, the Protocol enjoins Member states to cooperate, harmonise and integrate policies and strategies on both national and regional levels.²¹¹ It identifies areas where cooperation and integration are needed to include: policy, legal and regulatory frameworks; institutional frameworks;²¹² operations, logistics,²¹³ technical designs, investment regimes, administrative, financial, and human resources in the transport sector.²¹⁴ It also underpins the development of integrated transport corridors.²¹⁵ The Transport Protocol covers all modes of transport. However, this research is limited to an examination of the railway subsector.

²⁰⁷ The SADC Protocol on Transport, Communications and Meteorology (PTCM) was signed by the Heads of State and Governments of the 15 Member states of SADC in August 1996 and entered into force upon ratification, in accordance with its article 14.2. Available at:

http://www.sadc.int/files/7613/5292/8370/Protocol_on_Transport_Communications_and_Meteorology_1996.pdf (Accessed 14 February 2014)

²⁰⁸ See Treaty of the Southern African Development Community, 1992. Available at:

<http://www.chr.up.ac.za/undp/subregional/docs/sadc8.pdf> (Accessed 14 February 2014)

²⁰⁹ Article 2.1 PTCM.

²¹⁰ Article 2.3 PTCM

²¹¹ Article 3.3 PTCM

²¹² *Ibid*

²¹³ Article 3.4 PTCM

²¹⁴ Article 2.1 (a) PTCM

The Transport Protocol lays down a practicable cooperation framework on a regional level in the railway subsector.²¹⁶ It is aimed at facilitating the provision of interconnected, efficient and a cost effective railway service which is also responsive to environmental and market needs. To this end, the Protocol requires Members to: establish a harmonised regional railway policy; co-ordinate economic and institutional restructuring of railways by granting the autonomy and reforming management; monitor the adequacy of rail infrastructure required to meet the region's developmental needs; co-operate on operational matters and human resource development; as well as develop and implement compatible technical standards in respect of infrastructure and operational equipment.²¹⁷

To operationalise the objectives of the Protocol, various tools and strategies have been devised by SADC. These include: a Regional Indicative Strategic Development Plan (RISDP); the SADC Regional Infrastructure Master Plan; the SADC transport corridor concept; and railway concessioning. The tools and/or initiatives are discussed in detail below.

3.3.2. *The Regional Indicative Strategic Development Plan (RISDP) 2003*

The RISDP²¹⁸ is a 15 year programme framework broken into five-year RISDP strategic plans to be implemented in phases between 2005 and 2020). The strategic plans provide targets and out puts to be achieved in the medium-term.²¹⁹ It is intended to guide Members States, SADC Institutions, stakeholders and development partners on SADC programmes, projects and activities in line with the SADC agenda and strategic priorities, as contained in the SADC Treaty.²²⁰ The ultimate objective of the RISDP is to deepen integration in the region.²²¹

²¹⁵ Article 2 PTCM

²¹⁶ Articles 7.2 and 7.4 of the SADC Protocol on Transport Communications and Meteorology 1996

²¹⁷ Article 7.2 of the SADC Protocol on Transport Communications and Meteorology 1996.

²¹⁸ SADC Secretariat, Summary of the Regional Indicative Strategic Development Plan 2003. Available at: <http://www.sadc.int/about-sadc/overview/strategic-pl/regional-indicative-strategic-development-plan/> (Accessed 14 February 2014)

²¹⁹ *Ibid*

²²⁰ Chapter 1, paragraph 1.2.1 of RISDP. See also Article 5A, of the Treaty of the Southern African Development Community 1992 Available at: <http://www1.chr.up.ac.za/undp/subregional/docs/sadc8.pdf> (Accessed 14 February 2014)

Although the RISDP is not a legally binding instrument but a guiding document which has been largely successful because it enjoys significant political support in SADC.²²² It was developed in the context of reviewing and restructuring SADC institutions.²²³ The restructuring was aimed at increasing the efficiency and effectiveness of SADC programmes and policies in a coordinated and harmonised way.²²⁴

The RISDP identifies the existing gaps and the coordination-challenges which SADC faces in implementing its Programmes. Then Member States are able to prioritise areas for joint implementation, based on a particular areas' significance to achieving SADC's objectives.²²⁵ The RISDP also guides members to set up a logical implementation programme necessary for achieving the region's broader goals, taking into account their feasibility and the region's resources.²²⁶ For example, it was on the basis of the strategic framework in the RISDP, upon which the SADC Secretariat prepared a comprehensive implementation framework for the 2005-2020 period.²²⁷

Suffice to note that before RISDP was conceived, SADC programmes, policies and strategies were not properly co-ordinated. There were poor inter-sectoral linkages because most of them were designed in isolation by individual sector-coordinating units.²²⁸ RISD has therefore provided a backbone for effective implementation of SADC programmes.

²²¹ SADC. (2005). SADC Major Achievements and Challenges: 25 years of Regional Co-operation and Integration. Gaborone: SADC. Available at: http://www.sadc.int/files/7713/5826/4978/Achievements_booklet.pdf (Accessed 22 January 2014)

²²² Hartzenberg, T. (2011). 'Regional Integration in Africa' Staff Working Paper ERSD-2011-14, World Trade Organisation. Geneva. Pp. 6. Available at: http://www.wto.org/english/res_e/reser_e/ersd201114_e.pdf (Accessed 2 May 2014)

²²³ Trade Law Centre. (2012). The Regional Indicative Development Plan: SADC's trade-led integration agenda. How is SADC doing? Stellenbosch: tralac. Available at: <http://www.tralac.org/files/2012/04/S12TB022012-SADC-RISDP-SADC-agenda-20120418.pdf> (Accessed 27 January 2014)

²²⁴ See <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm>

²²⁵ Chapter 1 of the Regional Indicative Strategic Development Plan 2003

²²⁶ Chapter 4 of the Regional Indicative Strategic Development Plan 2003

²²⁷ SADC Secretariat. 2011. Desk assessment of the Regional Indicative Strategic Development Plan 2005-2010. Final report approved by SADC Council, November 2011. Gaborone. Available at: <http://www.sadc.int/about-sadc/overview/strategic-pl/desk-assessment-risdp/> (Accessed 2nd May 2014)

²²⁸ Chapter 1 of the Regional Indicative Strategic Development Plan 2003

A desk review of the impact of SADC programmes that have been facilitated by the RISDP since its implementation in 2005²²⁹ revealed tremendous progress.²³⁰ The review concluded that the RISDP has facilitated the adoption of efficient protocols and policies.²³¹

However, the achievements of RISDP have not been without challenges. Actual implementation of the RISDP has not been overly successful. It has been found for instance that commitments taken by Member States are often not realised in a timely fashion, leading to delays in project implementation.²³² Furthermore, Member States' implementation of regional programmes is still behind schedule largely because, majority of the states did not dedicate resources in their national budgets, for RISDP programmes within their territories.²³³ The desk review also found that where Member States established national structures to implement SADC programmes, such national structures were not conferred with the requisite capacity to execute their coordination mandates. The result has been failure to implement agreements according to set targets.

