

# VARIATION IN THE USE OF SUBREGIONAL INTEGRATION COURTS BETWEEN BUSINESS AND HUMAN RIGHTS ACTORS: THE CASE OF THE EAST AFRICAN COURT OF JUSTICE

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## I

### INTRODUCTION

This article analyzes the resort to the East African Court of Justice (EACJ) by human rights advocates and business actors. In doing so, this article considers how the EACJ fits Alter, Helfer, and Madsen’s concept of the authority of an international court (IC). According to Alter and her co-authors, an IC has authority when two conditions are met. First, when a legally binding ruling issued by an IC exists, and second, when key audiences, such as governments and private actors, engage in meaningful practices designed to give full effect to those rulings. This article demonstrates that the EACJ has intermediate authority at a thin-elite level in human rights cases because urban-based, human rights nongovernmental organizations (NGOs), pro-democracy activists, and some governmental officials recognize in some, but not all, cases the legally binding nature of the EACJ’s human rights cases and take steps to give effect to the rulings of the EACJ. Most importantly, the EACJ has intermediate authority not only because there are efforts by governments to comply with some human rights cases, as the Alter, Helfer, and Madsen authority framework suggests, but also because of the mobilization of these cases to “name and shame” East African Community (EAC) governments for human rights violations, which that framework does not take into account.

Human rights advocates have actively and repeatedly litigated their cases in the EACJ, even though the EACJ does not have explicit jurisdiction to decide human rights cases. In fact, in every case raising a human rights issue that has come before the EACJ, the defending government has challenged the Court’s jurisdiction, but it has continued to litigate before the Court when its jurisdictional challenge has failed. Further, the judges of the EACJ have been proactive in encouraging human rights cases to come before the Court.

Unlike human rights advocates, business actors in general and the East African Business Council (EABC) in particular have eschewed litigating before

the EACJ. Yet, nontariff barriers (NTBs) impose very high costs for business in the EAC. Rather than pursue litigation, over the last ten years the EABC has pursued an administrative strategy embodied in the NTB Monitoring Mechanism for monitoring, reporting, and removing NTBs. This mechanism gives the EABC access to the EAC's Council of Ministers and Secretariat as well as EAC member states.

This article illustrates the variation between human rights and business actors in their use of the EACJ. Part II introduces the EACJ. Part III discusses the EABC's NTB Mechanism. Part IV includes an examination of the reasons accounting for the absence of litigation arising from private sector actors in the EACJ. Part V examines the EACJ's human rights case law with a view to establishing the contrast between the Court's human rights cases and the nonexistence of trade cases. Part VI concludes by reflecting on the implications of this variation for the three-tiered framework of the authority of international courts. The conclusion also shows that this framework's compliance-centric account of authority minimizes the other goals served by human rights litigation before the EACJ.

## II

### THE EAST AFRICAN COURT OF JUSTICE

The EACJ was inaugurated in 2001 following its establishment as the judicial organ of the EAC.<sup>1</sup> It was not until 2005, however, that the EACJ received its first case. Since then, the EACJ has decided about sixty cases. In the period between 2001 and 2005, the judges of the EACJ engaged in outreach activities to the then-burgeoning regional bar association and its affiliate national chapters, to NGOs, and to donors who sponsored training programs in Europe and elsewhere.<sup>2</sup> These external constituencies in turn became major sources for cases filed before the Court. As allies to the EACJ, they also defended the Court when it decided cases that EAC member states criticized.

In its original structure, the Court had one chamber.<sup>3</sup> However, amendments to the Treaty for the Establishment of the EAC (EAC Establishment Treaty) that came into effect in March 2007 created an Appellate Division, making the Court a two-chamber court.<sup>4</sup> The First Division is comprised of ten judges,<sup>5</sup> two

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1. The East African Community (EAC) was reestablished in 1999. See JAMES THUO GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* 181 (2011). The original EAC was disbanded in 1977 following major differences among the three original members: Kenya, Uganda, and Tanzania. See *id.* at 43 (discussing Kenya's dissatisfaction as a primary factor leading to dissolution); *id.* at 181 (stating the original members of EAC were Kenya, Tanzania, and Uganda); *id.* at 268.

2. James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 *DUKE J. COMP. & INT'L L.* 249, 272 (2014).

3. EACJ, *User Guide*, at 11 (2014), <http://eacj.org/wp-content/uploads/2014/05/User-Guide.pdf>.

4. Treaty for the Establishment of the East African Community, art. 24, Nov. 30, 1999, 2144 U.N.T.S. 255 [hereinafter EAC Establishment Treaty]. The EAC Establishment Treaty provides that the Court "shall consist of a First Instance Division and an Appellate Division." *Id.* art. 23(2). These amendments were made following a decision of the EACJ that was strongly objected to by the government of Kenya. For more on the circumstances leading to the amendments, see Gathii, *supra*

from each of the five EAC member states.<sup>6</sup> The Appellate Division is comprised of five judges,<sup>7</sup> one from each of the five member states.<sup>8</sup> The current location of the Court is Arusha, Tanzania. This location is deemed to be temporary; a permanent seat for the Court has not yet been determined by the Summit,<sup>9</sup> the highest organ in the EAC.<sup>10</sup> The Summit also appoints judges to the Court.<sup>11</sup> Other than the President of the Court, who also heads the Appellate Division, and the Principal Judge of the First Instance Division,<sup>12</sup> the judges do not reside in Arusha.<sup>13</sup> They come to Arusha when there is a prescheduled convening of court business.<sup>14</sup> Judges hold office for a seven-year period<sup>15</sup> and must retire at seventy years of age.<sup>16</sup> As further evidence of the novelty of this Court, the salaries, conditions of service, and other terms of EACJ judges are yet to be determined.<sup>17</sup>

The EACJ has jurisdiction “over the interpretation and application” of the EAC Establishment Treaty.<sup>18</sup> The EAC Establishment Treaty then provides

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note 2, at 268–71.

5. EAC Establishment Treaty, *supra* note 4, art. 24(2) (providing that the First Instance Division shall not be comprised of more than ten judges).

6. *Id.* art. 24(1)(a) (providing that no more than two judges can be appointed from the same EAC partner state).

7. *Id.* art. 24(2) (providing that the Appellate Division shall not be comprised of more than five judges).

8. *Id.* art. 24(1)(b).

9. *Id.* art. 47 (providing that the “[s]eat of the Court shall be determined by the Summit”).

10. *Id.* art. 10 (stating that the Summit comprises the heads of government of the five East African partner states).

11. *Id.* art. 24

12. Under the EAC Establishment Treaty, the President “shall direct the work of the Court, represent it, regulate the disposition of matters before the Court, and preside over its sessions.” *Id.* art. 24(10). Under Article 24(8), the “Principal Judge shall direct the work of the First Instance Division, represent it, regulate the disposition of the matters brought before the Court and preside over its sessions.” *Id.* art. 24(8). The EAC Establishment Treaty provides that “[t]he President and Vice-President . . . shall not be nationals of the same Partner State.” *Id.* art. 24(6).

13. EAC, EACJ Judge President, *Principal Judge Now Full-Time in Arusha* (July 2, 2012), [http://www.eac.int/index.php?option=com\\_content&view=article&id=1044:eacj-judge-president-principal-judge-now-full-time-in-arusha&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1044:eacj-judge-president-principal-judge-now-full-time-in-arusha&catid=146:press-releases&Itemid=194).

14. Since 2013, both divisions of the Court have held longer quarterly sessions every year as the number of cases has increased. For example, the First Division continued to meet between February 4 and February 28. *See* EACJ, *EACJ 5th Quarter Sessions Resume Today* (Jan. 27, 2014), <http://eacj.org/?p=1756>.

15. EAC Establishment Treaty, *supra* note 4, art. 25(1).

16. *Id.* art. 25(2). As a matter of practice, judicial appointments are staggered to prevent all the judges’ terms coming to an end at the same time. In the first appointment round, judges are appointed for seven years. In the second appointment round, judges are appointed for five years. The cycle is then repeated with each subsequent appointment round. Interview with Justice Butasi, Principal Judge of the EACJ First Division, in Arusha, Tanzania (June 25, 2014).

17. *See* EACJ, *Strategic Plan: 2010–2015*, at v (Apr. 2010). The EAC Establishment Treaty provides that the Summit, which consists of the heads of government of EAC states, shall determine the salary, terms, and conditions upon recommendation of the EAC Council of Ministers. EAC Establishment Treaty, *supra* note 4, art. 25(5).

18. *Id.* art. 27(1). In addition, the EAC Establishment Treaty provides that the role of the Court shall be to “ensure the adherence to law in the interpretation and application of and compliance with

that the EACJ “shall have such other original, appellate, human rights and other jurisdiction *as will be determined* by the Council at a suitable subsequent date.”<sup>19</sup> At the 15th Ordinary Summit of the EAC’s Heads of State, a decision was made to defer giving the EACJ jurisdiction over human rights and to instead consult with the African Union on the matter.<sup>20</sup> The Summit did, however, extend the Court’s jurisdiction over trade and investment cases as well as cases arising under the EAC’s Monetary Union treaty.<sup>21</sup> The Court also has jurisdiction over disputes between the EAC and its employees;<sup>22</sup> arbitral disputes arising from commercial contracts between private parties; and agreements to which the EAC, any of its institutions, or EAC member states are parties if an arbitration clause in such a contract or agreement confers such jurisdiction.<sup>23</sup>

Any person residing in the EAC can bring cases to the EACJ.<sup>24</sup> Such suit can only be filed against one of the EAC member states or an institution of the EAC for a declaration that its conduct is inconsistent with the EAC Establishment Treaty.<sup>25</sup> Employees of the EAC may sue regarding the terms and conditions of their service to the EAC.<sup>26</sup> The Court’s arbitral jurisdiction can be invoked pursuant to an agreement or contract between commercial actors, the EAC, or EAC member states.<sup>27</sup>

Having introduced the Court, the next part of this article examines the NTB mechanism that business actors in East Africa have preferred to litigation for resolving complaints about trade barriers.

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this Treaty.” *Id.* art. 23(1).

