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TOWARDS A HARMONISED EAC TAX SYSTEM: CURRENT STATUS, CHALLENGES AND WAY FORWARD*

Pie Habimana
Doctor of Law, Lecturer, School of Law, University of Rwanda; Partner, Amilex Chambers

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ABSTRACT

Under Article 79 of the EAC Treaty, the Partner States have undertaken to harmonize and rationalize investment incentives to promote the Community as a single investment area while avoiding double taxation. Article 83 of the same Treaty states that the Partner States have committed themselves to adjust their tax policies to eliminate tax distortions. These provisions show the extent to which the EAC Partner States are willing to advance with tax integration as part of comprehensive regional integration. This approach is welcomed, as scholars generally agree that full regional integration cannot be achieved without tax integration. In this sense, tax harmonization is seen as a sure path to tax integration, a driver for effective regional integration. It is unfortunate, however, that tax harmonization in the EAC faces several challenges. Some causes of the challenges are legal, such as differences in legal systems, while others are geopolitically motivated. This paper discusses where the EAC currently stands in relation to tax harmonization. Starting with a theoretical framework, the paper focuses on the current practical aspects of tax harmonization in the EAC. The paper, therefore, highlights the existing discrepancies alongside the challenges in building a harmonized tax system in the EAC. The paper identifies three ways out de jure harmonization through traditional law-making by the legislature, de facto harmonization through judicial law-making processes, and tax coordination where tax harmonization does not work.

* This paper draws from remarks I gave on 08 November 2022 during the 2022 East African Magistrates and Judges Association (EAMJA) Conference held in Kigali, Rwanda.

INTRODUCTION

The East African Community (EAC) is one of the eight regional integrations on the African continent recognized by the African Union.[1] It is important to note that several elements set the EAC apart. First, the EAC is the only African regional integration with the vision of creating a political federation.[2] Second, there is widespread agreement among scholars that the EAC is the oldest regional integration in Africa. This view is based on various initiatives taken in the 1900s in the British East African colonies, i.e., Kenya, Uganda, and Tanzania. These initiatives include, for example, the construction of the Kenya – Uganda Railway (1897-1901), the establishment of the Customs Collection Centre (1900), the East African Currency Board (1905), the Postal Union (1905), the Court of Appeal for Eastern Africa (1909), the Customs Union (1919), the East African Governors Conference (1926), the East African Income Tax Board (1940), and the Joint Economic Council (1940).[3] A more formal EAC was established in 1967 when Kenya, Tanzania, and Uganda signed an East African Cooperation Treaty. Unfortunately, this community collapsed ten years after its formation, i.e., in 1977, for various socio-economic and political reasons.[4] A new EAC was re-established two decades after the collapse of the old EAC, in 1999, when the three original Partner States again signed a treaty re-establishing the EAC, which came into force on 07 July 2000.

Currently, the EAC consists of seven Partner States, including the recently admitted Democratic Republic of Congo (DRC).[5] Today, the EAC covers an area (including water) of 4.8 million sq. km, with a population of 283.7 million in 2021, and a GDP of $305.3 billion in 2021.[6] The objective of the EAC is to develop policies and programs aimed at broadening and deepening cooperation among the Partner States in the political, economic, social and cultural, research and technological, defense, security, and legal and judicial fields, for mutual benefit.[7]

Although the EAC is considered the most active and successful regional integration in Africa,[8] it is not the world's most advanced regional economic integration. Indeed, in terms of age, the EAC rivals the European Union (EU), which was established in 1957, and formalized in 1992 with the Maastricht Treaty.[9] To date, the EU has a fully functioning customs union, a common market known as the single or internal market, a monetary union, and is on its way to becoming a political federation. Today, EU citizens are much closer than ever before, and it becomes difficult for a foreigner traveling across the EU in a train or car to know that they have crossed the border from one country to another.

In contrast, despite the Common Market Protocol signed in November 2009,[10] an EAC citizen has to go through several immigration protocols when traveling from one country to another. This costs time and causes stress due to differences in language, culture, currency, etc. These discrepancies are partly because there are no harmonized procedures,[11] among others. In this context, the question arises whether the EAC is integrated? If so, to what extent? When will integration be fully achieved? etc.

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1 Clayton, V. H., (2019). African Regional Economic Integration in the Era of Globalisation: Reflecting on the Trials, Tribulations, and Triumph. *International Journal of African Renaissance Studies*, 14(1), p. 3, doi: 10.1080/18186874.2019.1577145.

2 Tharani, A., Harmonization in the EAC, in Ugirashebuja, Ruhingisa, J. E., Ottervanger, T., Cuyvers, A. (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 486.

3 Masinde, W., Omolo, C. O., The Road to East African Integration in Ugirashebuja, Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 15.

4 Ibid., p. 16.

5 East African Community, Secretariat, Communique on the signing of the Treaty of accession of the Democratic Republic of Congo to the Treaty for the Establishment of the East African Community, Kenya, 8th April 2022.

6 EAC, Quick Facts about EAC. <https://www.eac.int/eac-quick-facts> [Last seen 10.12.2022].

7 Treaty for the establishment of the East African Community (As amended on 14/12/2006 and 20/08/2007), art. 5(1).

8 Mei, A. P., (2009). Regional Integration: The Contribution of the Court of Justice of the East African Community. *ZaoRV*, 69, p. 404.

