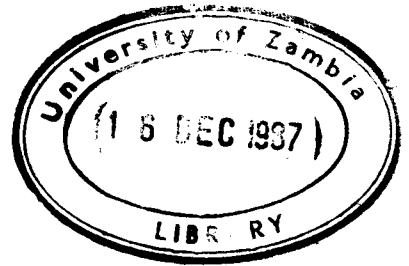


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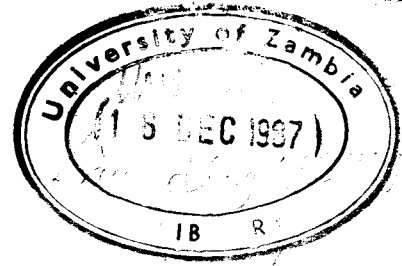


TRADE IN THE EAC AND THE PTA:  
A COMPARATIVE APPROACH

An obligatory essay submitted in partial  
fulfilment of the requirements of the LLB  
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THE UNIVERSITY OF ZAMBIA  
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I recommend that the obligatory essay prepared  
under my supervision by

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TRADE IN THE EAC AND THE PTA: T/  
A COMPARATIVE APPROACH

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..... 22/9/87 .....  
Date

..... Quyu .....  
Supervisor

(iii)

To S.M. Otieno who died when I was abroad,

'Though wise men at their end know dark is right,  
Because their words had forked no lighting they  
Do not go gentle into that good night.

Good men, the last wave by, crying how bright  
Their frail deeds might have danced in a green bay,  
Rage, rage against the dying of the light.

And you ... there on the sad height,  
Curse, bless [us] now with your fierce tears, I pray.  
Do not go gentle into that good night.  
Rage, rage against the dying of the light!

(Dylan Thomas)

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LIST OF ACRONYMS

CCCN	Customs Cooperative Council Nomenclature
EAC	East African Community
EADB	East African Development Bank
ECA (UN)	(United Nations) Economic Commission for Africa
EEC	European Economic Community
GDP	Gross Domestic Product
IBRD	International Bank for Reconstruction and Development
INT	International Negotiating Team
LDCs	Least Developed Countries
MULPOC	Multinational Programme and Operations Centre
NIEO	New International Economic Order
OAU	Organization of African Unity
PTA	Preferential Trade Area for Eastern and Southern African States
SACU	South African Cooperative Union
UAPTA	Units of Accounts of the PTA.

TABLE OF CONTENTS

	<u>PAGE</u>
Dedication.....	(iii)
Acknowledgements.....	(iv )
List of Acronyms.....	( v )
Table of Contents	(vi )
Abstract.....	(vii)
Chapter 1 : BACKGROUND TO THE EAC AND THE PTA.	1
Section A: Origins of the EAC.....	1(i)
Section B: Origins of the PTA.....	18
Chapter 2 : THE TREATIES OF THE EAC AND THE PTA: THEIR EFFECTS ON TRADE.....	25(i)
Section A: The EAC Treaty.....	26
Section B: The PTA Treaty.....	37
Section C: Problems and compromises in the PTA (Rule 2 1(a).....	47
Section D: Conclusion: Differing approaches of the EAC and the PTA.....	51
Chapter 3 : REASONS FOR THE FAILURE OF THE EAC AND PROSPECTS OF THE PTA.....	53
FOOTNOTES AND REFERENCES	1
SELECT BIBLIOGRAPHY	8

ABSTRACT

This essay is faithful to its title: it is a comparative study of trade in the EAC and the PTA. It examines trade in the EAC and the PTA along the lines of its historical evolution; in the context of the legal frameworks for trade provided in the respective Treaties themselves; and ends with an estimation of the prospects of success of the PTA in the light of the failure of the defunct EAC. That statement of the study's preoccupation also coincides with the layout of the chapters. The approach to the study is analytical (not merely descriptive). The argument of the essay is that the PTA has distinct prospects of success principally because it attempts to reorient the patterns of trade towards the region itself.

## Chapter 1

### THE BACKGROUND TO THE EAST AFRICAN COMMUNITY (EAC) AND THE PREFERENTIAL TRADE AREA FOR EASTERN AND SOUTHERN AFRICAN STATES (PTA)

#### INTRODUCTION

This chapter traces the historical evolution of the EAC and the PTA respectively. As this is done, an attempt is made to restrict the discussion to the issues that have a bearing on trade.

In Section A, we trace the origins of the EAC to the customs union of the twenties when the seeds of the much contentious industrial imbalance were sown. We also examine the failure of the federal idea. The many reactions against cooperation are a major motif in the discussion. Then we look at the relatively successful East African High Commission when cooperation in so many areas in East Africa was either initiated or consolidated. The section also discusses the provisions of the Riasman Commission and the Kampala Agreement which were both attempts to bring about harmony in trade in East Africa in their different ways. The Section ends with the situation in 1967 illustrating the attitudes the signatories of the EAC Treaty brought to bear upon cooperation at the time. The whole impact of the Section should be to reveal the immense potentialities for co-operation open to East Africa in 1967 in view of the strong structures of cooperation built over time but, as against this, to show the divisive forces that had always been in operation throughout East African history.

In Section B we trace the origins of the PTA, its objectives, the potentials, and, the negotiational problems of the PTA Treaty before signature in 1981.