The key lesson for the EAC arising from the analysis of SADC's RISDP is to set up a clear roadmap for railway development. The existing five-year Development Strategies of the EAC should be re-aligned to reflect genuine targets and out puts to be achieved, taking into account the EAC's available resources. They should guide not only the Partner States but also EAC Institutions, stakeholders and development partners on EAC programmes, projects and activities in line with the EAC objectives and strategic priorities, as contained in the EAC Treaty. The EAC also needs to carry out a periodic and comprehensive assessment of its Development Strategies to inform what needs to be re-aligned in order to achieve better results.

²²⁹ This review was sanctioned by the SADC Summit of Heads of State in 2011- See SADC Secretariat. 2011. 'Communiqué of the 31st Summit of Heads of State and Government of the Southern African Development Community (SADC)' which was held in Luanda, Republic of Angola from August 17 to 18, 2011. Available at: <http://www.trademarksa.org/news/communiqu-sadc-summit> (Accessed 3 January 2014)

²³⁰ Trade Law Centre (tralac). *Op cit*

²³¹ SADC Secretariat. (2011). 'Desk Assessment of the Regional Indicative Strategic Development Plan (2005 – 2010)' Final Report Approved by SADC Council, Gaborone. November 2011. Available at: http://www.sadc.int/files/4413/5292/8372/Regional_Indicative_Strategic_Development_Plan_Desk_Assessment.pdf (Accessed 14 February 2014)

²³² *Ibid*

²³³ *Ibid*

The EAC should also set up National Structures with the requisite capacity to coordinate the implementation of its Development Strategies. Otherwise, the result may be failure to implement set targets. This has been the case with RISDP because SADC members did not have such structures in place to ensure compliance.

3.3.3. SADC Regional Infrastructure Development Master Plan (RIDMP) (2012 -2027)

Building on the success of the RISDP, SADC launched the RIDMP²³⁴ in 2012. The RIDMP provides a framework for cooperation among Member States and with development partners as well as all stakeholders, in the joint implementation of infrastructure development.²³⁵ It ensures that regional infrastructure development is systemic and that projects are prioritised towards achieving regional integration. It guides the processes from selection of regional infrastructure projects through preparation for bankability and investment, to implementation.

The RIDMP defines SADC's infrastructure development strategy and constitute basis for prioritisation of projects, as well as the *modus operandi* for implementation. The Strategic Framework forecasts both requirements and implementation roadmap over a duration of fifteen (15), in three phases of five (5) years each. The three phases are as follows; Short-term 2013-2017, Medium-term 2017-2022 and long-term 2022-2027.

Although the EAC also has a railway master plan (the EARMP)²³⁶ relative to SADC's RIDMP, the edge that the SADC has over the EAC is implementation of the RIDMP. The EARMP recommends what the region needs to do to revamp the railways system in the short, medium and long terms. But, these have still remained on paper.

3.3.4. SADC transport corridor concept

SADC adopted the transport corridor development concept to promote joint operations, connectivity and pooling of resources. Corridors in SADC have evolved over a long period of

²³⁴ SADC Secretariat. (2012). SADC Regional Infrastructure Development Master Plan (Executive Summary) 2012. Available online at: <http://invest-tripartite.org/wp-content/uploads/2013/06/SADC-RIDMP-Executive-Summary.pdf> (Accessed 1 March 2014)

²³⁵ *Ibid*

time.²³⁷ Transport infrastructure development has traditionally occurred along corridors that connect areas of industry with areas of trade.²³⁸

Corridors are seen as a regional policy tool to focus on improvement of both physical and 'soft' infrastructure.²³⁹ The transport protocol enjoins members to designate, *inter alia*, transport corridors which may be intermodal or multimodal in nature.²⁴⁰ This mandate was re-echoed by the heads of state of SADC Member States at their 2007 SADC Summit at which they directed the SADC secretariat to fast-track a corridor Strategy.²⁴¹ SADC has since made considerable progress in this area.

On the regional level, sixteen development corridors have been designated in Southern Africa in conjunction with the Member States.²⁴² These corridors include but are not limited to; Beira and Zambezi Development Corridors;²⁴³ the North-South Corridor;²⁴⁴ Tazara Development Corridor (Dar es Salaam Corridor);²⁴⁵ and Walvis Bay Corridor.²⁴⁶

²³⁶ See chapter two

²³⁷ De Beer GRM. (2001). 'Regional Development Corridors and Spatial Development Initiatives – Some Current Perspectives on Potentials and Progress'. A prepared for the 20th South African Transport Conference, July 2001. South Africa. Available

at: <http://repository.up.ac.za/bitstream/handle/2263/8129/3a11.pdf?sequence=1> (Accessed 15 April 2014)

²³⁸ See SADC Secretariat. <http://www.sadc.int/themes/infrastructure/transport/transport-corridors-spatial-development-initiatives/> (Accessed 15 April 2014)

²³⁹ SADC Secretariat. (2003). Regional Indicative Strategic Development Plan 2003.

²⁴⁰ Article 3.5 (2) of the SADC Protocol on Transport Communications and Meteorology 1996

²⁴¹ SADC Secretariat. (2007). 'Communiqué of the summit of Heads of State and Government of SADC'. Lusaka, 2007. Available at: http://www.sadc.int/files/4113/5292/8387/SADC_Summit_Communique_-_Aug_2007.pdf

²⁴² The corridors include: the Dar es Salaam Corridor, Mtwara Development Corridor, Nacala Development Corridor, Shire- Zambezi Waterway, Beira Corridor, Limpopo Corridor, Maputo Corridor, Libombo Development Corridor, Lesotho Railway, Trans-Kalahari Corridor, Walvis Bay Corridor, Trans-Capriivi Corridor, North-South Corridor, Trans-Kunene Corridor, Lobito Corridor, and the Malanje Corridor

²⁴³ It links Malawi, Mozambique, Zambia and Zimbabwe. It comprises a road network and a railway system. The Sena Railway Line was concessioned in 2004.

²⁴⁴ It links South Africa to the countries to its north and is the busiest transit transport link in Eastern and Southern Africa. It connects Botswana, DRC, Malawi, Mozambique, Zambia, Zimbabwe and South Africa. It also interlinks with other Corridors including the Trans-Kalahari, Beira, Lobito, Nacala, and Tazara Corridors. The Port of Durban has the largest capacity in the region. Rail traffic handles a significant amount of cross-border freight traffic.

²⁴⁵ It links Southern Africa with East Africa and Central Africa. The Corridor links Zambia and Tanzania. The Corridor interlinks with the Nacala Corridor, the North South Corridor and the Great Lake Area. The Corridor comprises a trunk road and a railway line.