19. *Id.* art. 27(2) (emphasis added).

20. See EAC, *Communiqué of the 15th Ordinary Summit of the EAC Heads of State*, ¶ 16 (Nov. 13, 2013), [http://www.eac.int/index.php?option=com\\_content&view=article&id=1437:communiqué-15th-ordinary-summit-of-the-eac-heads-of-state-&catid=146:press-releases&Itemid=194](http://www.eac.int/index.php?option=com_content&view=article&id=1437:communiqué-15th-ordinary-summit-of-the-eac-heads-of-state-&catid=146:press-releases&Itemid=194) (extending the jurisdiction of the EACJ to include commercial, investment and monetary matters, but deciding to work with the African Union (rather than the EACJ) on matters relating to human rights and crimes against humanity).

21. EAC, *Communiqué of the 16th Ordinary Summit of the East African Community Heads of State*, ¶ 9, [http://news.eac.int/index.php?option=com\\_docman&task=doc\\_download&gid=410&Itemid=](http://news.eac.int/index.php?option=com_docman&task=doc_download&gid=410&Itemid=;); EAC, *EACJ Gets New Judges and Deputy Principal Judge* (Jan. 27, 2015), <http://eacj.org/?p=1754> (noting that “[t]he Summit approved the Council recommendation to extend the jurisdiction of the [EACJ] to cover trade and investment as well as matters associated with the East African Monetary Union. On Human Rights matters as well as crimes against humanity, the Summit directed the Council of Ministers to work with the African Union on this matter.”).

22. EAC Establishment Treaty, *supra* note 4, art. 31.

23. *Id.* art. 32.

24. *Id.* art. 30(1).

25. *Id.* art. 30 (providing that in such a case the Court could be asked to determine “the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the EAC on grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty”). A carve-out in Article 30(3) provides that the Court shall have no jurisdiction “where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State.” *Id.* art. 30(3).

26. *Id.* art. 31.

27. *Id.* art. 32.

## III

## THE NONTARIFF BARRIER MECHANISM OF THE EABC

Businesses or individuals challenging conduct related to the business environment in East Africa filed only four of the sixty or so cases decided by the EACJ between December 2005 and June 2013.<sup>28</sup> This is surprising given that trade integration is a primary goal of the EAC. Three of the four major stages of the EAC's regional integration involve trade—the customs, common market, and monetary union stages. Only the final stage, political union, is not primarily business related.

As part IV demonstrates, only four of the cases that have come before the EACJ relate to governmental conduct with respect to the business environment and, surprisingly, none of the cases involve regional trade integration rules.<sup>29</sup> Why have businesses in the EAC not used the EACJ to resolve business problems that stand in the way of EAC integration? The absence of business disputes in the EACJ is striking considering that NTBs are widely recognized as one of the most important impediments to trade integration in East Africa.<sup>30</sup> These barriers include burdensome and costly customs procedures, import licensing procedures and charges, costly road-user charges, and sanitary and phytosanitary barriers.<sup>31</sup> The Secretary General of the EAC acknowledges that NTBs are the biggest limitation on market access facing East African companies,<sup>32</sup> yet there is not even a trickle of cases challenging these barriers in the EACJ. The EAC's customs and common market protocols—as well as the EAC's Establishment Treaty—prohibit NTBs.<sup>33</sup>

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28. A peculiar feature of the EACJ's case law is that each individual case spawns several interlocutory applications involving issues such as jurisdiction challenges or questions relating to whether or not interim orders such as injunctions would be issued. Hence, although only fifty-six cases were filed before the EACJ between December 2005 and June 2013, they involved 109 separate decisions.

29. *See infra* Part IV.

30. EAC, *The Second EAC Development Strategy 2001–2005*, at 12 (Apr. 24, 2001), [http://www.eac.int/index.php?option=com\\_docman&task=doc\\_view&gid=3&Itemid=163](http://www.eac.int/index.php?option=com_docman&task=doc_view&gid=3&Itemid=163) (identifying nontariff barriers such as administrative and bureaucratic inefficiencies standards and technical requirements as major impediments to trade in East Africa). The report further noted nontariff barriers could be more significant than tariffs as barriers to trade in East Africa. *Id.*

31. Article 1 (Interpretation) of the EAC Establishment Treaty defines nontariff barriers as “administrative and technical requirements imposed by a partner state in the movement of goods.” EAC Establishment Treaty, *supra* note 4, art. 1. The EAC Customs Union Protocol defines nontariff barriers as “laws, regulations, administrative and technical requirements other than tariffs imposed by a Partner State whose effect is to impede trade.” EAC, *Protocol on the Establishment of the East African Customs Union*, at pt. A, art. 1 (Mar. 2, 2004) [hereinafter *Customs Union Protocol*].

32. Richard Sezibera, *Let's Rid EAC of These Non Tariff Barriers*, EAC OFFICE OF SECRETARY GENERAL, [http://www.eac.int/sg/index.php?option=com\\_content&view=article&id=116:lets-rid-eac-of-these-ntbs&catid=40:sgs-blog&Itemid=1](http://www.eac.int/sg/index.php?option=com_content&view=article&id=116:lets-rid-eac-of-these-ntbs&catid=40:sgs-blog&Itemid=1) (last visited Oct. 19, 2015).

33. EAC Establishment Treaty, *supra* note 4, art. 75 (providing that “the Partner States agree to remove all the existing non-tariff barriers on the importation into their territory of goods originating from the other Partner States and thereafter refrain from imposing further nontariff barriers”); EAC, *Protocol on the Establishment of the East African Community Common Market*, art. (2)(a) (Nov. 20,

Established in 1997, the EABC represents the interests of the private sector in EAC integration processes.<sup>34</sup> It comprises national private-sector associations representing manufacturers, industry groups (such as banks), and chambers of commerce.<sup>35</sup> It aims at creating an enabling and conducive business environment for its members by lobbying for targeted policy reforms at the EAC.<sup>36</sup> It engages directly with national policymakers. At the EAC Secretariat, the EABC enjoys “observer status,” which allows it to participate in all activities of any organ or institution of the EAC.<sup>37</sup> This unprecedented access to the EAC gives the EABC a seat at the table in the drafting of EAC policies and treaties, as well as other EAC activities.<sup>38</sup> The EABC is therefore able to channel its goals to the highest decisionmaking body of the EAC, the Summit, which consists of the heads of government of the five member states.<sup>39</sup>

An example of the EABC’s success in lobbying within the EAC was a decision by its Ministerial Council, the highest policy-making organ, to give the EABC, a private organization, acquiescence to draft together with the EAC Secretariat a monitoring mechanism to identify, monitor, and remove nontrade barriers in the EAC.<sup>40</sup> This delegation of authority to draft this monitoring mechanism is remarkable considering Article 13(2) of the Customs Union Protocol of 2004 gives that power to EAC member states.<sup>41</sup> Interviews with EAC and EABC officials confirmed that the EABC was integrally involved in the drafting of the Customs Union Protocol.<sup>42</sup> In fact, according to an EABC official, EAC integration was no longer a government-to-government affair, but rather one in which the private sector was an integral part.<sup>43</sup> As a reflection of

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2009) [hereinafter *Common Market Protocol*] (providing that partner states will eliminate NTBs to trade); *Customs Union Protocol*, *supra* note 31, art. 13(1) (providing that that “each of the Partner States agrees to remove, with immediate effect, all the existing non-tariff barriers to the importation into their respective territories of goods originating in the other Partner States and, thereafter, not to impose any new nontariff barriers”). In addition, the EAC Establishment Treaty provides that EAC member states will establish a customs union and will include commitments to eliminate nontariff barriers. EAC Establishment Treaty, *supra* note 4, art. 75(1)(c).

34. EABC, *Who We Are*, <http://www.eabc.info/eabc/about/category/who-we-are> (last visited Feb. 25, 2015).

35. *Id.*

36. *Id.*

37. *Id.*

38. Interview with Human Rights Advocate M, in Nairobi, Kenya (Sept. 5, 2013) (noting that business groups were the first to obtain observer status in the EAC and that it is not easy for human rights groups to get observer status in the EAC because to obtain such a status, a group must have a chapter in each of the five member states, and highlighting the difficulty of human rights groups to meet that criteria due to the expense of having five national offices). Notably, the EABC does not have offices in each of the five member states. Instead, it works with nationally based associations.

39. EAC Establishment Treaty, *supra* note 4, art. 10(1).

40. See East African Community, East African Community Gazette, Vol. AT 1—No. 004, 2 (Dec. 30, 2007) (showing both that the Council of Ministers commended the EAC Secretariat in collaboration with the EABC for developing guidelines on removal of NTBs and also that the Council adopted Mechanism on Monitoring NTBs).

41. *Customs Union Protocol*, *supra* note 31, art. 13(2).

42. Interview with EABC official, in Arusha, Tanzania (July 30, 2013).

43. *Id.* (noting that the success of the current efforts at EAC integration, unlike in the past, was on

the central involvement of the private sector in EAC integration initiatives, the NTB mechanism was designed in a process that involved key policymakers and heads of agencies responsible for enforcing trade-related requirements, on the one hand, and business associations and representatives of key businesses in the EAC, on the other.<sup>44</sup>

These negotiations coincided with the coming into force of the Customs Market Protocol in 2005.<sup>45</sup> Soon thereafter, the EABC forwarded the study to the EAC Council of Ministers, which adopted it in 2006.<sup>46</sup> That same year, the EABC compiled the first inventory of NTBs in East Africa.<sup>47</sup> Under the mechanism, each member state has established a National Monitoring Committee (NMC), which meets annually and report to the Regional Forum on NTBs, which in turn meets quarterly.<sup>48</sup> In 2013, the twelfth Regional NTB Forum meeting was held.<sup>49</sup> In each EAC member country, there is both a public- and private-sector focal point designed to work together toward the elimination of NTBs.<sup>50</sup>

The EABC's strategy for removal of NTBs is a legally nonbinding administrative mechanism. It establishes a coordination framework within which national institutions and officials in a variety of government departments

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account of the involvement of the private sector).

