

**UNIVERSITY OF PRETORIA
CENTER FOR HUMAN RIGHTS
INTERNATIONAL DEVELOPMENT LAW UNIT**

**CHALLENGES AND OPPORTUNITIES IN DEVELOPING A COMMON LEGAL AND
REGULATORY FRAMEWORK ON ENERGY IN EAST AFRICAN COMMUNITY**

By:

Sandrine MUNEZERO BUZINGO

21837016

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Supervisor:

Dr Jonathan R. Kabre

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DECLARATION

I, Sandrine MUNEZERO BUZINGO, do hereby declare that “Challenges and opportunities in developing a common legal and regulatory framework on energy in EAC” is my original work and has not been submitted for any degree or examination in any other university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in this dissertation, all the materials and sources used have been duly and properly acknowledged.

Supervisee:
Sandrine MUNEZERO BUZINGO
Signed.....
Date.....

Supervisor:
Dr Jonathan R. Kabre
Signed.....
Date.....

DEDICATION

I dedicate this work to my late father. Your eternal support, daddy, remains forever in my heart.

ACKNOWLEDGEMENT

I am grateful to the Almighty God for life, good health, and provisions to pursue my dreams. You have made way for me and given me strength and guidance to complete this work. I am forever thankful.

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LIST OF ABBREVIATIONS

AfDB	African Development Bank
AU	African Union
CU	Customs Union
CM	Common Market
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EAMU	East African Monetary Union
EACU	East African Customs Union
EACM	East African Common Market
EWOWAS	Economic Community of Western Africa States
EACJ	East African Court of Justice
EALA	East African Legislative Assembly
EACREEE	EAC Centre for Renewable Energy and Energy Efficiency
EAPP	Eastern Africa Power Pool
EACA	East African Community Competition Authority
EADB	East African Development Bank
ECT	Energy Charter Treaty
ESIA	Environmental and social impact assessment
ECREE	ECOWAS Regional Centre for Renewable Energy and Energy Efficiency
ERERA	ECOWAS Regional Electricity Regulatory Authority
EREP	ECOWAS Renewable Energy Policy
EEEP	ECOWAS Energy Efficiency Policy
EREI	ECOWAS Renewable Energy Investment Initiative
ECOREX	ECOWAS Observatory for Renewable Energy and Energy Efficiency
EREF	ECOWAS Renewable Energy Facility
ECOW-GEN	ECOWAS Programme on Gender Mainstreaming in Energy Access
EE	Energy efficiency
GHG	Greenhouse gas
GATT	General Agreement on Tariffs and Trade

GATS	General Agreement on Trade in Services
ICSID	International Centre for Settlement of Investment Disputes
IEC	International Energy Charter
IGAD	Intergovernmental Authority on Development
IPA	International Project Agreement
MFN	Most-favoured nation
MDGs	Millennium Development Goals
MIGA	Multilateral Investment Guarantee Agency
NEPAD	New Partnership for Africa's Development
NT	National Treatment
PIDA	Programme for Infrastructure Development in Africa
RECs	Regional economic community
RE	Renewable energy
SDGs	Sustainable Development Goal
SADC	Southern Africa Development Community
SME	Small and Mid-size Enterprises
SDO	Strategic Development Objectives
SE4ALL	Sustainable Energy for All Initiative
UN	United Nations
WBG	World Bank Group
WTO	World Trade Organisation
WAPP	West African Power Pool
WAGP	West African Gas Pipeline
WAGPA	West African Gas Pipeline Authority
WAPCo	West African Gas Pipeline Company limited

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CHAPTER I: INTRODUCTION

1. Background to the research

One of the major areas in the development of a country is a solid and reliable energy sector. Indeed, energy is a driver of socio-economic development and one of the major areas challenging for States.

For example, more than half of Sub-Saharan Africa has very limited access to energy, which constitutes almost three-quarters of the global deficit.¹ Therefore, countries should ensure energy policy development to facilitate the population's access to modern energy, especially in rural locations where a significant part lives without energy for basic life needs such as cooking, heating, and light.²

Globally, the United Nations has determined an agenda to ensure the sustainable development of nations. Among the agenda's goals, energy is included as a Sustainable Development Goal (SDGs). Indeed, the seventh SDG aims at ensuring access to energy for all. Nevertheless, only 46% of the population in Sub-Sahara have access to electricity.³

On the African Continent, the African Union (AU) Agenda 2063 has infrastructure development as one of the leading objectives to tackle the infrastructure challenge (including energy). In this regard, the Energy Development Strategies and Initiatives in Africa's objective are to raise energy access and enhance livelihoods while ensuring a sustainable environment for the African people.⁴

In addition, the AU Commission, in partnership with the United Nations Economic Commission for Africa, African Development Bank (AfDB) and the New Partnership for Africa's Development (NEPAD) Planning and Coordinating Agency, launched the Programme for Infrastructure Development in Africa (PIDA). Indeed, the program focuses on regional projects and programmes and aims to close the infrastructure gap, therefore, increase Africa's competitiveness in the global market through a common framework. Further, the initiative emphasises the importance of regional integration to support the economic development of Africa.⁵

¹ World Bank Group 'Report: Universal Access to Sustainable Energy Will Remain Elusive Without Addressing Inequalities' World Bank Press release on 7 June 2021 available at <https://www.worldbank.org/en/news/press-release/2021/06/07/report-universal-access-to-sustainable-energy-will-remain-elusive-without-addressing-inequalities> (accessed 7 November 2021).

² A Wawryk 'International energy law: an emerging academic discipline' in P Babie & P Ledbeter (eds) *Law as change: engaging with the life and scholarship of Adrian Bradbrook* (2014) at 248.

³ United Nations Foundation 'Sustainable development goals' available at <https://unfoundation.org/what-we-do/issues/sustainable-development-goals/> (accessed 7 November 2021).

⁴ African Union 'Energy' available at <https://au.int/en/directorates/energy> (accessed 7 November 2021).

⁵ African Union 'Programme for Infrastructure Development in Africa' (2012) at 2 available at https://www.icafrica.org/fileadmin/documents/PIDA/PIDA%20Executive%20Summary%20-%20English_re.pdf (accessed 7 November 2021).

Therefore, a common framework for achieving infrastructure development goals, especially energy, is highlighted in different suggested strategies and initiatives to achieve AU Agenda 2063 and a regional approach promoted.

For this purpose, African regional economic communities (RECs) considers in their agenda energy development. The East African Community (EAC), like many other RECs is concerned and has to deal with energy challenges impeding its development.

The EAC is composed of six Member States, which is Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. The ultimate objective of EAC is to achieve a political federation.⁶ To achieve this goal, the Community has established a customs union (CU) protocol, a common market (CM) protocol, and an agreement on the EAC monetary union.⁷

One of the significant indicators of the EAC's energy sector is its lowest per-capita electricity production and coverage on the African continent. Further, the elaboration of an overall regional strategy for a power pool is falling behind, while the Community faces challenges such as limited energy production and coverage, high pricing costs, and biomass energy use instead of modern energy.⁸

For example, the EAC Energy Security Framework states that:

"Biomass energy is the primary energy source in the EAC. In Burundi, over 90% of the population rely on firewood and charcoal as a source of cooking energy. Over 82% of urban and 34% of rural population of Kenya rely on charcoal, and firewood is the preferred source of cooking energy for 89% of the rural population. In Rwanda, 85% of the energy used is in the form of biomass, and over 88% of rural households rely on wood fuel as a major source of energy. All rural households and about 98% of urban households in Uganda rely on biomass energy for cooking. Similarly, wood energy accounts for 90% of Tanzania's overall energy supply, and 75% of cooking energy in Zanzibar."⁹

The main indicators of economic growth and development include the type, level and intensity of commercial energy consumption in the region.¹⁰ Even if the energy situation is critical, the Community considers energy in its development agenda since the beginning through the Treaty for establishing the EAC (EAC Treaty) where the States will is expressed.

The EAC Treaty states that *"the objective is to develop policies and programs to widen and deepen cooperation among the Partner States"*.¹¹ Specifically, regarding energy, the EAC Treaty states that *"the Partner States shall adopt policies and mechanisms to promote the efficient exploitation, development, joint research and utilisation of various energy resources available within the region"*.¹²

⁶ The Treaty for the Establishment of the East African Community, signed on 30 November 1999, entered into force on 7 July 2000, as amended on 14 December 2006 and 20 August 2007, (hereafter, EAC Treaty), Art 5.

⁷ EAC Overview available at <https://www.eac.int/overview-of-eac> (accessed 7 November 2021).

⁸ East African Community 'East African Community Energy Security Policy Framework' (2018) (Hereafter EAC Energy Security Policy) at 28.

⁹ As above (n 8) 16.

¹⁰ East African Community 'East African Community VISION 2050' (thereafter, EAC Vision) (2015) at 53.

¹¹ Art 5, EAC Treaty.

¹² Art 101, EAC Treaty.

Therefore, harmonisation of policies and frameworks is one of the EAC integration and development process pillars emphasised in the EAC Treaty and reflected in the EAC Vision 2050. Indeed, the Vision states that its objective is *to enhance coherence and harmonise the policy, legal, and implementation frameworks of the EAC Partner States consistent with the EAC integration agenda*. Further, the Community's vision considers energy as a key enabler and pillar.¹³

Accordingly, the fulfilment of the economic visions of the EAC Partner States involves an energy sector shift from being a barrier to development to being a driver of development and economic transformation.¹⁴

Even though the EAC considers energy among the enablers of economic development, the region has not set a proper legal and regulatory framework for energy within the Community impacting energy sector development. For example, the Economic Community of Western Africa States (ECOWAS) and the Southern Africa Development Community (SADC) have developed a common legal and regulatory framework for energy access and economic development.

In light of the above, this research seeks to examine the legal factors impeding the EAC's energy sector development to increase energy access and energy trade and investment. In addition, it will also seek to extract lessons, if any, from the ECOWAS experience, the most updated and advanced RECs in regional energy cooperation, to establish eventually a common legal and regulatory framework in EAC.

2. Problem Statement

The EAC has undergone overall economic transformation and growth over the last decade. Nevertheless, low energy generation capacity remains a significant barrier to the region's growth.¹⁵

The development of the energy sector would be a factor of growth and transformation. Indeed, sustainable socio-economic development in the EAC will require an increase in energy capacity and access to affordable energy. However, the region faces energy security challenges in the biomass, electricity, oil and gas sectors, even if the region has significant potential in the same. One of the main challenges in the sector is the lack of a common legal and regulatory framework.¹⁶

According to AfDB, *the lack of consistency across legal and regulatory frameworks impedes regional integration and development of effective power pools. Therefore, the extent to which governments and their operators can define common legal and regulatory frameworks is critical for the efficiency of regional energy trading systems.*¹⁷

In this regard, the EAC Secretariat proposed the EAC Energy Security Framework in 2018 to provide policy guidance. However, the document is not a binding policy document and aims to propose guidance to the States to take action in the energy sector. Therefore, it is tentative to

¹³EAC Vision (n 10) 88.

¹⁴ EAC Energy Security Policy (n 8) 22.

¹⁵ As above.

¹⁶ As above.

¹⁷ African Development Bank Group 'Energy Sector Policy of the AfDB Group' (2012) at 36.

resolve the lack of a legal and regulatory framework in the region's energy sector.¹⁸ As a result, the region's lack of a legal and regulatory framework impacts trade and investment in the energy sector.

Therefore, it is important to seek a solution to address energy deficit and access through a common legal and regulatory framework that would attract investors and traders by offering predictability and security for investment and trade in the sector for local investors, foreign direct investment and public-private partnerships.

3. Research Questions

From the foregoing analysis, this study seeks to answer the following questions:

1. What is the legal and regulatory landscape for energy in EAC?
2. What is the legal framework for energy in EAC?
3. What are the challenges facing energy regulation in EAC?
4. Which lessons can EAC draw from the ECOWAS experience in the regulation of energy?

4. Objectives of the study

The overarching objective of this study is:

1. To explore and examine the legal and regulatory for energy in EAC.
2. To demonstrate the consequences of inadequate regulatory framework to energy trade and investment.
3. To itemize the rationale for a common framework to enhance energy production and investments into energy projects in EAC.

5. Significance of the Research

Energy is an essential element with a significant impact on people's well-being and a country's economy. Indeed, energy is a fundamental factor in real and sustainable development, and its lack has a major impact on the nation as a whole and in the context of this research on the EAC region.

Further, energy makes possible the realisation of numerous things in all aspects of life: health, transport, trade, finances, and industries, among others utilities. Further, energy is the main key to the success of every country as well as for every human being. It is more than a commercial product; it is a human right. Therefore, the lack of energy impedes the improvement of many economic sectors.

The EAC, a community that aims for complete integration, should consider this vital aspect that can help achieve the goals fixed as a community in the same way that the common legal instruments on trade and customs have helped increase the region's economic growth. In the same way, energy could increase the transformation of our economy and accelerate our development.

¹⁸ EAC Energy Security Policy (n 8).

In this regard, the EAC Vision 2050 take into account the seventh SDG related to energy.¹⁹ Accordingly, the EAC Treaty, EAC Vision and Sustainable Development Goals could be the foundation for a legal framework to ensure the achievement of the objectives while strengthening the integration process.

6. Literature review

Energy access is important to the sustainable development of a state, and its lack has a great impact on citizens' lives. Therefore, the importance of energy access for all is often a major element of the development agenda in EAC, Africa and globally.

On the Continent, the African Union Agenda 2063 seeks to develop an efficient and appropriate infrastructure to improve the growth of economies in the Continent and increase integration. Indeed, infrastructure and energy development is one of the goals assigned to the agenda translated through the Programme for Infrastructure Development in Africa (PIDA), which has a mandate to provide a common framework for African Stakeholders to build infrastructure; energy is one of the major areas.²⁰ In the light of the above, it appears that developing a common framework on energy is essential to achieve the goal defined to improve infrastructure in Africa.

In addition, EAC Vision 2050 define the main priorities to achieve as a community and among them the development of the energy sector and seeks to *ensure a sustainable, adequate, affordable, competitive, secure, and reliable energy supply to meet regional needs at the least cost while protecting and conserving the environment. The region will emphasise access, capacity, efficiency and sustainability of energy.*²¹ Moreover, the EAC Vision 2050's overall objective is *to enhance coherence and harmonise the policy, legal, and implementation frameworks of the EAC Partner States consistent with the EAC integration agenda.*²²

Regarding the provisions of the legal instruments in EAC above, it is clear that enhancing the regional integration through harmonisation of the framework is one of the main pillars of EAC. Accordingly, harmonisation is explicitly reflected in the EAC Treaty and emphasised in the CU and the CM.²³ Therefore, harmonisation of the legal and institutional framework for the energy sector within the EAC is a key factor in driving the integration process.

Furthermore, a study report of African Development Bank (AfDB) has stated that the harmonisation process can provide substantive benefits:

*“Firstly, harmonisation of frameworks can potentially make operational processes more effective and efficient. Secondly, it could also improve the perception of the region as a stable and predictable area for investments. Finally, harmonisation will underpin the institutional and political process of developing the Community.”*²⁴

¹⁹ EAC Vision (n 10) 35.

²⁰ African Union 'Infrastructure & Energy Development' available at <https://au.int/en/infrastructure-energy-development> (accessed 7 November 2021).

²¹ EAC Vision (n 10) 53.

²² EAC Vision (n 10) 88.

²³ Art 5, EAC Treaty.

²⁴ African Development Bank Group 'Study Report on Harmonisation of Petroleum Policies, Legal, Regulatory and Institutional Frameworks in the East African community' African Natural Resources Center (2018) at 8.

In the light of the AfDB report, a harmonised framework within the Community could improve the stability perception. Moreover, a common framework within six countries to implement the same procedures could increase the region's credibility to remain stable.²⁵ A harmonisation is an important tool for fostering cooperation, integration and economic development within EAC.

According to Aleem Tharani, EAC Partner States need to harness the regional integration and harmonisation of policy and laws while ensuring that all Partner States harness energy and power.²⁶ Therefore, it is vital to have binding legal documents to enhance the development of the energy sector and attract investment, from private investors, foreign direct investment, and private-public partnerships.

Further, knowing the country's legal and regulatory framework is essential market insight. As Kodjo (2019) explained, *private investors will review some critical information to understand the country's legal and regulatory framework, the power sector policy, the general enabling environment, and the creditworthiness of the off-taker before making an investment decision.*²⁷ Therefore, the development of a common legal and regulatory framework within EAC will benefit the development of the energy sector.

According to Witness Simbanegavi, building or enhancing regulatory and institutional frameworks and designing appropriate policies and incentives should support investment, innovation, and thus growth in these sectors, engendering broad-based economic growth. However, inadequacies in productive infrastructure like energy and deficiencies weigh Africa's growth potential and impede structural transformation. Indeed, electricity is one of the most binding constraints to structural transformation in the region, particularly in industrial development and the manufacturing sector.²⁸

According to Mark Olsthoorn and others, regulatory and general economic risks tend to be higher in developing countries, and a lack of technical energy infrastructure may result from regulatory failure. Among other barriers to investment, prevailing practice or existing regulatory or policy requirements impedes and prevent a project activity.²⁹

According to Edna Sussman, the experience has shown that *an enabling domestic and international investment environment is fundamental to fostering domestic and foreign private investment and that bilateral/multilateral investment treaties may promote private flows by increasing legal stability and predictability.*³⁰

According to Robert F. Ichord, *developing countries should build sound policy, legal, and regulatory frameworks and institutions to attract investment in the electric power sector.*

²⁵ As above (n 24) 52.