²⁴⁶ The Corridor serves the Central and southern SADC region: a) via the Trans-Kalahari Corridor linking Botswana, Namibia and South Africa; b) via the Trans- Capriivi Corridor connecting Namibia and Zambia to DRC and Zimbabwe; and c) via the Trans-Cunene Corridor connecting Angola and Namibia.

However, over the years, the operations of some corridors have been hampered to varying degrees by ‘hard’ and ‘soft’ infrastructure constraints such as poor infrastructure, inefficiency (due to monopolistic practices) and high transportation costs.²⁴⁷

In order to ensure operationalisation of the corridor strategy, the transport protocol, as seen earlier, obliges members to carry out a restructuring of their railways with the aim of creating efficient institutional frameworks.²⁴⁸ As such, various SADC Member States restructured their railways either through concessioning or ceding ownership and management to strong national institutions. The salient features (which are applicable to the EAC) of the restructured railways in SADC are discussed in detail below.

3.3.5. Railway concessioning

By 1996, ownership of railways in SADC had been predominantly by the State. All railways’ governing boards and chief executives were government appointees.²⁴⁹ However, there were a lot of inefficiencies in operations. SADC’s railways had been declining until few years ago. Successful implementation of the regional railway objective had been hampered by lack of investment and maintenance.²⁵⁰

In order to reverse this trend, SADC initiated a Railway Revitalisation Programme which sought to bring the railways back to life.²⁵¹ This programme sought to attract more investment through private sector participation (through concessioning), and improvement of the regulatory environment.

²⁴⁷ SADC Secretariat. (2008). 'Towards seamless infrastructure corridors.' SADC Today Volume 11 No.1, August 2008. Available at: <http://www.sardc.net/editorial/sadctoday/view.asp?vol=666&pubno=v11n1>

²⁴⁸ Article 3.5 of the Protocol of the Protocol on Transport, Communication and Meteorology 1996

²⁴⁹ Nathan Associates. (1997). ‘SADC Railways Restructuring and Policy Options: An Overview’ Maputo. Available at: http://pdf.usaid.gov/pdf_docs/PNACD459.pdf (Accessed 7 January 2014)

²⁵⁰ SADC. (2010). ‘Formulation of SADC Regional Infrastructure Development Master Plan: Sector Diagnostic Report, Rail Sector. Preview Version’. Available at: <http://www.sararail.org/wp-content/uploads/2010/07/Rail-Diagnostic-Preview.pdf> (Accessed 15 April 2014)

²⁵¹ Makumbe, R. (2012). ‘SADC Perspectives on the Regional Transport Sector and Opportunities within the Regional Transport Master Plan.’ A presentation to the SADC Summit at its Brainstorming Session on the Scaling

As a result several SADC States restructured their railways through privatisation.²⁵² Some Member States namely: Malawi, Mozambique, Tanzania, Swaziland, Zambia and Zimbabwe concessioned their railways to private players through concessioning. Others whose railways were performing well for instance, South Africa (Spoornet railways), Swaziland Railways (SR), Botswana (Botswana Railways) and Namibia (Trans Namib) retained state ownership. However, they moved ownership to corporate independent state owned enterprises.²⁵³

Although railway concessions in SADC have not operated to the required levels (just like the case of the EAC),²⁵⁴ there has been considerable improvement in several areas. For example, the Beit bridge Bulawayo Railway concession improved service through the corridor and a reduction in transit time. Zambia's concession of Zambia Railways limited was successful in terms of relieving the Zambian Government of the burden to invest in the infrastructure. In the case of Mozambique's concession, Beira Railway system (the concessionaire) has helped to free the Government of major capital investment. At the same time it receives fees from the concessionaire.²⁵⁵ Several factors account for these improvements. These include: existence of enabling law; elaborate institutional and monitoring mechanism and a SADC regional infrastructure fund

3.3.6. Factors contributing to the success of railway concessions in SADC

a) Existence of an enabling regional law

The need for restructuring had long been recognised by SADC's transport protocol, As discussed earlier, the transport protocol obliges Members States, *inter alia* to: restructure institutional arrangements for railways (which includes creating autonomous railways) in order to enable

Up of the Implementation and package projects package projects up to bankability. Available at: http://www.ebandla.co.za/uploads/AfricanR2012/SADC_african_R.pdf (Accessed 15 April 2014)

²⁵² Sondhi, J. and Phipps, L. (2008) 'The process of rail concessioning in SADC states' Available at: http://pdf.usaid.gov/pdf_docs/PNACT634.pdf (Accessed 24th February 2014)

²⁵³ Phipps, L. (2011). 'Technical Report: SADC Railways Revitalization Policy Dialogue'. Available at: https://tis.sadc.int/files/6613/3069/3579/sadc_railways_revitalization_policy_dialogue.pdf (Accessed 24th February 2014)

²⁵⁴ As discussed in chapter two

²⁵⁵ *Ibid*

them to operate on a commercial basis by reforming management, streamlining coordination procedures and harmonising operations.²⁵⁶ Members were also required to enact enabling national laws to govern concessions done on a national level.

Indeed, some SADC Member States²⁵⁷ which restructured their railways after putting place enabling laws were able to streamline the operations of their railways. Other members for instance, Malawi and Zambia, which proceeded with concessioning their railways without an enabling law faced difficulties. They never achieved progress after concessioning.²⁵⁸ A similar problem was highlighted in chapter two whereby, Uganda concessioned its railway without first enacting a specific law that would govern the post concessioning process.²⁵⁹

b) Elaborate institutional and monitoring framework

Building infrastructures alone cannot bring about economic development. Institutional reforms are equally needed to ensure efficient implementation of programmes.²⁶⁰ Failure to implement the programmes will grossly affect the envisaged results. This, coupled with disjointed institutional operations as discussed in chapter two has been one of EAC's undoing. The SADC region on its part, implementation of programmes has been more successful than the EAC giving it an edge in infrastructure development.

The success of regional infrastructure programmes depends on sustainable and effective institutional coordination at all levels not only between member states' governments but also with the private sector and development partners. As such SADC's RIDMP and the various players involved in the SADC infrastructure programme are intrinsically interconnected.²⁶¹ It has also been able to establish strong institutions to execute its infrastructure agenda.