9 Fairhurst, J., (2018). Law of the European Union. *Pearson Longman*, 11th ed., p. 52.

10 Gastorn, K., Wanyama, M., (2017). The Legal Analysis of the Common Market of the East African Community as Market Freedoms in the Open Market Economy in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A. (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 285.

11 Caroline, K., Wanyama, M., Free Movement of Workers in the EAC, in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A., (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 351.

The aim of this paper is not to answer all these questions about the effectiveness of integration in the EAC. It is about some legal aspects of integration. More specifically, this paper is about the harmonization of laws as one of the drivers of full integration. In this context, the focus of this paper is on tax harmonization.

Therefore, the problem examined herein is the current extent of tax harmonization in the EAC. This general problem gives rise to specific research questions, such as the current state of tax harmonization in the EAC, the challenges of tax harmonization in the EAC, and the possible ways to overcome these challenges.

In preparing this paper, I have extensively used a qualitative methodology based on the famous doctrinal approach to legal research. To this end, I have thoroughly reviewed the available documents on tax harmonization, focusing on the EAC. I have also looked at some tax cases from the national courts. The data used herein are divided into primary and secondary sources. Primary sources were first-hand information, legal instruments, court decisions, etc. Secondary sources consisted of scholarly research articles, books, dissertations, etc.

This paper is divided into six sections. I introduce the paper in the first section, which is current. In the second section, I set the framework for the research and discussion by outlining the importance of tax harmonization from a theoretical and practical perspective. In the third section, I give a brief overview of the current state of the practical aspects of tax harmonization. In the fourth section, I reflect on the challenges for the envisaged tax harmonization, while in the fifth section, I formulate suggestions for the way forward. In the sixth and final section, I draw a conclusion.

1. SETTING THE SCENE: THE RELEVANCE AND CONSIDERATIONS FOR TAX HARMONIZATION

Harmonization of tax systems is widely advocated in the literature as a pillar for achieving a fully functioning regional integration.[12] In the case of the EAC, several legal instruments touch upon tax harmonization as part of the overall objective of regional integration.[13] The question here is whether there has been a case in practice that argued for harmonization of tax systems in the EAC. I first address the theoretical aspect of tax harmonization in the EAC in the following subsections. I then shift the focus to the practical aspect of tax harmonization in the EAC through a case that argued for harmonization of tax systems in the EAC.

1.1. The need for harmonization in theory

Tax harmonization is seen as a prerequisite for economic integration,[14] and part of regional integration is economic integration.[15] In this way, regional integration cannot be achieved without tax integration, as regional integration depends on tax integration, and the former remains unachievable until the latter is achieved.[16] In other words, tax harmonization, economic integration, and regional integration are closely linked, as tax harmonization, and economic integration constitute essential components of regional integration. In this respect, harmonization of tax systems in a regional community is important, if not necessary, to achieve fully functioning regional integration.[17]

As far as the EAC is concerned, the EAC Treaty contains a considerable number of provisions aimed at harmonizing tax systems in the Community. This is evident from Article 75 of the Treaty, in which the Partner States have agreed not to impose new duties and taxes on products traded within the EAC or to increase existing ones. Under the same provision, the Partner States have also

12 Fair, D. E., Boissieu, C. D., (2012). Fiscal policy, Taxation and the Financial System in an Increasingly Integrated Europe, *Springer Science & Business Media*, 22, pp. 374-375.

13 EAC treaty, art. 80(f), 82(b), 83(e); Protocol on the establishment of the East African Community Common Market, art. 32.

14 Petersen, H. G., (2010). Tax Systems and Tax Harmonization in the East African Community (EAC), *Report to the GTZ and EAC on Tax Harmonization and Regional Integration*, p. 3.

15 Oloruntoba, S. O., (2015). Regionalism and integration in Africa: EU-ACP economic partnership agreements and Euro-Nigeria relations. *Palgrave Macmillan*, p. 35.

16 Ibid.

17 Keuschnigg, C., Loretz, S., Winner, H., (2014). Tax Competition and Tax Coordination in the European Union. *Working Papers in Economics and Finance No. 2014-04*, p. 2.

undertaken not to enact legislation or apply administrative measures that could directly or indirectly discriminate against the same or similar products of other Partner States.[18] This is a standstill clause that provides a good starting point for the harmonization of tax systems by firstly immobilizing existing practices.

Similarly, Article 79 of the Treaty provides for the commitment of the Member States to ensure the development of the industrial sector. To this end, the Partner States have undertaken to further harmonize and rationalize investment incentives within the Community, including those relating to the taxation of industries using, in particular, local materials and labor, in order to promote the Community as a single investment area.[19] In the same vein, Article 85 of the Treaty expresses the commitment of the Partner States to harmonize the taxation of capital market transactions.[20]

Similarly, Article 82 of the Treaty underlines the obligation of the Partner States to cooperate in monetary and fiscal matters. To this end, they undertake to remove obstacles to the free movement of goods, services, and capital within the Community.[21] In the same spirit, Article 83 of the EAC Treaty provides for harmonizing monetary and fiscal policies. Under this provision, the EAC Partner States undertake to adjust their fiscal policies and net domestic credit to the government to ensure monetary stability and sustainable economic growth.[22] In addition, the EAC Partner States undertake to harmonize their tax policies to eliminate tax distortions and thus achieve a more efficient allocation of resources within the Community.[23]

As part of the harmonization of tax policies, in conjunction with the implementation of Article 75 of the Treaty establishing the EAC Customs Union, the EAC Partner States adopted the East African Community Customs Management Act in 2004, which was last amended on 8 December 2008. This Customs Union is governed in detail by a Protocol whose roots lie in Article 75 of the Treaty. So far, the Customs Union has been instrumental in bringing the EAC Partner States closer together.