²⁶ A Tharani 'Harmonization in the EAC' *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Emmanuel Ugirashebuja et al (eds) Brill (2017) at 486 available at <http://www.jstor.org/stable/10.1163/j.ctt1w76vj2.34> (accessed 7 November 2021).

²⁷ G Kodjo 'Success Factors for Power Project Development Businesses in Sub-Saharan Africa' Walden University (2019) at 68-70.

²⁸ W Simbanegavi 'Expediting Growth and Development: Policy Challenges Confronting Africa' *Journal of Development Perspectives* (2019) Penn State University Press at 53.

²⁹ M Olsthoorn and others. 'Barriers to energy efficiency in developing countries industry sectors: empirical evidence from clean development mechanism projects' *The Journal of Energy and Development* (Autumn 2016 and Spring 2017) International Research Center for Energy and Economic Development at 196.

³⁰ E Sussman 'A Multilateral Energy Sector Investment Treaty: Is it Time For a Call for Adoption by All Nations?' *The International Lawyer* (FALL 2010) American Bar Association at 946.

Furthermore, policies should be embodied in laws in a way that provides clear direction without delving into implementing regulations. Indeed, if properly constituted, energy regulatory authorities can provide a measure of continuity and stability in the constantly changing political landscape in the developing world. Thus, the key issue is to scale up the system and provide a common framework for financing within a clearly defined legal and technical framework. In addition, the development of regional regulatory organisations and frameworks for cross border trade and market coupling is essential.³¹

In light of the above, the assumption to develop a common legal and regulatory framework is supported as both pieces of literature seek a harmonisation and common framework, especially at a regional level.

A common legal and regulatory framework can be one of the best ways to address the energy-deficient and the current weakness framework by concluding a protocol on energy as the Community did for the Customs Union and the Common Market. Moreover, it improves the implementation of the directives as they limit disparity and ensure a conform application among the member states.

A common legal and regulatory framework will improve the region's attraction for investment and strengthen the integration process. In addition, it could better address some transboundary challenges like climate change, environmental protection, and human rights in energy projects.

For this purpose, a lesson can be learned from other RECs in Africa, such as ECOWAS, who improved their framework and addressed the energy deficit by conforming to international standards.

Within this context, the dissertation seeks to critically analyse EAC's legal and regulatory framework and the foundation of a common framework on energy in the Community.

7. Research Methodology

The research shall adopt a desktop, library-based qualitative research methodology. Primary source, including the EAC Treaty, the EAC Customs Union Protocol and the Protocol on Common Market, and secondary source materials will be consulted and analysed, including the various energy legislation, regulation and policy instruments in EAC and RECs in Africa, and international legal texts related to energy.

The research will analyse the ECOWAS Energy framework to determine if they are lessons to learn from it. The ECOWAS was chosen because it has the most updated and advanced energy framework.

The research will also consult secondary sources books, policy reviews, reports, journals, articles, plans and other sources.

8. Limitations of the study

The research will focus on the legal and regulatory frameworks as an impediment to EAC's investment in the energy sector. Accordingly, it will cover only legal and regulatory aspects that

³¹ R F. Ichord, 'THE STRATEGY, "Transforming the Power Sector in Developing Countries" ' Atlantic Council (2016) at 5.

impact energy investment and suggest how a common legal and regulatory framework can be implemented.

Accessing online the updated documentation and statistics on energy in EAC could be a constraint to the research.

9. Structure of chapters

The research paper will contain five chapters, organised as follows:

Chapter one

The chapter is an introduction. It will provide an overview of the research and explore the challenges and questions relevant to the research. It will also address the relevant literature, the significance & objectives, methodology, and research limitations.

Chapter two

This chapter will provide an overview of energy's legal and regulatory landscape in the East African Community. The current legal and regulatory framework will also be analysed to determine the rationale for a common legal and regulatory framework on energy.

Chapter three

The chapter will explore the foundation of a common legal and regulatory framework and define the substantive components that constitute such a legal and regulatory framework. Finally, it will assess the challenges which can impede the implementation and the success of this framework.

Chapter four

The chapter will provide an analysis of the legal and regulatory framework on energy in ECOWAS to learn lessons for EAC. Indeed, ECOWAS has achieved to have a protocol on energy in conformity with international legal instruments.

Chapter five

The chapter will summarise the research key points and conclude the study with recommendations on creating a common legal and regulatory framework to enhance investment and sustainable development in EAC.

CHAPTER TWO: LEGAL AND REGULATORY LANDSCAPE OF ENERGY IN EAST AFRICAN COMMUNITY

1. Introduction

The EAC is among the lowest regions in generation and coverage of electricity in Africa and has failed to develop a regional vision for a power pool.³² This has inhibited the citizens of the Member States from participating in vital socio-economic activities to improve their living standard. It is undisputed that access to reliable and affordable energy is important to the livelihood and wellbeing of individuals. Access to energy is therefore fundamental to the delivery of the Millennium Development Goals (MDGs).³³

This Chapter seeks to examine the legal and regulatory landscape of energy in EAC. Accordingly, the Chapter will highlight the institutional framework for energy in EAC. It will also assess the programmes and initiatives in the energy sector. Finally, the Chapter highlights the rationale for a common legal and regulatory framework.

2. EAC Energy landscape

The EAC Energy sector takes place within the cooperation agenda of the Community aiming to achieve the vision of the EAC treaty. Therefore, even though the Community does not have yet a specific instrument governing energy cooperation, it is essential to assess the existing framework with programs and initiatives related to the energy sector.

2.1. EAC Treaty

The EAC Treaty is the foundation of the EAC. Regarding the energy, Article 101 of the Treaty enjoins Partner States to adopt policies and mechanisms geared towards the promotion of efficient exploitation and utilisation of energy resources. In doing so, the Treaty encourages Partner State to adopt joint research and utilisation mechanisms.³⁴

Partner States are encouraged to cooperate in the energy sector to promote cost effective transmission of electricity.³⁵ In that regard, the Treaty envisions the adoption of integrated programme for rural electrification in EAC, and the development of inter-Partner State electrical grid inter-connections. Cooperation could also enhance sustainable exploitation of fossil fuels and extensive exploitation of renewable energy.³⁶

The Treaty also enjoins Partner States to adopt unitary planning and research on exploitation, development and utilisation of energy resources.³⁷ The joint measures are hailed to be capable of protecting the environment.

³² EAC Vision (n 10) 27.

³³ P Kirai & M Hankins '*Regional Strategy on Scaling-up Access to Modern Energy Services in the East African Community*'(2009) at 4.

³⁴ Art 101.1, EAC Treaty.

³⁵ Art 101.2, EAC Treaty.

³⁶ As above.

³⁷ As above.

The treaty provisions provide orientations for the development of the energy sector. Thus, the program and the function of the sector are based on the Treaty, which leads the Community's action to attain the objectives of EAC.

Therefore, the treaty provisions regarding energy have influenced the EAC Vision, which includes improving the accessibility to affordable energy under the Infrastructure Development Pillar as a priority for the region's development agenda and other regional planning instruments.³⁸ Further, the treaty could be the basis for a specific energy framework for the region.

2.2. EAC Objectives

The Community's objectives are to come up policies and programmes geared towards enhancing cooperation among the Member States in diversified areas.³⁹ In this regard, the cooperation is built around four pillars establishing a Customs Union, a Common Market, a Monetary Union, and a Political Federation. The four will increase integration and encourage sustainable development among the Partner States.⁴⁰ Currently, the Customs Union and the Common Market are effective, and the Monetary Union has an agreement to proceed on it.

The objectives lead defines the actions of the Community, and are defined in Article 5 of the EAC Treaty.⁴¹ Indeed, the Treaty reveals the spirit behind the creation of the Community aiming to increase inter-state cooperation to achieve sustainable development through economic growth by putting together strengths, shared resources equitably and undertaking common activities to achieve the settled goals. The Treaty also enjoins the private sector and the civil society to participate in its cooperation activities and programmes, and promotes a people-centred development. Furthermore, strong cooperation and collaboration of all development actors could raise the EAC people's standard of living.

One of the areas of cooperation for economic growth and sustainable development is the infrastructure sector, including energy. However, in EAC, infrastructure development is one of the impediments to achieving sustainable development in the region.⁴² To achieve the objectives stated in article 5 of the Treaty, the Partner States should develop infrastructure and services.⁴³ The energy sector is an essential sector regarding the infrastructure development of the region. The EAC treaty recognises the importance of the energy sector for sustainable economic development. The development and strengthening of the energy sector is key to achieving the objectives stated in the EAC treaty and strengthening the regional integration.

2.3. EAC Institutional Framework

The realisation of the EAC objectives requires a functional institutional framework: Article 9 of the EAC Treaty establishes the EAC organs and institutions.

³⁸ EAC Vision (n 10) 44.

³⁹ Art 5(1), EAC Treaty.

⁴⁰ Art 5(2), EAC Treaty.

⁴¹ Art 5(3), EAC Treaty.

⁴² African Development Bank Group 'The Africa Infrastructure Development Index 2018' at 2-6, available at <https://www.afdb.org/en/documents/document/the-africa-infrastructure-development-index-july-2018-103158> (accessed 2 October 2021).

⁴³ Art 89-101, EAC Treaty.

2.3.1. EAC Organs

The main organs of the EAC are the Summit, the Council, the Coordinating Committee, the Sectoral Committees, the East African Court of Justice, the East African Legislative Assembly and the Secretariat.⁴⁴

2.3.1.1. The Summit⁴⁵

The Summit is composed of the Heads of State or Government of the Partner States and provides overall guidance for the achievement of the purpose and objectives of EAC. In addition, it has the responsibility to approve laws and regulations such as protocols and development agenda, among others, towards the accomplishment of the objectives of the Community.

Therefore, the Summit is an essential EAC organ regarding the energy sector because it is the supreme organ to define the energy framework and implementation.

2.3.1.2. The Council⁴⁶

The Council is the main decision-making and governing body of the EAC. It is the body responsible for the Community's policy. Indeed, implements the decisions of the Summit in its day-to-day running of the Community.

The Council is empowered to issue regulations, directives and decisions which are binding on Partner States and the Community. However, the Summit, the East African Court of Justice (EACJ) and the East African Legislative Assembly (EALA) are not bound by the Council.⁴⁷ For example, the Council on energy defines the strategy and the politics to adopt in the energy sector.

2.3.1.3. The Coordinating Committee⁴⁸

The Coordinating Committee is in charge of regional cooperation. It is mandated to coordinate the activities of the Sectoral Committees. It is also entrusted to make recommendations to the Council on the composition, powers and functions of the Sectoral Committees. Lastly, the Coordinating Committee implements the decisions of the Council.

2.3.1.4. Sectoral Committees⁴⁹

The Sectoral Committees by the Council to conceptualise programmes and monitor their implementation to achieve the objectives of the Community. As such, Council on energy could establish sectoral Committees to foster energy cooperation and programmes.

⁴⁴Art 9, EAC Treaty.

⁴⁵Art 10-12, EAC Treaty.

⁴⁶Art 14-16, EAC Treaty.

⁴⁷Art 16, EAC Treaty.

⁴⁸Art 17-19, EAC Treaty.

⁴⁹Art 20-22, 25, EAC Treaty.

2.3.1.5. The East African Court of Justice⁵⁰

The EACJ is the main judicial organ of the Community and ensures compliance with the law while applying the EAC Treaty. It has sub-registries in the premises of national courts. Moreover, the decisions of the EACJ on the interpretation and application of the EAC Treaty overrides those of national court on the same subject.

The Court of justice is a vital organ ensuring the interpretation of the EAC law and dispute resolution. Moreover, its competence over national courts regarding community matters guarantees the application of EAC laws and its conformity, which can ensure confidence in the region's stability, especially regarding trade and investment provisions.

2.3.1.6. The East African Legislative Assembly⁵¹

The EALA is the legislative arm of EAC. Its mission is to further the objectives of EAC through legislation, representation and oversight. EALA Act 2012 established the EALA Commission to oversee the management of the Assembly.⁵²

The EALA could support regional trade and investment initiatives in the energy sector by legislating enabling laws.

2.3.1.7. The Secretariat⁵³

The Secretariat is the executive Organ of the EAC. As the guardian of the Treaty, it ensures the proper implementation of the regulations and directives adopted by the Council. The Secretary-General is the principal executive and accounting officer of the Community, and the Counsel to the Community is the principal legal adviser to the Community.

As a major milestone regarding energy, the Secretariat has already provided a key document to guide the member states in their action, the EAC energy security framework. Furthermore, the Secretariat hosts the Energy Division who plays a significant role in the sector for the establishment of specific institutions such as the EAC Centre for Renewable Energy and Energy Efficiency (EACREEE) and Eastern Africa Power Pool (EAPP), and the planning of the regional development strategy in the energy sector.

2.3.2. EAC Institutions

There are many EAC institutions. This section only examines the institutions, which play a prominent role in the energy sector.

⁵⁰Art 23-47, 26-37, EAC Treaty.

⁵¹ Art 48-65, 38-46, EAC Treaty.

⁵² EALA 'Acts of the Community' available at <https://www.eala.org/index.php?/documents/category/acts-of-the-community> (accessed 7 November 2021).

⁵³Art 66-73, 47-51, EAC Treaty.

2.3.2.1. The East African Community Competition Authority

The East African Community Competition Authority (EACA), an institution of EAC, is mandated to promote and protect fair trade and ensure consumer welfare in the Community according to EAC Competition Act, 2006.

The EAC Competition Act seeks to protect all market participants by ensuring free competition through the prohibition of anti-competitive practices to enhance the welfare of the people of the Community. In addition, it aims to increase the openness of the partner states against barriers to inter-state trade and economic transactions of market participants.

Moreover, it guarantees fair opportunities for market players in the Community (Small and Mid-size Enterprises (SME)) and a fair competitive environment, avoiding any discrimination by partner states on the basis of nationality or residence.

Further, the Act provides access to competitively priced and higher quality products and services for consumers and incentives for producers to enhance production and products through technical and organisational innovation.

Finally, it fosters economic integration and development through the establishment of an environment favourable to trade and investment in the Community and the alignment of EAC competition policy and law with international best practices.⁵⁴

EACA can play a role in the energy sector for the promotion and protection of fair trade. Indeed, fair competition could encourage investors and lead to better regulations in the EAC energy sector.

2.3.2.2. The East African Development Bank

The East African Development Bank (EADB)'s mandate is to offer financial and related assistance to businesses in member states, with the ultimate goal of improving regional integration and socio-economic development.⁵⁵ EADB could offer financial products and services oriented to organisations in the energy sector, considering that financing energy projects are often one of the major problems faced in developing energy projects.

2.4. EAC Vision

The overall objective of the EAC Vision 2050 is *to enhance coherence and harmonise the policy, legal, and implementation frameworks of the EAC Partner States consistent with the EAC integration agenda.*⁵⁶

The EAC Vision 2050 sets out a wide-ranging vision in which the region harnesses its resources to boost the overall productivity and welfare of its people, while at the same time establishing a favourable business environment that will make East Africa a haven for private sector investment and thus stimulate high and sustainable economic growth rates of at least

⁵⁴ EAC 'Institutions' available at <https://www.eac.int/eac-institutions#EACA> (accessed 7 November 2021).

⁵⁵As above.

⁵⁶ EAC Vision (n 10) 88.

10% per annum.⁵⁷ The EAC Vision 2050 considers the AU Agenda 2063 and the Sustainable Development Goals.⁵⁸

With this vision, the region aims to expand its productive capacity and increase its exports in terms of composition and value by creating an enabling environment for investment coupled with effective institutional capacity.⁵⁹ Further, the vision provides architecture around which the Community should focus its economic and social development efforts within the EAC Treaty framework.⁶⁰

Infrastructure development is a pillar of the EAC vision which sets out the objective of improving access to affordable and efficient energy for increased competitiveness through infrastructure systems that facilitate cost reduction and increase the region's competitiveness to attract investment and do business in the region and beyond.⁶¹

The objective of the energy sector development for Vision 2050 will be to *ensure a sustainable, adequate, affordable, competitive, secure and reliable supply of energy to meet regional needs at the least cost while protecting and conserving the environment*. Therefore, the region aims to emphasise access, capacity, efficiency and sustainability of energy.⁶²

In order to achieve these targets, the region needs to assess the challenges and opportunities in the energy sector and establish a dedicated agenda taking into account the specificity of each energy sub-sectors to formulate policy, laws and regulations tackling the impediments of the sector.

2.5. The 5th EAC Development Strategy (2016/17 – 2020/21)

The overriding objective of the development strategy is: *“to build a firm foundation for transforming the East African Community into a stable, competitive and sustainable lower-middle-income region by 2021”*, while its overarching theme is: *“accelerating a people-centred and market-driven integration”*.⁶³

The 5th EAC Development Strategy is informed and in line with the EAC Vision 2050. It considers relevant regional development concerns and priorities to maximise regional growth opportunities while recognising the EAC's development partnership obligations at the inter-regional, continental and global levels such as AU Agenda 2063, UNSDGs and RECs Partnership.⁶⁴

Regarding energy, the Strategic Development Objectives (SDO) include strengthening mechanisms and strategies for ensuring enhanced investment in clean and sustainable energy production and access as a driver and enabler of economic competitiveness and sustainable regional development.⁶⁵ The Strategic Development Objectives (SDOs) include enhancing

⁵⁷ EAC Vision (n 10) 16.

⁵⁸ EAC Vision (n 10) 13.

⁵⁹ EAC Vision (n 10) 12.

⁶⁰ EAC Vision (n 10) 14.

⁶¹ EAC Vision (n 10) 44.

⁶² EAC Vision (n 10) 53.

⁶³ East African Community '5th EAC Development Strategy (2016/17 – 2020/21)' (hereafter EAC Development Strategy) at x.