²⁵⁶ Article 7.2 (a) (i) PTCM

²⁵⁷ For example South Africa, Botswana and Namibia

²⁵⁸ Sondhi, J. and Phipps, L *op cit*

²⁵⁹ *Supra* note 152

²⁶⁰ Scholvin, S and Struver, G. 'Tying the Region together or tearing it apart? China and transport infrastructure projects in SADC region'. In André du Pisani., Gerhard Erasmus and Trudi Hartzernberg (Eds) *Monitoring Regional Integration in Southern Africa Yearbook* (2012). Available at: http://www.tralac.org/files/2013/09/Final-2012-MRI-for-web_Part-1.pdf (Accessed 12 April 2014)

²⁶¹ Mwanza, W. (2013). 'Operationalising the SADC Regional Infrastructure Development Master Plan'. Trade law centre. Available at: <http://www.tralac.org/2013/07/31/operationalising-the-sadc-regional-infrastructure-development-master-plan/> (Accessed 16 April 2014)

As discussed earlier, the SADC transport protocol, imposes a duty on Member States to create regional and national institutions, where required, to collaborate and provide a platform for collaboration among stakeholders in implementing the transport protocol.²⁶² It also encourages creation of institutions by private sector players. To this end, various regional and national institutions have been established. These are discussed in detail below.

c) Regional Institutions

The regional institutional frameworks and mechanisms for implementing the transport protocol include: Sub-sectoral Committees (SCOMs) comprising public and private sector partners from government, regulators, service providers, users and labour. Some of the most important institutional mechanisms in SADC include the following.

i. Southern Africa Transport and Communications Commission (SATCC)

SADC established a regional body, the SATCC to facilitate coordination of all railways in the region. The SATCC²⁶³ comprises of a Committee of Ministers which is the supreme body of the SATCC. SATCC's role is to guide and coordinate operations and the preparation of the policy of the region and strategy in the transport sector, among other things. Through this coordination, it is able to establish uniform standards of operation. This is a different operational model from the EAC where there is no regional body to set common standards and later develop common strategies and policy for railway operations on a regional level. The proposed EARA was yet to commence operations by the date of this study.

ii. Association of service providers

SADC encourages private sector actors to get involved in transport infrastructure development through various ways. The most viable way is through the associations of service providers. It has been largely effective and this research uses the associations as a case study. Article 13.13 of

²⁶² Article 13.13 of PTCM

²⁶³ Article 13.3 of PTCM

the transport protocol enjoins members to promote formation of associations of service providers in the various modes of transport. The associations comprise operators, regulators and any other entity with an interest in or who are directly affected by transport activities.²⁶⁴ Therefore, SADC has encouraged creation of associations.

The most active Association is the Southern African Railways Association (SARA). Associations have played a fundamental role of assisting SADC a member states with implementation of the SADC transport protocol. For instance, one study has found that the private sector has tremendously contributed to the success of the Maputo Development Corridor.²⁶⁵ The advantage with the associations is continued dialogue and coordination, which in effect promotes joint operations. Through these joint operations, common rules and policies can be developed and applied to promote seamless connectivity of railways.

d) National Institutions

Most SADC members have accomplished initial establishment of national railway regulators.²⁶⁶ Established national institutions include: National Protocol Implementation Teams (N-PICTs) comprising national and sub-sectoral coordinators and their deputies; Core (sub-sectoral) groups, which bring together the national public and private sector stakeholders from government, regulators, service providers, users/consumers and labour led or driven by the sub-sectoral coordinators; National Protocol Implementation workshops (NIPWs) or coordination meetings combining key stakeholders from all sub-sectors; Micro Action Plans (MICAPs) establishment, implementation, monitoring and progress reporting; and National legal reform teams and other mechanisms. The institutions coordinate the implementation of members' commitments on a regional level.

However, most Member States have are yet to provide for private sector participation. The private sector is this not organised in strong national associations to enable it to participate effectively. The public sector has also suffered from lack of capacity to carry out the necessary

²⁶⁴ Makumbe R. (2001) *Supra* note 251

²⁶⁵ *Supra* note 182

reforms on its own, to enable establishment of a conducive environment for enhanced private sector development and involvement in the transport sector. Furthermore, domestic political and economic priorities tend to overrule countries' commitments to regional integration agendas as agreed within formal regional institutions.²⁶⁷

e) SADC Regional Development Fund (RDF)

SADC Governments are naturally the first point of reference for infrastructure financing.²⁶⁸ However, most face budgetary challenges due to scarcity of resources. Additionally, the political economy considerations that accompany the lengthy periods for developing of hard infrastructure projects affect choices of governments. Without regional collaboration or external assistance, small economies will not be able to develop their own infrastructures.²⁶⁹

SADC has therefore embarked on a programme of joint preparation and implementation of projects under the framework of the RIDMP. This will enable SADC governments to harness their efforts, including pooling potential sources of finance. Members also agreed to establish a joint Regional infrastructure Fund (RDF).

The RDF was proposed by the Conference in Maputo in 2012.²⁷⁰ The Fund would have an infrastructure window that would provide financial support for regional infrastructure projects. The objective of the SADC Regional Development Fund is to create a financial mechanism to mobilise resources from Member States, Development Partners and Private Sector to support regional development and deepening of regional integration.²⁷¹

Despite the supremacy of railway networks in SADC relative to the EAC, there are several challenges. Some of these largely contributed to the dismal performance of railway concessions

²⁶⁶ SADC Secretariat. (2011). Desk Assessment of the RISDP *supra* note 231

²⁶⁷ *Ibid*

²⁶⁸ This is acknowledged in the SADC Regional Infrastructure Development Master plan

²⁶⁹ *Supra* note 177

²⁷⁰ SADC Regional Development Fund Operationalisation: An update.' Presentation to the SADC Dfi Subcommittee Biannual Meeting Stuart Kufeni, Ceo, Dfrc 14th June 2013, Lusaka, Zambia. Available online at: http://www.sadc-dfrc.org/assets/files/publications/forum_zambia_2013/kufeni_forum_zambia2013.pdf (Accessed 12 may 2014)

²⁷¹ *Ibid*

in the region.

3.3.7. Challenges to railway concessioning in SADC

Despite SADC achieving better results from its concession processes relative to the EAC, concessioning processes in the region were not without challenges. An assessment of performance of concessioned railways in SADC concluded that a number of challenges followed the concessioning of some railways.²⁷² These challenges include: under-performance of the concessioned entities, declining state of infrastructure, and reduced business cooperation amongst railways in certain areas.²⁷³ The assessment identified several factors which were responsible for the dismal performance of railway concessions in SADC. These factors discussed in detail below included, *inter alia*: lack of enabling legislation in some states, lack of regulator prior to concessioning, grant of monopolies to some concessionaires and financing challenges.

a) Lack of an enabling national legislations

As discussed earlier, SADC Member States were required to establish supportive regulatory and legislative frameworks to support restructuring of their railways.²⁷⁴ However, some members did not enact enabling laws but proceeded with concessioning their railways. Failure by those countries for example Malawi, Mozambique, Zambia and to a lesser extent in Zimbabwe, to enact enabling legislation resulted in problems that affected operations. In Malawi for instance, the concessionaire was under the impression that everything would be sufficiently agreed upon and governed by the concession contract. However, some clauses were couched in ambiguous language, which led to conflicting interpretations and this disputes.