All these provisions show how eager the EAC is for tax harmonization. Given the importance of tax harmonization for developing regional integration systems, it is imperative to reflect on the practical side of tax harmonization in the EAC.

1.2. The need for harmonization in practice

Based on the above description of the theoretical assertions about the necessity and legal support for tax harmonization in the EAC, the question now arises about the practical aspects of harmonizing tax systems in the EAC. The question here is whether tax harmonization is essential or not.

To show the case, I refer to a recent case in Rwanda where one party invoked the EAC Common Market Protocol application and referenced Kenyan case laws. This occurred when a law firm challenged a VAT levied on exported services. The firm pointed out in its submissions that Rwandan law does not clearly define exported services. Therefore, the firm requested that the court refers to Article 1 of the General Agreement on Trade in Services (GATS), which almost mirrors the idea of Article 16 of the EAC Common Market Protocol (EACCMP).[24] Article 1(2) of GATS reads as follows: *"For the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member."*

Article 16(2) of the EACCMP states the following: *"The free movement of services shall cover the supply of services: (a) from the territory of a Partner State into the territory of another Partner State; (b) in the territory of a Partner State to service consumers from another Partner State; (c) by a service supplier of a Partner State, through commercial*

18 EAC Treaty, art. 75(4), 75(6).
19 EAC Treaty, art. 80(1) f).
20 EAC Treaty, art. 85(1)(c).
21 EAC Treaty, art. 82(1)(c).
22 EAC Treaty, art. 83 (2)(c).
23 EAC Treaty, art. 83 (2)(e).

24 ENSAfrica Rwanda Ltd v RRA, RCOMA 00350/2019/HCC, Commercial High Court, 04/12/2019, par. 11(a); Urugaga rw'Abavoka mu Rwanda v. Leta y'u Rwanda, RS/INTL/SPEC 00001/2020/SC, Supreme Court, 23/10/2020, para. 15; ENSAfrica Rwanda Ltd v RRA, RCOM 01512/2020/TC, Commercial Court, 08/12/2020, para. 5.

presence of the service supplier in the territory of another Partner State; and (d) by the presence of a service supplier, who is a citizen of a Partner State, in the territory of another Partner State."

In addition, the firm requested the court to refer to the case law of the High Court of Kenya in Commissioner of Domestic Taxes v. Total Touch Cargo Holland – Income Tax Appeal No. 17 of 2013 (para. 30), where the judge held as follows:[25] *"I am in full agreement with the above finding by the tribunal. The location where the service is provided does not determine the question of whether the service is exported or not. The test is the location (or place) of use or consumption of that service. Therefore, the relevant factor is the location of the consumer of the service and not the place where the service is performed.*

That party also referred to the case of Coca-Cola Central East and West Africa Limited v. The Commissioner of Domestic Taxes [Tax Appeal No. 5 of 2018] dated 31/03/2020, where the Kenya High Court applied the destination principle".[26]

In contrast to the Kenya High Court, the Rwanda Commercial Court ruled in RCOM 01492/2019/TC of 20/03/2019 between ENSAfrica Rwanda Ltd and the Rwanda Revenue Authority that the relevant factor is not the location (or place) of the consumer. Even if the consumer resides abroad, but the service was consumed in Rwanda, the VAT is due.[27] In this case, the court applied the consumption principle.

The decision RCOM 01492/2019/TC was appealed in case RCOMA 00350/2019/HCC. In appeal, ENSAfrica argued that an exported service should be considered as a service supplied to a non-resident, regardless of the place or location of consumption of the service.[28] The appellant relied on Article 1(2)(b) GATS, to which Rwanda is a party, and Article 16(2)(b) of EAC CMP, to which Rwanda is also a party. The appellant also referred to the Kenya case law in Commissioner of Domestic Taxes v. Total Touch Cargo Holland, which confirmed that the OECD's International VAT/GST Guidelines are internationally recognized principles that should be followed. The Commercial High Court upheld the Commercial Court's decision, i.e., it confirmed that the destination principle should apply.

However, it seems that this position was discussed and decided differently in RCOM 01512/2020/TC.[29] In paragraphs 18 and 19, the Court appears to have accepted the application of the destination principle. This was also confirmed by the Commercial High Court in case RCOMA 00017/2021/HCC, which stated in paragraph 31 that it is important to consider where the service recipients are located, whether in Rwanda or abroad. The Court further stated in paragraph 32 that whether or not the service was consumed in Rwanda or where it was provided was irrelevant. The Court further confirmed that the fact that the service was provided to a person resident abroad is sufficient to exempt VAT. In this sense, the Commercial High Court of Rwanda now appears to apply the destination principle.

At this point, it should be noted that the Rwandan courts' position is not yet clear. In some decisions, the consumption principle has been applied, and in others, the destination principle. The current situation in the Rwandan court seems to be in contrast to the Kenyan High Court, which applies the destination principle.