⁶⁴ EAC Development Strategy (n 63) xii.

⁶⁵ As above.

mechanisms and strategies to support further investment in the generation and access of clean and sustainable energy as a key enabler and driver of sustainable economic competitiveness and regional development.

The implementation of regional strategy is possible if a binding framework providing common rules to translate into national laws could be created to increase the commitment of member States towards regional energy integration.

2.6. EAC Energy Security Policy Framework

The EAC has developed a framework for a secure energy future for the region. The EAC Energy Security Policy Framework focuses on advancing an approach to conceptualising, measuring, monitoring and managing energy resources security in the biomass, electricity and oil and gas sub-sectors. It also outlines institutional and operational provisions for achieving energy security.⁶⁶

The policy framework developed aims to provide regional guidance to support strategic decisions by partner states to mitigate energy insecurity. Specifically, it should facilitate the consideration of current challenges in biomass, electricity, oil and gas supplies security. Furthermore, this policy should contribute to the achievement of the seventh SDG and the development of energy infrastructure, which is essential to boost intra-regional trade.⁶⁷

However, the EAC energy security policy framework is not a regional binding policy document. Instead, it seeks to provide the fundamental policy framework to guide the Partner States in devising energy security policy, strategy and action plans, and institutionalisation.⁶⁸ It is worth mentioning that the EAC has become the first REC to adopt an Energy Security Policy Framework in Africa.⁶⁹

2.7. EAC Energy sub-sectors: Programmes and Initiatives

The EAC region has various energy sources, including hydro, geothermal, natural gas, biomass, wind, solar, oil and nuclear.⁷⁰

In order to achieve the objectives of the EAC Treaty and Vision, the energy sector is divided into sub-sectors corresponding with the diversified energy sources within the region:⁷¹

1. The Power sub-sector (including transmission and interconnectivity)
2. The New and Renewable Energy Sources, Energy Conservation and Energy Efficiency sub-sectors
3. The Fossil fuels sub-sectors.

⁶⁶ EAC Energy Security Policy (n 8) 16.

⁶⁷ TRALAC 'EAC Legal Texts and Policy Documents' available at <https://www.tralac.org/resources/our-resources/4812-eac-legal-texts-and-policy-documents.html> (accessed 7 November 2021).

⁶⁸ EAC Energy Security Policy (n 8).

⁶⁹ EAC 'Energy Security Agenda' available at <https://www.eac.int/press-releases/143-energy/932-east-african-community-adopts-its-energy-security-agenda> (accessed 7 November 2021).

⁷⁰ EAC Vision (n 10) 54.

⁷¹ EAC 'Energy Overview' available at <https://www.eac.int/energy> (accessed 7 November 2021).

2.7.1. Power

Under the Power Sub-sector, key harmonisation objectives have been identified to cooperate on regional interest power sector issues, develop regional interconnections, joint power projects to benefit the region and regional markets, and technical and strategic information exchange.⁷²

In order to achieve the above objectives, the EAC implements projects and programmes under the power sub-sector. The major programmes are the Implementation of the EAC Power Master Plan, Collaboration and Partnerships with Regional Organisations working in the Power sub-sector to foster regional power trade and Cross-Border Electrification Programme.⁷³

2.7.1.1. East African Power Master Plan

The East Africa Power Master Plan is a cost-effective strategic power plan for the EAC. It sets out the plan to expand least-cost production and distribution to meet the region's growing electricity demand between 2013 and 2038. In addition, the Master Plan deals with technical requirements and economic viability, with consideration given to the generation resources available in the region and the potential for power exchange between the EAC Partner States and with other regions.⁷⁴

As a result, the EAC with the Eastern Africa Power Pool (EAPP) has developed a regional grid code (Interconnection Code). The Power Interconnection Code developed together with the Master Plan provides guidelines for designing and operating power interconnections in the region.⁷⁵

In addition, the EAPP developed a tool for a gap analysis to assist member utilities in assessing their conformity with the Interconnection Code. All EAC utilities are members of the EAPP (except South Sudan, which may join the pool) and work closely to fully comply with the interconnection code in preparation for regional electricity trade.⁷⁶

The EAPP's overall objective is to facilitate regional integration and realise sustainable growth and development.⁷⁷ However, the EAPP lacks a legal framework to govern the cross-border and power exchange, impacting its development. The establishment of a legal and regulatory framework promotes the development of power pool but also their effectiveness. For example, prior to the ECOWAS Energy Protocol, the West African Power Pool (WAPP) was ineffective even if it came before the protocol, as explained later in this study. It does, therefore, not facilitate the assessment of the EAPP impacts on the power sub-sector in EAC.

⁷²EAC 'Energy Power' available at <https://www.eac.int/gender/25-sector/energy?layout=blog&start=5> (accessed 7 November 2021).

⁷³ EAC 'Energy Power' <https://www.eac.int/energy/power> (accessed 7 November 2021).

⁷⁴ As above.

⁷⁵ As above.

⁷⁶ As above.

⁷⁷ EAPP 'Establishment' available at <https://eappool.org/establishment/> (accessed 7 November 2021).

2.7.1.2. Regional Collaboration and Partnerships⁷⁸

The EAC is closely working with the EAPP and other regional organisations to foster regional projects and programmes. The purpose of these projects is regional interconnection through the construction of transmission lines to support the development and establishment of a regional electricity market that will enable electricity trade between the Partner States and other regions.

In this regard, the EAC Energy Department collaborates closely with the Nile Equatorial Lakes Subsidiary Action Programme, the East African Power Pool, the Great Lakes Energy and neighbouring regional economic communities in collaboration with development partners.

The organisations have collectively committed to promote projects in a geographically common area, with each organisation playing a lead role in promoting the project it is best placed to promote. The focus of the projects is on the development of transmission lines that will eventually lead to a complete interconnection of the region to facilitate a dynamic regional electricity trade.

Therefore, it is essential to define the framework within which the cooperation is done to determine the provisions promoting and protecting States and energy actors, especially those involved in cross-border trade and investment.

2.7.1.3. Cross-Border Electrification Programme

The EAC initiated a cross-border electrification programme that allows border centres to access electricity from the closest grid to increase cost-effective access. As a result, border towns are supplied with electricity from the nearest and most cost-effective medium and low voltage grid from the neighbouring partner state instead of being connected to the high-cost grid of their own country.⁷⁹

The EAC's cross-border electrification policy provides guidance for the implementation of cross-border electrification projects and the development of shared renewable energy resources such as small hydropower projects. In this regard, a model Power Supply Agreement has been approved to facilitate the expeditious conclusion of cross-border electrification contracts between utilities.⁸⁰

Cross-border programs are relevant to the development of the energy sector in the region because it increases power exchange and energy access. However, each country has its own legal and regulatory framework, which could sustainably impact the program's implementation without harmonising and unifying law rules in the region.

⁷⁸ As above (n 73).

⁷⁹ As above.

⁸⁰ As above.

2.7.2. New and Renewable Energy Sources, Energy Conservation and Energy Efficiency

The EAC's objective for the new and renewable energy sources, energy conservation and energy efficiency sub-sector is to enhance the use of renewable energy and the acceptance of energy conservation and energy efficiency practices.

The specific goals are the promotion of the expansion of new and renewable energy resources, the instigation of programs on energy conservation and energy efficiency, the elaboration of a comprehensive energy conservation and efficiency strategy and plan, and the formulation of a master plan for renewable energy.⁸¹

In order to achieve the above objectives, the initiatives have been adopted, such as the Regional Strategy on Scaling-Up Access to Modern Energy Services, the Technical Capacity Building for Small Hydropower projects and the Establishment of the East Africa Centre for Renewable Energy and Energy Efficiency.⁸²

2.7.2.1. Regional Strategy on Scaling-Up Access to Modern Energy Services⁸³

The EAC Regional Strategy on Scaling-Up Access to Modern Energy Services aims to *increase access to modern energy services by adopting high-impact, low-cost scalable approaches. It addresses four key targets to poverty reduction and sustainable development in line with the seventh UNSDG, including access to modern cooking practices for 50% of traditional biomass users, reliable electricity for all urban and peri-urban poor, modern energy services for all schools, clinics, hospitals and community centres and mechanical power within the Community for all productive services.*⁸⁴

The strategy aims to commit the EAC Partner States towards a comprehensive agenda for expanding access to modern energy services in line with the fulfilment of the UN MDGs and poverty reduction. It provides a reliable roadmap for achieving energy and development goals through scaling up new and existing business models, leveraging development finance, and securing programmatic support for an enabling environment to increase energy.

However, the implementation of the strategy has taken a long time to be completed. It was supposed to be completed in 2015 but is still ongoing, highlighting the problematic implementation of policies, mainly because they are not binding and do not have a legal basis to strengthen their impact and implement quickly.⁸⁵

⁸¹ EAC 'Energy' available at <https://www.eac.int/energy/25-sector/energy> (accessed 7 November 2021).

⁸² EAC 'Projects and Programmes - Renewable Energy' available at <https://www.eac.int/energy/renewable-energy/projects-and-programmes> (accessed 7 November 2021).

⁸³ P Kirai & M Hankins (n 33).

⁸⁴ As above (n 82).

⁸⁵EAC Development Strategy (n 63) 66.

2.7.2.2. Technical Capacity Building for Small Hydropower projects

East Africa has enormous potential for small Hydropower development, enhancing access to modern energy services through renewable and sustainable solutions. Therefore, a study has been done to assess the technical capacity of small hydropower in East Africa and made recommendations aiming to fill the existing capacity building gaps.⁸⁶

Indeed, an assessment of the regional capacity is essential to elaborate a viable energy agenda and policies in the energy sector. Accordingly, joint effort of Partner States could mitigate the lack of technical, human and financial capacity.

2.7.2.3. Establishment of the East Africa Centre for Renewable Energy and Energy Efficiency

The EAC launched the East African Centre for Renewable Energy and Energy Efficiency (EACREEE) in June 2016.⁸⁷ The Overall Objective of the Centre is to *contribute towards increased access to modern, affordable and reliable energy services, energy security and mitigation of negative externalities of the energy system, local pollution and greenhouse gas (GHG) emissions by creating an enabling environment for renewable energy and energy efficiency markets and investments.*⁸⁸

The Centre was established to complete and reinforce the existing initiatives of the EAC Partner States in terms of policy and capacity development, knowledge management and awareness-raising, and investment and business promotion.⁸⁹ In this regard, EACREEE seeks to develop a conducive environment by addressing barriers and fostering a competitive and sustainable energy market and economies of scale in the EAC region.

The creation of the Centre is a milestone towards increasing the use of Renewable Energy and Energy Efficiency. The Centre could be the leader in assessing the region's potential and challenges in the sector to elaborate policy and regulations for Partner States with the benefit of the possibility to mitigate cross-border challenges of the energy sector for sustainable energy development.

2.7.3. Fossil fuels

Under fossil fuels sub-sectors are initiatives and programmes often driven by bilateral cooperation or national agenda. Therefore, the sub-sector needs to be promoted and consolidated with a regional agenda to benefit from the region's joint and complementary knowledge and capacity.

⁸⁶As above (n 82).

⁸⁷'EAC Centre of Excellence for Renewable Energy and Energy Efficiency (EACREEE)' EAC Press, available at <https://www.eac.int/press-releases/483-731-46-eac-centre-of-excellence-for-renewable-energy-and-energy-efficiency-eacreee-now-operational-in-kampala-uganda> (accessed 7 November 2021).

⁸⁸ 'EACREEE's Legal Status' available at <https://www.eacreee.org/content/eacreees-legal-status> (accessed 7 November 2021).

⁸⁹As above.

2.7.3.1. Regional Development Strategy Initiative

With the aim of supporting the provision of effective and reliable delivery of petroleum products throughout the region, a regional strategy on regional refinery development has been developed. It tackles all aspects of the oil distribution systems in the region, including refineries and storage facilities, in a comprehensive manner in order to enhance their overall effectiveness and efficiency. In addition, the strategy reveals the clear interdependence between the various forms of infrastructure in the delivery of petroleum products.⁹⁰

As a result, key recommendations for the strategy have been proposed, including the development of a new refinery in Uganda in order for the oil discovered in Uganda to benefit the region financially to provide optimal benefits to the region; the acceleration of planned upgrading of the Mombasa refinery; and the improvement in the handling, transportation, storage and distribution facilities in the region for efficient and economic distribution of petroleum products.⁹¹

In this regard, increasing cooperation to facilitate production, storage and transportation of petroleum products could be an element to increase trade and investment in the sector. Further, it calls for a legal and regulatory framework to frame petroleum activities.

2.7.3.2. Oil and Gas Pipeline Projects

Important discoveries made in Kenya, Tanzania and Uganda are expected to enhance the resource potential for the region towards energy self-sufficiency. The discovery has led to the scaling up of regional exploration efforts in the oil and gas sector. In addition, these efforts have paved the way for petroleum infrastructure projects.⁹²

The EAC has identified priority oil and gas pipeline projects such as the Crude oil pipeline, the upgrading existing oil products pipeline, the Kenya-Uganda-Rwanda-Burundi oil products pipeline and the Uganda-Tanzania oil products pipeline. They all aim to link partner States and facilitate delivery to the market and efficient, safe, cost-effective and environmentally-friendly distribution of oil products.⁹³

The benefit of these projects is to increase the region's autonomy and reduce reliance on other regions for petroleum imports. However, a legal and regulatory framework is needed to ensure the construction and operation of the pipeline, define the way pipeline projects should be governed and rules of market to be applied, and the regulation of the sector.

2.7.3.3. Natural Gas Infrastructure Development

The United Republic of Tanzania has developed a Natural Gas Master Plan to sustain local gas needs and surplus for export. However, substantial funding is needed to do additional

⁹⁰ Fossil Fuels- Projects and Programmes, available at <https://www.eac.int/energy/fossil-fuels/projects-and-programmes> (accessed 7 November 2021).

⁹¹ As above.

⁹² As above.

⁹³ As above.

and/or multiple appraisal wells in the deep water areas of discovery and to develop the necessary infrastructure (processing plants, pipeline, etc.).⁹⁴

The situation calls for a regional collaboration because it is for the region's benefit to access natural gas within the region. In addition, it could help to address the challenge of financing through the combination of Member States efforts for mutual benefit and regional integration.

2.7.3.4. East African Petroleum Conferences and Exhibition

The East African Petroleum Conferences and Exhibition aim at promoting petroleum exploration potential and investment opportunities in East Africa and respond to the limited information on the region's petroleum potential and little exploration activity resulting in little interest for the region. Indeed, the lack of information or difficult access to them impedes trade and investment promotion.⁹⁵

The East African Petroleum Conferences and Exhibition have changed things, and the interest in the region has grown extensively. Therefore, the EAC should establish a regional institution to ensure the assessment of the energy sector and provide updated and accurate information on the energy sector to increase the awareness of the sector opportunities.

2.8. The rationale for a common legal and regulatory framework of energy in EAC

The energy sector development covering renewable and non-renewable energy sources aims to facilitate the EAC's broader objectives of attracting investments, competitiveness, and trade for mutual benefit.⁹⁶ Furthermore, the EAC Energy landscape provides various projects and initiatives aiming to develop the energy sector. These programmes and initiatives contribute to the development of energy resources and show the EAC commitment towards meeting its objectives.⁹⁷ However, the EAC does not have a defined regional legal and regulatory framework on energy like other regions in Africa like SADC and ECOWAS.

As seen above, the lack of consistency between legal and regulatory frameworks hinders regional integration and efficient energy pool. Therefore, defining a common legal and regulatory framework is essential for the effectiveness of regional energy trading systems.⁹⁸

There is a need to seek a structure within the Community to ensure the unification and harmonisation of the framework to establish a strong legal and regulatory framework in the energy sector.

The programmes and initiatives in the energy face challenges regarding their implementation. In fact, it has been established that the EAC is deficient of institutional and professional capacity to provide necessary support and catalytic interventions towards achieving the strategic objectives defined to enhance energy access in the EAC.⁹⁹

⁹⁴As above.

⁹⁵As above.

⁹⁶ EAC 'Energy' available at <https://www.eac.int/energy> (accessed 7 November 2021).

⁹⁷ P Kirai & M Hankins (n 33) 8.

⁹⁸ AfDB (n 17) 36.

⁹⁹ P Kirai & M Hankins (n 33) 6.

One of the key problems to the implementation is the low institutional and human capacity at the EAC Secretariat in charge of applying the decisions, programmes, and initiatives approved by the Summit and the Council.¹⁰⁰

The EAC, a community that aims for complete integration, should consider creating an efficient legal and regulatory framework on energy to enhance energy access and energy production through the uniformisation and harmonisation of policies and laws.¹⁰¹

Indeed, they are benefits of a regional approach to energy access such as high-level political support, synergy, the existing common market, cross-learning, economies of scale and peer support, leading to more cost-effective implementation than would otherwise have been possible at a national level.¹⁰²

Achieving the EAC modern energy access targets requires political commitment and a supportive institutional framework of competent private and public actors. Furthermore, it requires a coherent policy and legal and regulatory instruments designed to support the attainment of the targets.¹⁰³

Therefore, it is vital to have binding legal documents to enhance the development of the energy sector and attract investment, private investors, foreign direct investment, and private-public partnerships through an efficient legal and regulatory framework.

A harmonised framework within the Community could improve predictability and stability of the region. Moreover, a common framework within six countries to implement the same procedures could increase the region's credibility concerning the possibility of remaining without changes.¹⁰⁴

Therefore, partner states could cooperate to make it real through a common legal and regulatory framework, increasing the efficiency of the current initiatives and projects and their implementation. Furthermore, it could resolve the fragmentation and diversity existing in national policies and laws in the energy sector and investment and trade, leading to a practical framework promoting investment and trade, especially cross-border projects.