Origins of the EAC

1. The customs union

The origin of the common market in East Africa is to be found in the period of the scramble for Africa. From the Berlin and Brussels Conferences of 1885 and 1890 respectively, there emerged the Congo Basin treaties. These were designed to impose a rudimentary customs union in the regions which were later to become Kenya, Uganda and German East Africa (Tanganyika). In the 1885 General Act of the Berlin Conference it was provided that, 'the trade of all nations shall enjoy complete freedom [in the] Indian Ocean from 5 degrees of North latitude to the mouth of the Zambezi in the South!'<sup>1</sup> Accordingly, when Great Britain and Germany administered the three regions of East Africa, they co-operated closely in trade policies and maintained customs duties at similar or nearly similar levels. This policy was of course pursued when Tanganyika was passed on to Great Britain after the war as the new mandatory so that even as late as 1957, the Colonial Secretary was able to assure the British Parliament that, 'the rates of customs duties are, with very few exceptions, the same in all three territories!'<sup>2</sup>

Britain nudged Kenya into structural union from these earliest times. In 1902 the East African Court of Appeal was founded; in 1911 Kenya and Uganda were linked together by a postal union; and finally in 1917, a customs and tariff union was formed between the two countries.

Very soon, Uganda started to resent the customs union and advanced the following arguments to prove her case. First, Kenyan settlers had managed to impose a protective tariff on butter, ghee, ham, sugar and wheat.

Since Uganda could not produce these goods, she was paying more than she would otherwise have had to pay if she was to import the goods from outside of the customs union. Second, by buying duty free goods from Kenya, Uganda was losing customs duty on commodities previously imported from outside East Africa. Third, the Kenya settlers had lowered railway rates for exports and raised them for imports to suit their own interests. Thus landlocked Uganda was paying a great deal in railway rates, which money was unfairly treated as revenue for Kenya Treasury. Kenya, in her turn, did not use the railway all that much, preferring the faster road transport between Mombasa and Nairobi. Fourth, the customs union was essentially uni-directional: Uganda had very little to sell to Kenya while Kenya could sell a wide range of products to Uganda. In spite of these arguments, however, Kenya's advantages prevailed as the Kenyan settler had become considerably influential.

After the first World War, Tanganyika passed to Great Britain by mandate between the latter and the League of Nations. The development of a customs and tariff union between Tanganyika and Kenya-Uganda as well as other measures on integration undertaken in subsequent years were all subject to the terms of the Mandate Agreement and the Trusteeship Agreement which was entered into later. Article 10 of the Mandate Agreement and the Trusteeship Agreement authorized the Mandatory to constitute the territory (Tanganyika) into a 'customs, fiscal, or administrative union or federation with the adjacent territories under its sovereignty and control, and to establish common services between such territories and Tanganyika....'<sup>3</sup> By 1927, Tanganyika was fully integrated into the customs union when duty-free transfer of goods among the three territories was agreed. There were other measures towards integration other than the customs union. In 1920, the East African Currency Board assumed control over issuance

of East African money; in 1925, an East African Office for Trade and Information was opened in London by the Governments of Kenya, Uganda, Tanganyika, Zanzibar, Nyasaland and Northern Rhodesia whose interests were represented by a Trade Commissioner; and, in 1933, the postal services between Kenya-Uganda and Tanganyika were amalgamated.

Even since the 1927 customs agreements between the three territories came into force, there was controversy as to the mutuality of benefits accruing from the agreements. The colonial government of Tanganyika in its report on the effects of the customs union prepared at the request of the Permanent Mandates Commission said that definite advantages had accrued to the whole region as a result of the customs union. The report went on to say:

'Without the protected market in Kenya and Uganda provided under the agreements, not only could there be little expansion in the Tanganyika production of rice, ghee, etc. but even the disposal of existing produce would be very difficult [and] further, the absence of a customs barrier enables producers in Tanganyika to avail themselves of articles of manufacturing processes which were available in Kenya intended for export overseas!'<sup>4</sup>

As opposed to that report is the Armitage-Smith report also prepared in 1932 on the movement of commodities between the territories. The reporter found that Tanganyika was importing far more from her neighbours than she was selling to them and that she was paying prices well above the world market prices for local imports because of protective tariffs. Thus,

'The conclusion to which this argument leads [the report stated] is clearly that Tanganyika should take steps forthwith to levy customs import duty at the same rate on foodstuffs imported

from Kenya and Uganda as those chargeable on foodstuffs imported from foreign parts, and should cease to deplete her revenues and impoverish her citizens by protecting the products of her neighbours!<sup>5</sup>

The Armitage-Smith report written, incidentally, only five years after Tanganyika had entered the customs union seems to be an expression of an incipient mood of indignation that was to tarnish the relationship of the East African States right down to the break-up of the EAC. It is important to note that the report did not indicate how, as Thomas Franck<sup>6</sup> has correctly observed, the depleted purses of impoverished Tanganyika citizens would be fattened by raising tariffs on Kenya and Uganda products rather than lowering tariffs on the same products coming from external sources. But the indignation arose from a genuine grievance that Kenya, having made a head-start in economic and administrative structures, was relatively better-off than her neighbours in the disbursement of industry. What seems to be ignored by Kenya's critics, however, is that industry was attracted there in the first place by the accidents of geographical location, attractions of landscape and climate, as by the benefits of tariff, and, most important of all, by the existence of a colonial polity within which the cheapest labour was available. It is not without significance in this latter respect that the Kenyan African suffered the lowest per capita income at dawn of independence amongst the East African black communities.