From this, one can partly conclude that VAT on exported services may be levied differently in the EAC, as the Kenyan judicial view may differ from the Rwandan one. On the one hand, this would not be a problem given the principle of tax sovereignty, whereby each country is sovereign to adopt a tax system it deems best in light of its socio-economic and political factors.[30] On the other hand, however, it seems problematic when regional integration aspects are taken into account.

As stated by the Supreme Court of Rwanda in the case RS/INTL/SPEC 00001/2020/SC of 02/08/2022,[31] this Court confirmed that since Rwanda signed and ratified GATS and EAC CMP, these legal instruments

25 RRA v. ENSAfrica, RCOMA 00017/2021/HCC, Commercial High Court, 29/12/2021, para. 26.

26 Ibid., para. 27.

27 ENSAfrica Rwanda Ltd v RRA, RCOM 01492/2019/TC, Commercial Court, 20/03/2019, pars. 13 and 14.

28 ENSAfrica Rwanda Ltd v RRA, RCOMA 00350/2019/HCC, Commercial High Court, 04/12/2019, para. 10 and 11.

29 ENSAfrica Rwanda Ltd v. RRA, RCOM 01512/2020/TC, Commercial Court, 08/12/2020, para. 18 and 19.

30 Cachia, F., (2017). Analyzing the European Commission's Final Decisions on Apple, Starbucks, Amazon and Fiat Finance & Trade. *EC Tax Review*, 1, p. 34; Sentsova, M., et al., (2018). Tax Sovereignty and the Concept of Fiscal Rule-making in the Countries of Central and Eastern Europe. *VSU Publishing House*, p. 78.

31 Nzafashwanayo Dieudonné v. Government of Rwanda, RS/INTL/SPEC 00001/2020/SC, Supreme Court, 2/8/2020, para. 35.

have been incorporated into the laws of Rwanda as provided for in Article 95 of the Constitution of the Republic of Rwanda.[32] The same should apply *mutatis mutandis* to all EAC Partner States that have signed and ratified EAC CMP. Therefore, EAC Partner States should apply EAC CMP as part of their legal instruments. Thus, the court decisions of the EAC Partner States must also be harmonized to a certain extent.

2. CURRENT STATUS OF TAX HARMONIZATION IN THE EAC

Four elements can be used here to discuss the current state of tax harmonization in the EAC: tax rates, tax bases, tax dispute resolution, and tax treaties. These elements have been chosen because they are inherent parts of a tax system. The focus of this section is on the differences between these four elements. Nevertheless, the section ends with a discussion of an area of tax law quasi-harmonized in the EAC.

2.1. Tax rates

Apart from customs duties, which are discussed in the following sub-section, there is no harmonization of tax rates in the EAC. This is epitomized by the fact that each EAC Partner State has its tax rates concerning different taxes payable. For some taxes, there are even significant differences in tax rates. This is the case, for example, with the withholding tax on dividends. While Kenya levies this tax at 5%, it is 15% in Uganda, 10% in Tanzania, and 15% in Rwanda.[33] Another example is the withholding tax on royalties. For this tax, the rate in Rwanda is 15%, while Uganda levies 6%, Tanzania 15%, and Kenya 5%.[34] The VAT rates in the EAC also vary, as Kenya charges 16% in contrast to the standard rate of 18% in the other countries.[35]

2.2. Tax bases

With regard to tax bases, the situation is the same as for tax rates. Each EAC Partner State defines the tax base for each tax payable independently of the definitions of the others. Not only the tax base *per se*, but also some details related to the tax base differ. A typical example is the VAT registration requirements, where there are differences in the thresholds required. In Uganda, for example, the annual threshold for mandatory VAT registration is UGX 50 million (about USD 13,300).[36] In Kenya, it is KES 5 million (about USD 41,250), while in Tanzania, it is TZS 100 million (about USD 42,800).[37] In Burundi it is FBU 100 million (about USD 48,300),[38] while in Rwanda it is FRW 20 million (about USD 19,050).

2.3. Tax disputes

Concerning the resolution of tax disputes, this area is also not harmonized, as each EAC Partner State has its methods of resolving them. For instance, some EAC Partner States have established tax appeal tribunals that hear tax cases at first instance. This is the case in Kenya, Uganda, and Tanzania. In others, such as Rwanda, such cases fall under the jurisdiction of the commercial courts.

2.4. Double taxation treaties

Another case that can be used to assess the situation of tax harmonization in the EAC is the area of double taxation avoidance agreements. All EAC Partner States have signed various double taxation treaties, but the number and counterparties differ. Regarding the number, some Partner States

32 The Constitution of the Republic of Rwanda of 2003 revised in 2015 (*O.G.* No. Special of 24/12/2015), art. 95.

33 KMG, Tax Data Card East Africa 2020/21. <https://assets.kpmg/content/dam/kpmg/ke/pdf/tax/EA%20Tax%20Data%20Card%202020-2021%20updated%20-%20Final.pdf> [Last seen 19/10/2022]; Law No. 016/2018 of 13/04/2018 establishing taxes on income (*O.G.* No. 16 of 16/04/2018), art. 60(2).

34 Ibid.

35 Kenyan VAT Act 2013, section 5(2); Law (Rwanda) No. 37/2012 of 09/11/2012 establishing the value added tax (*O.G.* No. Special of 05/02/2013), art 3(3); Tanzania VAT Act 1997, section 5; Loi (Burundi) No. 1/12 du 29 Juillet 2013 portant révision de la loi No. 1/02 du 17 Février 2009 portant institution de la taxe sur la valeur ajoutée, art. 15.