However, the EAC has put a legal framework to create a conducive legal environment for investments to grow, which should be strengthened to adapt its provisions to the energy sector. The framework allows EAC Partner States to engage in investment and industrial development to realise the investment potential for promoting economic growth and development in the region.¹⁰⁵

The legal framework also enables harmonisation and rationalisation of investment incentives to promote the EAC as a single investment area. It is also enabling production efficiency. The EAC legal framework finds its provisions in the EAC Treaty Articles, 79-80 and 127-129; The EAC Customs Union Protocol, Article 3 (c) and (d); The EAC Customs Management Act Article

¹⁰⁰ P Kirai & M Hankins (n 33) 14.

¹⁰¹ Tharani (n 26) 486.

¹⁰² P Kirai & M Hankins (n 33) 5.

¹⁰³ P Kirai & M Hankins (n 33) 15.

¹⁰⁴ AfDB (n 24) 52.

¹⁰⁵ EAC Investment Guide Legal Framework available at <https://investment-guide.eac.int/index.php/the-regional-framework/legal-framework> (accessed 7 November 2021).

25; The EAC Competition Act; the EAC Common Market Protocol Articles 23 and 29; and The EAC Model Investment Code 2006.^{106 107}

In addition, The EAC Investment Policy Proposal 2019-2024 seeks to address barriers through the establishment of a common legal and regulatory framework towards the collective promotion of the EAC as a single investment destination. It will continue a region-wide coordinated approach for promoting investment opportunities, pursuing domestic, regional and foreign direct investment.¹⁰⁸

The EAC Partner States have institutions and regulatory structures to deal with foreign investment even if each Partner State has its own requirements related to company registration, incorporation procedures, permits and licenses, property acquisition, access to capital and land, ownership and management control, and exit procedures.¹⁰⁹ A regional approach shall be applied to facilitate a unified implementation to achieve a single investment area within the region.

Investment opportunities exist in the generation of energy from biogas, hydrocarbons (natural gas, oil and coal), uranium and renewable raw materials; Solar, wind power generation; Production of biofuels; and geothermal exploration and development. Oil exploration will continue in the EAC partner countries. For example, South Sudan has huge oil reserves, and huge amounts of oil have recently been discovered in Uganda, Kenya and Tanzania. In Tanzania there were several gas discoveries on the coast of the Indian Ocean near Songo Songo, Mnazi Bay and Mkuranga in the coastal region. These discoveries are catalysts for natural gas production in Tanzania.¹¹⁰

Even if there are many challenges in EAC's energy sector, there are still many opportunities to cover, and a legal and regulatory framework on energy could be a catalyst and create a link between them to address the energy deficit and energy access in the EAC region.

2.9. Conclusion

This chapter has revisited the EAC Energy landscape and its components and highlighted the various ongoing programmes and initiatives in the regional energy sector and their importance in enhancing energy access and reducing energy deficit. However, the lack of a legal and regulatory framework impedes the development of the energy sector and impact regional economic growth.

The rationale for a legal and regulatory energy framework in the EAC has been explained in order to increase investment in the sector and facilitate a trade exchange system within the region. In addition, the diversity and the fragmentation of laws within the region in the energy sector and investment and trade promotion could be addressed through a common legal and regulatory framework.

¹⁰⁶ EAC Key documents available at <https://www.eac.int/documents/category/key-documents> (accessed 7 November 2021).

¹⁰⁷ As above (n 105).

¹⁰⁸ As above (n 105).

¹⁰⁹ EAC Regional Investment Framework available at <https://investment-guide.eac.int/index.php/the-regional-framework/investment-framework> (accessed 7 November 2021).

¹¹⁰ EAC Investment Sectors available at <https://investment-guide.eac.int/index.php/investment-opportunities/eac-investment-sectors> (accessed 7 November 2021).

The following chapter will focus on the foundation of this kind of framework in EAC, the challenges for its implementation and the benefits which could come from it.

CHAPTER THREE: THE FOUNDATION OF A LEGAL AND REGULATORY FRAMEWORK ON ENERGY IN EAC

1. Introduction

The energy deficit is one of the biggest impediments towards achieving sustainable economic development in EAC. With the lowest per capita electricity production and poor access in Africa, limited power generation capacity, insufficient coverage and expensive tariff costs¹¹¹, it is time for the Community to consider a new approach through the establishment of a clear framework that could help to address the relevant challenges stated in the previous chapter.

Even though the EAC is implementing several projects and programmes such as the EAC Power Master Plan, the Establishment of a Regional Power Market, the Power Interconnection Code, the Cross-Border Electrification Programme and the EAC Energy Security Policy Framework under the power sub-sector; the creation of the Centre for New and Renewable Energy Resources; and progressive cooperation in the fossils fuels sub-sectors, the region does still not have a framework to govern its energy vision like others RECs in Africa such as SADC and ECOWAS.

There is a real need for concrete measures to develop a legally binding regime that will ensure sustainable energy projects and programmes. The adoption of proper laws and regulations to guide energy actors in designing, managing, and organisation energy projects may benefit the sector and increase businesses' responsible and ethical conduct. In addition, it may ensure a unifying and standardisation or harmonisation of policies and practices favouring investment, trade and innovation in the sector.

The present chapter will examine the sources of this wished framework from international laws to EAC through the regional framework to bring out the best practices to sound legal and institutional framework for the EAC. It will emphasize the main components or the most relevant topics to address the challenges facing the energy sector in the region.

2. Sources for the framework

In order to create appropriate legal and institutional framework for the regulation of energy in the EAC, it is essential to start with the existing legal texts, and best practices recognised internationally, regionally and among the EAC.

This section will try to bring out the knowing rules of laws applied worldwide in the energy sector to provide existing rules and best practices that could inspire the drafting of the legal and regulatory framework on energy for the EAC.

2.1. EAC Treaty

Any discussion related to creating any legal framework in the Community must start with the EAC Treaty, which is the sole foundation of EAC. Indeed, the wished framework should be in line with the spirit and guidelines of the EAC Treaty.

¹¹¹ EAC Development Strategy (n 63) xi.

The objectives of the Community include developing policies and programmes aimed at widening and deepening cooperation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs for their mutual benefit.¹¹²

Article 5 of the EAC Treaty provides for specific measures dealing with the cross-cutting challenges of the region, among them is the promotion of sustainable exploitation and use of natural resources and environmental protection, which are recognised.¹¹³

The Treaty also has specific provisions governing the cooperation of Partner States in the energy sector. For example, Article 101 of the Treaty enjoins partner states to adopt mechanisms that would ensure efficient development and use of available energy resources.¹¹⁴

The Treaty provides the spirit of Partner States, which has always been to foster their cooperation and promote regional integration through economic development. By recognising energy as a pillar for cooperation and regional integration, the Treaty provides a meaning for creating a framework promoting efficient use of available regional energy resources for a mutual share benefit.

In order to implement the provisions of the Treaty, Partner States have undertaken to establish a Customs Union, a Common Market, a Monetary Union and ultimately a Political Federation. These are the four pillars of regional integration in the EAC.

The purpose of the above pillars is to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the partner states. The overall goal is an accelerated, harmonised and equitable development and a sustainable growth of economic activities, with a fair and equitable sharing of the benefits.¹¹⁵

As a Community aiming to achieve a complete integration which is an exception compared to the other RECs (as example COMESA and SADC among others), the commitment for the unification of laws and regulations is deeply recognised through the spirit leading the Community and explained in the Treaty.

This commitment for unification is a solid foundation to lead the development of a common legal and regulatory framework on energy in the EAC following the willingness of Partner States to deepen their cooperation, and one of the areas chosen is the energy sector which proves the importance given to the energy development and sustainable utilisation of natural resources.

Following the development of legal and regulatory frameworks facilitating the accomplishment of the four pillars stated above, there is a way to learn from the process and achievement of the existing framework to inspire the development of a specific framework regarding energy because energy covers many cross-cutting elements.

¹¹² Art 5.1, 12-13, EAC Treaty.

¹¹³ Art 5.3 (c), EAC Treaty.

¹¹⁴ Art 101.1, EAC Treaty.

¹¹⁵ Art 5.2, EAC Treaty.

2.1.1. Customs Union Protocol

The Protocol for the Establishment of the East African Community Customs Union (CU) ¹¹⁶ was signed in November 2004, launched in 2005 and fully operational in 2010. The Customs Union is the primary pillar of regional integration and the core foundation of the EAC, as stated in Article 75 of the EAC Treaty.¹¹⁷

The principal objective of the Customs Union is to deepen regional integration by way of liberalisation and promotion of intra-regional trade.¹¹⁸ Moreover, the Customs Union also aims at promoting efficient production among Partner States. To enhance economic development, the Customs Union seeks promote domestic, cross-border and foreign investment, and industrial diversification.¹¹⁹

Therefore, the Customs Union Protocol is a tool for providing solutions for the energy sector that faces challenges regarding the promotion of investment and trade among the region and with the external partner of the Community. The unified rules provided in the CU Protocol can help to define specific rules for the energy sector based on the successful practices existing in the region.

Accomplishments recorded include the successful implementation of the single customs territory, which has improved goods clearance by cutting compliance times and documentation, and resulted in a more effective information exchange between customs and other agencies in a timely manner. Achievements also include the promotion of the EAC as a single investment area and the introduction of common trade policy frameworks and reviews.¹²⁰

The Custom Union touches on the energy sector's two main aspects: investment and trade, domestic, cross-border, and foreign. Therefore, it is an essential tool providing rules to deal with trade and investment in the region.

2.1.2. Common Market

The Protocol for establishing the EAC Common Market¹²¹ came into force in 2010. It creates a single market for EAC Partner States. It aims at accelerating development and regional economic growth by introducing free movement of persons, labour, goods, capital, services, and the rights of establishment and residence. In addition, the Protocol is expected to strengthen, coordinate and regulate the economic and trade relations among the Partner States.¹²²

¹¹⁶ East African Community 'Protocol for the Establishment of the East African Customs Union' (2004).

¹¹⁷Art 75, EAC Treaty.

¹¹⁸Art 3, EAC Custom Union (n 116).

¹¹⁹ As above.

¹²⁰ EAC Development Strategy (n 63) 34.

¹²¹ East African Community 'Protocol on the Establishment of the East African Community Common Market' (2009).

¹²² EAC Development Strategy (n 63) 35.

The Common Market is beneficial because it provides rules on essential elements involved in energy projects agreements such as movement of persons, capital and technology transfer, labour rights, and investment and trade provisions.

For compliance, the Partner States have amended their national laws to be in line with the Common Market Protocol, however concerns remain as several barriers persist in all three fields of the Common Market Protocol.¹²³

The distinct development stages in the institutional sectors and frameworks of the partner states has led to a delay in harmonising systems and procedures leading to a single flawless market, creating doubts among the citizens on the fundamental realisation of the EAC Common Market.¹²⁴ It is a lesson to apply while creating and implementing the framework on energy.

2.1.3. Monetary Union

The East African Monetary Union (EAMU) Protocol¹²⁵ is a monumental stage in the EAC integration. Adopted following the EAC Treaty (article 82 & 83), the Protocol prescribes a progressive transformation from the currencies of Partner States to a single EAC currency.

Article 3 of the EAMU Protocol provides that the objective of the Monetary Union shall be to promote and maintain monetary and financial stability aimed at facilitating economic integration to attain sustainable growth and development of the Community.¹²⁶

In the quest for a single currency, the EAC Partner States aim to harmonise monetary and fiscal policies; harmonise financial, payment and settlement systems; harmonise financial accounting and reporting practices; harmonise policies and standards on statistical information, and establish an East African Central Bank.¹²⁷

The Monetary Union could provide solutions regarding financial transactions like the transfer of funds and taxation rules, and accounting and procurement laws essential for the excellent conduct of business in energy projects.

2.1.4. Political Federation

Establishment of a political federation is the ultimate objective of the EAC integration agenda. It is embodied in Article 5(2) of the EAC Treaty and builds on three pillars: a common foreign and security policy, good governance and the proper implementation of the preliminary steps towards regional integration.¹²⁸

¹²³ EAC Development Strategy (n 63) 35-36.

¹²⁴ EAC Development Strategy (n 63) 36.

¹²⁵ East African Community 'Protocol on the Establishment of the East African Community Monetary Union' (2013).

¹²⁶ Monetary Union East African Community. <https://www.eac.int/monetary-union> .

¹²⁷ EAC Monetary Union <https://www.eac.int/integration-pillars/monetary-union> .

¹²⁸ EAC Political federation <https://www.eac.int/political-federation> .

The EAC political integration principle entails harmonising and coordinating regional policy frameworks concerning good governance, democracy and human rights, peace and security, and international relations.¹²⁹

The political will is critical to establishing a framework on energy because it provides the principles to apply, the needed support, and willingness to implement it. The meaning and motivation of a shared vision on energy could be found through the spirit of commitment towards achieving a political federation as one people.

2.2. International instruments

Cooperation in the energy sector has been an interest among nations. Therefore, energy agreements have been established to foster cooperation and facilitate trade and energy investment. In addition, achieving energy efficiency is a major interest for nations and is among the SDGs.

2.2.1. Energy Charter Treaty

The Energy Charter Treaty (ECT) is the main multilateral treaty governing the energy sector. The Treaty was established to protect international investment arising from the increasingly globalised economy. It seeks to streamline the energy sector and enhance long-term investment in the capital intensive energy projects.¹³⁰

The ECT provide investment protections provisions aiming to ‘create a framework and reduce the non-commercial risks associated with energy sector investments; trade provisions consistent with WTO rules and practice; non-discriminatory principles consistent with the principle of free energy project aiming to facilitate the transit of energy; energy efficiency and environmental provisions; and dispute resolution mechanisms for investment-related disputes’.¹³¹

The ECT is a model in the energy sector as it is the most recognised multilateral Treaty related to energy. It provides lessons regarding what is successful or not in the sector, helping to frame a binding document specific to the need of the region through lessons of best practices around the world.

In EAC, Burundi and Uganda are observers of the ECT. The EAC as a community is a signatory and an observer of the International Energy Charter (2015)¹³² with all the EAC Member States except South Sudan.¹³³

The International Energy Charter (IEC) is a political instrument to enhance cooperation in energy matters between the state parties. It does not impose any legally bound obligations or

¹²⁹ EAC Development Strategy (n 63) 37.

¹³⁰ Sussman (n 30) 955.

¹³¹ As above.

¹³² International Energy Charter (2015) Overview available at <https://www.energycharter.org/process/international-energy-charter-2015/overview/> (accessed 7 November 2021).

¹³³ Members and Observers to the Energy Charter Conference available at <https://www.energycharter.org/who-we-are/members-observers/> (accessed 7 November 2021).

any financial commitments. The main difference between (IEC) and the ECT is the no binding character of the first.¹³⁴

Therefore, EAC should increase its commitment to energy cooperation for a solid international weight in the decision-making process to promote and protect the interest of the Community in the energy sector.

2.2.2. The UN Sustainable Development Goals (SDGs)

The SDGs are a universal call for action towards ending poverty, preserving the planet and enhancing the lives and of everyone's perspectives. The UN member States acceded to the 17 goals in 2015. They lay out a 15-year plan to attain the goals, including the seventh SDG on clean and affordable energy.¹³⁵

Hence, the EAC should take cognisance of the SDGs for Partner States pursue the goals to conclusion, in accordance with the relevant regional integration treaty and protocols.¹³⁶

2.3. Regional instruments

EAC Partner States also belong to the AU, and the EAC is a recognised regional economic community among the eight recognised by the African Union.¹³⁷ Therefore, it is essential to integrate an EAC energy agenda in the continental agenda to strengthen continental integration through regional integration. Further, a common framework for achieving infrastructure development goals, especially energy, is highlighted in different strategies and initiatives to achieve AU Agenda 2063, such as the PIDA ENERGY VISION 2050 and the African Continental Free Trade Area (AfCFTA).

2.3.1. AU Agenda 2063

The AU Agenda 2063 was adopted in 2013. It is a strategic framework for transformative and inclusive growth, and sustainable development. It keeps up the pan-African drive for freedom, self-determination, and collective prosperity.¹³⁸

The AU Agenda 2063 has as leading objective infrastructure development. In addition, the Energy Development Strategies and Initiatives in Africa have as objectives enhance African people's energy access, increase living standards and secure a sustainable environment.¹³⁹

At the regional level, the RECs are the lead institutions to support the Member States in the implementation of the Agenda. Accordingly, RECs, such as the EAC should 'act as a focal point to facilitate the adoption, implementation, monitoring and evaluation of all continental

¹³⁴ <https://www.energycharter.org/process/international-energy-charter-2015/overview/> (accessed 7 November 2021).

¹³⁵ United Nations 'The Sustainable Development Agenda'

<https://www.un.org/sustainabledevelopment/development-agenda/> (accessed 7 November 2021).

¹³⁶ EAC Development Strategy (n 63) 51.

¹³⁷ African Union 'Regional Economic Communities (RECs)' available at <https://au.int/en/organs/recs> (accessed 7 November 2021).

¹³⁸ EAC Development Strategy (n 63) 51.

¹³⁹ AU 'Energy' (n 4).

frameworks related to Agenda 2063 by Member States; and issue region-specific Agenda 2063 implementation, monitoring and evaluation guidelines to Member States'.¹⁴⁰

2.3.2. The PIDA ENERGY VISION 2050

The AU Commission, in partnership with the UNECA, AfDB and NEPAD Planning and Coordinating Agency, launched the Programme for Infrastructure Development in Africa (PIDA).