In fact the grumbling that was in the air was occasioned by a deeper malaise in the society than either tariffs and industrial imbalance could boast of. This malaise seems to have been that even as structures of co-operation were being erected, there were deep divisions in the heart of the society created as well which brought

forth multiple layers of alienation. These surfaced invariably within the context of the establishment of a federation (or schemes towards closer union), and yet, the federation, if imaginatively nurtured, would have provided the most ideal environment within which the common market could thrive. It would have managed to do this by encouraging allegiances larger than the national and ethnic.

## 2. The East African federation

In the middle twenties there were discussions taking place for the establishment of an East African federation. But when the Ormsby-Gore Commission toured the Eastern and Central African British dependencies, it noted that there were strong objections to close political union although there was also a consensus of opinion to the effect that the three territories of East Africa could benefit greatly from continuing and regular contact and from the common administration of certain services. The Ormsby-Gore Commission reported in 1925 recommending the holding of regular co-ordinating conferences of the Governors of the 6 British East and Central African dependencies as well as the heads of technical services. The first such meeting was held in Nairobi in 1926, a precursor of many such annual meetings. It is a sign of the mood of the times that federation could not, in view of the divisions anticipated, even find a place in the agenda, although Sir Edward Grigg, who had been appointed to the governorship of Kenya to prepare a plan for closer union chose the public banquet for visiting Governors to ingeniously put across Kenya's case for the federal capital: 'Kenya is the home of White settlement [he said] and Kenya is the colony in which public opinion has reached a larger right to express itself - that is the basis of our claim'<sup>7</sup>.

The Governors' Conference was a purely advisory body discussing such matters as customs, tariffs, railway rates and scientific research activities. It had a permanent secretariat through which it directed the work of the E.A. Meteorological Service, the Statistical Department and kept in touch with the work going on in neighbouring countries in the fields of research, legal procedure, railway development etc. Although in some quarters the Governors' Conference was viewed as a 'futile body' it served as a coordinating centre for activities with an East African bias untainted by Political federation. And for the same reason, it served as the nucleus around which the East African High Commission was later to be formed.

If the Governors' Conference of 1926 was handled in a discreetly apolitical manner so as not to provoke the tensions of East Africa, this was not to be true also of the Hilton Young Commission of 1929 which, in catching the bull by the horns, as it were, brought out the schisms of the East African society to the open. That Commission was the work of two men: L.S. Amery the Colonial Secretary who had shown a long-standing interest in the East African federation and Sir Edward Grigg, the Kenyan Governor, a self-appointed champion of White civilization in East Africa.

The Commission was set up to report on the possibilities of closer union among the East and Central African territories. It was advised to speak of the implications of establishing a federal council but it was also reminded, 'it will be a fatal error if any decisive step is taken before we have satisfied ourselves that such a step will be received with goodwill by those whose co-operation will be necessary for its success.'<sup>8</sup> The report recommended a 3-stage evolution toward a strong executive system of administration for common services under a Governor

General. At the third stage there would be established a central legislature which would exercise powers taken from the territorial government including independent fiscal jurisdiction.

The reactions which the recommendations of the Commission engendered are a good reflection of the lack of a pan-East African consciousness we talked about. The Kenyan settler, a terribly paranoic community, oblivious of the fact the report came very close to recommending a federation, attacked it. Sir Edward Grigg himself, angered by the loss of power which the scheme implied, uncritically expressed reservations about, '... cooperation if the Constitution of the colony were suddenly made subordinate by a coup d'etat to a local autocrat [the governor general] without constitutional advisers or any apparent limitations but the higher authority or the Secretary of State!'<sup>9</sup> The Kabaka of Buganda, in his turn, believing there was a design to subject his kingdom to the disabilities suffered by the black people of Kenya, wrote to the colonial Secretary expressing 'great anxiety!'<sup>10</sup> Sir Donald Cameron, the Governor of Tanganyika, attacked the Tanganyika White settler for conniving against the black man 'in secrecy and behind a veil of mystery [in an] atmosphere of intrigue!'<sup>11</sup> Even the Government of Imperial India<sup>12</sup> entered a plea, speaking, ostensibly, in defence of the rights the Indian minority of Tanganyika had under the Mandatory system (as opposed to their equal numbers in the Kenya colony) and thereby managed to set apart the Tanganyikan Indian from his Kenyan brethren. The Africans of Kenya also attacked the report.

The uncoordinated reactions were a dramatic illustration of the levels of alienation in the East African Society. Rosenberg and Segal have recorded an extremely

incisive analysis of the basis of the reactions. They say,

'the underlying motive for rejection of closer union by the multiracial population of East Africa was fear. Rather than experiment with federation, with its attendant possibilities for widespread economic and other rewards, the individual communities clung to the status quo. Indians in Tanganyika, guaranteed equality of treatment by the League of Nations mandate under which Britain administered the territory, were afraid that any closer ties with Kenya might bring upon them the disabilities under which Indians lived. Africans in both Uganda and Tanganyika hesitated to throw in their lot with Kenya which had long been referred to as a 'white man's' country and all of them, including those in Kenya as well, were opposed to the imposition of another authority between the territorial administration and Britain. Perhaps, however, the deciding factor was the opposition of Europeans in Kenya, who refused any diminution of local sovereignty without a corresponding increase in their power to control the government of Kenya! 13

This passage needs to be read and reflected over carefully especially by those who did not have a direct experience of East Africa at the times being analysed; it says so much about the fate of the EAC later and about E.A. inter-state relationships down to the present day. Of particular importance is it is the way Kenyan blacks were being set apart even by their brethren in the other States as the people with a special problem to solve. That line of thinking could not have failed to make an impression on men who were to wield power in Kenya after independence, nor did it exactly escape notice of the ordinary man in Kenya. And it must not be forgotten: Kenyans were to need the Mau-Mau war to dislodge their problem. They came out of that war into independence with a sense of time lost and impatient for

action to correct the special disabilities they had suffered throughout the period of colonial rule.