44. EAC, EABC & Simon Ngatia Ihigaa, *Monitoring Mechanism for Elimination of Non-Tariff Barriers in EAC*, at 3 [hereinafter *Monitoring Mechanism*].

45. See *Customs Union Protocol*, *supra* note 31, art. 43 (stating the protocol will become effective "upon ratification and deposit of instruments of ratification with the Secretary General by all the Partner States").

46. Nick Kimani, *Overcoming Non-Tariff Barriers to Regional Trade Through Stakeholder Forums: Normative and Empirical Dimensions*, 4, AFRICAN ECONOMIC CONFERENCE (Oct. 28–30, 2013), <http://www.afdb.org/en/aec-2013/papers/paper/overcoming-non-tariff-barriers-to-regional-trade-through-stakeholder-forums-normative-and-empirical-dimensions-902/>.

47. EABC, *Non-Tariff Barriers*, <http://www.eabc.info/policy/non-tariff-barriers-ntbs> (last visited Feb. 25, 2015).

48. See *Monitoring Mechanism*, *supra* note 44, at 18 (on annual meetings of NMCs). Kenya, Tanzania, and Uganda established National Committees in 2007 and Burundi and Rwanda in 2008. Capacity-building workshops were conducted. For a typical meeting where NMCs report to the Regional Forum, see EAC, *Report of the 16th EAC Regional Forum on Non-Tariff Barriers* (Dec. 9–11, 2014), <http://www.meac.go.tz/sites/default/files/Documents/NTB%20REPORT%20DEC%202014.pdf>.

49. *Outcome of the 12th EAC Regional Forum on NTBs*, RWANDA NATIONAL MONITORING COMMITTEE (Oct. 28, 2013), <http://nmerwanda.org/spip.php?article141>.

50. Kimani, *supra* note 46, at 5. Since 2012, the EAC Secretary General has held annual forums for the private sector and civil society groups to engage with the work of the EAC. See EAC Secretariat, *Entebbe to Host 3rd EAC Secretary General's Forum for Private Sector and Civil Society in September 2014*, (Mar. 6, 2014) [http://www.eac.int/news/index.php?option=com\\_content&view=article&id=1165:entebbe-to-host-3rd-eac-secretary-generals-forum-for-private-sector-and-civil-society-in-september-2014&catid=48:eac-latest&Itemid=69](http://www.eac.int/news/index.php?option=com_content&view=article&id=1165:entebbe-to-host-3rd-eac-secretary-generals-forum-for-private-sector-and-civil-society-in-september-2014&catid=48:eac-latest&Itemid=69); see also EAC News Agency, *Uganda to Host Secretary General's Third Forum*, IPPNEWS MEDIA (Mar. 9, 2014), <http://www.ippmedia.com/frontend/?l=65577> ("The Dialogue Framework Forum for Private Sector, Civil Society and other interest groups in the EAC integration process was endorsed by the EAC Council of Ministers at its 26th meeting in November 2012 in Nairobi, Kenya. The Forum is guided by the principles of cooperation for mutual benefit, trust, goodwill, active and constructive participation, inclusivity and respect for diverse views.").

responsible for facilitating intra-EAC trade<sup>51</sup> assume responsibilities for overseeing NTB elimination.<sup>52</sup> The EABC, its members, and the responsible organs of the EAC monitor and report to the EAC Council of Ministers on the progress made in the removal of NTBs. The NTB mechanism is therefore a forum for communication and dialogue to eliminate NTBs. It is a cooperative solution designed to provide a common pool of information and knowledge about NTBs among an otherwise disparate set of national and regional actors needed to remove NTBs.<sup>53</sup>

A World Bank study showed that, between 2008 and 2009, the Kenya Private Sector Alliance had successfully negotiated the removal of roadblocks with the Prime Minister's Round Table talks.<sup>54</sup> In early 2013, the EABC realized some NTBs that had been successfully removed had begun to reappear under a different guise. Hence, the EABC sought further dialogue with the EAC to enact a legally binding and time-bound framework for their removal.<sup>55</sup> This move toward a legally binding framework evidences a private-sector-led increase in reliance on legal mechanisms in the removal of trade barriers in East Africa.

The next part of this article explains why the EABC has opted for a monitoring mechanism for which implementation depends on the "goodwill and commitment" of EAC member states, rather than opted for a litigation strategy that would result in a legally binding decision of the EACJ.

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51. These include customs and immigration officials, standard-setting agencies such as bureaus of standards, plant and health inspectorates, revenue agencies, and trade and industry officials *See, e.g., Monitoring Mechanism, supra* note 44, at pt. 2(B).

52. *See id.* at pt.1, § 9.4.

53. The NTB Mechanism also aims at awareness creation among trade officials at the national level and calls upon EAC member states to allocate resources for eliminating NTBs.

54. George Omondi, *Trade Experts Tackle Non-Tariff Barriers at Nairobi Forum*, BUSINESS DAILY (Jan. 7, 2009, 9:00 PM GMT), <http://dev.bdafrica.com/rest-africa/policy-and-politics/financial-services/trade-experts-tackle-non-tariff-barriers-nairobi>.

55. *See* EABC, EAC & Trademark East Africa [TMEA], *Summary of Issues [and] Recommendations from the Regional [Secretary General]/CEO Meeting Held in the Kampala Uganda*, at 2 (Feb. 27, 2013) (recommending to the EAC Council of Ministers the adoption of a legally binding instrument to remove NTBs). As originally proposed, the bill had as a very last resort reference to the EACJ if all other efforts to remove an NTB fail. Indeed, the EAC Council of Ministers in 2011 directed the EAC Secretariat to raise funds to develop a Legally Binding Enforcement Mechanism for the Elimination of Identified Non-Tariff Barriers. *See* TMEA, *Annual Report 2013/2014*, at 13, <https://www.trademarkea.com/download/6836/>; EAC, *28th Meeting of the Council of Ministers*, EAC/CM/28/2013, ¶ 6.1.1.1 (Nov. 22–29, 2013) [hereinafter *28th Meeting of the Council of Ministers*], <http://www.meac.go.tz/sites/default/files/Documents/FINAL%20SIGNED%20REPORT%20FOR%20THE%20MINISTERIAL%20SESSION%2028th%20MEETING%20OF%20THE%20COUNCIL.pdf>. Such a bill was developed with funding from Trademark East Africa and was subsequently referred to the EAC's Sectorial Council on Judicial and Legal Affairs for input. *See* José Maciel, *Growing Prosperity Through Trade: The Proposal of a Legally Binding Bill Addressing Non-Tariff Barriers in the East African Community*, TMEA, [http://www.ictsd.org/sites/default/files/event/J%20Maciel%20Geneva%20-%20EAC%20Bill\\_0.pdf](http://www.ictsd.org/sites/default/files/event/J%20Maciel%20Geneva%20-%20EAC%20Bill_0.pdf). As eventually passed, the Bill did not include referring the removal of NTBs to the East African Court of Justice. The final version of the bill is available at [http://www.ictsd.org/sites/default/files/event/J%20Maciel%20Annex%20III-NTB%20Bill%20revised%20monday\(9th%20Sept%202014\).pdf](http://www.ictsd.org/sites/default/files/event/J%20Maciel%20Annex%20III-NTB%20Bill%20revised%20monday(9th%20Sept%202014).pdf).



## IV

ACCOUNTING FOR THE PRIVATE SECTOR'S PREFERENCE FOR  
ADMINISTRATIVE MECHANISMS

This part advances three reasons for the absence of litigation arising from private sector actors. First, as the case study on removal of NTBs shows, the private sector prefers administrative mechanisms at the regional and national levels, rather than litigation in the EACJ, to address its concerns. Second, transplanted regional trade rules have little salience for business actors in East Africa. Third, the EACJ has limited remedial power, which further explains why business actors do not seem to prefer litigation to resolve their business problems.

These three reasons help illustrate the argument that the EACJ has no authority over business cases. Alter, Helfer, and Madsen define the narrowest form of authority an IC might have as existing when “the losing party publicly acknowledges an obligation to comply with an IC ruling . . . [and takes] a consequential response . . . to the ruling . . . , such as paying compensation.”<sup>56</sup> The EABC does not recognize the authority of the EACJ in even this most narrow-authority sense—after all, it has preferred to use an administrative mechanism instead of litigation to pursue its goal of removing NTBs in intra-EAC trade.

A. The Private Sector's Preference for Administrative Mechanisms Other than  
Litigation

The EABC's advocacy for and involvement in designing the NTB Monitoring Mechanism indicates its preference for advancing the concerns of its members through administrative mechanisms at the regional and national levels. Why has the private sector preferred administrative solutions to address its concerns?

A close examination of the powers of the Council of Ministers (the Council) of the EAC partly accounts for the private sector's preferences.<sup>57</sup> The Council is the highest policy organ of the EAC.<sup>58</sup> It is charged with promoting, monitoring, and keeping in “constant review the implementation of the programmes of the [EAC].”<sup>59</sup> Pursuant to this mandate, the Council decided that all of its decisions and directives had to be accompanied by clear time frames so that it could more easily monitor and follow up on their implementation.<sup>60</sup> Thus, at every meeting, the Council receives a status report from the Secretariat showing the status of its previous decisions or directives—whether they have been implemented,

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56. Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 *LAW & CONTEMP. PROBS.*, no. 1, 2016, at 13.

57. EAC Establishment Treaty, *supra* note 4, art. 9(1)(b) (establishing the Council).

58. *Id.* art. 14(1).

59. *Id.* art. 14(2).