36 Ugandan VAT Act, section 7(2).

37 Kenyan VAT Act, section 32(1)(b); Tanzania VAT Act, section 28(4).

38 Ordonnances Ministérielle No. 540/708/2009 du 2/06/2009 portant mesures d'application de la loi No. 1/02 du 17 Février 2009 portant institution de la taxe sur la valeur ajoutée, art. 2.

have signed a large number of tax treaties, such as Kenya with 15,[39] Rwanda with 12,[40] and Tanzania and Uganda with nine each;[41] while others have signed only a few, such as Burundi, which only recently ratified the EAC double taxation avoidance agreement.[42] Differences can also be observed in the states with which the EAC Partner States have signed the treaties. The lack of harmonization is also evident in the EAC double taxation avoidance agreement. This Agreement was signed on 30 November 2010 by the then five EAC Partner States, namely Burundi, Kenya, Rwanda, Tanzania, and Uganda, to avoid double taxation and prevent fiscal evasion with regard to taxes on income. The entry into force of this Agreement is governed by Article 30(1), which states that the Agreement shall enter into force on the date of the last notification of the ratification process with respect to partners' domestic procedures. To date, almost 12 years later, the Agreement has not entered into force as it has only been ratified by Kenya, Rwanda, Uganda, and Burundi.

Without belittling the above differences, the EAC has a green area of tax harmonization. This is the area of customs duties governed in the EAC by the EAC Customs Management Act of 2004, amended in 2007. Details on the current status of customs duties in the EAC are given below.

2.5. Quasi-harmonised management of customs duties

The only tax aspect that is quasi-harmonized in the EAC concerns customs duties. The EAC has established a customs union, as provided for in Article 75 of the Treaty. All EAC Partner States signed the Protocol establishing the Customs Union, and the EAC Customs Union Act was gazetted in 2004. This was amended in 2007 to include the accession of Rwanda and Burundi. According to Article 110(1) of the East African Customs Management Act (EACMA), all EAC Partner States apply the same import duty rates. The tax base of import duties is also harmonized, and the tax bases are the same in the EAC. This means that a product from outside the Community is subject to the same regime irrespective of the entry border.

Administrative appeals relating to import duties are also harmonized as they are all addressed to and dealt with by the Commissioner of Customs.[43] Understandably, all EAC Partner States have Commissioners of Customs. Nevertheless, after this step of administrative appeals, the judicial appeals related to customs duties are not harmonized. This is due to the inconsistent implementation of Article 231 of the EACCMA, which reads as follows: *"Subject to any law in force in Partner States with respect to tax appeals, each Partner State shall establish a tax appeals tribunal for the purpose of hearing appeals against the decision of the commissioner under section 229."*

So far, the EAC Partner States have implemented this provision differently. Countries such as Kenya, Uganda, and Tanzania have literally implemented this provision by establishing tax appeal tribunals. Other countries, such as Rwanda, do not yet have tax appeal tribunals in their court structures. The corresponding jurisdiction of tax appeal tribunals in Rwanda lies with the commercial courts. But, a commercial court differs from a tax tribunal, not only by its name but also by its jurisdiction. Indeed, while tax appeal tribunals have jurisdiction over tax matters only, commercial courts have a broader mandate, as they also have jurisdiction over all commercial and financial matters, among others.[44] It is therefore understandable that the tax appeal tribunals are much more specialized than the commercial courts.

Apart from the question of jurisdiction, the specialization of Rwanda's commercial courts is

39 Kenya has tax treaties with the UK, Germany, Norway, Sweden, Denmark, India, Canada, Zambia, France, Iran, Qatar, Seychelles, SA, UAE, and South Korea.

40 Rwanda has tax treaties with Belgium, China, DRC, Jersey, Luxembourg, Mauritius, Morocco, Qatar, Singapore, SA, Turkey, UAE.

41 Tanzania has tax treaties with Canada, Denmark, Finland, India, Italy, Norway, SA, Sweden, Zambia, while Uganda has tax treaties with Denmark, India, Italy, Mauritius, Netherlands, Norway, SA, UK, Zambia.

42 Loi No. 1/02 du 30 juin 2020 portant ratification par la République du Burundi à l'accord pour l'élimination de la double imposition et prévention de l'évasion fiscale en matière d'impôt sur le Revenu entre les gouvernements de la République du Burundi, du Kenya, de l'Ouganda, du Rwanda et de la République Unie de Tanzanie.

43 East African Community Customs Management Act, sections 5 and 229.

44 Law (Rwanda) No. 30/2018 of 02/06/2018 determining the jurisdiction of courts (*O.G.* No. Special of 02/06/2018, art. 81.

also broadly contestable. Established for the first time in 2008,[45] the commercial courts are currently governed by Law No. 30/2018 of 02/06/2018, determining the jurisdiction of the courts. The law refers to these courts as specialized courts. However, several elements call this character into question.