Similarly, Zambia's concession agreement did not have a clear distinction between what monetary expenditure amounted to 'investment' or 'maintenance' in terms of railways. This

²⁷² Phipps, L. 2011. Technical Report: SADC Railways Revitalization Policy Dialogue'. Submitted to: USAID/Southern Africa. Available online at: https://tis.sadc.int/files/6613/3069/3579/sadc_railways_revitalization_policy_dialogue.pdf (Accessed 3 March 2014)

²⁷³ Phipps, L. 2008. Technical Report: Review of the Effectiveness of Rail Concessions in the SADC Region' Gaborone. Available at: http://pdf.usaid.gov/pdf_docs/PNADU391.pdf (Accessed 3 March 2014)

became a source of dispute which invariably slowed the operations of the concession.²⁷⁵ In the absence of an enabling law, all rights and obligations, performance requirements and targets must be laid out in concession agreement. The language of the agreement must also be sufficiently unambiguous to leave no room for conflicting interpretations.

b) Lack of a regulators prior to concessioning

Some Member states namely: Malawi, Mozambique and Zambia which failed to establish a national regulator prior to concessioning their railways faced considerable regulatory deficiencies. Without a regional regulatory body, enforcement of the rights and obligations in the concessions became difficult. It has been argued that if there is no independent regulator as well as enabling legislation, each concession depends on the language of its contract to govern concession obligations. Yet, not all concessions regulate similar circumstances.²⁷⁶ This leads to fragmentation of rules, operations, practices and unfair competition.

c) Granting monopolies to some concessionaries

There were instances where a national concessionaire with cross-border linkages for example, in Zimbabwe, was granted monopoly powers unilaterally. This severely affected other competing players in the region's railway sector. Monopolistic tendencies resulted in distortion of freight charges thereby affecting overall traffic movement along railways. For example, due to monopoly practices in the DRC, there has been transfer of predominantly railway cargo to roads in an attempt by shippers to avoid unpredictable railway charges.²⁷⁷

d) Financing challenges

Funding for projects in SADC is the biggest challenge constraining implementation of railway projects. SADC requires enormous funds if it is to achieve its infrastructure agenda. For

²⁷⁴ Article 2.4 (I) of the Protocol on Transport, Communications and Meteorology 1996

²⁷⁵ *Ibid*

²⁷⁶ As discussed in chapter two

²⁷⁷ Ranganathan, R. and Foster, V. 2011 *Supra* note 125

example, the RIDMP has indicated that the transport sector requires \$100 billion for the various infrastructures, including railways. However, SADC faces several constraints in trying to raise these funds. The major constraints to financing are risks associated with regulatory gaps, political interventions (nationalisation and expropriation), coordination failure and frontier costs and risks.²⁷⁸

Suffice to note that investment in infrastructure in SADC done by national government. But, national governments are usually faced by competing interests which result in governments not being able to address all the infrastructure needs due to shortage of resources. Therefore the governments need to fully engage the private while at the same time; governments should harness their efforts on a regional level.²⁷⁹

²⁷⁸ Kharas H & K Sierra, 'Time for a Big Push on Infrastructure in Africa: What the G-20 Can Do' Policy Paper, 2011-08. Washington, DC: Brookings Institution, (2011). Available at: http://www.brookings.edu/~media/research/files/papers/2011/8/infrastructure%20africa%20kharas%20sierra/08_africa_infrastructure_kharas_sierra.pdf (Accessed 14 April 2014)

²⁷⁹ Dube, M. 'Donors Versus Investors in Southern African Infrastructure Development' PERISA Case Research 1 Infrastructure. ECDPM, (2013). Available at: <http://ecdpm.org/wp-content/uploads/2013-PERISA-CaseResearchResearch1-Donors-Versus-Investors-Southern-African-Infrastructure-Development.pdf> (Accessed 12 April 2014)

3.4 Lessons from the SADC region

This study has thus far established that despite the SADC facing similar challenges relative to those of the EAC in developing its railways, it has attained better railway development and connectivity than the EAC. The foregoing discussion has assessed features of SADC's legal and institutional frameworks governing railway development which can provide useful lessons to the EAC. These include; a protocols for operationalising regional treaties, private sector participation in infrastructure development, a robust framework for coordinated institutional operations, a regional infrastructure fund, coordinated corridor development and that efficiently nationally managed railways can perform better than concessioned ones.

3.4.1. Operationalisation/enforcement treaty provisions

SADC operationalised the provisions of the SADC Treaty and its transport objectives by creating the SADC transport protocol. Under the transport protocol, Member States have undertaken institutional and economic restructuring of their railways. This has, *inter alia*, accorded autonomy to railways; increased private sector involvement in railway development; enhanced operational synergy amongst the various railway service providers in the region; and promoted the establishment of an integrated railway transport system.

On its part, the EAC is yet to operationalise the salient provisions of the EAC Treaty which deal with railway development in an integrated manner. The EAC has enacted various treaties and agreements in order to operationalise the provisions of the EAC Treaty but this has instead left a fragmented legal framework with lots of gaps. The EAC needs to follow SADC's example by operationalising its EAC Treaty with a unified legal framework.

3.4.2. Framework for participation of private sector in infrastructure development

Participation of the private sector in SADC's infrastructure development plans is streamlined. A number of private sector associations for example, the Southern African Railways Association – (SARA), have been formed. The associations help coordinate efforts, mobilising resources and

implementation of joint infrastructures. It is easier to attract private firms if the regulatory environment is predictable and can guarantee profitable investment.²⁸⁰ For the EAC, its policies are not well streamlined with regards to private sector participation in railway development. Without a clear regulatory framework, private sector contribution to infrastructure development cannot easily be harnessed.

3.4.3. Joint institutional operations

SADC has an elaborate and more coordinated institutional and monitoring mechanism on both regional and national levels. SATCC-TU focuses on transport sector policy issues while SARA focuses on issues related with operational efficiency of rail corridors, interchange and fair competition between rail and road transport. Both play an important role in policy development and implementation at regional level and promoting and obtaining an integrated and efficient rail transport system for the region.

Furthermore, SADC's programmes are implemented in a more coordinated and phased manner through the RISDP framework. The RISDP provides a platform for coordinating Member States, the private sector and development partners towards fulfilling a common agenda. Through RISDP, SADC is able to draw up logical and achievable implementation plans premised on availability of resources. Most importantly, SADC prioritises the most critical infrastructures. SADC has a review mechanism for its programmes aimed reorienting unworkable ones due to changing circumstances and needs of the region. This is not clearly laid out in EAC's legal and institutional framework.

3.4.4. Regional infrastructure development fund

SADC also established the RDF with a pillar on transport infrastructure. The RDF provides a platform for members, the private sector and development partners to make targeted contributions. This helps pool resources in a more coordinated manner towards an agreed

²⁸⁰ United States International Trade Commission Investigation No. 332-477 USITC Publication 4071 April 2009 Sub-Saharan Africa: Effects of Infrastructure Conditions on Export Competitiveness, Third Annual Report USITC

common cause. EAC has a regional partnership fund which is yet to come realise the regional agenda.