60. See *28th Meeting of the Council of Ministers*, *supra* note 55, at 8, EAC/CM/28/2013 (Nov. 22–29, 2013).

partially implemented, or are pending implementation.<sup>61</sup> The first order of business in each Council meeting is to give directions on unimplemented decisions.<sup>62</sup> Council decisions are published in the EAC Gazette and usually come into force upon publication.<sup>63</sup> Decisions, regulations, and directives of the Council are not only binding on EAC partner states, but also on all EAC organs and institutions, other than the Summit, the East African Legislative Assembly, and the EACJ.<sup>64</sup> From this perspective, the Council has the power to order the removal of NTBs and the EABC, as an accredited nongovernmental body, has the day-to-day access to the machinery of the EAC that reports to the Council. This access is partly facilitated by the fact that both the EAC Secretariat and EABC's offices are currently located in Arusha, Tanzania,<sup>65</sup> and by the fact that the EABC has observer status within the EAC.<sup>66</sup>

The EABC prefers a strategy that emphasizes administrative action over judicial review because such action is arguably more effective than judicial review. This preference must be seen in light of the low levels of legalization of EAC integration. Regions or regimes with high legalization are accompanied by heightened obligations, greater precision in rules, and delegation of rule interpretation to third parties. That is not the case in East Africa. The EACJ's Strategic Plan for 2010 through 2015, for example, argues that a lack of recognition of the EACJ's role as a dispute resolution organ at the core of the integration process is one of its "crippling challenges."<sup>67</sup>

Further, the rules embodied in EAC treaties calling for the elimination and removal of NTBs are rather generic and do not go into detail, for example, by listing the consequences of noncompliance.<sup>68</sup> The absence of precision makes

61. In a decision of the 15th Summit, the Secretary General was directed to "among others: report regularly on the implementation of decisions including non-compliance" and "submit progress reports on implementation of major decisions and directives of the Council and Summit every six months." EAC, *Communiqué of the 15th Ordinary Summit of the EAC Heads of State*, ¶ 5(a), (e) (Nov. 30, 2013) [hereinafter *Communiqué*], [http://www.eac.int/news/index.php?option=com\\_docman&task=doc\\_view&gid=353&Itemid=77](http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=353&Itemid=77). Pursuant to this directive, see for example, EAC, *Communiqué of the 30th Council of Ministers*, ¶ 1, EAC/CM/30/CM/2014 (Nov. 20–28, 2014) [http://www.meaca.go.ug/index.php/press/doc\\_download/76-30th-meeting-of-the-council-of-ministers-nairobi-kenya-20th-28th-november-2014-.html](http://www.meaca.go.ug/index.php/press/doc_download/76-30th-meeting-of-the-council-of-ministers-nairobi-kenya-20th-28th-november-2014-.html).

62. See *Communiqué*, *supra* note 61.

63. EAC Establishment Treaty, *supra* note 4, art. 14(5).

64. EAC Establishment Treaty, *supra* note 4, art. 16.

65. In 2014, Rwanda offered the EABC some land on which to build its headquarters. The EABC will therefore move its headquarters to Kigali, Rwanda but will retain an office in Arusha so that it can maintain its links with the EAC.

66. See *supra* Part III.

67. EACJ, *Strategic Plan: 2010–2015*, at v (Apr. 2010).

68. For example, Article 5(2)(s) of the Common Market Protocol provides that EAC Partner States agree to "eliminate tariff, non-tariff and technical barriers to trade . . ." without defining what constitutes a nontariff barrier. This leaves questions unanswered. For example, to what extent and under what conditions would sanitary and phytosanitary measures or price and quality controls be considered NTBs? Or does the definition only include technical barriers to trade or pre-shipment inspections? What about nontechnical measures such as police roadblocks? See *Common Market Protocol*, *supra* note 33.

the rules more amenable to monitoring than to litigation.<sup>69</sup> In fact, at the time of the establishment of the Customs Union in 2004, the EACJ had hardly decided any cases at all—its first decision was issued in 2006.<sup>70</sup> Thus, resort to judicial enforcement for removal of NTBs may not have promised the EABC much given there was no history of successful cases on removal of NTBs. By contrast, the EAC Council of Ministers offered the promise of a ready avenue and real power with the prospect of a cooperative approach to a partnership that would involve the private sector. The Council offered to the EABC the promise of more leeway to propel the EAC's agenda, both because of the Council's policy-making autonomy as well as the fact that its decisions are binding on EAC states. The EACJ does not have the discretion to collect detailed information about barriers that businesses face in EAC trade or even to tailor solutions for removing specific NTBs in the way the Council does.

Another important reason accounts for the EABC's preference for an administrative approach. Removing NTBs to competition invariably exposes some companies to more competitive regional and international companies. Hence, while companies engaged in importation would prefer removal of NTBs, those predominantly supplying for the domestic market may not favor their removal since NTBs act to buffer them from regional competitors. Removal of NTBs would also be accompanied by revenue losses for the country that removes NTBs. Even the removal of barriers such as police checks and weigh-and-bridge stations is not costless. The police and other officials who benefit from the corruption associated with these barriers represent an interest group that accounts for the presence of these barriers. Removal of these barriers therefore creates future uncertainty that might not be politically acceptable.<sup>71</sup> Seen this way, removing NTBs is first and foremost a political challenge. The preference for political solutions through the EAC Council of Ministers makes sense to business actors who are familiar with how government agencies operate and how to overcome the types of political and other costs associated with removing NTBs.

In fact, large businesses in East Africa rarely seek judicial redress against governments in the countries where they operate. Governments are important clients for these businesses. This is in part because in many developing countries, including in the EAC, governments have large procurement budgets.<sup>72</sup> Large businesses make large profits when they win these

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69. Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661, 663 (2000).

70. See John Eudes Ruhangisa, *The East African Court of Justice: Ten Years of Operation (Achievements and Challenges)*, 12, <http://eacj.huriweb.org/wp-content/uploads/2013/09/EACJ-Ten-Years-of-Operation.pdf>.

71. On future uncertainty as a cost of increased legalization, see generally Kenneth W. Abbott and Duncan Snidal, *Toward a Theory of International Legalization*, 53 INT'L ORG. 421 (2000); see also Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 573, 584 (2000) (showing that states with a high susceptibility to balance of payment crisis are less likely to commit to high legalization).

72. See Dinfin Mulupi, *Are Kenyan Companies Ignoring Government Work at their Own Peril?*,

procurement contracts. Suing the government, particularly in a regional court, is likely to jeopardize a business's relationship with the government. Businesses want long-term, strategic relationships—they avoid legalistic and adversarial relationships that might undermine building a relationship of trust with governments. Placing a call to a high-ranking governmental official is more likely to expeditiously resolve problems that a business is encountering with the government or in the marketplace than a court order is likely to resolve them.

EAC member states have taken steps to give businesses alternatives to traditional litigation. The EAC Customs Market Protocol, for example, establishes a specialized administrative mechanism to resolve disputes.<sup>73</sup> It sidesteps the EACJ as the dispute-settlement mechanism.<sup>74</sup> Further, the EAC Common Market Protocol gives national courts jurisdiction to decide cases arising under it—national courts are given the jurisdiction to decide whether an EAC member government has conducted itself inconsistently with the Common Market Protocol.<sup>75</sup> These provisions are consistent with a widely held view that government officials in Africa do not like to file cases against each other or to defend suits filed by businesses in judicial proceedings, particularly in regional courts.<sup>76</sup> Government officials, like business actors in the EAC region, also prefer alternatives to litigation. They provide their offices to resolve disputes with businesses and governments that are members of their subregional trading system.

The next section discusses the lack of a litigation strategy among business actors in East Africa. Litigation around business issues, especially at the regional level, so far has not been a preferred strategy, and it does not have a history or predicate, such as a bar specializing in regional trade law practice and

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HOW WE MADE IT IN AFRICA (June 6, 2014) (quoting Joanne Mwangi, PMS Group), <http://www.howwemadeitinafrica.com/are-kenyan-companies-ignoring-government-work-at-their-peril/40223/> (“The biggest spender in this economy will always be government so if you are not doing business with government it means you are already fishing in a pond when there is an ocean right next to you.”).

73. *Customs Union Protocol*, *supra* note 31, art. 40 (stating that the annexes of the protocol are integrated into the protocol); EAC, *The East African Community Customs Union (Dispute Settlement Mechanism) Regulations, Annex XI*, at Regulation 5 [hereinafter *Dispute Settlement Mechanism*] (establishing the dispute settlement mechanism).

74. *See generally Dispute Settlement Mechanism*, *supra* note 73.

75. *Common Market Protocol*, *supra* note 33, art. 54. Notably, the First Division of the EACJ has decided that these alternative dispute settlement forums were not designed to undermine its authority as the preeminent court with jurisdiction to determine whether or not a treaty of the EAC has or has not been violated. *See E. African Ctr. for Trade Policy and Law v. Sec’y Gen. of EAC*, Ref. No. 9 of 2012, ¶¶ 76–78 (EACJ First Instance Div. 2013), [http://eacj.org/wp-content/uploads/2013/09/FI\\_EACCommunity-EACTPL.pdf](http://eacj.org/wp-content/uploads/2013/09/FI_EACCommunity-EACTPL.pdf) (“The dispute settlement mechanisms provided for under the Customs Union and the Common Market Protocol do not oust the original jurisdiction of the Court of handling disputes thereunder.”).

76. P. Kenneth Kiplagat, *Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience*, 15 *NW. J. INT’L L. & BUS.* 437, 441 (1995) (arguing that many regional integration schemes in developing countries opt for dispute-avoidance frameworks). Notably, none of the forty African countries that are members of the World Trade Organization have ever brought a case before its dispute-settlement system.

litigation, on which it can be built the same way that litigation around business issues occurs within each of the EAC member states.

### B. Transplanted Regional Trade Rules Have Little Salience for Business Actors

Business laws in East Africa—such as those of contract, agency, partnership, and corporations—are a colonial inheritance.<sup>77</sup> They were imposed under colonial rule to serve primarily the needs and interests of foreign investors.<sup>78</sup> The fact that these laws were not designed to serve the needs of local businesses means these business laws have attracted little legitimacy or relevance particularly for informal businesses.<sup>79</sup> When formally incorporated business actors in East Africa resort to law or judicial dispute settlement, they invariably invoke national business laws and national courts because these laws govern their incorporation and every aspect of their operations. Regional laws such as those of the EAC do not apply to any aspect of day-to-day operations of business actors. As such, regional courts such as the EACJ are quite removed from the workings of business actors. In short, the underlying legal infrastructure for trade in the EAC region is still national—each member country has its own separate law of contract, law of agency and partnership, corporate law, and so on.