First, specialization is limited to the institution but not to the staff. Some judges in these courts do not have a degree of specialization compared to judges in ordinary courts. There are no special requirements to become a judge in the commercial courts, and from time to time, judges of the ordinary courts are assigned to the commercial courts and vice-versa. Commercial court judgments are appealable before the Commercial High Court and, at a second appeal, before the Court of Appeal. This Court does not have a special chamber for commercial cases. Consequently, the judges for ordinary cases are the same judges who decide the commercial cases. When one considers that the reference to commercial matters here includes, among other things, tax matters, it becomes easier to digest how critical the concern is.

Apart from that, there is also criticism of the procedural aspects. One of the justifications for establishing the commercial courts was to expedite commercial cases, which by their nature require quick processing. In practice, however, there has been no significant difference between commercial and ordinary courts. The same lack of a substantial difference also applies to tax cases, whose proceedings can drag on for a very long time.

All these criticisms are sensitive in commercial disputes and become even more sensitive in tax cases, which by their nature require a high level of expertise. The point of establishing tax appeal tribunals might be to recognize tax law as a technical area of law whose dispute resolution requires expertise and special procedures. This suggests in part that the requirements of the EAC Customs Management Act are not fully met even today, as a tax tribunal differs from a commercial court.

45 Organic Law (Rwanda) No. 59/2007 of 16/12/2007 establishing commercial courts and determining their organization, functioning and jurisdiction (*O.G.* No. 5 of 01/03/2008).

3. CHALLENGES

From the above, it is clear that harmonizing the tax system in the EAC faces several challenges. Some challenges are legal, some are political, and others are natural. These three challenges are discussed below.

3.1. Legal challenges

From a legal point of view, the harmonization of tax systems in the EAC is complicated by the diversity of legal systems. Three of the seven EAC Partner States, namely Kenya, Tanzania, and Uganda, apply the common law system. Burundi and the Democratic Republic of Congo use a pure civil law system. Rwanda used to have a civil law system, but since 1994 has started to adopt some elements of the common law system, along with elements of Rwandan traditions, so Rwanda now applies a sui generis legal system. South Sudan, despite having several lawyers trained in Arab-Islamic law and civil law, the legal system is based on statutes and customary law.[46]

These differences in legal systems pose both substantive and procedural challenges when it comes to harmonization. For example, Article 137(1) of the EAC Treaty mentions English as the Community's official language. Even though English is not spoken and used everywhere in the EAC territory. Not only that but the laws of each Partner State are also written in different languages, which is also not conducive to harmonization. This is exacerbated by the lack of interpretation and translation services in the administration of Community affairs.[47] This diversity of legal systems not only poses a challenge in terms of where to start harmonizing tax systems in the EAC but also contributes to practices that hinder harmonization.

In addition, the style of legislation, the language of national courts, etc., are also not harmo-

46 Harriet, L., (2015). Unraveling an Intricate Legal System: A Strategic Review of the Duality of Customary and Statutory Laws in South Sudan, p. 2. <http://dx.doi.org/10.2139/ssrn.2658541> [Last seen 30/09/2022].

47 Döveling, J. et al. (2018). Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities, *LawAfrica*, p. 12.

nized, adding to the divergence of legal systems. For example, it is not common for judges in the EAC to refer to other Partner States case laws to rule on the same matter. Opining from a Rwandan perspective, it is common for Rwandan judges to refer to foreign case laws and laws, mainly from the West.[48] However, it is not common for a Rwandan judge to refer to a case law or legislation from an EAC Partner State. I have not managed to find any research that has discussed the reasons for this. In my view, the question is twofold: (a) are they documented/published and easily accessible? (b) are they sufficiently researched?

As for the first question, the fact is that the world today lives in an era of digitalization. Nowadays, much of the research in various sciences, including law, is done using online tools. If one uses the Google search engine and types key search words, most references are from Western and developed countries. It would not be an exaggeration to affirm that finding a case law from an EAC Partner State is more difficult than a European case law. The question is where to find EAC case law, and what can be done to find it easily? As for the second question, one could admit that the reference to Western case law is partly motivated by the quality of this case law. Without belittling the above concern, even the available EAC case law is challengeable as it may be of little use due to its low quality.

3.2. Political and geo-political challenges

The political challenges can be divided into three deficits: rhetorical defiance, nationalism, and protectionism. Starting with rhetorical defiance in political forums, meetings, summits, conferences, and other gatherings of EAC authorities, compositional and persuasive speeches are made in favor of fully functioning regional integration. But in practice, the rhetorical strategies remain dead words. This concerns several aspects, including tax harmonization. If this rhetorical disregard continues, tax harmonization will not be achieved, which will affect full integration.

As far as nationalism is concerned, the EAC has so far been characterized by an excessive state monopoly, as the EAC Partner States have so far been reluctant to cede power to the Community organs.[49] In this regard, decision-making power remains in the hands of the Partner States and not with the EAC as a Community, whose organs and other non-state actors remain locked-out of the integration process.[50] This leads to a Community in which each Partner State fights for itself, and tries to reap the benefits of integration more than others. In this view, the EAC Partner States put their national interests above the interest of the Community. This is commonly associated with protectionism, where each EAC Partner State seeks to protect its tax base, without regard to the interests of the other Partner States. A study conducted in 2010 found that despite the ostensible support for harmonization, there is a fear that tax harmonization could lead to a loss of more or less tax revenue, and doubts about the competitive situation of the partner states, as one Partner could dominate the entire Community.[51] These political deficits pose a serious challenge as a lack of political will is fatal to the success of regional integration efforts.[52]