When the Hilton Young Commission failed, there remained only one more important step before the issue of federation was shelved. A Joint Select Committee of the Houses of Parliament was appointed to reconsider the whole question. The Committee concluded closer union was incapable of implementation in any way acceptable to all the interested parties. The African representatives who were invited to present their case before the Committee argued a spirited, vociferous, and cogent case against closer association. That is how the idea of an institutionalized federation died.<sup>14</sup> Perhaps it is just as well that the E.A. federation failed in the colonial days since a similar venture in Central Africa about thirty years later never proved a boon for cooperation in that area of the continent.

Once it became clear from the recommendations of the Select Committee that federation was not in the cards, it became possible to amalgamate the postal and telegraph services in 1931 and the East African air services in 1937. Further progress towards other kinds of integration was made possible by functional cooperation during the Second World War.

### 3. The East African High Commission

During the War the Governors' Conference did much work in co-ordinating the war effort on a regional basis in East Africa by establishing inter-territorial boards to deal with manpower, wartime production, industrial management, refugees, price-control and demobilisation. The Conference Secretariat was the main link between the Government and these boards and was the point of contact for military and civilian co-operation. However, the

Governors' Conference had no permanent constitutional basis for the operation of common services, no effective means of securing the backing of public opinion for them, nor any method of enacting common legislation save through the cumbersome procedure of passing bills through the three legislatures.

Consequently, on December 12, 1945, the British Government issued a White paper<sup>15</sup> making proposals for the future management of the inter-territorial services in East Africa. The new proposals provided for the creation by Order-in-Council of a permanent executive authority, the East African High Commission, assisted by inter-territorial advisory boards and advised by a Central Legislative Assembly. The High Commission would administer certain specified common services on an all-East African basis. The British Government made it clear that these proposals did not involve closer political union or any fusion of the East African governments.

The High Commission came into being on 1st January, 1948, and continued in existence until 9th December, 1961, when Tanganyika became independent. It is during its days that the railway systems were finally amalgamated in 1948, the East African Airways Corporation was firmly established as a competitive statutory body and the Posts and Telecommunications administration was made an independent undertaking. It was also at this time that an Industrial Licensing Council was formed. The work intended for it was the achievement of territorial industrial balance by licensing firms in certain scheduled industries, guaranteeing them a market for a given period of time, subject to certain conditions, and, directing such industries to suitable locations according to an East African plan. However, the Licensing Council failed

because, lacking an enforcement machinery, even those who were meant to benefit by it were flouting its provisions with impunity.

The late 1940s and the 1950s was the period of the greatest growth in East African inter-territorial trade. Given that East African trade orientations are towards the outside, inter-territorial trade could never become a large proportion of world trade, but it did grow in absolute terms every year from its position of relative minor importance in the immediate after-war years (except in 1955-56) to about 20 percent of external trade in 1962. The most dramatic performance was Kenya's where the relationship of interterritorial trade to external trade trebled from 7 percent to 22 percent in 1962 equaling Uganda's performance which nearly doubled from 12 percent to 22 percent. In Tanganyika there was relatively poor performance where the relationship shot from 9 percent to 16 percent in the same period. By 1962, when Kenya's external imports were increasing by a third, the interterritorial exports were increasing by two-thirds, and, in 1962 Kenya was selling nearly two and a half times as much as she bought from her neighbours.

By 1958, the expansion of trade and the approach of independence (with the concomitant national consciousness) must have brought the issue of inequalities to the forefront. The arguments presented by Uganda and Tanganyika were: One, the boom of the 1950s had benefitted Kenya more than Uganda or Tanganyika with the result that Kenya was growing much faster than the other two territories. Two, the two territories were losing fiscal revenue on imports supplied duty free from Kenya and needed compensation for this loss. Three, the need for near uniform rates of taxation fettered the constitutional powers of the separate territories to adjust fiscal revenue to developmental requirements.

#### 4. The Raisman Commission

The East African Economic and Fiscal Commission (The Raisman Commission) was set up to investigate the grievances and particularly to recommend on the merits of the common market.

The Raisman Commission found that although the benefits of the common market were unequal, none of the members would have been better off without it. The proposals made by the Raisman Commission were therefore meant to achieve the following purposes: First, to make Kenya shoulder the greatest burden of running the organisation's institutions and, second, to redistribute the wealth to the other members arising from the concentration of industry in Kenya. A 'distributable pool' was therefore to be created as follows:

- (i) 40 percent of the annual proceeds of the income tax to be paid by companies on profits arising from manufacturing and financial activities within East Africa to be paid into the pool. Kenya had the majority of registered industries<sup>16</sup> and was expected to contribute the major share;
- (ii) 6 percent of the annual revenue collected in the territories by means of customs and excise duties also to be paid into the pool.

**The 'pool' was to be used as follows:**

- (iii) 50 percent to be allocated to the High Commission and was to be used to run the non-self-contained services. This gave the Commission an independent source of finance for the first time;
- (iv) 50 percent was to be redistributed equally among the three Members.