Regional trade integration rules and their attendant dispute-settlement provisions, also transplanted from Europe, were superimposed on national business laws in the post-independence period. Notwithstanding the increased pace of adopting these regional trade rules in the recent past,<sup>80</sup> even sophisticated business lawyers who advise multinational corporations doing business in East Africa do not see these regional trade rules as options for their clients.<sup>81</sup> This is largely because regional trade rules are a recent historical phenomenon<sup>82</sup> and have not gained the salience that domestic business laws have had in structuring business deals or in providing an alternative dispute-settlement mechanism to the predominance of national courts.

Another related reason for the non-use of regional courts is that a broad

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77. James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1031–32 (2007) (“[T]he introduction of rules of private property, tort, and contract . . . helped to consolidate . . . an informal empire of trade and commerce in the protectorate [present-day Kenya].”).

78. *Id.*

79. The EAC treaty regime can therefore be argued to suffer from the “transplant effect”—it is disconnected from the local context. For more on this in the context of regional integration, see Karen J. Alter, Laurence R. Helfer & Osvaldo Salidas, *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 69 AM. J. COMP. L. 629 (2012).

80. See generally James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011) (discussing the increased number of bilateral and regional trade agreements with an emphasis on neoliberal economic ideals).

81. Interview with the General Counsel to a large multinational bank, in Nairobi, Kenya (Aug. 2, 2013).

82. The EAC was revived in 2000. Its Customs Protocol came into effect in 2005 and its Common Market Protocol came into effect in 2010. Its Monetary Union Protocol was signed by the members in November 2013 and will come into effect in 2015.

cross-section of the population of the EAC lacks knowledge of the regional courts' underlying trade-integration rules.<sup>83</sup> Yet there are significant commercial transactions within and across national boundaries in the region, especially those involving big domestic and foreign firms. What is more, a large segment of the population has for a long time relied upon traditional commercial customs for engaging in business and resolving disputes.<sup>84</sup> These customs predate the enactment of formal laws with the advent of colonialism and their subsequent amendment and updating under the era of neoliberal economic reform since the early 1990s. These customary modes of dispute settlement, unlike formal legal rules such as those of the EAC or national business law systems, are based on social controls such as “religion, custom, habit and rules of practical prudence.”<sup>85</sup>

Further, regional trade regimes are largely invisible, particularly to small- and medium-scale business actors who are overwhelmingly in the informal sector. The informal sector, which dominates the manufacturing, commerce, finance, and mining sectors in Africa,<sup>86</sup> employs more people than the formal sector and is concentrated in urban areas where secondary school graduates flock in search of jobs.<sup>87</sup> The informal sector in many African countries thrives because the formal sector cannot absorb the high numbers of unemployed people. The informal nature of business deals in East Africa is reflected by the fact that a large majority of small- and medium-scale firms enter into oral contracts with their suppliers.<sup>88</sup> Thus, a very large segment of trade and business

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83. Interview with Judge C, EACJ First Instance Division, in Nairobi, Kenya (Aug. 2, 2013) (noting that knowledge of EAC law among judges in Kenya was “poor”); *see also* Interview with EACJ Appellate Judge A and President, in Arusha, Tanzania (July 30, 2013) (noting the various efforts to create awareness of the EACJ).

84. *See* Antony N. Allot, *The Future of African Law*, in *AFRICAN LAW: ADAPTATION AND DEVELOPMENT* 216, 232–33 (Hilda Kuper & Leo Kuper eds., 1965) (arguing that in newly independent African countries, keeping courts nonprofessionalized would make justice local, speedy, flexible and that there existed a “whole apparatus of arbitration” outside the formal European court system).

85. Paul Brietzke, *Private Law in Ethiopia*, 18 *J. AFR. L.* 149, 155 (1974).

86. Donald L. Sparks & Stephen T. Barnett, *The Informal Sector in Sub-Saharan Africa: Out of the Shadows to Foster Sustainable Development and Equity?*, 9 *INT'L BUS. ECON. RES. J.* 1, 1 (2010), <https://datapro.fiu.edu/campusedge/files/articles/barnetts3107.pdf>. According to Kenya's Economic Survey (2012), the informal sector in Kenya contributed 85.7% of the total employment created in 2011, by providing 445,900 jobs—as compared to the formal sectors' contribution of 14.3%. KENYA NAT'L BUREAU OF STATISTICS, *ECONOMIC SURVEY 2012*, at 65 (2012). The survey notes that the Kenyan Government recognizes the potential of the sector in creating employment and reducing poverty levels—agendas that are central in the Kenya Vision 2030. *Id.* at 75–76. For its part Tanzania has developed Private Sector Development Strategy with a view to encouraging, among others, the informal sector to formalize their businesses. *Id.* The Ministry of Industry and Trade introduced a fully fledged Department of Small and Medium Size Enterprises (SMEs) to deal with informal sector including overseeing the implementation of the SMEs Policy and strategies. *See* World Trade Organization (WTO) Secretariat, *Trade Policy Review: EAC*, WT/TPR/S/271 (Oct. 17, 2012).

87. *See* Sparks & Barnett, *supra* note 86, at 3 (observing that lack of opportunity for secondary education drives migration into urban areas for work in the informal sector).

88. Joseph Mpeera Ntayi, Gerrit Rooks, Sarah Eyaa & Flavian Zeija, *Contract Enforcement in Ugandan Business Transactions: The Case of Small and Medium Enterprises*, INVESTMENT CLIMATE AND BUSINESS ENVIRONMENT RESEARCH FUND, at 2 (Feb. 2013), <http://www.africaportal.org/dspace/>

takes place outside formal structures such as privately incorporated entities, and even outside the national judicial systems. These informal businesses do not interface with formal government structures such as registrars of companies, tax and social security administrations, or government entities that oversee the protection of labor laws. These businesses are therefore unlikely to ever resort to regional, dispute-settlement systems.<sup>89</sup> In addition, many of these informal micro-, small-, and medium-scale enterprises are owned by entrepreneurs who are not literate in English or French, the languages that overwhelmingly tend to be the language of the law and formal dispute settlement.

Thus, even though the EACJ has tried to simplify its rules of procedure and gone out of its way to promote its accessibility in East Africa,<sup>90</sup> as of 2013, the EACJ decided only four cases challenging EAC member governments for conduct relating to the business environment.<sup>91</sup> None of these cases directly related to a violation of EAC's regional trade rules. These four cases are discussed below.<sup>92</sup> In any event, the EACJ's emerging jurisprudence shows that it is most likely to be accessible to well-funded businesses that can afford lawyers to make the kind of sophisticated legal arguments to which farmers, fishermen, and handicraftsmen who trade across national boundaries in the EAC would hardly have access. In short, regional trade rules are not tailored to address "local conditions" and are not designed as the "best fit" for these conditions.<sup>93</sup>

### C. EACJ Has Limited Remedial Power

The EACJ's jurisdiction only allows it to declare governmental conduct to be inconsistent with a treaty of the EAC.<sup>94</sup> Although the Court has granted injunctions restraining member governments, the EAC Secretary General, and other EAC organs from continuing to violate the EAC treaties, the EACJ does not have jurisdiction to grant damages or to employ the broad array of remedial powers that national courts have; it simply lacks a compliance jurisdiction.<sup>95</sup> For

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articles/contract-enforcement-ugandan-business-transactions-case-small-and-medium-enterprises.

89. See Isabelle Deschamps, *Assessing the Organisation pour l'harmonisation en Afrique du droit des affaires's Contributions to Poverty Reduction in Africa: A Grounded Outlook*, 6 L. DEV. REV. 111 (2013). *But see* Claire Moore Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17 (2005) (interviewing business actors and coming to a different conclusion based on selected provisions of OHADA).

90. See Gathii, *supra* note 2, at 274 (discussing the accessibility of EACJ due to low financial costs and procedural barriers).

91. See *infra* Part IV.C.

92. See *infra* Part IV.C.

93. See Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 789 (2009); Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003). This conclusion is also consistent with another contribution in this symposium. See Claire Moore Dickerson, *The OHADA Common Court of Justice and Arbitration: Exogenous Forces Contributing to its Influence*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 86–87.

94. EAC Establishment Treaty, *supra* note 4, art. 28.

95. In an interview, an EABC official argued that the EACJ lacks jurisdiction over commercial

this reason, a business seeking relief for a particular business problem is much better off going to a national court than to the EACJ.

This limitation in the remedial regime of the EACJ partly explains why, to date, cases involving commercial actors suing their governments for noncompliance with EAC treaties have been rare. One such exceptional case involved allegations of contravention of the protections of cross-border investment in the EAC's Common Market Protocol.<sup>96</sup> There, a Kenyan company sued Standard Chartered Bank (a Ugandan company), the Ugandan government, and the National Social Security Fund (another Ugandan company).<sup>97</sup> The issue was a bank guarantee issued by Standard Chartered Bank pursuant to an eight-million-dollar arbitral award made in favor of the Kenyan company.<sup>98</sup> The case against Standard Chartered Bank was dismissed on the basis that the bank was not a member state of the EAC and the EACJ could only entertain suits against EAC member states.<sup>99</sup> The case against the government of Uganda was also dismissed on the ground that the bank guarantee—the basis of the cause of action—had already expired pursuant to orders of the highest court in Uganda.<sup>100</sup>

The second case involved waiver of customs warehouse rent and loss of consignment. The case *Modern Holdings v. Kenya Ports Authority et al.*<sup>101</sup> arose following delays in clearing perishable goods out of customs warehouses in Mombasa by Modern Holdings. The Kenya Ports Authority transferred the perishable goods to a private warehouse that then claimed a large fee from Modern Holdings.<sup>102</sup> Modern Holdings was unable to raise the amount.<sup>103</sup> In the interim, all goods of Modern Holdings had expired.<sup>104</sup> Modern Holdings brought suit against the Kenya Ports Authority alleging a violation of the EAC Establishment Treaty.<sup>105</sup> The EACJ dismissed the case, holding that the case was not brought against an EAC member state and that since the EACJ could

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cases and that partly explained the absence of commercial cases before the Court. Interview with EABC official, in Arusha, Tanzania (July 30, 2013) (noting that the decision in the *Modern Holdings* case shows that the EACJ could not effectively resolve business cases).