In addition to the political challenges, geopolitical challenges are exacerbated by various natural factors and differences in comparative advantages. Some of the EAC Partner States are landlocked, while others are not. Some are also economically advanced, while others are economically underde-

48 see for example in RCOMAA 00040/2016/CS in which reference was made to Salomon v. Salomon & Co Ltd [1896] and UKHL AGC (Investments) Limited v Commissioner of Taxation, Federal Commissioner of Taxation (1964) 111 CLR 443 from UK; RS/INCOST/SPEC 00001/2020/SC in which reference was made to Delhi-v, Supreme Court of India, Civil Appeal Nos. 5105-5107 of 2009 from India; RS/INCONST/SPEC 00004/2019/SC in which reference was made to Conseil Constitutionnel, décision no 2009-599 DC du 29 décembre 2009, para 80 from France; Gulf, Colorado & Santa Fe Ry. Co. v. Ellis 165 U.S. 150 (1897) from USA, and Vodacom Business Nigeria V. Federal Inland Revenue Service (FIRS), Appeal No. CA/556/2018, p. 23 from Nigeria.

49 Masinde, W., Omolo, C. O., (2017), p. 20.

50 Ibid.

51 Petersen, H. G., (2010), p. 87.

52 Otieno-Odek, J., Regional Integration and Fundamentals of Legal Harmonization, in Döveling, J. et al. (2018). Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities, *LawAfrica*, p. 30.

veloped. Differences also exist in terms of political stability and security. Some EAC Partner States are broadly peaceful, while others are in constant internal and external conflicts, either intra – or extra-community. The consequence of such persistent insecurity and political instability is to inhibit an effective and deeper regional integration.[53] In this context, it is suggested that peace, security, stability, and mutual trust are the necessary conditions for the success of regional integration.[54]

4. WAYS FORWARD

Given the current situation, as discussed in section three, combined with the scene described in section two and the challenges mentioned in section four, it is important to reflect on the possible paths to a harmonized tax system in the EAC. In my view, two paths are possible, namely de jure harmonization and de facto harmonization, as described below. A third option is also conceivable, namely tax coordination.

4.1. *De jure* harmonization

The simplest way to harmonize tax systems in the EAC is through regular legislation. This route is called de jure harmonization, given the traditional legislative process. De jure harmonization is understood here as the harmonization of EAC tax systems through parliamentary acts. Regarding Articles 9(f), 48, and 49 of the EAC Treaty, which establishes and empowers the Community's Legislative Assembly, the East African Legislative Assembly would be the right body to legislate at the EAC level. Alternatively, EALA, as the Community Legislative Body, would take the lead regarding Article 49 of the Treaty and liaise with the National Assemblies of the Partner States on harmonizing tax systems. However, considering the sovereignty of the Partner States and the socioeconomic differences between them, the use of a directive is recommended. In this way, the EAC Council would provide the guidelines and set the objectives to be achieved by each Partner State, leaving it to them the freedom to design the ways to achieve the set goals.

To be successful, I recommend that de jure harmonization be undertaken strategically and gradually. The point here is not to undertake general harmonization. Rather, proceed step by step, starting with a particular type of tax or a specific tax base. An example of this is the harmonization of the cigarette tax, as was the case in the EU. With particular attention to the EAC, J. Posen and C. Van Walbeek conducted a study in 2014 on the impact of increasing and harmonizing excise tax on cigarettes in the EAC and concluded that increased levy of a uniform excise tax on tobacco in the EAC would generate more revenue for the treasury.[55] Another example is the EU's Common Consolidated Corporate Tax Base (CCCTB), which sets a single set of rules for calculating the taxable profits of companies in the EU. If a similar CCCTB can be introduced in the EAC, it would positively contribute to the harmonization of corporate taxation.

4.2. *De facto* harmonization

An alternative to de jure harmonization is de facto harmonization. This process is called de facto because it requires no formal legislative act. De facto harmonization of the tax system in the EAC would be achieved through the use of judicial legislative power. This concept is well and easily understood from a common law perspective. Under the common law, a judge can make laws through judicial decisions that are consistently made and thus deemed constituted into laws. Not only in the common law, but also the judges' power to legislate is recognized, both at international and national levels.[56] Judicial lawmaking is even said to be inevitable due to the incompleteness of every legal system, which therefore calls the judge to apply existing and recognized rules, but also to create laws by developing, adapting, modifying, interpreting, and filling gaps.[57] In the words of Stephen E. Sachs,

53 Masinde, W., Omolo, C. O., (2017), p. 20.
54 Otieno-Odek, J., (2018), p. 32.
55 Posen, J., Walbeek, C., (2014). The Impact of Cigarette Excise Tax Increases and Harmonization in the East African Community, *SALDRU*, p. 49.
56 Ginsburg, T., (2004). Bounded Discretion in International Judicial Lawmaking. *Virginia Journal of International Law*, 45(3), p. 632.
57 Ibid., p. 635.

both courts and scholars regard the law created by judges as inevitable,[58] as they do something more than discovering law, to fill in the vague, indefinite or generic terms through judicial interpretation.[59] Some legal systems also explicitly refer to judges' power to make laws. This is the case, for example, with Article 9(1) of Rwanda's Law No. 22/2018 of 29/04/2018 relating to the civil, commercial, labor, and administrative procedure, which requires a judge to adjudicate a case brought before him/her. Paragraph one of Article 9 states that a judge adjudicates based on the relevant rules of law. However, in the absence of such rules, a judge is obliged to decide according to the rules he/she would establish if he/she were the legislature. Undoubtedly, this provision gives the judge the power to make law without legislature-created laws. However, this process could face resistance from jurisdictions that apply civil law systems, where judges are not used to making law.