Built on regional projects and programmes, the initiative intends to address the infrastructure gap that critically hinders Africa's competitiveness in the global market through a common framework. It recognises the role of regional integration to support Africa's economic development.¹⁴¹

The PIDA Energy Vision 2050 aims 'to harness all African energy resources to ensure access to modern energy for all African households, businesses and industries by developing efficient, reliable, cost-effective and environmentally friendly energy infrastructure resulting in poverty eradication and vigorous, sustainable development of the continent'. Its primary objective is to increase access to energy at affordable cost.¹⁴²

The PIDA Energy Vision provides guidelines and solutions that could help create an efficient framework on energy in the EAC. It suggests that regional infrastructure brings essential benefits by creating larger markets through unification. Regional infrastructure provides affordable energy benefits for other sectors of the economy. Whereas, integration is projected to lower the costs of fuel, the same may require more capital investment in large-scale hydropower plants.¹⁴³

As the program focuses on achieving the infrastructure development goal through regional integration, it indicates the importance of regional integration towards reducing the infrastructure gap in Africa. Furthermore, it highlights the importance of cooperation among Partner States for energy matters through a dedicated program.

Through the dedicated mechanisms, the AU Agenda is considerable support for the energy sector, especially regarding the funding of energy projects. EAC, as a region, could benefit more funding for a regional project than for a solo country project.

2.3.3. African Continental Free Trade Area (AfCFTA)¹⁴⁴

AfCFTA is a flagship project of the AU's Agenda 2063, Africa's development vision. It aims at increasing trade between African states and boosting the position of Africa in the global market.¹⁴⁵

¹⁴⁰ EAC Development Strategy (n 63) 52.

¹⁴¹ PIDA (n 5).

¹⁴² AfDB 'The PIDA Energy Vision' available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/PIDA%20brief%20Energy.pdf> (accessed 7 November 2021).

¹⁴³ As above.

¹⁴⁴ African Union 'Agreement Establishing the African Continental Free Trade Area (AfCFTA)' (2018).

¹⁴⁵ About the AfCFTA <https://afcfta.au.int/en/about> (accessed 7 November 2021).

The AfCFTA can be an opportunity for the energy sector and inspire a framework on energy in EAC. Indeed, the AfCFTA aims to build a continental market for goods and services, with free movement of persons and investment. It also provides a way to resolve the challenge of multiplicity of RECs and dispute resolution mechanisms.

Therefore, the AfCFTA consolidates the fragmented market in African countries into a big market, providing a considerable interest that can impact the dynamics of the continent and economic region regarding access to funding, technology transfer, human capital, investment, and trade facilitation, among other benefits.

The AfCFTA could also help address specific challenges related to the energy sector by promoting liberalisation of trade, dealing with cross-border trade and investment, and promoting investment and fair competition. Indeed, the next step will provide Protocol on investment, intellectual property rights and competition.

Such protocol could enhance investment promotion, support the existing initiatives such as PIDA and increase regional integration because States could have a better exposition as a group such as RECs to negotiate and reduce barriers or challenges faced during trade and investment negotiations for a better deal.

The EAC as a REC can take inspiration from the AfCFTA to benefit from the unification of rules to resolve cross-cutting issues and common concerns like addressing the energy deficit through regional cooperation.

It could increase the confidence of States to liberalise the energy market and therefore the creation of Power Pool and specialised energy agency leading to address the challenge regarding the management of the production and distribution of energy.

3. Major components of the framework

In order to frame a dedicated energy framework in EAC, they are some major elements to emphasise regarding their importance for sustainable energy development. The following elements are not exhaustive but indicative towards a legal and regulatory framework in EAC.

3.1. Investment

Several factors determine decisions in favour of investment in a given country. These factors include the foreign investment policy, political stability, and socio-economic factors.¹⁴⁶ Further, high investment protection standards are important to international agreements. Investments are protected by fair treatment, compensation for any expropriation and access to impartial dispute resolution procedures.¹⁴⁷

Therefore, there is a need in the energy sector to promote investment through a legal and regulatory framework equitable, transparent, stable and effective for sustainable investment with benefit on the attraction and competitiveness of the energy market-leading for the efficient production, supply, transmission, distribution and use of energy.

¹⁴⁶ Sussman (n 30) 953.

¹⁴⁷ Sussman (n 30) 956.

Indeed, a predictable legal and regulatory regime will increase the region's attraction because investors and traders will be able to analyse how much the region is favourable and open to trade and investment. It is only through policies, legal and regulatory binding texts which make the assessment possible and transparent.

Investors, local and foreign, seek a framework ensuring the protection of the investment and the facilitation of trade through a mechanism providing transparency, predictability, accountability, fair compensation in case of expropriation, and easy access to dispute resolution mechanisms.

In addition, the framework should ensure investment in the energy sector, the stability and consistency of incentives offered prior investment, the simplification of administration by removing administrative barriers that affect the swiftness in doing business, and the easy and rapid enforcement of laws.

It is vital in the energy sector to predict regulation and host government action because the economic viability of many energy projects depends on the government incentives and subsidies to encourage such investment.¹⁴⁸

Governments often provide concessional funds, taxation incentives, and flexible regulation to impact the tariff of energy, which could be high if projects use private funds only. Indeed, Governments have access to loans and funds from International Financial institutions at an affordable rate, and the same institution provides funds to the private sector when funds are destined to be used for significant projects supported by Governments.

Furthermore, Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group (WBG), provides a guarantee mechanism on behalf of States for potential risks like conflicts which encourage investors while assessing a country or a region. The government's support on energy projects that require massive investment is determinant to reduce the cost of energy projects and the risks related to investment in the energy sector.

The framework should provide a solution to the potential case when governments decide to modify partially or totally incentives priority provided whatever reasons considered which could be for a change of legislation or regulation, for example, environmental measures, taxation rules or expropriation.

A change of legislation affects the cost of the project and its sustainability because the previous framework has created expectations, especially on the estimation of potential return on investment expected by the investors. It also affects the projects risks assessment important for fundraising.

Indeed, investors are interested in considering the regulation related to the return on investment with its correlation of transfer of the funds and technology transfer. Therefore, it is upon the government to provide solutions to minimise the energy project risks. Moreover, it is a customary prerogative of the government to change legislation and regulation whenever needed to adapt them to current realities. However, the change of legislation should ensure fair treatment and compensation when the new legislation and regulation negatively impact the completion of ongoing projects.

¹⁴⁸ Sussman (n 30) 958.

Furthermore, States need to ensure that investment provisions do not undermine legitimate laws and regulations protecting other aspects such as Human Rights, Health, Environment, labour rights, taxation and financial rules.

While promoting investment, the framework should ensure fair treatment for all investors because investment promotion often seems to focus on foreign investment or Public-Private Partnerships, forgetting local investors. Moreover, incentives and preferential advantages are often offered to foreign investors, creating unfair competition.

The private sector plays an essential role in the energy sector as they provide an alternative and support to public funds and initiatives. For instance, the EAC Treaty recognises the need for partnerships with the private sector and civil society to ensure a sustainable development.¹⁴⁹ Accordingly, the Treaty promotes the private sector's involvement in improving policies providing a supportive business environment to implement agreed decisions.¹⁵⁰ Therefore, a robust private sector in the energy sector could help increase initiatives and projects in the energy sector, especially through innovation promoted mainly by the private sector.

3.2. Trade

Trade is a significant aspect for any framework to establish regarding energy. Even though energy is not clearly defined as a good or a service, one can find applicable provisions in both goods and services rules applied to trade.

The most relevant source of law applicable to trade is the World Trade Organisation (WTO) provisions. The General Agreement on Tariffs and Trade ('GATT') and other WTO agreements like the General Agreement on Trade in Services (GATS) provide energy-related provisions, but no particular agreement on energy trade and investment has been concluded.¹⁵¹

The lack of a precise categorisation of energy calls for particular attention while establishing a special agreement on energy in the EAC. Furthermore, it questions the applicable legal framework for aspects related to energy that already have other applicable rules and the delimitation of their application.

However, the WTO rules apply to all kinds of trade. Thus, the rules apply to trade involving energy and are enforceable through the dispute settlement procedures established under the WTO.¹⁵²

The most significant rules applied are the Most-favoured nation (MFN) obligation prohibiting discrimination based on the origin or destination of energy as products or services, the national treatment (NT) obligation prohibiting discrimination in taxation or regulation between the local and imported products and other prohibitions provided by the WTO system.

It is important to consider the existing commitment of Partner States vis-à-vis their international and regional obligations to ensure the compliance of the framework and keep the best

¹⁴⁹Art 5.3 (g), EAC Treaty.

¹⁵⁰Art 127.1, EAC Treaty.

¹⁵¹Wawryk (n 2) 252.

¹⁵²As above.

practices while improving the rules of law by applying specific provisions related to the energy sector.

For example, the increasing demand for renewable energy technologies has caused competition for market share among the major producers and exporters of these technologies.¹⁵³ This situation questions the government's grant of subsidies and incentives, which impacts the market and could be considered an unfair treatment or advantage. Actually, around the world, many countries have provided in their laws incentives to promote clean energy technology. The incentives include subsidizing the manufacturers of renewable energy products.¹⁵⁴

The EAC, as a Community, and Partner States, are parties in diverse trade agreements. Therefore, it is crucial to consider those diversified commitments while drafting the energy framework to develop a unified framework towards increasing and facilitating energy trade, domestic, cross-border and foreign trade.

The rules applicable to trade have sources in diverse trade agreements and laws applicable in the EAC, such as the Customs Union Protocol, the Common Market Protocol and the AfCFTA. In addition, other key documents like the EAC Vision or the EAC Strategic Plan are applicable because they provide the basis for cooperation among Partner States and the steps to undertake to keep coherence with other development keys in the region.

The role of the dedicated energy framework regarding trade is to provide a framework able to mitigate the difference that can be found in the diverse trade agreements applicable in the region and create a unified framework that permits to avoid incoherence and ensuring a conform application of rules related to trade in energy in drafting and execution of the provisions defined.

3.3. Environmental, Social and Human Rights aspects

The issues of "good governance" and "licence to operate" of companies, including consideration of all the relevant environmental, social and cultural impacts of energy projects, are a major theme in international energy law.¹⁵⁵

The exploitation of energy is inextricably entwined with environmental protection issues, with many issues of environmental planning and protection and conservation legislation relevant to the industry.¹⁵⁶ Therefore, an environmental and social impact assessment (ESIA) must be mandatory and follow international standards to ensure the actors' alignment.

Environmental and Social aspects are often sacrificed in the name of investment promotion. However, such promotion can lead to unsustainable energy development with major environmental issues such as air pollution, lack of water, climate change, and biodiversity loss with a negative health impact and living of people affected by projects and the region in general. It is crucial to increase energy access while fostering environmentally sustainable, low-carbon and socially inclusive development.

¹⁵³ Wawryk (n 2) 253.

¹⁵⁴ As above.

¹⁵⁵ Wawryk (n 2) 247.

¹⁵⁶ Wawryk (n 2) 245.

The EAC Treaty also recognises the protection of the environment in its article 5(3) (c) stated the objectives of the Community, in article 101(2) (f) related to energy, article 111 and 112 dedicated to the protection of the environment in EAC.

EAC has a great potential in new and renewable energy resources such as solar energy, wind and geothermal energy. Furthermore, there is no need to make a costly energy transition like for developed country which is an opportunity for the region.

The framework should ensure legislation and regulation compliance with environmental policies and reduce dependence on fossil fuel and preserve non-renewable resources. In addition, it should promote investment in the development of technologies assisting the exploitation of renewable resources.

Energy projects impact the social life of a region or a country in which they are made, especially in the project area. The impact is not only on the economic growth and elevation of living standards provided by access to energy but also touches the living of the population affected by the projects.

Therefore, it is essential to plan social services like schools and hospitals in the project area and offer fair compensation when the energy projects include the expropriation of lands, and ensure the continuation of working and business activities or the compensation of the loss of activities for the population affected by the projects. Furthermore, it is also essential to consider the need for fair use of resources such as water or fish protection while designing energy projects.

The other relevant element is to consider the population's living standards while planning projects because the tariff could increase or decrease the population's ability to access energy services even if the energy is available.

Indeed, energy is an essential element with a huge impact on the population's life and is more than a luxury or commercial product or service. Increasingly, there is awareness globally about the essential contribution of energy services to eradicate poverty and to realise many of the recognised economic, social and cultural human rights.¹⁵⁷

However, there are no binding international commitments in public international law concerning universal access to energy services. Modern energy services are not recognised as an express human right in any international human rights instrument. Instead, it has been argued that access to energy services should be an implied human right given that many express rights (such as the right to education and the right to an adequate standard of living, to name but a few) cannot be achieved without access to energy services.¹⁵⁸ Energy should be considered as a basic need for human beings and a determinant for economic development.

Human Rights are not only limited to question the right to universal access to energy but it is also involved in the conduct of energy projects. It touches on the rights of local citizens living in the project area, questioning their involvement in the decision-making process.

It calls to the precaution needed while drafting a specific energy framework in the EAC to consider local participation in the energy projects making decision process and ensure the

¹⁵⁷ Wawryk (n 2) 248.

¹⁵⁸ As above.

adhesion of local Community to project affecting their rights to land, the preservation of the environment, labour rights, economic rights ...

One example regarding human rights in the exploitation of natural resources and which affects energy projects is the rights of Indigenous Peoples. Energy projects can have devastating impacts on indigenous peoples, who may need to be relocated away from their traditional lands.¹⁵⁹ As a result, the degradation caused by energy projects to the physical environment and the health, cultural, religious and traditional economic activities of local and indigenous communities have been so devastating that a breach of human rights has occurred.¹⁶⁰

Therefore, it is vital to reduce the negative impacts on indigenous peoples, provide social services to local communities, and ensure the accountability of all involved public and private actors. The role of the energy framework should be to take into consideration not only investment promotion but also the respect of human rights obligations to ensure sustainable energy projects preserving peace and prosperity for all.

3.4. State Sovereignty

Energy is a critical natural resource that nations often regard as uniquely their own and has a history of expropriations, which makes investment protection all the more important.¹⁶¹ Nevertheless, unfortunately, this vision of States over energy is often an impediment to establishing a multilateral energy framework.

For ensuring energy development and regional integration, States need to partially concede their autonomy and compromise on energy-related matters to achieve energy access. There are already many compromises on states' sovereignty principle regarding trade, environment and investment aspects through different treaties in force, and even the creation of a REC is a cession of a part of the sovereignty of States.

However, States should continue to seek to preserve the ability to decide what investments they will permit in their natural resources to preserve the degradation and ensure fair use and sustainability of resources. Indeed, energy is essential for the independence of States, and its lack has a significant impact on the States.

What is essential is to preserve the possibility of countries deciding about the use of their natural resources even when they are used for mutual benefit among the region towards achieving a complete regional integration ending by a political federation.

3.5. Dispute settlement

Dispute resolution is essential for any framework elaborated to prevent and resolve potential conflict and ensure the application.

In energy industries, arbitration is often chosen over courts and tribunals for different reasons, such as the swiftness of the procedures and impartiality required, especially by the private sector who want to avoid States' potential influence over national courts and tribunals.

¹⁵⁹ Wawryk (n 2) 247.

¹⁶⁰ As above.

¹⁶¹ Sussman (n 30) 958.

However, the arbitration system is questionable. States have as principal concern that investment arbitration infringes upon their sovereignty by favouring the interests of investors over the host state's competing interests and by removing disputes of a public nature from the province of their domestic court.¹⁶² The notion that international investment law and arbitration is a one-sided system favouring investors has gained traction among governments.¹⁶³

The arbitration process questions the lack of transparency and accountability because the arbitrators are not accountable to the public and are often commercial lawyers, which does not guarantee their total independence.

Arbitration also questions the ability or possibility for civil parties to access arbitration and be heard like local communities or indigenous people for human rights-related matters or the corporation's accountability in the conduct of energy projects. Indeed, energy implicates a public interest matter which should not be determined in private (as well as many other investment projects affecting local communities). This perception of the arbitration as an unfair procedure for States and local communities is important while determining the dispute resolution mechanisms to adopt for the EAC Energy Framework because the political and local support is relevant to the process.

Another question is regarding the potential case where States could have a conflict for any reason. For example, in the region, we face conflicts between States with consequences like countermeasures and closing borders.

The dispute resolution mechanism should consider such a scenario to avoid the possibility for a State to private another one access to energy and avoid shortages, which is a fundamental need for the continuation and safety of all activities in a country like health services, industrial services, transport, telecommunications... Again, an example in the Great Lakes Region regarding joint regional projects could guide the reflection. During the War in the '90s, Burundi, the Democratic Republic of Congo and Rwanda, did their best to protect the common regional power plant on the Ruzizi River and permitted the continuing production and transmission of energy for the benefit of the three countries.

This example shows how a joint project on common interest can be the source of cooperation and even impact the peace and stability of the region. Therefore, energy should be considered an expressive human right to call for the application of human rights provisions applicable even during conflict time between States.

Currently, the region has the EAC Court of Justice applying the EAC Laws with an arbitral jurisdiction and in charge of the dispute matters arising out of the EAC CU and CM, which are integral parts of the EAC Treaty. They are also the regional and international mechanisms adopted by States, such as the WTO Dispute Resolution Mechanism included in the AfCFTA, even if it faces now a dysfunction of the Appellate Body.

¹⁶² Sussman (n 30) 961.

¹⁶³ As above.

4. Implementation of the framework

The wished energy legal and regulatory framework has the potential to help to address energy challenges. Even though, they are some potential impediments to the implementation of such a framework.