96. *Alcon Int'l Ltd. v. The Standard Chartered Bank of Uganda et al.*, Ref. No. 6 of 2010 (EACJ First Instance Div. 2011), <http://eacj.org/wp-content/uploads/2012/11/Alcon-International-2010-6-judgment-2011.pdf>. Notably, when this case was first heard, the First Division dismissed it. The Appellate Division reinstated it because the First Division had failed to establish if it had jurisdiction. The 2010 decision dismissed the case again on the grounds discussed in the main text of this article.

97. *Id.*

98. *Id.* at 5.

99. *Id.* at 14.

100. *Id.* at 17. In any event, the First Division held that the provisions of the Common Market Protocol could not have been infringed because the facts of the case occurred before the protocol had come into effect. *Id.* at 23.

101. Ref. No. 1 of 2008, 2–3 (EACJ First Instance Div. 2009), <http://eacj.org/wp-content/uploads/2012/11/no-1-of-2008.pdf>.

102. *Id.* at 2.

103. *Id.*

104. *Id.* at 3.

105. *Id.* at 2.



only entertain suits against an EAC state, the Court had no jurisdiction.<sup>106</sup>

The third case, *Ndorimana v. Burundi*,<sup>107</sup> unsuccessfully sought damages from the government of Burundi arising from business losses suffered as a result of the litigant's imprisonment by Burundi.<sup>108</sup>

The fourth case, *Kyarimpa v. Uganda*<sup>109</sup> concerned an unsuccessful challenge to Uganda's alleged irregular procurement of a Chinese firm to construct a hydroelectric power plant for inconsistency with the EAC Establishment Treaty.

Neither the *Alcon* case nor the *Modern Holding* case was decided on the merits. Both cases were dismissed on procedural grounds, in part because they were not brought against an organ of the EAC or an EAC partner state.<sup>110</sup> The decisions in these two cases have been cited as having chilled the EABC, the largest regional business group, from advising their members to take cases to the EACJ.<sup>111</sup> Although the EACJ has jurisdiction to act as an arbitral forum, to date there has been only one reported instance in which a private party identified the EACJ as an arbitral forum in a business-to-business contract.<sup>112</sup>

Further, private parties do not have standing to sue each other because private party access is limited to suing governments.<sup>113</sup> The EACJ's jurisdiction only extends to private parties when they select the Court as the designated dispute settler in their contract's forum-selection clause.<sup>114</sup> This lack of jurisdiction to entertain business-to-business or business-to-individual cases is yet another reason why businesses may strongly prefer to take cases to national courts. After all, businesses are more familiar with national courts deciding such cases. And national courts have developed a record of experience and expertise in deciding business law cases.

The growing reputation of the EACJ as a human rights court makes it less likely that businesses would regard it as the go-to court to resolve their business problems.<sup>115</sup> The next part of this article examines how human rights groups

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106. *Id.* at 11.

107. *Ndorimana v. Att'y Gen. of Burundi*, Ref. No. 2 of 2013, 14 (EACJ First Instance Div. 2014), <http://eacj.org/wp-content/uploads/2014/11/REF.-NO-2-OF-2013-BENOIT-NDORIMANA-28-NOVEMBER-2014.pdf>.

108. *Id.* at 3.

109. *Kyarimpa v. Att'y Gen. Uganda*, Ref. No. 4 of 2013, 26–27 (EACJ First Instance Div. 2014).

110. *See Modern Holdings*, Ref. No. 1 of 2008 at 11 (holding that the Kenyan Ports Authority was not an institution subject to the EAC Establishment Treaty and therefore the EACJ had no jurisdiction); *Alcon Int'l Ltd.*, Ref. No. 6 of 2010 (holding that the respondents were not subject to the EAC Establishment Treaty and therefore the EACJ had no jurisdiction).

111. Interview at EABC, in Arusha, Tanzania (July 30, 2013) (noting that the decision in the *Modern Holding* case shows that the EACJ could not effectively resolve business cases).

112. *See Paul Juma, EAC Court Still Unpopular 9 Years In On*, THE EAST AFRICAN, (May 3, 2010) <http://www.theeastafrican.co.ke/news/-/2558/910494/-/pf9allz/-/index.html> (discussing that Uganda has included such a clause in a Railway Concession Agreement).

113. *See Modern Holdings*, Ref. No.1 of 2008 at 10–11 (holding that Article 30 of the EAC Establishment Treaty contemplates only suits against Partner States of the EAC).

114. EAC Establishment Treaty, *supra* note 4, art. 32.

115. Interview at EABC, in Arusha, Tanzania (July 30, 2013).

have frequently brought cases to the Court and in so doing have solidified the authority of the Court among individuals and groups interested in the promotion and protection of human rights.

## V

### THE HUMAN RIGHTS CASES OF THE EACJ

Human rights groups such as the East African Law Society (EALS), the regional bar association, have adopted a litigation approach to achieve their goals of promoting the rule of law, democracy, and human rights in East Africa. This legalistic enforcement style differs from the preference of the private sector for a cooperative relationship with EAC governments to achieve their goals. Adversarial legal accountability to promote the rule of law, democracy, and human rights was borrowed from the national experience of pro-democracy and human rights groups in one of the EAC member states—Kenya.<sup>116</sup> Officials who worked for these groups in Kenya helped create similar mechanisms when the EACJ was established.<sup>117</sup> They shaped the newly established EALS to adopt a litigation strategy to promote human rights.<sup>118</sup> Through the advocacy of these groups, they succeeded in persuading the judges to make the rights recognized in the EAC Establishment Treaty justiciable through repeated adversarial and litigious interactions.<sup>119</sup>

For these and other reasons discussed below, the EACJ has intermediate authority over human rights cases. Alter, Helfer, and Madsen say intermediate authority exists only when the behavior and decisions of “potential future litigants as well as government officials charged with implementing international rules as interpreted by the court, such as executive branch officials, administrative agency officials, and judges,” is affected by an IC’s decisions.<sup>120</sup> However, it is quite clear that the EACJ does not have extensive authority. Whereas Kelemen argues that the Court of Justice of the European Communities (CJEU) has extensive authority,<sup>121</sup> the following findings indicate the EACJ is unable to “consistently shape law and politics” in East Africa<sup>122</sup> as the CJEU is able to do in Europe.

The achievements of human rights groups, however, cannot be underestimated. They have persuaded judges of the EACJ that the Court has jurisdiction over human rights cases notwithstanding the Council’s failure to formally extend such jurisdiction to it as required by the EAC Establishment

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116. See Gathii, *supra* note 2, at 278 (discussing in particular the role of Donald Deya who rose from the ranks of the Law Society of Kenya to the then fledgling EALS Secretariat).

117. *Id.*

118. *Id.*

119. *Id.*

120. Alter, Helfer & Madsen, *supra* note 56, at 10.

121. R. Daniel Kelemen, *The Court of Justice of the European Union in the Twenty-First Century*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 118–119, 140.

122. *Id.*

Treaty, a move that the Council has been considering since 2004.

The EACJ's path to becoming a human rights court began with the 2007 *Katabazi* case.<sup>123</sup> The case arose following the arrest of several individuals who had just been granted bail by the Uganda High Court within the precincts of the High Court of Uganda.<sup>124</sup> These arrests were carried out on November 15, 2005 by a paramilitary group of the Ugandan government.<sup>125</sup> The events have been described as “the worst attack on judicial independence through the siege of the High Court.”<sup>126</sup> Not only did the paramilitary men interfere with the preparation of the bail papers; they also took the men before a military general court-martial, where they were charged with unlawful possession of firearms and terrorism under the same facts that had supported the previous charges for which they had been granted bail.<sup>127</sup> The Ugandan Constitutional Court, on petition from the Uganda Law Society, declared the detentions unconstitutional and ordered the individuals released from detention.<sup>128</sup> The Ugandan government failed to comply with that decision, and a complaint was thereafter filed in the EACJ.<sup>129</sup> The complainants challenged their re-arrest, military charges, and detention as inconsistent with the provisions of the EAC Establishment Treaty.<sup>130</sup> They argued that this conduct, together with the refusal by the Ugandan government to comply with the bail order, constituted an infringement of Articles 6, 7(2), and 8(1)(c) of the EAC Establishment Treaty.<sup>131</sup>

Article 5(1) of the EAC Establishment Treaty provides that “the objectives of the [EAC] shall be to develop policies and programmes aimed at widening and deepening co-operation among Partner States in political, social and cultural fields, research and technology, defence, security and legal and judicial affairs.”<sup>132</sup> Article 6 provides that the objectives of the EAC include the “promotion . . . of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights.”<sup>133</sup> Article 7(2) provides that the “principles of good governance, including adherence to the principles

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123. *Katabazi et al. v. Sec’y Gen. EAC et al.*, Ref. No. 1 of 2007 (EACJ First Instance Div. 2007), [http://eacj.org/wp-content/uploads/2012/11/NO.\\_1\\_OF\\_2007.pdf](http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf).

124. *Id.* at 1–2.

125. *Id.*

126. Kituo Cha Katiba, E. Afr. Ctr. Constitutional Dev., *Five-Year Strategic Plan 2011–2016*, at 10 (2011). Notably, the EACJ uses the term security personnel while Kituo Cha Katiba uses the term paramilitary personnel. Compare *id.* with *Katabazi*, Ref. No. 1 of 2007 at 2.

127. *Katabazi*, Ref. No. 1 of 2007 at 2.

128. *Id.*

129. *Id.* at 2–3.

130. *Id.*

131. EAC Establishment Treaty, *supra* note 4, art. 6 (setting out the fundamental principles of the EAC, which include the “promotion and the protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”). *Katabazi*, Ref. No. 1 of 2007 at 3.

132. *Katabazi*, Ref. No. 1 of 2007 at 15 (quoting EAC Establishment Treaty, *supra* note 4, art. 5(1)) (emphasis added).