3.4.5. Better coordinated corridor development concept

SADC's transport-corridor development concept also provides lessons for the EAC. The transport corridor concept provides for a mechanism to coordinate Member States' efforts. Most importantly, it provides for development of infrastructure in the entire SADC region. Yet in the EAC the transport corridor concept has concentrated more on trade facilitation aspects with less emphasis on revamping the region's physical transport infrastructure. Again, as discussed in chapter one, transport infrastructure development is mainly addressed in the joint infrastructure Summits of Heads of State and Government. The EAC should have an all-inclusive corridor development strategy. Furthermore, Special corridor management groups were set up to ensure smooth operations throughout different corridors.

3.4.6. Nationally operated railways can also perform efficiently

SADC has provided the lesson that not all governments should concession their railways if a country has or is capable of establishing strong and efficient national institutions and/or authorities that can manage railways better than private concessionaires. For example, the countries which never concessioned their railways to private sector players seem to perform better than those that concessioned. The example of Spoornet of South Africa and Botswana Railways of Botswana are clear lessons that EAC partners needed to do a thorough feasibility research before deciding whether to concession or merely revamp their railways.

3.5 Challenges that the EAC may face in implementing the best practices from SADC

The research discusses challenges that the EAC may face as well as how to overcome them. During the implementation of lessons from the SADC region, the EAC is likely to face several challenges which may be political, social or economic. This is because, despite the similarities discussed earlier in this chapter,²⁸¹ SADC and EAC are not homogeneous. They may face similar challenges but in different magnitudes. These challenges including: financing, multiple memberships, conflicting regional priorities and fear of loss of sovereignty. These are discussed in detail below.

3.5.1. Financial constraints

EAC Partner States vary in their level of development, resources at their disposal and success at establishing effective institutions. For examples, the LDCs²⁸² are incapable of generating additional revenues from their budgets to fund additional responsibilities of the region or setting up new institutions that a review may require them to. As discussed in chapter two, their budgets are often in deficits and are supported by external development partners.

The EAC's current account deficit as percentage of GDP in 2012 remained quite high, at 11.1 percent compared to an average of 3.5 percent in Sub Saharan Africa.²⁸³ The EAC's financial resources mostly emanate from the Treaty provisions. The EAC Treaty requires Partner States to contribute equally to the budget of the EAC in addition to contributions from development partners.²⁸⁴ It is common for some Partner States to delay remitting their contributions due to scarcity of resources. Moreover, sometimes, some of these Partner States request for waivers from their obligation to contribute.²⁸⁵ SADC faces similar challenges but, through concerted regional efforts, it manages to surmount them. If the EAC adopted SADC's model, this research

²⁸¹ See subsection 3.2

²⁸² Burundi, Rwanda and Uganda. *Supra* note 23

²⁸³ Bageine, S. Presentation of the budget of the East African Community for the Financial Year 2013/2014 to the East African Legislative Assembly. EAC Secretariat (2013). Available at: http://www.news.eac.int/index.php?option=com_docman&task=doc_view&gid=338&Itemid=152 (Accessed 1 May 2014)

²⁸⁴ Article 132(4) of the Treaty for the Establishment of the East African Community 1999.

²⁸⁵ In 2008 Burundi requested to pay only US\$ 1.7 million as budget contribution for Financial Years 2007/08 and 2008/09 due to unfavourable economic conditions (EAC Summit of Heads of State, 2008:3).

argues that it would also be able to surmount its financial deficits.

The EAC can surmount this challenge by improving financial management of resources within their territories. This will create more savings and enable them pool resources. The pooled resources can then be saved in a dedicated regional infrastructure fund. Furthermore, partners should engage more with the private sector and their diaspora to finance projects. Bankable PPPs and diaspora bonds can be used to raise funds. The cost of setting up new institutions can be reduced by sharing human resources in the region and setting up joint institutions or one-stop-service centres. Furthermore, the EAC should engage more with development partners by showing concrete results for previous funding. This way, the donor community can build confidence by showing value for money.

3.5.2. Multiple memberships

Each of the Partner States in the EAC belongs to at least two RECs. The most common groupings are; EAC, COMESA, IGAD and SADC. Moreover, the different RECs have conflicting programmes, targets and timelines. These create a strain on Partners' resources as well as implementation difficulties. SADC region also faces a similar problem of multiple-memberships whereby majority of its members, for example, Angola, DRC, South Africa, and Zambia also belong to the COMESA economic grouping. But it has still achieved better infrastructure developments. It appears that multiple groupings have not had a very big negative impact on SADC's infrastructure plans. Therefore, the EAC can also overcome this by eliminating inconsistencies created. Partner States should maximally exploit opportunities offered by the ongoing tripartite negotiations in the context of the Tripartite Free Trade Area among the COMESA, the EAC and the SADC. Partners should work towards harmonisation of programmes, policies and targets.

3.5.3. Conflicting priorities

EAC Partner State in the EAC is often faced with more pressing and urgent domestic challenges which directly compete with regionally agreed goals for the limited resources. The challenges consume a big chunk of their financial and human resources that would be expended on regional activities. This can be surmounted by Partner States pooling resources and sharing

responsibilities depending on capacity and need thereby exploit economics of scale. Furthermore, Partner States should agree to set achievable targets and sequence their projects from most critical to less. This is one of the principles envisaged in SADC's RISDP which has helped SADC Member States to surmount their individual financial challenges.

3.5.4. Fear of loss of national sovereignty

As discussed in chapter two, establishment of supranational institutions and laws, has meant that EAC Partner States feel threatened to lose national sovereignty over critical sectors of their economies. Therefore, institutions created may not be accorded the necessary authority to achieve the objectives of the EAC. A similar scenario has already manifested itself in SADC where the Zimbabwe Government ignored rulings of the SADC tribunal court. This eventually resulted in suspension of the Tribunal by the SADC Summit. To allay these fears, research by Arnold, J²⁸⁶ provides useful lessons. The author proposes a phased process of ceding some state powers to the supranational authorities through consensus. The process, he argues, should start with those areas that provide mutual benefit to all Partner States.

This research argues that since EAC Partners are already negotiating a political federation which will require ceding some powers to the EAC,²⁸⁷ ceding some degree of national sovereignty to supranational authorities should be seen as a step towards the ultimate goal. Furthermore, the process for making the supranational laws ought to be fully consultative involving representation from all Partner States and interested stakeholders. This will ensure ownership of the process and the resultant legal framework which will offer better chances of enforceability of its enforceability.

3.6 Concluding remarks

Despite the SADC having similar policies, laws and institutions and, facing challenges relative to those of the EAC in the railways subsector, it has achieved better levels of railway development and integration. This is primarily attributed to building stronger institutions and ensuring more

²⁸⁶ Arnold, J. (2006) *Supra* note 41

²⁸⁷ Article 5(2) of the EAC Treaty sets political federation as the ultimate goal of EAC integration processes. See also EAC Secretariat.

efficient enforcement of its policies and laws. The EAC therefore has valuable lessons to learn from SADC's best practices. At the same time, the EAC should not merely transplant SADC's best practices to the community. The best practices could have worked in a different Southern African environment but not compatible to the circumstances of the EAC. Therefore, great care should be taken to modify them to adapt to EAC's peculiar circumstances while at the same time putting in place safeguards to avoid similar mistakes that have slowed progress in the SADC.