The Raisman Commission's statistics/calculations on which the proposals were based were subjected to a great deal of criticism. P.K. Lomas<sup>17</sup> attacked the basis on which the Raisman Commission had reached the conclusion that East Africa was better with the common services than without them. He asserted that East Africa had always had a customs union and therefore there was no way anybody would know how it ever fared without one. Hudson-Cave<sup>18</sup> wondered whether Kenya indeed grew faster than the rest of East Africa in the 1950s as the Raisman's figures seemd to indicate and went on to question whether, even if that was true, the growth was attributable to the cooperation between her and her neighbours. Given their way, Lomas and Hudson-Cave would probably have thrown the Raisman Commission out of the window.

But there was also a considerable body of opinion which accepted that even if the Raisman Commission was completely wrong on the strict interpretation of the facts, the more important thing was that it was being acted as if the facts were true.<sup>19</sup> For the sake of co-operation, therefore, it would be better to ignore the facts and concentrate much more on a better common design for East Africa. Most of the people in this group spoke about the 'potentiality' of trade in East African, rather than, its actuality. D. Walker and J.D. Nyhart<sup>20</sup> had written in the East African Economic Review (two years in fact before the Raisman Commission) of the limited industrial opportunities of Uganda on her own, and Ian Stewart<sup>21</sup> and A.J. Brown<sup>22</sup> also wrote after the Raisman Commission speaking of the potential of trade rather than its presence.

A.J. Brown used Uganda as an example. He said Uganda has 40 per cent of the British population and 0.05 per cent of the money incomes of Britain, Thus, on that

basis, Uganda could only support 35 percent to 40 percent of British industry on her own while East Africa put together could support 70 percent to 80 percent of British industry. On this reasoning, then, it was logical to retain East Africa in one piece. And, a World Bank Mission to Tanganyika<sup>23</sup> (which, incidentally, did not find Kenya's rampant exploitation of her neighbours), spoke of the case for some protection of Tanganyikan infant industry but, at the same time, of the greater benefit of Tanganyika sinking her lot together with that of her neighbours to the North.

#### 5. The Kampala Agreement<sup>24</sup>

The fiscal redistribution of the Raisman Commission proved to be unsatisfactory to Tanzania and in the third year of its existence she threatened to leave the customs union unless immediate advances towards a political federation were made. In the meantime, the Kampala Agreement was passed to take care of the then current problems. According to the Agreement, five steps needed to be taken to correct industrial imbalance:

- (a) Immediate action be taken with certain interterritorially connected firms to increase production in a deficit country and thereby reduce imports from a surplus country. The firms were East Africa Tobacco Co. Ltd., Bata Shoe Company Ltd., East African Breweries Ltd., and British Portland Cement (Bamburi).

#### Evaluation

The aforementioned Kenya-based firms reallocated their production so as to retain their markets in Tanzania and Uganda and so as to avoid the quota restrictions applicable under (c) below. In essence, this measure was tantamount to a duplication<sup>of</sup> industrial capacity with the consequence

that the already small base for territorial trade was further reduced. When this happened, the firms sought for markets outside of East Africa to consume the product of their excess capacity. They also switched on to other lines of production which had a demand in the common market. Therefore, even though implementation of this clause provided an improvement in the balance of trade in the short-run, the partners reverted to their old trade positions when the new lines of production were fully operational.

- (b) Agreement as to the immediate allocation of certain major industries.

### Evaluation

The terms of agreement on this clause were that certain new industries which were to be formed and which on economic grounds merited only one plant in East Africa, were to be allocated mainly in favour of Uganda and Tanzania. The allocation was to be done as follows: manufacture and assembly of Landrovers and certain lorries and trucks; radios, motor vehicle tyres and tubes were to be done in Tanzania. Uganda was to manufacture bicycles and nitrogenous fertilizers and Kenya was to manufacture electric bulbs..

The framers of the Kampala Agreement conceded it was impossible to gauge exactly what effect the implementation of this clause would have until the firms actually came into production and their trading patterns established. But the effect was presumed to be potentially substantial.

However, the clause was not implemented because the utterances and conduct of all the members were opposed to it. It is a pity the clause was not implemented.

- (c) The application of a system of quotas and suspended quotas would be applied whereby exports from surplus countries would be progressively reduced, and local production

increased in the deficit countries according to the building up of the productive capacity of the deficit country. The suspended quota would apply in a situation where a deficit country wished to develop productive capacity.

Evaluation

This clause was not implemented.

- (d) Increased sales from a country in deficit to a surplus.

Evaluation

This clause was not implemented.

- (e) Early agreement within the East African common market on a system of inducement and allocation of industry in order to secure the equitable distribution of industrial development as between the three countries.

A team of industrial experts was to draw up a list of East African industries and advise on measures necessary to achieve an equitable pattern of industrial development.

Evaluation

This clause was not implemented either.

By 1966, the Kampala Agreement came apart (in fact Kenya had never ratified the agreement) and the Philip Commission was set up to lay a new legal base for co-operation in East Africa, which was the EAC Treaty (1967).

6. The situation in 1967

By 1967 when the EAC Treaty was signed, the leadership in East Africa perceived that a break-up of the common market structures built over forty years was imminent. This would be expensive and so, to prevent collapse, each state sought to secure certain gains and also to offer compromises on a variety of issues to achieve a package which would be mutually acceptable.<sup>25</sup> Apart from the specific provisions for trade that were ultimately embodied in the Treaty, it seems there was considerable significance attached to the territorial location of the headquarters of the organisation itself as well as of the corporations and the East African Development Bank. As our analysis in the last Chapter will show, the life of the Community hinged quite a great deal on these Corporations as well of course on such non-trade matters as foreign exchange difficulties, political factors such as the accession to power of Idi Amin etc, etc.