133. EAC Establishment Treaty, *supra* note 4, art. 6.

of democracy, *the rule of law*, social justice *and the maintenance of universally accepted standards of human rights*” are operational principles of the EAC.<sup>134</sup> Furthermore, Article 8(1)(c) obliges EAC partner states to “abstain from any measures likely to jeopardiz[e] the achievement of those objectives or the implementation of the provisions of this Treaty.”<sup>135</sup>

Uganda challenged the EACJ’s jurisdiction on the basis that the Court does not have jurisdiction over human rights.<sup>136</sup> The EACJ dismissed this jurisdictional challenge and held that it could decide human rights cases.<sup>137</sup> It held that it had a responsibility not to “abdicate from exercising its jurisdiction of interpretation under Article 27(1) merely because the reference includes allegation[s] of human rights violation[s].”<sup>138</sup> The Court then held that Articles 5(1), 6, 7(2), and 8(1)(c) require partner states to abide by the decisions of their courts.<sup>139</sup> The Court held that it had an obligation to “provide a check on the exercise of the responsibility . . . to protect the rule of law,”<sup>140</sup> and that Uganda’s conduct constituted “an unacceptable and dangerous precedent, which would undermine the rule of law.”<sup>141</sup>

The *Katabazi* case established a cause of action for challenging violations of human rights of EAC member states. Several cases followed. In *Rugumba v. Secretary General of the East African Community et al.*, the EACJ held that Rwanda’s incommunicado detention of one of its citizens without trial was contrary to Articles 6(d) and 7(2) of the EAC Establishment Treaty, which obliges partner states to be bound by principles of good governance and the rule of law.<sup>142</sup> The Court also invoked provisions of the African Charter on Human and Peoples’ Rights, referred to in Article 7(2) of the EAC Establishment Treaty, and asserted that these provisions were not decorative or cosmetic parts of the EAC Establishment Treaty but were “meant to bind [p]artner [s]tates.”<sup>143</sup> The Court declined to hold that exhaustion of domestic remedies was a bar to bringing the suit.<sup>144</sup> Similarly, in *Ariviza v. Attorney General of Kenya et al.*, the Court had held that internal law could not be invoked to justify a violation of the EAC Establishment Treaty.<sup>145</sup>

134. *Katabazi*, Ref. No. 1 of 2007 at 16 (quoting EAC Establishment Treaty, *supra* note 4, art. 7(2)) (emphasis added).

135. EAC Establishment Treaty, *supra* note 4, art. 8(1)(c).

136. *Katabazi*, Ref. No. 1 of 2007 at 12.

137. *Id.* at 14–16.

138. *Id.* at 16.

139. *Id.* at 15–23.

140. *Id.* at 23.

141. *Id.* at 22.

142. Ref. No. 8 of 2010, 25–26 (EACJ First Instance Div. 2011), <http://eacj.org/wp-content/uploads/2012/11/Plaxeda-Rugumba-2010-8-judgment-2011.pdf>.

143. *Id.* ¶ 37.

144. *Id.* ¶¶ 30–31 (reasoning that a mathematical computation of time in a criminal case when the conduct complained of was a chain of continuous events would be inappropriate).

145. Application No. 3 of 2010, 10–11 (EACJ First Instance Div. 2010), *arising from* Ref. No. 7 of 2010, <http://eacj.org/wp-content/uploads/2013/10/RULING-OF-1ST-DECEMBER-2010.pdf>.

In *Independent Medical Legal Unit v. Attorney General of Kenya et al.*,<sup>146</sup> the EACJ entertained yet another important human rights case. This case tested yet again the argument that the Court does not have jurisdiction over human rights, as Uganda claimed in *Katabazi*.<sup>147</sup> The Court, consistent with its *Katabazi* decision, held that while it did not have jurisdiction over human rights, it nevertheless had jurisdiction to interpret provisions of the EAC Establishment Treaty even if cases included allegations violating human rights provisions.<sup>148</sup> *Independent Medical Legal Unit* involved allegations of executions, torture, cruelty, and inhuman and degrading treatment committed by agents of the Government of Kenya in the Mount Elgon area.<sup>149</sup> Notably, the plaintiff was an NGO that investigates human rights violations using forensic evidence.<sup>150</sup>

As has become the tradition in these human rights cases, the Kenyan government brought an unsuccessful challenge to the jurisdiction of the Court.<sup>151</sup> The Court reiterated that even though it does not have human rights jurisdiction as contemplated in Article 27(2), it has jurisdiction to interpret the EAC Establishment Treaty.<sup>152</sup> Hence, as long as allegations brought before the Court relate to an interpretation of an EAC Establishment Treaty, the fact that they involve allegations of violations of human rights does not preclude jurisdiction.<sup>153</sup> The Court noted that the only limitation to its jurisdiction is a suit against officers of a partner state—other than the Attorney General, the party who could be sued for Kenya’s responsibility for the maintenance of law and order—is not permissible.<sup>154</sup> Thus, only the Attorney General of the partner state may be sued for EAC Establishment Treaty violations.<sup>155</sup>

In all of these cases, the EALS played a critical role supporting the lawyers and litigants in the cases by filing amicus curiae and by having their lawyers appear in court together with the litigants’ lawyers, or on behalf of the litigants’ lawyers when they could not travel to Arusha.<sup>156</sup> Public-interest advocacy is one of the EALS’s primary mandates.<sup>157</sup> This includes public-interest litigation that

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146. Ref. No. 3 of 2010 (EACJ First Instance Div. 2011), <http://eacj.org/wp-content/uploads/2012/11/3-of-20101.pdf>. Notably, the First Instance Division’s opinion in the header of the case referred the applicant to as the Independent Medical Unit, instead of the Independent Medical Legal Unit. On appeal the Appellate Division used the correct name of the applicant in the header of the case: Independent Medical Legal Unit.

147. *Id.* at 3–6.

148. *Id.* at 4.

149. *Id.* at 2.

150. See *A Just World Free from Torture*, INDEP. MEDICO-LEGAL UNIT, <http://www.imlu.org/template/who-we-are.html> (last visited Feb. 28, 2015).

151. *Indep. Med. Unit*, Ref. No. 3 of 2010 at 3–6.

152. *Id.* at 5–6.

153. *Id.*

154. *Id.* at 7.

155. *Id.*

156. Interview with Selemani Kinyunyu of the Pan African Lawyers Union and previously of the EALS (May 2013).

157. *Our Programmes*, EALS, <http://www.ealawsociety.org/index.php/our-programmes> (last visited Feb. 28, 2015) (stating public interest advocacy as a program of the EALS). Among the EALS’s other

seeks “judicial re-affirmation” of the obligation of East African states to promote and protect human rights.<sup>158</sup> In 2011 alone, the EALS filed three cases before the EACJ.<sup>159</sup> In 2010, prior to these cases being filed, the EALS convened a Colloquium of Legal Scholars on Litigation Strategies before the EACJ and the African Court on Human and Peoples’ Rights, which was attended by judges from national courts and regional tribunals (including the African Court on Human and Peoples’ Rights), as well as lawyers from East and Southern Africa.<sup>160</sup> Among the outcomes from this meeting were offers for technical support and for institution of the three cases filed in 2011.<sup>161</sup>

This above discussion shows the EACJ assumed jurisdiction over human rights consistently with the preferences of civil society groups such as the EALS. Civil society groups like the EALS pursued and supported a litigation strategy before the EACJ to promote the rule of law, democracy, and human rights as core values of regional integration in East Africa. This strategy of engagement with the EAC fundamentally differs from that of the EABC, which has by and large preferred to collaborate with East African governments and the EAC in nonadversarial ways, for example, with the EABC’s NTB strategy.

## VI

### CONCLUSION

This symposium reflects on the authority of ICs in their social and political context. In doing so, this article has examined the predominance of human rights litigation in the EACJ and the absence of trade cases on the EACJ’s docket. The absence of trade cases indicates a preference on the part of the EABC for administrative mechanisms to address the concerns of the private sector in East Africa.<sup>162</sup>

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objectives are the professional development of its members, supporting regional integration, and institutional development. *Id.*

158. *Public Interest Advocacy*, EALS, <http://www.ealawsociety.org/index.php/our-programmes/public-interest-advocacy> (last visited Feb. 28, 2015).

159. The cases are: EACJ Reference No. 1 of 2011 against the EAC Secretary General, “challenging certain provisions in the Common Market Protocol and Customs Union Protocol that purport to oust the [j]urisdiction of the EACJ as granted by the EAC [Establishment] Treaty;” EACJ Reference No. 2 of 2011 against the Attorney General of Uganda and the EAC Secretary General, “relating to the [h]uman [r]ights [v]iolations in Uganda during the walk to work processions;” and EACJ Reference No. 3 against the Attorneys Generals of Uganda and Kenya as well as the EAC Secretary General “relating to the rendition of Kenyan [c]itizens to Uganda. EALS, *ANNUAL REPORT: NOVEMBER 2010–NOVEMBER 2011*, at 15 (2011), [http://www.ealawsociety.org/images/publications/annual\\_report/annual\\_report\\_2011.pdf](http://www.ealawsociety.org/images/publications/annual_report/annual_report_2011.pdf).

160. *Id.* at 14.

161. *Id.* Following the Colloquium of Scholars conference, the EALS’s Human Rights and Strategic Litigation Committee and its Regional Integration and International Relations Committee met to approve the institution of the cases. *Id.* at 14–15.

162. It is also notable that there is no international trade-law practice in East Africa that revolves around EAC law. The lack of an international trade bar that can identify cases and urge their clients to bring them to the EACJ contributes to the lack of trade cases before the EACJ. This, in addition to the fact that the EABC is predominantly run by business professionals and the lawyers who work have no power of initiative to lobby in favor of creating a litigation strategy for trade matters as human rights

The predominance of human rights litigation on the docket of the EACJ shows that human rights groups and lawyers recognize the authority of the EACJ while the EABC, and therefore the formal private sector, do not. From this perspective, business actors in East Africa do not validate the theoretical assumption that business actors demand binding, third-party dispute settlement to guarantee a stable legal and policy environment for commercial transactions.<sup>163</sup> The EABC has to date eschewed litigation, preferring to cooperatively work with the EAC and EAC member governments about how best to remove NTBs. The reappearance of trade barriers after successful removal through the trade barrier removal mechanism prompted EAC business CEOs in 2014 to propose a legally binding framework for their removal. This, together with the explicit extension of the EACJ's jurisdiction over trade, investment, and monetary issues in 2013, may open the way for business cases in the future.