The political will is essential for a successful implementation, but its lack could be based on the State Sovereignty Principle. Moreover, Partner States have a different vision regarding the energy sector; while some focus on New and Renewable Sources, others focus on fossil fuels. Therefore, it is necessary to take the wished framework to unify all these goals and bring out the best practices to adopt for a mutual share and benefit from energy resources among the region.

The political will, commitment and support of States are determined. However, a more widespread sense of “*east africaness*” among all categories of stakeholders across the EAC Partner States is needed.

They are fragmented legislation in the region among Partner States regarding the energy sector. Therefore, the unification and the resolution of implementation challenges could delay the process due to the varying levels of development across the energy sector and institutional frameworks in Partner States.

Even though the region promotes a single investment area and a single market to deepen integration, the unification process could be tackled by learning lessons from implementing the CU and CM in the region and other regional and international agreements.

The overlapping membership of Partner States in other RECs could be an important challenge because rules and goals can be different. However, it is not a specific issue for the energy sector but is applicable in the context of regional integration. It is, therefore, important to adopt rules of compliance and mitigation of potential contradiction.

The acceptance and understanding of the citizens of Partner States are relevant to the successful implementation of the framework. Indeed, communities must perceive the use and share of energy resources as beneficial for them (with the implication of cession on lands and other sacrifices involved). Moreover, it could increase the “*east africaness*” and strengthen the regional integration agenda, which seeks to be one region, one people.

5. Conclusion

The EAC has shown its interest as a community to deepen cooperation and strengthen regional integration through cooperation on matters of common interest and share its benefit. Energy is one of the common challenges and opportunities in the region.

It is time to address energy challenges by providing a dedicated framework to facilitate a sound trade and investment framework that increases energy access while protecting the environment and all legitimate laws and regulations, such as those related to human rights and social protection.

The need for a legal and regulatory framework on energy in EAC is real. The present chapter has taken out the sources of such framework internationally, regionally, and EAC framework, emphasising significant components.

The next chapter will seek lessons from ECOWAS who has established a common legal and regulatory framework.

CHAPTER FOUR: THE ECOWAS LEGAL AND REGULATORY FRAMEWORK ON ENERGY: LESSONS FOR EAC

1. Introduction

While seeking a common energy framework on energy in EAC, it is essential to learn from other regions that have achieved the desired framework. For example, the African Union recognises eight RECs in Africa,¹⁶⁴ but only ECOWAS and SADC have an energy protocol.

However, COMESA has an ongoing framework on energy development and focuses on harmonising the regulatory framework to promote a regional energy market. The framework should covers five RECs, including EAC, Intergovernmental Authority on Development (IGAD), Indian Ocean Commission (IOC) and SADC. The framework will also cover the specialized energy agencies, association of energy regulators, power pools and centres for renewable energy.¹⁶⁵ Therefore, EAC should be prepared with a strong energy sector.

For the purpose of this study, the ECOWAS will be the reference for the analysis to learn lessons useful for the EAC. Indeed, ECOWAS has the most recent protocol and has made considerable progress in developing diversified policy, legal and regulatory rules with dedicated institutions for each energy sub-sector.

This Chapter analyses the ECOWAS framework to assess the progress made and learn lessons from its success and failures to constitute a viable energy framework in EAC.

2. The Economic Community of West African States (ECOWAS)

ECOWAS comprises of fifteen Member States with a mandate of promoting economic integration and development among its Member States in all areas of activity, including energy production, development and trade in natural resources within the sub-region.¹⁶⁶

The Treaty establishing ECOWAS was ratified in 1975. Subsequently, a revised Treaty was adopted by fifteen-member States, following the new development and mandates for the Community.¹⁶⁷

The Community aims to promote co-operation and integration in West Africa. It also seeks to found an economic union to improve the living standards of the citizens of the Member States. Additionally, the Community seeks to ensure economic stability while fostering proper inter-state relationship. As such, contributing to the development and progress of African.¹⁶⁸ To achieve these objectives, the Community seeks for the harmonisation and coordination of

¹⁶⁴As above (n 137).

¹⁶⁵ COMESA 'Framework for Regulatory Oversight for the Regional Energy Market Developed' available at <https://www.comesa.int/framework-for-regulatory-oversight-for-the-regional-energy-market-developed/> (accessed 7 November 2021).

¹⁶⁶ Economic Community of West African States Basic Information <https://www.ecowas.int/about-ecowas/basic-information/> (accessed 7 November 2021).

¹⁶⁷ Economic Community of West African States Treaty 'Revised Treaty of 24 July 1993' (hereafter ECOWAS Revised Treaty) available at <https://www.ecowas.int/ecowas-law/treaties/> (accessed 7 November 2021).

¹⁶⁸Art 3(1), ECOWAS Revised Treaty.

national policies, the promotion of integration programmes, projects and activities in energy, trade, natural resources, finance and legal matters, among other fields.¹⁶⁹

ECOWAS has institutions and specialised agencies. The institutions are the Authority of Heads of State and Government, the Council of Ministers, the Community Parliament, the Community Court of Justice, the Commission, and other specialised technical commissions.¹⁷⁰

Among the recognised specialised agencies, the West African Power Pool (WAPP), ECOWAS Regional Centre for Renewable Energy and Energy Efficiency (ECREEE) and ECOWAS Regional Electricity Regulatory Authority (ERERA) are related to the energy sector.¹⁷¹

3. ECOWAS Energy framework

The ECOWAS energy framework's main provisions are found in the ECOWAS Treaty¹⁷² and the ECOWAS Energy Protocol¹⁷³. The ECOWAS Regional Energy Programme is part of the integration and economic development policy. The programme aims at strengthening regional integration and boosting growth by developing market to eradicate poverty. In all stages of energy chain, the Community energy programme has set coordinated actions to achieve the regional energy agenda through legal and regulatory instruments.¹⁷⁴

3.1. Legal framework

The ECOWAS energy agenda and priorities took its building on the existing bilateral connections and firstly appeared in the ECOWAS treaty (1975), the ECOWAS Energy Policy (1982)¹⁷⁵ and its 1993 revised version.¹⁷⁶ Both instruments majors on the harmonization and coordination of the national energy policies in the region. They also propagate the need to promote integration activities among Member States, and increase the collective energy autonomy of the region leading to the ECOWAS Energy Protocol (2003)¹⁷⁷ regulating the energy sector in the region.¹⁷⁸

¹⁶⁹ Art 3(2), ECOWAS Revised Treaty.

¹⁷⁰ Art 6, ECOWAS Revised Treaty.

¹⁷¹ As above (n 166).

¹⁷² Art 28, ECOWAS Revised Treaty.

¹⁷³ Economic Community of West African States 'Energy Protocol A/P4/1/03 of 31 January 2003' (hereafter ECOWAS Energy Protocol) available at <http://www.energy.gov.sl/EcowasProtocol.pdf> (accessed 7 November 2021).

¹⁷⁴ M Ogwezy 'Legal Framework for the Implementation of ECOWAS Energy Programmes: The Energy Protocol, WAPP Agreement and WAGP Treaty' OGEL 1 (2017) at 5.

¹⁷⁵ ECOWAS Energy Policy A/DEC.3/5/82. Decision AIDEC.3/5/82 relating to the adoption of the ECOWAS Energy Policy adopted by the Authority of Heads of State and Government (1982).

¹⁷⁶ K Karaki 'Understanding ECOWAS Energy Policy *From national interests to regional markets and wider energy access?*' *ECDPM policy* (2017) at 5. <https://ecdpm.org/wp-content/uploads/ECOWAS-Energy-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf> (accessed 7 November 2021).

¹⁷⁷ ECOWAS Energy Protocol (n 173).

¹⁷⁸ Karaki (n 176) 6.

3.1.1. ECOWAS Treaty¹⁷⁹

The Revised ECOWAS Treaty provides for the promotion, co-operation, and development of the energy projects and sectors of the ECOWAS Member States.¹⁸⁰

Article 3 of the Treaty entails the aims and objectives of the Community. These includes the promotion of cooperation and integration within the region. In doing so, the Community is enjoined to harmonise and coordinate the national policies and to promote the integration activities in energy to foster regional integration.¹⁸¹

Article 26 of the Revised ECOWAS Treaty promotes industrialisation through harmonisation of policies to contribute to natural resources and energy development.¹⁸² Furthermore, creating a firm basis for industrialisation and promoting self-resilience requires member states to promote industrialisation and the modernisation of energy sector.¹⁸³ Indeed, adequate energy supply is considered as a catalyst for industrial growth and general development of ECOWAS member States.¹⁸⁴ Moreover, sustainable industrialisation is linked to energy development and vice-versa.

Article 28 is the specific reference to energy in the Treaty. It provides the required actions to be done to achieve coordination and harmonisation of policies and programmes in the energy sector by ensuring development of energy resources, establishing cooperation mechanisms, promoting new and renewable energy, harmonising national energy development plans, articulating a common energy policy and establishing mechanism for the collective solution of energy development problems.

The Revised ECOWAS Treaty provides a solid legal basis for regional integration¹⁸⁵ in Articles 43(1) and 44 regarding the MFN treatment provision.¹⁸⁶ The commitment of member states is laudable because of the idea of MFN treatment and not granting tariff concession to a third country outside the Contracting States Parties makes it a legal basis for regional power interconnection.¹⁸⁷

Article 55 of the Revised ECOWAS Treaty makes provisions requiring Member States to complete the adoption of a common policy in energy within five years following the Customs Union and the economic and monetary union; both are already created and functional.¹⁸⁸ Thus, it aims to fast the integration process envisaged through a common customs union that facilitates industries creation and establishment with no border controls or limitation among them energy industries and services.

In essence, the Treaty establishes a proper institutional framework to steer ECOWAS to effectively tap its energy potentials and combat energy challenges among the West African

¹⁷⁹ ECOWAS Revised Treaty.

¹⁸⁰ Art 3, 26, 28, 43, 44 & 55, ECOWAS Revised Treaty.

¹⁸¹ Art 3, ECOWAS Revised Treaty.

¹⁸² Art 26(1) (2) (a-b), ECOWAS Revised Treaty.

¹⁸³ Art 26(3) (a) (viii), ECOWAS Revised Treaty.

¹⁸⁴ Ogwezzy (n 174) 4.

¹⁸⁵ Art 43 (1) & 44, ECOWAS Revised Treaty.

¹⁸⁶ Ogwezzy (n 174) 7.

¹⁸⁷ As above.

¹⁸⁸ Art 55(1) (i), ECOWAS Revised Treaty.

countries.¹⁸⁹ Furthermore, it has been a foundation for developing an energy framework fostering regional integration in all sub-energy sectors.

3.1.2. The Treaty on the West African Gas Pipeline (WAGP) Project¹⁹⁰

The Treaty on the West African Gas Pipeline (WAGP) Project was signed in 2003.¹⁹¹ It provides a legal and regulation framework for the construction and operation of the West African Gas Pipeline. It requires Member States to jointly and severally undertake necessary measures for the construction and operationalization of the pipeline.¹⁹²

The Treaty provides legislation and regulation for the West African Gas Pipeline (WAGP) Project¹⁹³, establish the West African Gas Pipeline Authority (WAGPA)¹⁹⁴ and the WAGP tribunal¹⁹⁵. Moreover, the Treaty provides provisions regarding fiscal regime¹⁹⁶, prohibition of expropriation¹⁹⁷, ownership of the WAGP¹⁹⁸ and dispute resolution¹⁹⁹, among other provisions.

The Treaty shows the commitment of the region to develop the energy sector by allowing multilateral treaties or agreements between member States who share a common concern and intention to resolve it in the energy sector. It is a lesson that could benefit the EAC to address the lack of interest that could exist for some member States regarding a specific energy sub-sector with the lowest interest for them.

3.1.3. ECOWAS Energy Protocol²⁰⁰

ECOWAS Energy Protocol was signed in 2003 to establish a legal framework with the main objective of promoting long-term cooperation in the energy sector to increase investment and energy trade in the region.²⁰¹

The Protocol aims at progressive removal of administrative, technical and other trade barriers in the energy sector.²⁰² It seeks to enhance access to available energy resources²⁰³ and technologies.²⁰⁴ It also seeks to encourage the use of efficient energy process from exploration to the use of energy while sustaining the environment.²⁰⁵ Further, it considers the role of the

¹⁸⁹ Ogwezy (n 174) 5.

¹⁹⁰ West African Gas Pipeline Authority http://www.wagpa.org/Treaty_on_WAGP_Project.pdf (accessed 7 November 2021).

¹⁹¹ West African Gas Pipeline Authority. <http://www.wagpa.org/> (accessed 7 November 2021).

¹⁹² Art 2.1, the Treaty on the West African Gas Pipeline (WAGP) Project (hereafter WAGP Treaty).

¹⁹³ Art 3.2, 7.2(1), WAGP Treaty.

¹⁹⁴ Art 4, WAGP Treaty.

¹⁹⁵ Art 4.15(1), Art 6.4-6.7, WAGP Treaty.

¹⁹⁶ Art 5-6, WAGP Treaty.

¹⁹⁷ Art 9.2, WAGP Treaty.

¹⁹⁸ Art 9, WAGP Treaty.

¹⁹⁹ Art 11, WAGP Treaty.

²⁰⁰ ECOWAS Energy Protocol (n 173).

²⁰¹ Art 2, ECOWAS Energy Protocol.

²⁰² Art.2 & 3, ECOWAS Energy Protocol.

²⁰³ Art 3, ECOWAS Energy Protocol.

²⁰⁴ Art 8, ECOWAS Energy Protocol.

²⁰⁵ Art 19, ECOWAS Energy Protocol.

private sector in the promotion and implementation of investments²⁰⁶ and intent to ensure an institutional framework promoting investment and trade in the energy sector.

The ECOWAS Energy Protocol acts as a support for the region's energy goals by encouraging the integration of energy trade amongst the member states. By balancing the development of the primary energy resources of its member states, ECOWAS hopes to achieve increased access to energy with an uninterrupted energy transit, as well as a stable and reliable electricity supply that is affordable and sustainable.²⁰⁷

Article 10 of the energy is related to the promotion, protection and treatment of investments. It seeks stable, equitable, favourable and transparent conditions for investors by ensuring fair and equitable treatment, protection and security of investments. The protocol also provides a framework seeking to eliminate cross-border barriers in energy trade and promote investment in the energy sector²⁰⁸ through provisions regarding dispute resolution mechanism recognising international arbitration²⁰⁹, protection against expropriation²¹⁰, repatriation of profits²¹¹, and other provisions attractive for investors.

The protocol provides open and non-discriminatory access to power generation sources and transmission facilities concerning the electric power sector.²¹² The protocol has also a specific provision which deserve attention because it provides an exception to the non-application of Chapter III related to investment promotion and protection in certain circumstances. It is article 17 of the protocol, the same like the one of the Energy Charter Treaty which inspired the ECOWAS Energy Protocol²¹³.

Article 17 of the ECOWAS Energy Protocol authorises a State party to refuse the benefits of the terms of Chapter III of the Protocol to a legal entity controlled by nationals of a third state and if such entity lacks substantial business in the territory of the Member State. Similarly, a State Party may refuse the benefits of the chapter to an investment owned by an investor of a third State with which the state party has not established diplomatic relations.

Article 17(1) of the ECT has been interpreted by the tribunal (International Centre for Settlement of Investment Disputes (ICSID)) in the dispute *Plama Consortium Limited v. Republic of Bulgaria*²¹⁴, which stated that '[...]The tribunal recalled that under Article 26(3)(a) of the ECT, a Contracting Party had given unconditional consent to arbitration and held that objections based on Article 17 of the ECT could not interfere with the tribunal's jurisdiction as the right of an ECT Contracting Party to deny Part III advantages to an investor relates to the merits of the

²⁰⁶Art 10(4) (b), ECOWAS Energy Protocol.

²⁰⁷Ogwezy (n 174) 5-6.

²⁰⁸Art 2, 3 & 7, ECOWAS Energy Protocol.

²⁰⁹ Art.26, 27 & 28, ECOWAS Energy Protocol.

²¹⁰ Art 13, ECOWAS Energy Protocol.

²¹¹ Art 14, ECOWAS Energy Protocol.

²¹² Ogwezy (n 174) 7.

²¹³ Article 17: Non-Application of Part III in Certain Circumstances available at <https://www.energychartertreaty.org/provisions/part-iii-investment-promotion-and-protection/article-17-non-application-of-part-iii-in-certain-circumstances/> (accessed 7 November 2021)

²¹⁴ *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) Decision on Jurisdiction of 8 February 2005 (*Plama*) available at: <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C24/DC520.pdf> (accessed 7 November 2021)

case. The tribunal further considered that the exercise of this right should have no retrospective effect [...]’.

Therefore, from a host-state perspective, an energy investor would be covered by the full range of investment protections provided by Chapter III, including fair and equitable, national, and most-favoured-nation treatment, even if that investor deliberately misled the regulatory authorities as to its ownership's identity or nationality.²¹⁵

Article 17 (1) is limited to investors, which are *entities*. The article does not apply to an investor who is a natural person. It applies to entities that are either owned *or* controlled by "citizens or nationals" of a state other than that of the host of the investment, that is, the respondent in the dispute, or the entity's home state, its state of registration. Its applicability would be limited to citizens or nationals from non-ECOWAS Energy Protocol states since investors from member states would be able to claim their own rights. In addition to satisfying the ownership or control criteria, the entity must have "no substantial business activities" in its home state.²¹⁶

For EAC, it is important to strengthen this kind of provision to ensure that the exception to grant advantages covers all the substantial contents to protect countries' interests.

The protocol provides a framework that gives an orientation regarding different aspects of the energy sector. It is helpful because it provides a clear indication regarding the environment of the energy sector but also on the regional agenda, which impacts the easiest assessment of the stability and opportunities in the region. Furthermore, the protocol facilitates the creation of specific institutions and policies to address the energy challenge through a strong legal basis and regulatory instruments.