But why were the East African countries bent on sticking together at all in 1967? The answer is that East Africa at that time was composed of two sets of bilateral relations: (1) The Kenya-Uganda; Kenya-Tanzania axis; and (2) The Uganda-Tanzania axis.<sup>26</sup> In each of the two pairs, Kenya was the stronger partner and she therefore had every reason to stick together with the other sister countries - quite apart from the argument that she never had much to complain about co-operating with them even initially. In the case of Uganda, and to a lesser degree Tanzania, [these] saw the EAC as a way to reduce this inequality because in the Community they could form joint negotiating positions on issues against Kenya!<sup>27</sup> Therefore, both Uganda and Tanzania had good reasons to stick together with Kenya in the EAC. Moreover, in the case of Tanzania, The EAC offered a good opportunity for planning self-reliance and Socialism on a regional map predicated upon greater growth of productive forces.<sup>28</sup>

However, there was a major problem in East Africa in 1967 even as the EAC was being planned in that two countries (Kenya and Tanzania) had adopted diametrically opposed forms of development; the Sessional Paper No. 10 of Kenya had become the blueprint for a capitalist/laissez faire form of development while Tanzania was launched on the socialist path by the Arusha Declaration of the same year. This latter document called for planned socialist development. The differences in approach between the two countries did not augur well for future joint efforts. Further, if it is remembered that only four years previously (during independence) the discussion for an East African federation had been re-opened and shelved dismally, it will then be clear the East African countries were indeed drifting apart in 1967 rather than coming closer together. This time around, the failure of the federation was a real pity.

## SECTION B: THE BACKGROUND TO THE PTA

### 7. Origins of the PTA

In the early 1960s, the UN Economic Commission for Africa EAC started promoting the idea of a wide economic grouping in East Africa. The setting up of the East African Community with provisions for the inclusion of other members than the initial 3 was partly responsible for the delay in setting up another body: Zambia, Somalia, Ethiopia and Burundi applied to join as full members while Zaire and Swaziland showed an interest in associate Membership. A 'Negotiating Team', secretariat, and, ministerial committees, were set up to consider the applications and the implication and nature of an expanded EAC membership. But soon enough, the EAC was facing problems especially after the Idi Amin coup in Uganda in 1971. Thus no further meetings were held in the post-1971 era till the EAC collapsed in 1977.

It is not possible to establish all the many cross-currents of ideas and events that were in operation in the 1970s to make possible a resurgence of interest in a regional grouping in Eastern Africa. The continuously declining economic growth of Africa precipitated initially by the new oil prices of 1973/74; the vagaries of the weather; Africa's growing external debt; massive cuts in foreign aid to the countries of the continent all contributed in their several ways to show that Africa was in an exceptionally vulnerable position in the world economic context. According to the arguments associated with the New International Economic Order (NIEO) which became common in the mid-70s, the world is divided between the rich industrial North who have the capacity for producing manufactured goods which are exchanged for the raw/primary products of the South at extremely unfair prices. Once the South understood its economic problems according to the lights of the proponents of the NIEO, it did not have to make too random a jump to the idea of the advantages (of scale, negotiating power vis-a-vis the North) that could be derived from 'hanging together rather than separately'.<sup>29</sup>

Thus the collapse of the EAC as well as the deterioration in economic performance and, consequent upon this, ideological positions reached in the 70s led to new efforts towards the creation of regional integration. The Third Multinational Programming and Operations Centre (MULPOC) Council of Ministers Conference held in Lusaka in 1977 called for a joint meeting of the ministers of trade, finance and planning to formulate principles for the establishment of the PTA and a clearing and payments system for the sub-region. The first extra-ordinary meeting was held promptly in March, 1978. It issued a 'Declaration of Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern African States'

and set up an Intergovernmental Negotiating Team (INT) to negotiate the Treaty. The Treaty if acceded to, would link the actual and potential PTA members shown in Table 1:1 with data on some important characteristics of their economics, especially trade-related ones. Together the PTA area has a population of 160 million people. It produces most of the world's gold, diamonds, platinum, chrome, manganese, and a significant share of the world's uranium, coal, nickel, copper, cobalt and numerous metals and minerals essential for industrial production.

Table 1:1

## THE ECONOMIES OF THE INTEGRATING STATES IN EASTERN AND SOUTHERN AFRICA

	Area 2 ('000Km <sup>2</sup> )	Population (m)	GDP (US\$m)	Proportion of GCD (%)				Exports (US\$m)	Imports (US\$m)
				Services	Industry & Mining	Agriculture			
Angola	1,247	6.9	2,490	44	27	29	500	340	
Malawi	118	5.8	1,220	33	22	45	233	399	
Mozambique	733	10.2	2,360	40	15	45	129	278	
Zambia	753	5.6	3,240	45	41	14	1,377	755	
Zimbabwe	391	7.1	3,640	44	40	16	1,194	940	
Botswana	600	0.8	342	34.3	28.3	37.5	367	467	
Swaziland	17	0.5	273.3	33.5	35.7	30.8	168	267	
Lesotho	30	1.3	240	54.1	7.3	37.5	15	80	
Tanzania	945	18.0	4,130	39	16	45	523	1,084	
Kenya	583	16.5	5,280	45	21	34	1,104	1,658	
Uganda	236	13.2	8,410	38	7	55	427	230	
Rwanda	26	4.8	860	37	21	42	115	190	
Burundi	28	4.2	730	30	15	55	105	152	
Ethiopia	1,222	33.0	4,800	29	15	46	374	738	
Somalia	638	4.6	1,930	29	11	60	111	287	
Madagascar	587	8.7	2,310	46	20	34	394	641	
Djibouti	217	0.3	242	n.a.	n.a.	n.a.	16	114	
Comoro	2.2	0.3	79.7	n.a.	n.a.	n.a.	9	16.3	
Seychelles	0.44	0.7	100	n.a.	n.a.	n.a.	52	98	
Mauritius	2.04	0.97	728	n.a.	n.a.	n.a.	304	441	

Source: World Bank, World Development Report, Washington, August 1982; Alan Rake, Africa South of the Sahara, Europa, London, 1981; and Faaland J. and J.