As previously discussed, business actors do not recognize the authority of the EACJ. Small- and medium-scale enterprises are not even aware of the EAC's regional trade rules, and when they are aware of them, they do not resort to judicial dispute settlement before the Court. Because the EACJ has limited remedial power for business actors interested in judicial relief, domestic courts are a preferable alternative. According to the Alter, Helfer, and Madsen's definition of authority, which presupposes the filing of cases,<sup>164</sup> the fact that business actors have not filed cases before the EACJ means that it has no real authority over business cases.

By contrast, the EACJ has intermediate authority over human rights cases at a thin-elite level. Civil society actors, including the EALS and an increasing stream of litigants, have approached the Court for relief since the *Katabazi* decision of 2007. Academics interested in the rule of law, human rights, democracy in East Africa, and beyond have started producing a new stream of scholarship about the EACJ's human rights cases.<sup>165</sup> Donors such as the Soros Foundation have funded conferences on the role of the Court and have financially supported the judges of the EACJ to visit and learn from courts in other jurisdictions.

The success of human rights cases before the EACJ has also spurred the initiation of a line of cases challenging the environmental conduct of EAC

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lawyers have, is another factor that has contributed to the lack of trade cases before the EACJ.

163. Kahler, *supra* note 69.

164. At the beginning of their introduction to this issue, Alter, Helfer, and Madsen argue that an international court has as one of its essential features hearing "cases where one of the parties is, or could be, a state or an international organization," which presupposes cases must be filed to evaluate the authority of a court. Alter, Helfer & Madsen, *supra* note 56, at 3 n.2 (quoting Cesare Romano, Karen J. Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues and Players*, in OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 1, 6 (Cesare Romano, Karen J. Alter & Yuval Shany eds., 2014).

165. See, e.g., Ally Possi, *The East African Court of Justice: Towards Effective Protection of Human Rights in the East African Community*, in 17 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 173 (Christiane E. Philipp et al. eds., 2013); James Gathii, *supra* note 116.

member states. In the *Serengeti* case, an NGO was successful in getting orders to stop the government of Tanzania from building a highway across the Serengeti National Park.<sup>166</sup> The case was funded through a global campaign that invoked the park's status as a UNESCO Heritage site and included major international conservation groups that came together to raise money and awareness about the case under the name "Save the Serengeti." This level of mobilization around the EACJ started with human rights cases. The fact that complainants now use the EACJ to bring environmental cases demonstrates that groups outside of the Court's jurisdiction recognize its authority and are capitalizing on the Court to achieve their objectives.<sup>167</sup> The recognition of the authority of the EACJ's rulings by human rights NGOs and litigants seeking to enforce those rulings through national judicial enforcement or naming-and-shaming mechanisms highlights the Court's intermediate authority.<sup>168</sup>

This widening circle of actors interested in the EACJ's developing ability to consistently shape and reshape the law and politics of human rights in the region may herald the very early beginnings of the Court's extensive authority. Until EACJ rulings consistently shape and reshape the law and politics of human rights in East Africa, its intermediate authority is at a thin-elite level for at least two reasons. First, litigation before the EACJ requires legal expertise, which is available to well-paying, politically connected, donor-funded litigants, or litigants supported through pro bono strategic litigation of the EACJ. After all, legal services are in the hands of the urban-centric, educated elites. Second, the EACJ decides an extremely small number of cases relative to the widespread nature of violations of human rights in East Africa.<sup>169</sup> Indeed, more than merely litigation is needed to democratize authoritarian societies.

Although the EACJ has intermediate authority at a thin-elite level in human rights cases—because more cases involving human rights have been brought to the Court since the *Katabazi* case—this intermediate authority does not flow solely from the fact that some cases have resulted from human rights advocates' repeated use of the Court by human rights advocates, nor from the changing the practices of East African governments. Alter, Helfer, and Madsen's discussion of narrow authority helps to elucidate the more varied sources of the EACJ's authority. They argue that narrow authority is indicated by actors' "meaningful step[s] in response to the ruling, such as paying

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166. African Network for Animal Welfare v. Att'y Gen. Tanzania (*Serengeti*), Ref. No. 9 of 2010 (EACJ First Instance Div. 2014), <http://eacj.org/wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf>.

167. For more on this, see James Gathii, *Saving the Serengeti: Africa's New International Judicial Environmentalism*, 16 CHI. J. INT'L L. (forthcoming 2016).

168. Interview at the Attorney General's Office A, in Nairobi, Kenya (July 28, 2013). This official made it clear that the view of the Government of Kenya was that the EACJ did not have jurisdiction over human rights as this was a question still being negotiated by the member states. *Id.*

169. See generally Makau Mutua, *Human Rights NGOs in East Africa: Defining the Challenges*, in HUMAN RIGHTS NGOS IN EAST AFRICA: POLITICAL AND NORMATIVE TENSIONS 13, 31–32 (Makau Mutua ed., 2008) (criticizing these groups for their dependency on northern funding and methodologies).



compensation [or] reviewing or revising challenged laws and policies . . . .”<sup>170</sup> Because a court with intermediate authority presumably has narrow authority as well, the EACJ would, using this understanding of narrow authority, have triggered actors outside the government to take meaningful steps toward compliance and therein achieved intermediate authority. Although there have been cases of compliance by governments,<sup>171</sup> the EACJ’s cases on human rights have been important in another respect that the Alter, Helfer, and Madsen authority framework does not capture. Activists use human rights litigation to name and shame governments for human rights violations.<sup>172</sup> Thus, human rights cases in authoritarian contexts are widely recognized as having more utility than merely seeking compliance. For example, long-standing research shows that some litigants prefer an acknowledgment that a wrong has been done to them rather than a monetary award.<sup>173</sup> Other scholars have argued persuasively that “in order to capture the full range and effects of court decisions, impact studies need to enlarge the conventional and methodological fields of vision . . . [by paying] attention . . . to the broader impact, which includes equally important indirect and symbolic effects.”<sup>174</sup>

In short, human rights activists bring cases before the EACJ not necessarily or merely to get compliance, but to name and shame their governments for the alleged violations. The authority framework offered by Alter, Helfer, and Madsen does not take into account these alternative uses of litigation surrounding human rights that do not involve compliance as a goal or that have compliance as merely one of a broader set of strategies in the effort to democratize authoritarian societies.<sup>175</sup>

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170. Alter, Helfer & Madsen, *supra* note 56, at 13.

171. One of the best examples here is the payment of \$2 million to the Kenyan lawyers who successfully challenged the government’s slate of nominees in the Nyong’o case. *See Nyong’o v. Kenya*, (2011) K.L.R. Misc. Application No. 173 of 2011 (H.C.K) (Kenya), <http://kenyalaw.org/case-law/cases/view/77629>. Following that case, the EACJ ordered the \$2 million payment, the High Court of Kenya confirmed the award, and the Kenyan government, after much protestation, paid the lawyers. *See id.* *See also* Benson Wambugu, *Judges Hand Kenya Sh160m Bill in Dispute Over EAC Poll*, BUSINESS DAILY AFRICA (Aug. 19, 2010), <http://www.businessdailyafrica.com/Corporate-News/Judges-hand-Kenya-Sh160m-bill-in-dispute-over-EAC-poll/-/539550/980654/-/ey9cch/-/index.html>.

172. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC’Y REV. 631, 631–49 (1981).

173. Tamara Relis, “*It’s Not About the Money!*”: *A Theory on Misconceptions of Plaintiffs’ Litigation Aims*, 68 U. PITT. L. REV. 701, 702 (2007) (noting that “virtually all plaintiffs vehemently insist, ‘it’s not about the money!’”).

174. César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1675–76 (2011); *see also* Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689 (2008); David Harvey, *Flexible Accumulation Through Urbanization: Reflections on “Post-Modernism” in the American City*, 26 THEATER, THEATRICALITY, AND ARCHITECTURE 251 (1990), <http://www.fcp.uncu.edu.ar/upload/harvey-1990-flexible-accumulation-through-urbanization.pdf>.

175. For two excellent sources on this, see MARK FATHI MASSOUD, *LAW’S FRAGILE STATE: COLONIAL, AUTHORITARIAN, AND HUMANITARIAN LEGACIES IN SUDAN* (2013) and William Forbath et al., *Cultural Transformation, Deep Institutional Reform, and ESR Practice*, in *STONES OF*

This willingness by human rights actors to use the EACJ even when they are unsure whether they will prevail or whether their rulings will be implemented sharply contrasts, however, with the aversion to adversarial legalism that this article has demonstrated in the private sector's nonuse of the EACJ.<sup>176</sup> In interviews in East Africa, the EABC strongly implied that it did not want to be associated with the use of the EACJ because the Court was considered aggressive, assertive, and challenging toward East African governments in its human rights case law.<sup>177</sup>

This article demonstrates that although human rights groups in East Africa see their litigation strategy as a tool for raising awareness heightening opportunities that challenge governments for human rights abuses, business actors are averse to polarizing governments through adversarial litigation and prefer solutions to their problems that do not antagonize governments. By identifying and explaining this variation between human rights and business actors with reference to the EACJ, this article sheds light on the implications of these divergent preferences have on the authority of the Court.

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HOPE: HOW AFRICAN ACTIVISTS RECLAIM HUMAN RIGHTS TO CHALLENGE GLOBAL POVERTY 51 (Lucie E. White & Jeremy Perelman eds., 2011).

176. This by no means suggests that I am advancing the claim that the private sector in East Africa does not resort to litigation in national courts; quite to the contrary. Business actors are rational actors and have supported reform of national commercial courts to speed up hearing of cases, suggesting that they leave open the option of using courts when it is their interest to do so. Similarly, foreign investors are either protected by Bilateral Investment Treaties or contractual clauses that designate investor state dispute settlement or foreign courts as alternatives to African national or subregional judiciaries.

177. Interview at EABC, in Arusha, Tanzania (July 30, 2013).