3.2. Policy and Regulatory framework

The ECOWAS regional energy programme focuses on increasing the utilisation of regional resources to expand power generation and exchange and on developing cross-border interconnections in the context of a regionally integrated energy market. The overall objective is to boost and optimise the energy availability and use by ensuring an enhanced energy service access to rural and peri-urban communities.²¹⁷

In order to implement the ECOWAS energy agenda, three key pillars have been established: the West African Power Pool (WAPP), created in 1999 regulated with the ECOWAS Energy Protocol and operational since 2006; the development of the West African Gas Pipeline (WAGP) conceived in 1982 and implemented in 2003 and the ECOWAS Centre for Renewable Energy and Energy Efficiency (ECREEE) created in 2010.²¹⁸ These pillars are based on

3.2.1. The West African Power Pool

The West African Power Pool (WAPP) was established in 1999 to create regional energy production and distribution facility. The articles of agreement West African Power Pool

²¹⁵ J Chalker 'Article 17 (1) of the ECOWAS Energy Protocol' OGEL 3(2008) available at www.ogel.org/article.asp?key=2816 (accessed 7 November 2021)

²¹⁶ As above

²¹⁷ Ogwezzy (n 174) 5.

²¹⁸ Karaki (n 176) 6.

Organisation and Functions²¹⁹ were adopted in 2006 by the Authority of ECOWAS Heads of State and Government through Decision A/DEC on 18 January 2006. In addition, the WAPP was established as a Specialized Institution of ECOWAS through Decision A/DEC on 20 January 2006.²²⁰

The WAPP based its strategy on a vision of integrating the national power systems into a unified regional power market. The unified regional power market seeks to provide regular and reliable energy at an accessible cost for the citizens of Member States in the medium and long term. In addition, it aims at promoting the development of infrastructure for power production and transmission and coordinate power exchange within the Community.²²¹

Creating a regional power market is an attractive element for investors and encourages Member States to share their energy resources. Essentially, WAPP establishes a platform for tripartite or bilateral arrangements on power generation, transmission and distribution between Member States.²²²

The Energy Protocol has established the necessary legal and institutional framework to ensure the cooperation of states in the development of energy sector. Thus, the Protocol was an essential requirement for WAPP to be fully operational. The EAC that lagged in developing power pool could therefore ensure the establishment of a legal and institutional framework as a solution to increase cooperation under the power sub-sector.

Globally, the institutional framework of the WAPP is advanced. The ECOWAS protocol provides key issues like protecting foreign investments, non-discriminatory provisions for energy imports and exports, and a dispute resolution provision leading to creating sound legal instruments and institutions. These provisions of the ECOWAS protocol can assist the WAPP to promote opportunities for regional energy project investment.²²³

However, there is still improvement to be done regarding the enforcement of decisions for the dispute resolution process because there is no enforceable compliance mechanism to ensure greater predictability for foreign and/or regional investors. As a result, ECOWAS Regional Electricity Regulatory Authority (ERERA) is developing dispute settlement procedures and enforcement rules.²²⁴

The ECOWAS Member States established the ERERA in January 2008 by Supplementary Act²²⁵ as a specialised institution of ECOWAS within the framework of the Energy Protocol and

²¹⁹ Economic Community of West African States 'Articles of Agreement West African Power Pool Organisation and Functions' done at Accra October 2005 <https://www.erera.arrec.org/wp-content/uploads/2016/08/Articles-of-Agreement-WAPP.pdf> and update at Cotonou on 8 November 2019 https://ecowapp.org/sites/default/files/eng_wapp_articles_of_agreement.pdf (accessed 7 November 2021).

²²⁰The West African Power Pool, Creation of the WAPP <https://ecowapp.org/en/content/creation-wapp> (accessed 7 November 2021).

²²¹As above.

²²² Karaki (n 176) 6.

²²³ Karaki (n 176) 13.

²²⁴ As above

²²⁵ Supplementary Act A/SA.2/1/08 establishing the ECOWAS Regional Electricity Regulatory Authority (ERERA) <https://www.erera.arrec.org/wp-content/uploads/2016/08/ERERA-s-Establishment-Act.pdf> (accessed 7 November 2021).

the West African Power Pool Program.²²⁶ ERERA's governance structure is provided by Council Regulation 2007 on the composition, organization, functions and operations of the Authority²²⁷ and its amendments.²²⁸

The ERERA regulates regional cross-border electricity trade and interconnection in West Africa.²²⁹ Indeed, ECOWAS Member States seek to achieve electricity interconnections through joint implementation and sharing the region's energy resources. This commitment is translated in the legal and regulatory instruments established to create an appropriate legal and institutional for the development of the electricity sector in the region, which are the foundation of the role of ERERA.²³⁰

ERERA has as main objectives to regulate cross-border electricity exchanges, provide appropriate support to national regulatory bodies, and facilitate the setting up of regulatory and economic environment suitable for the development of the regional market while overseeing the implementation of the necessary conditions to ensure rationalisation and reliability. In addition, it ensures compliance with Energy protocol provisions with a tariff setting methodology suitable for regional power pooling.²³¹

The creation of specific institutions under the Power sub-sector has helped implement the energy protocol provisions while the energy protocol provisions strengthen the institutions. However, a legal framework should be completed by a regulatory framework and vice-versa to fully implement the program and initiatives in the energy sector for its development and sustainability.

3.2.2. The West African Gas Pipeline (WAGP)

The WAGP was legally established on the basis of the West Africa Gas Pipeline Project Agreement of January 31, 2003 signed between Benin, the Republic of Ghana, the Federal Republic of Nigeria and the Republic of Togo (the "WAGP Agreement").²³²

The established order of the WAGP is one of the big successes of ECOWAS as a sub-local financial business enterprise to reinforce fueloline deliver to the 4 collaborating countries. The WAGP is a cooperative attempt of the 4 States, the Producers, the Sponsors, the Transporters, the Foundation Customers, and the vendors of political hazard guarantees.²³³

Article 2 of the WAGP Treaty describes the purpose and the nature of the West African Gas Pipeline project as being intended to "transport Natural Gas to electricity generating companies

²²⁶ ECOWAS Regional Electricity Regulatory Authority (ERERA), <https://www.ecowas.int/specialized-agencies/ecowas-regional-electricity-regulatory-authority-erera/> (accessed 7 November 2021).

²²⁷ Council Regulation C/REG.27/12/07 of 15 December 2007 on the Composition, Organisation, Functions and Operations of the Authority <https://www.erera.arrec.org/wp-content/uploads/2016/08/ERERA-s-Operations-Act.pdf> (accessed 7 November 2021).

²²⁸ Council Regulation C/REG.24/11/08 of 29 November 2008 related to the amendment of articles 5(4), 12(2), 13(1) and 39 of the Council Regulation C/REG.27/12/07 of 15 December 2007 on the Composition, Organization, Functions and Operations of the Authority <https://www.erera.arrec.org/wp-content/uploads/2016/08/ERERA-s-Operations-Act-Amendment.pdf> (accessed 7 November 2021).

²²⁹ As above (n 226).

²³⁰ As above (n 226).

²³¹ ECOWAS Regional Electricity Regulatory Authority (ERERA), <https://www.erera.arrec.org/en/about-erera/overview/> (accessed 7 November 2021).

²³² WAGP Treaty (n 192).

²³³ Ogwezzy (n 174) 12.

and other industrial buyers and users of Natural Gas in the West African region and it shall be an open-access transporter to the extent contemplated in the International Project Agreement".

Through this initiative, cheaper and cleaner energy sources can reach Member States for electricity generation and industrial purposes. Indeed, the good thing about the gas pipeline is that the reduction of the dear production prices of electricity generation mistreatment fossil fuels and therefore the environmental pollution leading to bigger industrial growth and economic integration.²³⁴

The WAGP is a successful cooperation between public and private sector to resolve a regional concern in the energy sector. It is essential to combine efforts of all the stakeholders to increase energy access and efficiency in a region. Further, the EAC promotes through the Treaty the participation of the private sector in the region's economic development.

The WAGP institutional framework is composed of the WAGP Authority serves as the governing and regulatory body of WAGP when the pipeline is owned and operated by WAPCO.²³⁵

3.2.2.1. The West African Gas Pipeline Authority

The West African Gas Pipeline Authority ("WAGP Authority" or "WAGPA") is a global establishment established by the WAGP treaty. WAGPA has illustration functions (to take actions and selections within the name and on behalf of the State Parties)²³⁶, facilitation functions²³⁷ and regulatory functions^{238, 239}. The WAGP treaty grants the WAGPA exclusive jurisdiction to exercise the powers and perform the functions specified under the International Project Agreement (IPA).²⁴⁰

The main functions of WAGPA are the approval of pipeline design and construction plans²⁴¹; negotiate and agree on the licenses and access codes²⁴² and change in tariff methodology²⁴³ with WAPCO; negotiate and agree with a third-party operator of the pipeline system²⁴⁴ and on any expansions plans²⁴⁵; act on behalf of the four States' respective tax authorities²⁴⁶; and use its best efforts to ensure that each State complies with the IPA and applicable enabling legislation²⁴⁷. The WAGP Authority does not set tariffs, as these are regulated by contract.²⁴⁸

In summary, the primary function of the WAGP Authority is to monitor and regulate the affairs of WAPCO and ensure that the Company complies with the IPA.²⁴⁹ It is worthy of being noticed

²³⁴ Ogwezy (n 174) 13.

²³⁵ Art IV (2) (2) (a-c), WAGP Treaty.

²³⁶ Art IV (a), WAGP Treaty.

²³⁷ Art IV (b), WAGP Treaty.

²³⁸ Art IV(c), WAGP Treaty.

²³⁹ The West African Gas Pipeline Authority (WAGPA) <https://www.wagpa.org/about-us/> (accessed 7 November 2021).

²⁴⁰ Art IV (2) (1) & Article II (2), WAGP Treaty.

²⁴¹ Art IV (2) (2) (iii), WAGP Treaty.

²⁴² Art IV (2) (2) (ix), WAGP Treaty.

²⁴³ Art IV (2) (2) (iii), WAGP Treaty.

²⁴⁴ Art IV (2) (2) (ix), WAGP Treaty.

²⁴⁵ Art IV (2) (2) (iii), WAGP Treaty.

²⁴⁶ Art IV (2) (b) (vi-vii), WAGP Treaty.

²⁴⁷ Art IV (2) (2) (x) (xi) (xii), WAGP Treaty.

²⁴⁸ Ogwezy (n 174) 13.

²⁴⁹ Ogwezy (n 174) 19.

that a company owned by public and private sector should stay regulated by an official regulator who has a word to say in its administration to ensure fair conduct of business and stability of the WAGP. This is the main benefit of specialised agencies that can help government follow up and ensure the protection of States interests in the energy sector.

3.2.2.2. The West African Gas Pipeline Company limited (WAPCo)

West African Gas Pipeline Company Limited (WAPCo) is a multinational limited liability company that builds and operates the West African Gas Pipeline (WAGP) under the auspices of ECOWAS. WAPCo is a joint venture between Nigerian, Beninese, Togolese and Ghanaian public and private companies, with the mandate to transport natural gas safely, responsibly and reliably at competitive prices to customers in Nigeria, Benin, Togo and Ghana. The West African Gas Pipeline Authority is the regulator for WAPCo.²⁵⁰

WAPCo, which was founded under the Build, Own and Operate Policy, is an excellent example of the cooperation and partnership between the ECOWAS member states in order to achieve their long-term goal of energy security. In the effort of the states of the ECOWAS region to create a predictable and stable business environment, significant private direct investments can flow into the sub-region.²⁵¹

The Company has exclusive ownership and operating rights to the West Africa Pipeline and all other assets to be used in the construction or operation of the West Africa Pipeline.²⁵²

3.2.3. The ECOWAS Centre for Renewable Energy and Energy Efficiency (ECREEE)

The ECREEE was created through C/REG.23/11/08 of Council of Ministers in 2008.²⁵³ It is the translation of the provisions of the ECOWAS energy protocol to improve energy efficiency and the use of renewable energy sources. In addition, the ECOWAS / UEMOA White Paper on Access to Energy Services for the Population in Rural and Urban Areas stipulates that at least 20% of new investments in electricity generation must come from locally available renewable resources in order to achieve independence and vulnerability to reduction and sustainable environmental development.²⁵⁴

ECREEE plays its role around the main pillars of activities that focus on policy development, capacity building, knowledge and awareness management, and investment and business promotion.

Under the Policy improvement activity, the ECREEE help Member States to develop, undertake and put into effect countrywide renewable strength (RE) and strength efficiency (EE) guidelines and objectives, regulatory frameworks, requirements and incentives. The gain of the local

²⁵⁰ The West African Gas Pipeline Company Limited (WAPCo), Company Profile. [Company Profile – WAPCo \(wagpco.com\)](http://www.wagpco.com).

²⁵¹ Ogwezzy (n 174) 14.

²⁵² WAGP Treaty (n 192).

²⁵³ ECREEE Overview <http://www.ecreee.org/page/overview-ecreee> (accessed 7 November 2021).

²⁵⁴ As above.

guidelines in ECOWAS is they encompass a duty for the nations to advise countrywide motion plans and measures which reply to the set local objectives through 2030.²⁵⁵

Under the Capacity improvement activity, the ECREE works to bolster the capacities of key actors inclusive of non-public and public Stakeholders withinside the sustainable power area to deal with the lack of information and technical abilities constituting a barrier for the dissemination and utilisation of renewable power and power performance technology withinside the region. As a chief milestone, the Centre achieved a "local capability wishes assessment".²⁵⁶

Indeed, it is essential to ensure the capacities development of actors to promote new and renewable energy resources for a mentality and conceptional change. Therefore, a prior assessment is an excellent idea to determine the need and plan accordingly to provide solutions and sustain the energy sector resources of member States of a regional community.

As a significant milestone, the Centre developed the ECOWAS Renewable Energy Policy (EREP) and the ECOWAS Energy Efficiency Policy (EEEP).²⁵⁷

The framework of the EEEP helps to create a favourable environment for private investments in energy efficiency, the reliability and security of the energy supply by reducing losses in all links of the supply chain dependence on fossil fuels, industrial development and to stimulate employment by reducing energy costs by raising the standard of living of the ECOWAS population and making energy access more affordable and easier, in both urban and rural areas, with an impact on public services such as education, health and cleaning water and to reduce negative external environmental influences.²⁵⁸

The EREP translates the goal of applying regional goals to national goals and activities. The goals set are grid-connected applications for renewable energies, stand-alone and off-grid applications as well as applications for renewable energies in the household.²⁵⁹

The vision of the EREP is to ensure an increasing and more complete part of the Member States' energy supply and services through timely, reliable, sufficient and profitable use of renewable energy sources, thereby enabling universal access to electricity and a more sustainable and secure supply of domestic energy services to the Cooking, thereby meeting the objectives of the White Paper on Access to Modern Energy Services.²⁶⁰

As part of the knowledge and awareness management activity, the ECREE addresses the lack of up-to-date and high-quality energy information, which is an important limitation for investors and project developers in the area of sustainable energy in the region, as it constitutes an investment risk. The center works to raise the awareness of key market participants and the

²⁵⁵ ECREE Policy Development <http://www.ecreee.org/page/policy-development> (accessed 7 November 2021).

²⁵⁶ ECREE Capacity Development <http://www.ecreee.org/page/capacity-development> (accessed 7 November 2021).

²⁵⁷ As above (n 255).

²⁵⁸ ECOWAS Energy Efficiency Policy. <http://www.ecreee.org/page/ecowas-energy-efficiency-policy-eeep> (accessed 7 November 2021).

²⁵⁹ ECOWAS Renewable Energy Policy (EREP). <http://www.ecreee.org/page/ecowas-renewable-energy-policy-erep> (accessed 7 November 2021).

²⁶⁰ As above.

general public about the possibilities that technologies and services for renewable energies (RE) and energy efficiency (RE) offer.²⁶¹

Therefore the Centre has initiated programs and initiatives to enhance the existing knowledge and awareness barriers.²⁶² Among other things, the ECOWAS potential assessment program for renewable energies aims at providing various activities such as the ECOWAS Renewable Energy Policy (EREP), including the ECOWAS Energy Efficiency Policy (EEEP), Business Initiative and Investment in Renewable Energies (EREI) of ECOWAS and Observatory of Renewable Energy and Energy Efficiency (ECOWREX) of ECOWAS.²⁶³

The ECOWAS Observatory of Renewable Energies and Energy Efficiency (ECOWREX) deals with the unavailability of reliable and current energy information and facilitates access to current information and data, it acts as a specialized platform for the exchange of information and experience.

Therefore, ECOWREX aims to improve existing knowledge and break down information barriers for the development of the energy sector in the region, offers personalised information and planning strategies for decision makers, project developers, investors and other interested parties and promotes knowledge management, networking, promotion and empowerment. renewable energies and energy efficiency.²⁶⁴ Indeed, a lack of accurate information on the existing and planned resources vital for strategic planning and development is a constraint not only for investors and project developers but also for decision-makers and experts in the energy sector. This situation leads to lost significant opportunities for sustainable energy development in the region.²⁶⁵

In essence, access to information and increased awareness is essential to develop the new and renewable energy sub-sector and the energy sector.