Isaksen, "Economic Dependency and Regional Cooperation", DERAP Working Paper No. 147, Bergen, March 1979.

Note: The first 9 countries denote SADC states; 6-8, the SACU members; and 9-11, members of the defunct East African Community.

The PTA was envisaged as a device for linking the economies of the Member States. It is a looser form of organization than either a customs union or even a free trade area in that it leaves the Member States with a great deal of autonomy. However, the ultimate objective of the PTA is to establish a sub-regional common market with a common currency.<sup>30</sup> Indeed according to the OAU Lagos Plan of Action the common market should be achieved by the year 2,000.

The aims of the PTA were agreed upon from a very early start. They are eshrined in Article 3 of the PTA Treaty as the promotion and cementing of intra-PTA inter-linkages in all major economic sectors-trade, transport, agriculture, industry, monetary affairs etc - with a view to raising the standard of welfare of all the people of the PTA sub-region, of fostering closer relations among Member States, and contributing to the progress and development of the African continent.

#### 8. Problems of the Rules of Origin

The bone of contention during the early period of negotiation before signature of the Treaty in December 1981 concerned the Rules of Origin<sup>31</sup> that must be complied with by all enterprises which produced commodities that would enjoy preferential treatment when traded among PTA Member States. Between June, 1978 and January, 1981 the INT held eight meetings. The levels of equity holding and management by nationals were the main items of negotiation in seven out of the eight meetings. When the INT failed to reach agreement on a specific percentage figure, the matter was referred to the Council of Ministers.

By May 1981, a compromise formula was struck out. The formula proposed was that, before goods would receive preferential treatment when traded within the PTA, they should be produced by enterprises subject to 51 percent equity holding and majority management by nationals of PTA Member States - except in the case of the Comoros, Djibouti, Mauritius, Zimbabwe, Botswana and Swaziland - who were given special derogations because of their peculiar historical or economic circumstance. This formula was reviewed further, and adopted, at a meeting of Ministers held in October, 1981 to approve the Draft Treaty. Thereafter the formula was incorporated in the Draft Treaty as Rule 2 1(a) of the Protocol on Rules of Origin to be attached as Annex III to the Treaty. It was also agreed that Rule 2 1(a) would be an indispensable provision of the Treaty. The Draft Treaty and all its Annexes, including Annex III on the Rules of Origin, was approved and signed by Heads of State and Government at the PTA Summit in Lusaka in December 1981. The Treaty entered into force in September 1982. The Operational Phase of the PTA was launched in July, 1984, by which time the problems of the Rules of Origin had resurfaced as well as problems of the Common List and the Clearing House.<sup>32</sup>

#### 9. Problems of particular Members

One striking feature of the PTA Treaty that will emerge in the next chapter when we discuss the Treaty itself in some detail is its attempt to reach out to the particular Member so as to grant such a Member the conditions that would be most suitable to his participation in the Treaty. No doubt that is a result of the

negotiation approach to the treaty-making in the PTA Treaty. It is not possible to discuss all the problems of the various Member States in the PTA and the characteristics of their economies here. A fairly good insight into that can be had from the reports which come from the countries themselves from time to time as well as from the Report of the Second Study on Rule 2 1 (a) on Rules of Origin of the PTA Treaty.<sup>33</sup> What is possible to accomplish here is a limited discussion of the problems of a few Member States picked almost at random so as to give some indication of the way they have exercised the minds of the PTA Treaty-makers.

The problems of Botswana, Lesotho and Swaziland which were responsible for according those countries special derogations on Rule 2 1 (a) is that they are either encircled by South Africa or neighbourly to her with the consequence that they extensively depend on her for outlets. They are also members of the Southern African Cooperative Union (SACU) from which they could not be hoped to reasonably disengage. They were able to sign the Treaty on that understanding. In the case of Mozambique, Angola and Madagascar there is extensive dependence on harbours for foreign exchange earnings. These countries do not have much else to trade in the PTA. So far they have not been able to sign the Treaty although they appear in PTA meetings as observers from time to time.

Tanzania also did not sign the Treaty in 1981; that had to await till 1984. However, all negotiations proceeded on the assumption that she would eventually become a member. It was felt it would be a pity if she could not especially as she is both an important gateway for the landlocked Southern Members as well as a

corridor linking the East and the South.

Tanzania could not sign the Treaty because the Treaty had failed to take care of two situations: (1) it did not include a provision allowing a Member State to terminate or suspend application of the Treaty or some of its provisions in its relationships with other Member States. Hansungule says, 'this proposal was directed at Kenya which Tanzania felt enjoyed an unequal share of the defunct EAC and accused it of responsibility of its failure,'<sup>34</sup> and, (2) some of the proposed tariffs on exports and imports favoured potential net exporters at the expense of importers like herself. Hence, Tanzania wanted something in the form of compensation included in the Treaty along the lines of the Transfer Tax of the East African Community. As already said, Tanzania joined the Treaty in 1984 and a compensation facility has now been included in the Treaty.