A practical implementation of de facto harmonization would start with East African judges' consciousness that a reference to EAC case law is more helpful than Western case law. A reference to an EAC case law would be more helpful because its applicability to EAC peers would be relatively easy and possible, given that the EAC Partner States share common features compared to the Western. Of course, as discussed in 4.1, some challenges might slow down this approach. Nevertheless, I commend the efforts of some judges who understand the importance of referring to the Community law. An example is the Ugandan case of Kawuki Mathias v. Commissioner General of Uganda Revenue Authority before the Uganda High Court. In this case, it was held that *"[S]tatutory procedure under the EAC Customs Management Act must be followed. When statute prescribes a certain procedure, it is unlawful to follow a different procedure".*[60]

4.3. A viable option: tax coordination

Although both ways, i.e., de jure and de facto harmonization, can work well, it is also necessary to consider whether it is not time to harmonize the tax systems in the EAC. Indeed, the harmonization of tax systems would bring several integration benefits. However, introducing a system with the same tax rates, tax bases, exemptions, statutory deductions, etc., could also have difficult economic consequences. From a practical point of view, it would not be easy to claim that the EAC Partner States are ready to deal with such consequences today.

The importance of taxes to the life of each country, combined with differences between the EAC Partner States, such as socioeconomic differences, geo-political differences, and other economic comparative advantages, add doubts to the acceptance of a fully harmonized tax system by the EAC Partner States. Such reluctance would not be a special case for the EAC but seems to be a general trend for regional integrations. Indeed, it is important to mention here that the process of tax harmonization takes a relatively long time, especially if one considers the potential challenges that may arise from state sovereignty.[61] Having this said, if it is not time to advocate for harmonization of tax systems, an alternative would be tax coordination.

Speaking of tax harmonization as opposed to tax coordination, it is important to highlight the difference between the two concepts. The two concepts differ in that tax harmonization is seen as closer coordination, leading to almost identical or at least similar tax systems, tax bases, and tax rates within a regional integration.[62] In this respect, tax harmonization requires three elements, namely: (1) an equalization of tax rates, (2) a common definition of national tax bases, and (3) a uniform application of the agreed rules.[63] On the other

58 Sachs, S. E., (2019). Finding Law. California Law Review, 107(527), p. 560.

59 Ibid.

60 HC Miscellaneous Cause No. 14 of 2014 cited in Otieno-Odek, J., Judicial Enforcement and Implementation of EAC Law, in Ugirashebuja, E., Ruhingisa, J. E., Ottervanger, T., Cuyvers, A. (2017). East African Community Law: Institutional, Substantive and Comparative EU Aspects, *Brill Nijhoff*, p. 475.

61 Sentsova, M., et al (2018), p. 78.

62 Keuschnigg, C., Loretz, S., Winner, H., (2014), p. 2.

63 Quak, E. J., (2018). Tax Coordination and Tax Harmonization within the Regional Economic Communities in Africa, *Institute of Development Studies*, p. 3. <https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/13797/Tax_Coordination_within_Regional_Economic_Communities_Africa.pdf?sequence=1&isAllowed=y> [Last seen 04/10/2022].

hand, tax coordination stands as another possible way of implementing tax integration in the mechanisms of the Community.[64] In this sense, tax coordination refers to a cooperative tax design in which countries or a group of countries work on their national tax systems to bring them compatible with the objectives of regional integration.[65]

Hence, given the lesser extent nature of tax coordination compared to tax harmonization, it is relatively easier for EAC Partner States to accept tax coordination in the first place before embarking on complete tax harmonization. Against this background, I recommend the EAC Partner States proceed steadily by not rushing into harmonization of the tax systems, rather by first trying out the possibilities of tax coordination, as a way that will later lead to tax harmonization.

CONCLUSION

In this paper, I have discussed the current status of tax harmonization in the EAC, the existing challenges, and the possible ways to overcome these challenges. Based on the provisions of the EAC Treaty, which requires Partner States to harmonize their tax systems, this paper has highlighted some areas that have not yet been harmonized. Among other things, the EAC Partner States have not yet harmonized their tax rates, tax bases, and the resolution of tax disputes. Nevertheless, in this paper, I have highlighted one quasi-harmonized area, namely, the taxation of customs duties. Discussing the current state of affairs was to pave the way for uncovering the underlying challenges. I have divided these challenges into two categories, namely, the legal and the geopolitical challenges.

Given the EAC's desire to harmonize tax systems, vis-a-vis the existing challenges that have hindered achieving a fully harmonized tax system, I propose three paths to harmonization. The first is de jure harmonization, whereby the EALA can legislate, or the Council can adopt a directive to this effect. The second is de facto harmonization, where judges can use their indirect legislative power by harmonizing case law. The third is coordination, where Partner States would cooperate in adopting domestic tax systems that are compatible with the objectives of the Community.

64 Sentsova, M., et al. (2018), p. 213.

65 Keuschnigg, C., Loretz, S., Winner, H., (2014), p. 2.

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