Under the investment and Business Promotion activity, the ECREE aims to fulfil its mandate of attracting investments in Renewable Energy.²⁶⁶ To this end, the center has launched investment initiatives for the numerous RE and EE projects identified in the region, including the ECOWAS Renewable Energy Fund (EREF) and the ECOWAS Renewable Energy Investment Initiative (EREI).²⁶⁷

The EREF is a grant mechanism that provides co-financing of grants for small to medium-sized projects in the field of RE and EE and companies in rural and peri-urban areas.²⁶⁸

The EREI aims to remove financial barriers to investments in medium-sized and large renewable energy projects and companies in the region and to support member states in

²⁶¹ ECREE Knowledge management and awareness. <http://www.ecreee.org/page/knowledge-management-and-awareness> (accessed 7 November 2021).

²⁶² As above.

²⁶³ As above.

²⁶⁴ ECOWAS observatory for Renewable Energy and Energy Efficiency (ECOWREX). <http://www.ecowrex.org/page/about> (accessed 7 November 2021).

²⁶⁵ As above.

²⁶⁶ ECOWAS Renewable Energy Investment Initiative <http://www.ecreee.org/page/ecowas-renewable-energy-investment-initiative-erei> (accessed 7 November 2021).

²⁶⁷ ECREE Investment and Business Promotion. <http://www.ecreee.org/page/investment-and-business-promotion> (accessed 7 November 2021).

²⁶⁸ ECOWAS Renewable Energy Facility Peri Urban and Rural Areas <http://www.ecreee.org/page/renewable-energy-facility-peri-urban-and-rural-areas-eref> (accessed 7 November 2021).

realizing their individual RE potential by developing an economic one sustainable project portfolio to arouse the interest of potential investors and financiers.²⁶⁹

Indeed, significant investments are needed to support the development of renewable energy markets in the ECOWAS region; However, the main obstacle to the development and implementation of RE investment projects in the region is difficult access to low risk capital and long-term finance rather than technical resources. Economy or profitability.²⁷⁰

Therefore, such initiatives like EREI and EREF are necessary to strengthen the energy sector requiring high production costs, especially the fact that they are done through a specialised energy agency providing structure and confidence of potential sponsors.

The ECOWAS program on Gender Mainstreaming in Energy Access (ECOWGEN) is the first regional policy instrument that aims to close gender-specific differences in the energy sector; Raising awareness and understanding of policy makers for gender sensitive policies; Expand business opportunities; and promoting information, education and communication between Member States on gender equality and energy.²⁷¹

The advantage of ECOWGEN is that a specific gender mainstreaming policy on access to energy is required to better meet the needs of all citizens for modern and sustainable energy services that improve living standards and productivity. Gender discrimination and a lack of inclusion, which at the same time limit the opportunities and skills of women and men and thus their economic potential. All citizens should have access to sustainable energy and benefit from it.²⁷²

Therefore, the innovation of the ECOWAS Energy framework to include gender issues resolution as a specific target is notable and should inspire the EAC in framing its energy framework for the benefit of all its citizenry.

In conclusion, ECREEE is coordinating and/or implementing agency for sustainable energy programs and projects in ECOWAS, facilitating the framing of an energy politic on new and renewable energy as a solution to the specific concern of the sector.²⁷³

4. Lessons from the ECOWAS Energy Framework

On the surface, the ECOWAS Energy framework can be said to be quite advanced. However, there are still areas for improvement, especially in implementing policies, laws, and regulations adopted.

There is still a disparity in electricity access between urban and rural areas in the ECOWAS region.²⁷⁴ Moreover, the low consumption and inability of consumers to pay an expensive tariff

²⁶⁹ As above (n 266).

²⁷⁰ As above (n 266).

²⁷¹ Economic Community of West African States 'ECOWAS Policy for Gender Mainstreaming in Energy Access' (hereafter ECOWGEN adopted copy) at 7 http://www.ecowrex.org/system/files/ecowas_policy_for_gender_mainstreaming_in_energy_access.pdf (accessed 7 November 2021).

²⁷² As above (n 271) 8.

²⁷³ ECREE Projects <http://www.ecreee.org/page/other-specific-projects> (accessed 7 November 2021).

²⁷⁴ O Akinyemi and others 'Regional Integration and Energy Sustainability in Africa: Exploring the Challenges and Prospects for ECOWAS' (2019) African Development Review at 525 available at <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8268.12406> (accessed 7 November 2021).

due to the use of diesel generation makes electricity generation costly and not viable in rural areas.²⁷⁵ Therefore, it is essential for EAC who faces the same challenges to promote solutions viable in a rural area such as new and renewable resources over the use of fuels for electricity production.

While selling a local strength framework, it is miles important to impeach the hobby for which, States may want to favourite local integration withinside the strength zone due to the fact States regularly favour to broaden their personal infrastructure to benefit a snug strength independence, which affects and indicates problems in deepening strength local integration. However, modernising country wide strength infrastructure can also additionally facilitate local cooperation in the end as it will increase local infrastructure and enables strength transmission.²⁷⁶

However, utilities and power generators face additional costs to build interconnection lines as an adjustment is required to accommodate utilities elsewhere in the regional network. As a result, a regional balancing mechanism is required as utilities and energy producers have to adjust their distribution capacity to include other utilities, which creates additional costs and could create limited motivation to take on those costs.²⁷⁷

Regional energy integration benefits increasing energy trade by providing a large market for countries with a high energy potential contributing to resolving the issue of the limited market size and reducing energy production costs while allowing countries with limited capacities to access affordable and reliable energy.²⁷⁸

Another energy sector challenge to address as a Community is the limited financing capacities preventing countries from investing in additional capacities and new technologies.²⁷⁹ The question of financing and the associated risks, costs and benefits of regional energy bundling are decisive factors in determining the interests of the member states in cooperation initiatives.²⁸⁰ For example, States often prefer to use aid and funds for their interests rather than for regional interests.²⁸¹

Hence there is a need for external investment for project funding as the ECOWAS member states cannot afford these costs and this conclusion can also be applied in the framework of the EAC.²⁸²

However, there is an impediment related to the monopoly of States-owned electricity enterprises, which represents a barrier to private sector participation and the development of the regional market, affecting the ability of the WAPP and other regional energy institutions to promote investment in the electricity sector.²⁸³

As a result, the slow progress in implementing programs has led States to create alternatives and affect policies' effectiveness. To illustrate this, the ECOWAS member countries have adopted the special purpose vehicle (SPC) model due to the slow progress made in

²⁷⁵ Karaki (n 176) 9.

²⁷⁶ Karaki (n 176) 8-9.

²⁷⁷ Karaki (n 176) 17.

²⁷⁸ Karaki (n 176) 10, 16 & 17.

²⁷⁹ Karaki (n 176) 11.

²⁸⁰ Akinyemi and others (n 274) 525.

²⁸¹ Karaki (n 176) 18.

²⁸² As above.

²⁸³ Karaki (n 176) 12.

implementing the WAPP master plan in 2008. An SPC is structured as a public-private partnership (PPP) for interested WAPP member countries. " Utilities and a private equity strategic partner aiming to facilitate the implementation of priority regional energy projects by overseeing the design, construction and commissioning of the regional power plants identified by Member States.²⁸⁴

Although the effective functioning of WAPP is not yet efficient, WAPCo is the main engine of WAGP and has been instrumental in addressing various political and economic challenges faced by WAGP: dealing with linguistic, cultural, social and institutional barriers (different legal systems); Combination of various practical experiences.²⁸⁵

The above challenge questions the need for the private sector to get involved in the energy sector; Just as governments prefer national interests to regional interests, the private sector also prefers short-term needs and interests, which can slow or postpone long-term structural investment in the sector.²⁸⁶

Involving private sector actors can also pose challenges: a lack of transparency was found in one of the WAPP projects, a turbine facility in Marie Gleta, Benin; In addition, the responsibility and accountability of oil companies has been challenged, the environmental and socio-economic impact of the projects and without the involvement of host communities and civil society groups, which creates tension during project development.²⁸⁷

The role of the private sector in the energy sector is an essential topic to address wisely because it affects the business conduct of the Project, the financing of costly energy projects, and often brings conflicts regarding the respect of the environment, socio-economic, and human rights. There is therefore a need for transparent, accountable and accountable ways to involve the private sector in greater regional energy integration and cooperation.

The pricing element is an essential and sensitive aspect for countries which lead to difficulties regarding the convergence and fixation of the price because the political and social context of the countries impacting the fixation of price is different.²⁸⁸ This situation translates well the subsidies applied on the tariff to make it affordable and avoid social protest and the need for a competitive tariff to avoid power shortages and provides suitable conditions for the sector to be efficient. However, this also means that changes in the balance of power and competition can complicate or accelerate regional energy projects.²⁸⁹

The political will and the lack of commitment to regional integration are among the main impediments to implementing the regional energy agenda, including the effectiveness of the WAPP in ECOWAS.²⁹⁰ It questions how to translate the regional policies into the national framework and deepen the regional integration. There are still significant challenges to implementing the needed liberalisation policies at the national level.²⁹¹ The fact that ECOWAS

²⁸⁴ Karaki (n 176) 14.

²⁸⁵ As above.

²⁸⁶ Karaki (n 176) 19.

²⁸⁷ Karaki (n 176) 14.

²⁸⁸ Akinyemi and others (n 274) 525.

²⁸⁹ Karaki (n 176) 18.

²⁹⁰ Akinyemi and others (n 274) 525.

²⁹¹ Karaki (n 176) 14.

member States are continually changing and lack of trust between them is said to lead to non-continuity in regional policy implementation.²⁹²

However, impressive results were achieved when Member States committed to participating in a regional approach to energy development. The WAGP negotiations, for example, were challenging because they involved countries with different origins and political orientations. However, they had great engagement and commitment to ECOWAS, a solid foundation for the WAGP agreement.²⁹³

The lack of national and African ownership is a key factor in explaining some of the shortcomings of the regional approach, as most projects are designed and implemented by non-African institutions and often fail to consider the political, technical context and local social realities of the regional Energy sector.²⁹⁴

Therefore, it is to promote ownership of energy projects²⁹⁵ to avoid external political influence from developed countries. For example, most emerging power countries (China, Brazil, India) have policies privileging bilateral agreement over regional one and are currently increasing their investment in the energy sector in Africa. This external political influence could undermine ECOWAS efforts towards regional energy policy and other RECs in Africa like EAC.²⁹⁶ Notably, a strong political commitment towards regional integration is the foundation of successful implementation of regional energy policies in a regional Community.

However, they will remain limited progression as long as national priorities do not converge with regional ones.²⁹⁷ Instead, the priority is given to national supply, which impacts export commitment and interfering with domestic demand in case of limited power supply at member state's level prevents Member States from thinking regionally²⁹⁸ where most political traction may lie to deepen regional energy integration in the ECOWAS region.²⁹⁹

In essence, ECOWAS has made much progress towards a solid regional energy framework, but they are still areas for improvement. Nevertheless, the EAC can learn from ECOWAS and benefit from its legal and regulatory framework while developing and implementing an EAC regional energy framework.

However, it is also important to learn from the failures and lack of the ECOWAS framework to avoid the same mistakes and innovate for sustainable energy development.

5. Conclusion

Energy is known as an enabler of economic and social development. However, access to it in Africa in general and within ECOWAS and EAC member states has been very poor.

The ECOWAS region has made steps towards addressing energy shortage, energy security, and stimulating economic development due to access to energy resources through dedicated

²⁹² Akinyemi and others (n 274) 526.

²⁹³ Karaki (n 176) 15.

²⁹⁴ As above.

²⁹⁵ Akinyemi and others (n 274) 525.

²⁹⁶ Karaki (n 176) 16.

²⁹⁷ Karaki (n 176) 17.

²⁹⁸ As above.

²⁹⁹ Karaki (n 176) 20.

legal and regulatory frameworks developed to create favourable conditions for trade and investments in the energy sector of the ECOWAS sub-region.

Furthermore, the adoption of specific policies, laws and regulations and the creation of specific institutions for each energy sub-sectors contribute well to tackle challenges in roots.

The ECOWAS Energy Protocol, the WAPP Agreement and the WAGP Project have positively impacted energy projects in West Africa through the legal frameworks adopted by the contracting states parties. In addition, they have enhanced the aim of regional socio-economic integration in West Africa, leading the ECOWAS Treaty.³⁰⁰

Therefore, the EAC shall improve its regional energy framework based on lessons from other regional economic communities like ECOWAS that have progressed towards addressing energy deficit and increasing their citizens' energy access and living standards. In addition, a common regional framework helps to address competition and national interests leading to deepening regional integration.

The next chapter will summarise the key points of the research and recommendations towards creating a common legal and regulatory framework in EAC.

³⁰⁰ Ogwezzy (n 174) 20.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

1. Introduction

This research paper has taken a journey to analyse the challenges and opportunities in developing a common legal framework on energy in EAC. Indeed, energy access remains a major constraint for the region's development.

The study has revisited the energy landscape of the EAC to assess the achievements and relevant challenges, among them the lack of a legal and regulatory framework on energy but also to provide some of the opportunities available in the energy sector and different ongoing programs and initiatives.

The present chapter summarises the research by providing key finding points to review the research problem and questions. After that, the chapter concludes the study with recommendations and conclusions seeking to address the energy deficit and facilitate energy access in EAC through a legal and regulatory perspective.

2. Summary of key points

This study's background was the lowest energy access in the EAC and its impacts on the region's economic development. Further, the region relies a lot on biomass and other non-renewable energy, which impact the environment and affect climate change with substantial consequences on the region's sustainable development in the long term. Indeed, all forms of power generation have a meaningful environmental impact on air, water, and land because production and energy use involve GHG emissions and air pollution. However, the use of renewable resources such as solar, geothermal, and wind can reduce the high cost and environmental impact of the combustion of fuels and contribute to a more efficient production and energy use with a limited impact on climate change.

The research focuses on one of the impediments to energy access and efficiency, the lack of a legal and regulatory framework in the energy sector. The research questions aimed to review the legal and regulatory landscape on energy in EAC to assess the achievements, challenges, and opportunities of the energy sector to seek a foundation to develop a common legal and regulatory framework on energy in EAC. In addition, the aim was to find challenges and opportunities of such framework and learn lessons from ECOWAS to establish the most advanced framework on energy for the benefit of the Community.

The first chapter provided the background and the research aims inspired by existing literature on the need for an energy framework to tackle energy challenges. Next, the chapter provided the structure of the study and its methodology.

The second chapter assessed the energy landscape in EAC and concluded that it is not well constituted and strong to tackle the energy sector's challenges. Indeed, the region has many initiatives and opportunities, but the implementation is difficult because they are not binding documents, only orientations and fall to be aligned with national policies. In addition, a rationale for a legal and regulatory framework on energy has been demonstrated to address the

challenges due to the lack of an energy framework and to emphasise the benefit of such framework for the region, especially regarding trade energy and investment.

The third chapter sought sources to develop such a framework and highlighted the need to consider the existing international and regional instruments, especially those related to trade and investment. It has shown that such a framework is possible even if there are some challenges in implementing it.

The fourth chapter looked at the ECOWAS Energy framework as a reference regarding the development and implementation of such framework. It has shown the challenges and failures that impede this framework's sustainability and lessons for EAC to establish the most efficient energy framework.

In conclusion, the study has shown that developing a legal and regulatory framework on energy in EAC is possible and needed, but thorough planning is required. Further, Partner States' commitment is mandatory for the successful implementation of such framework. However, it has also shown that such a framework could contribute to strengthening regional integration and economic development by reducing the energy deficit and increasing energy access permitted by a sound legal and regulatory framework providing an attractive environment for energy projects development.

3. Recommendations

In order to achieve the EAC' objectives in the energy sector, there is a need to consider the legal and regulatory matters as an impediment to energy development. Therefore, the EAC should establish a specific energy framework to address the lack of a legal and regulatory framework. As such, this study suggests the following recommendations:

Firstly, the Community should commission an assessment in the energy sector to define the challenges and potential of each energy sub-sectors. Indeed, a separate assessment can be more relevant because each energy sub-sector has its own challenges, even if they also have some in common. Furthermore, the assessment could provide orientation for establishing institutions and a legal and regulatory framework conforming to the real need of the energy sector facilitating their implementation.

Secondly, the Community should establish an energy protocol to provide a legal basis for establishing policies and regulations of the energy sector while governing the cooperation within and outside of the Community. A dedicated energy protocol could contribute to developing the energy sector fastly by providing a stable and predictable framework favourable for energy trade and investment.

Thirdly, the Community should consider creating specialised institutions and ensuring a cession of power to them to facilitate the implementation of rules in national legislation. Indeed, political will is the key to the successful establishment and implementation of a regional energy framework. Furthermore, rules should be binding and considered in the national framework to

be effective. Lessons learned from ECOWAS could lead to the framing of the framework in order to avoid inconsistency and inefficacy of the framework.

Fourthly, the Community should consider developing its energy agenda with consideration to the target of increasing access to clean energy and protecting the environment. In this regard, renewable energy development requires cross-country coordination and regional development planning to effectively address cross-border energy challenges such as climate change and potential competition for resources. Indeed, a regional approach can change the dynamics of access to funding, human capital and technology for the renewable energy sector through the common market.

For example, the energy transition cost could be lower for the region than developed countries because the energy sector is still developing, facilitating an energy mix or an energy shift. Furthermore, the development of clean energy can offer the region a source of funding for energy sector development by trading the Carbon Credits to partners while reducing climate change impact and promoting a sustainable environment.

Therefore, the energy framework should be built as suggested above on AU Agenda 2030 and AfCTA, which are more aligned with the Paris Agreement regarding its focus on environmental sustainability and underlines a more conducive environment for clean energy within the spirit of the EAC treaty in this regard.

In summary, a legal and regulatory framework on energy is the suggested solution to reduce the energy deficit, increase energy access and energy efficiency for the economic and social development of the region while strengthening regional integration for the benefit of the Community and Partner States.

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