CHAPTER FOUR

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

4.1 Introduction

This chapter presents a summary of the findings and conclusions from the study. It identifies the problem that made this study necessary; and the main research methods that were used to find solutions to the problem. It also discusses the implications of the chosen methodology on the research. Following the findings and conclusions, the research makes recommendations.

4.2 Summary of findings

The findings of this research mirror the principle objectives of the research which was to show the significance of efficient legal and institutional frameworks in facilitating cross-border railway development in the EAC. Therefore the findings respond to the research questions that were posed in chapter one. The questions were instigated by the researcher's a general observance of a failure by the EAC to surmount its transport infrastructure bottlenecks.

The research was premised on the assumption that creating efficient legal and institutional frameworks to regulate cross-border transport infrastructure projects will enable the EAC to surmount deficits in its regional railway networks.

In chapter two, the research sought to determine the validity of the assumption in the preceding paragraph by carrying out a desk assessment of the legal and institutional framework governing cross-border railway development in the EAC. It also reviewed the institutional frameworks mandated to enforce those laws and policies in the EAC. Major treaties, agreements and national laws of partner states which govern railway development were reviewed.

In chapter three, a comparative study of the SADC's legal and institutional frameworks that govern cross-border railway development was also undertaken. The purpose of comparing SADC's legal and institutional frameworks governing railways to those of the EAC was to prove

that establishment of an efficient legal and institutional framework coupled with effective implementation can actually promote the development of efficient, integrated and sustainable cross-border railways.

Suffice to note that preliminary background information discussed in chapter one indicated that following the EAC's attainment of greater market integration, trade and investment increased in the region. This resulted in increased growth and production. Increased growth and production resulted in increased movement of goods, people and other factors of production. However, progress in market integration was not matched in the transport infrastructure sector. Therefore the transport infrastructures remained insufficient to satisfy demand. This resulted in increased pressures on EAC's surface transport infrastructure. EAC therefore set out to address the transport infrastructure bottlenecks.

The concerted efforts by EAC Partner States and their development partners to improve the railway situation have not yielded desired results. This is because much effort has been exerted on addressing the 'hard' infrastructures bottlenecks without corresponding improvement of the 'soft' infrastructure bottlenecks. Yet, the research argued, 'soft' infrastructure bottlenecks are the major impediments to the success of hard infrastructures. This research identified the major soft infrastructures bottlenecks in EAC railways to be inefficient legal and institutional frameworks.

Following a critical evaluation of the efficacy of legal and institutional frameworks, the major findings from the research are summarised below.

4.2.1 Lack of clarity of rights and duties

The research found that there is lack of clarity of rights and duties of states in the EAC's principal law, the EAC Treaty, which governs cross-border railway development. The EAC Treaty does not clearly define the rights and duties of Partner State in jointly implemented infrastructure projects. Much as the treaty provides a basis for Partner States' cooperation in infrastructure development, the provisions in their form are not legally enforceable against Partner States. Therefore, judicial enforcement of violations is very difficult. State to state

dispute settlement is not provided for by the Treaty. States that violate Treaty provisions are seldom sanctioned. Moreover, no dedicated protocol or law exists to operationalise the transport-infrastructure-related provisions of the Treaty. By comparison, the SADC passed a dedicated and legally binding Protocol on Transport which sets clear rights and obligations of partners in infrastructure development.

4.2.2 Regulatory gaps

There are regulatory gaps for some critical aspects of railway revitalisation in the EAC. Burundi, Rwanda and Uganda have not enacted proper laws to streamline the participation of the private sector in infrastructure development and govern PPPs as a policy tool for resource mobilisation. In addition, some railway reserves are occupied by illegal settlers. These have to be resettled if work is to proceed. However, resettlement especially on No-Mans-Lands along shared borders are not clearly regulated which may make evictions difficult and expensive. SADC region on its part has an elaborate framework for participation of the private sector in railway development.

4.2.3 Lack of legal harmonisation

Lack of harmonised laws was also identified as a constraint to development of integrated regional railways. EAC partners have two conflicting operational legal systems. Kenya, Tanzania and Uganda operate a common law system while, Burundi and Rwanda operate a civil law system. The legal systems contain disparate procedures and standards which constrain smooth implementation of projects. For Partners operating a similar legal system, disparities within their national laws were identified. For instance, the procurement laws of Kenya, Tanzania and Uganda are different in terms of threshold levels; technical specifications; administrative specifications such as time limits, contract splits, number of bidders, and treatment of local companies. For instance while Kenya and Tanzania provide a 15% preferential treatment for local companies. Burundi, Rwanda and Uganda are yet to streamline this provision in their laws.

4.2.4 Weak institutional capacity

Weak institutional capacity was identified as the major institutional challenge. Weakness of institutions is caused mainly by three factors namely: lack of decision making authority; poor funding and lack of technical capacity. The institutions created are not granted enough powers to make decisions to implement their mandates. Most decisions are reserved for the Ministerial Committees, but these are most often driven by political considerations of their governments. Additionally, shortage of funding is a perennial problem. The major source of funding is member states contributions but, these usually come late. The LDC Partners are usually faced with budgetary deficits which affect their ability to meet their contributory obligations. Lack of technical capacity on the other hand results from low levels of specialists on technical details of project implementation.

4.2.5 Disparate operations

The research also found that disparate operations by the different railways in the region constrain the development of integrated cross-border railways. Despite their regional outlook, the KRC, TRC and URC operate distinct of each other. Moreover, two incompatible railway gauges exist in the region. Efforts to develop a harmonised standard gauge through the Standard Gauge Railway Agreement are yet to be embraced by all the partner states. The agreement is only enforceable between Kenya and Uganda. Moreover, there is no single regional railway regulator. The proposed East African Railways Authority is yet to be established. For SADC region, the SATCC and SARA act as umbrella bodies to coordinate joint operations of different railways in the region. It is therefore easy to develop common understanding and set common standards which ensure seamless operations.

4.2.6 Unfavourable concessioning arrangements

The research also found that the concession processes as a policy tool for funding and efficient management of the EAC's railways resulted in unfavourable positions for EAC Partner States. It seemed that there were no thorough feasibility studies regarding the capacity of the

concessionaires (RVR) for the Kenya and Uganda railways as well as that of Tanzania, to execute their mandates. Additionally, the concession agreements for Kenya and Uganda granted enormous monopoly powers for the concessionaire in the railway sectors. This continues to constrain the capacity of the governments to introduce other players, despite the dismal performance of the concessionaires. Moreover, whereas other countries reviewed their railway-related laws, Uganda relied on the PERD Act to accomplish the concessioning process. Yet, the PERD Act does not govern concession operations. Similarly, those countries in SADC which did not enact enabling law prior to concessioning their railways face similar challenges faced in the EAC.

4.2.7 Inefficient funding mechanisms

The research further found that EAC is affected by inadequate funding mechanisms for railway development. There is no coordinated joint infrastructure fund where Partner States, development partners and the private sector can pool and dedicate funds specifically for infrastructure development. Contributions by countries and their development partners usually come late. Moreover, funding from donors does not sometimes mirror the needs of the recipient countries. This has constrained the effective and timely implementation of infrastructure projects. In contrast, SADC established a dedicated regional development fund where Member States, their development partners and the private sector can pool dedicated resources for railway development.

4.3 Conclusions of the research

On the strength of the findings in the preceding chapters, it suffices to say that EAC's legal and institutional frameworks fall short in facilitation of development of integrated and seamless cross-border railways in the region. Unless the EAC addresses these legal and institutional bottlenecks, development and operation of sustainable, integrated and seamless railways will not be achieved in the region.

Various initiatives to address infrastructure bottlenecks in the EAC have thus far failed to enable the EAC to surmount these problems because of a weak legal and institutional framework. Weak legal and institutional framework has led to disjointed operations, resulting in lack of enforcement of laws and lack of execution of mandates of the EAC. As a result, there is wastage of resources and the continuation of deterioration of regional infrastructures.

From the analysis of SADC's progress, the research concludes that efficient legal and institutional frameworks are a pre-requisite for efficient implementation of railway infrastructure programmes. Credible private investors can be attracted if legal and institutional frameworks are sufficient and can guarantee profit. It also gives confidence to international financing institutions as well as other development partners.

Weak legal and institutional frameworks may perpetuate laxity among Partner States if the enforcement mechanisms are not strong enough. And if the laws do not clearly spell out the rights and obligations of members, all members may fail to perform a function that benefit others on the presumption that another member state will perform it.

If laws and institutional operations are not harmonised, disparate implementation of regional projects will result. This will lead to disintegrated railway systems, thereby cause further difficulties in crossing borders by railways.

EAC's efforts to develop its railways are not only affected by legal factors. Other political and economic factors equally affect its efforts. Nevertheless, an efficient legal framework may help address other challenges that would otherwise arise in a lawless environment.

4.4 Recommendations of the research

From the conclusions of this research, it is imperative that the problems identified by this research be addressed to overcome the transport infrastructure bottlenecks. The research therefore makes the following recommends for improvement.

4.4.1 Legal review

The EAC should carry out a legal review of the existing legal frameworks to provide for clarity of rights and obligations of states, clear enforcement mechanisms and fill the missing gaps. Environmental issues with cross-border effects and resettlement along No-Mans-Lands should be addressed. Burundi, Rwanda and Uganda should fast track the enactment of their PPP laws to provide for a clear framework to regulate private sector participation in infrastructure projects. Furthermore, countries without updated laws to regulate execution of concessions should update those laws to provide for clear rights and obligations of the concessionaire as well as the governments.

4.4.2 Harmonisation of legal frameworks

EAC Partner States should harmonize their laws to create uniform standards governing various processes in railway development. Procurement standards and processes should be harmonised and simplified with a view to providing for joint procurements in the event of a joint project. The EACT Treaty under its Article 126 mandates Partner States to harmonise their laws.

4.4.3 Harmonise railway operations

EAC should harmonise railway operations. Other Partner States ought to accede to the Standard Gauge Railway Agreement, operate one gauge and share resources to benefit from economies of scale. Partner States should share resources to benefit from economies of scale. The EAC should set up a logical implementation program necessary for achieving the region's broader goals. Common technical, operating and safety standards need to be established and enforced in order for railways to operate across borders. The formulation of a multilateral regional business

agreement between railways needs to be negotiated to facilitate migration from the existing constraints of bilateral agreements.

4.4.4 Establish supranational institutions

The operation of the established EAC Railways Authority (EARA) should be fast-tracked. The EARA should be clothed with sufficient supranational powers to enable it issue binding rules and regulations on Partner States or their national railway regulators. Partner States should particularly confer decision making powers to the EARA in matters of common regional benefit. The EARA should handle especially matters that are often beyond the jurisdiction of Partner States' national railway regulators. The national railway authorities should be affiliates to this organisation and should derive their mandate from this organisation. But most importantly, Partner States should be willing to comply with the EARA's decisions.

4.4.5 Establish a dedicated regional infrastructure fund

There is a need for a dedicated regional infrastructure fund particularly dedicated for transport infrastructure development. The infrastructure fund should be contributory and also open to donor contributions as well as private sector actors. The infrastructure fund needs to be managed by independent auditors who can guarantee safe custody and accountability. Currently, contributions and user fees collected from members go into the general pool of revenues for the Community. Similarly, on a national level, revenues collected from user fees are also deposited with the respective Partner States' Revenue Authorities. The commingling of revenues makes it difficult to align revenue and expenditure. In the alternative, the existing road funds should be given more mandates to source funds for railway development, on top of those for roads development.

4.4.6 Address issues of multiplicity of memberships

EAC Partners should address the issue of multiplicity of Members under the framework of the

Tripartite Free Trade Area negotiations. Partners should agree on common interests relative to infrastructure development within all their groupings and concentrate on those.

4.4.7 Human capital development.

Partner States should increase joint training programmes for staffs employed in institutions that implement regional projects. Alternatively, establishing one-stop-centres where individuals can offer services across a section of institutions may help bridge the human resource gaps that may be affecting one of the partner states.

4.4.8 Explore multimodal transport development

The EAC should promote initiatives that encourage interconnection between roads and railways to benefit from economies of scale. This would mean setting up joint institutions to manage both road and railway transport. In the alternative, there should be cross-linkage between railway operators and roads operators. This may alleviate the problem of wasteful competition and monopolistic tendencies.

4.4.9 Renegotiate or terminate failing concessions

Finally, concessionaires that have failed to fulfil their obligations should have their agreements re-negotiated or terminated. The renegotiated agreements should clearly define the roles and responsibilities of the concessionaire and government in relation to infrastructure rehabilitation and investment. The agreements should provide for clear avenues when governments can be allowed, at least, limited introduction of other private players on the same trunks being operated by the concessionaire. This should be so especially when national or international obligations so dictate. Article 91 (1) (m) of the EAC enjoins Partner States to “take measures to facilitate thorough working of trains within the Community”. If the concessionaire persistently fails to perform, the concession should be terminated. For any new concession to be concluded, comprehensive feasibility research be carried out.

4.5 Concluding remarks

With the increased tariff liberalisation in the world today, it is only practical that for EAC region's products to be competitive on the world market they are produced at lower cost, reach the world markets on time and in good shape. Since the EAC has achieved much of the tariff liberalization, the region still has enormous potential in reducing its transport deficits which will help cut down transport costs, resulting in reduction in the cost of goods as well as timely access of world markets. Constructing efficient, integrated and seamless railways will go a long way in connecting the landlocked countries of the region to world markets.

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