#### CONCLUSION

This chapter has been a historical survey of the EAC and the PTA respectively. The historical approach serves to show the historical determinants of the contents of the Treaties as well as the situation of the participants to the Treaties at the time of signature of the Treaties. It reveals also, and this is especially true of the EAC, attitudes accumulated over time which were going to constitute such an important element in dealings with each other. These attitudes as well as other non-trade factors could not quite be divorced from the efficacious working out of the Treaties. We shall encounter them again in the last chapter. The next chapter is mainly about the Treaties themselves.

Chapter 2:

THE TREATIES OF THE EAC AND PTA:

THEIR EFFECTS ON TRADE

This chapter will introduce the legal frameworks that were created by the EAC and PTA Treaties respectively. This is done through an examination of particular treaty provisions that had/have a bearing on trade so as to assess their effect or impact on trade in the EAC and the PTA.

The chapter is divided into four sections. Section A discusses the provisions regulating trade in the EAC. Section B repeats the same exercise for the PTA. In Section C, we look at Rule 2.1(a) on the Rules of Origin which has been one of the major problems the PTA has had to deal with. Section D is a concluding section contrasting the legal frameworks and approaches to trade and growth of the region in the EAC and the PTA.

SECTION A: THE EAC TREATY

1. Quantitative restrictions or prohibitions

The East African Treaty of Cooperation removed all quotas, quantitative restrictions or prohibitions and forbid the addition of any other such restriction or prohibitions except if they were imposed for the purposes of security; control of arms, ammunition and other equipment; protection of human, animal, or plant health or life or the protection of public morality; the protection of nuclear materials etc. etc. However, a Partner State could impose restrictions and prohibitions for retaliatory reasons so as to give effect to contractual obligations; or in the case of certain agricultural products which are basic staple foods or major export crops; or when the imposing State was in balance of payments problems, provided:

- (a) the proposed quantitative restrictions do not contravene the imposing Partner's obligations under the rules of GATT or the IMF;
- (b) the restrictions have been imposed on import of goods from foreign countries and are inadequate to solve the difficulties;
- (c) the restrictions imposed do not operate more unfavourably against the goods of Partner States than foreign countries; and
- (d) consultations concerning the proposed quantitative restrictions have already taken place within the common market.

Under Article 16, the EAC Treaty also forbid discriminatory practices which hinder trade and are incompatible with the Treaty such as one-channel marketing, discriminatory taxes, duties and other charges against goods of a Partner State; dumping and discriminatory purchasing.

2. Customs and excise tariffs

Since the EAC Treaty aimed at the creation of a Common Market within East Africa, it follows therefore that customs duty within East Africa itself were abolished. This was accomplished by virtue of Article 11. A discussion of customs duty in the EAC is therefore in relation to external trade.

In Article 5, the Partner States recognized that the establishment of a common customs tariff was a basic requirement of the Common Market and thus agreed to establish and maintain such a tariff in respect of goods imported into the Partner States. Article 7 is the most-favoured-nation clause of the Treaty forbidding the entry by any one of the Partner into arrangements which would result in that State receiving tariff concessions which were not available to the other States. The common tariff was to be applicable to all goods imported into the Partner States for either resale or commercial purposes. However, remission of duty was allowed for goods intended for consumption or use by the Government and for goods imported for the operation of the EAC Corporations.

Article 9 provided that within the Partner States, customs duty was to be chargeable only once; that is to say, no further customs duty was chargeable on goods transferred from one Partner States to another Partner

State if the duty had already been paid in the transferring State. The theoretical basis of this provision is clear; obviously it would have been inconsistent with the Common Market concept if it were provided otherwise. However, the duty collected belonged to the 'consuming' State. Accordingly, Article 10 provided that the duty collecting State would pay the duty in full to the State where the goods were consumed. By Article 10 (2) the collecting State would still pay to the consuming State the full duty payable on such goods if it had remitted the duty. In the words of Article 10 (2) it would pay the duty which, 'would have been chargeable and collected if the goods had been imported directly into the Consuming State'.

So far, we have looked at the customs policy as it applied to processed goods. The same policy, more or less, was to be followed in the case of goods to be later used in manufacturing processes.

Article 15 accordingly provided that duty which is charged on goods which are later used for the purposes of manufacture of other goods (which are subsequently consumed in another Partner State) would be payable to the consuming State. Thus if A imports goods to be used in manufacturing other goods and charges a duty and the manufacturing process happens in B while the goods are passed over to C for consumption, then A would pay C the duty collected. It would appear the equities of the customs duty arrangements in the EAC demanded that the duty should always follow the consumer.

As a general conclusion on the customs policy of the EAC Treaty the only point that needs be made is that the balancing of equities was pursued irrespective of consideration being paid to the unequal stages of development of the Partner States.

The principle of equity was not lost to the Article that dealt with excise. By Article 17(1), the Treaty established a common excise tariff in respect of excisable goods manufactured, processed, or produced in the Partner States. However, it was also provided by Article 17(2) that, in special circumstances, and after consultation between the Ministers responsible for public finance, a Partner State could depart from the common excise tariff in respect of manufacture, processing or production of particular goods in that State. According to Article 18(1) excise duty was collectable either at the rate in force in the Consuming State if the latter was higher than the rate in force in the collecting State. By Article 18(3) the East African Customs and Excise Department was empowered to pay to the Consuming State at the rate in force in that state, in respect of goods liable to excise duty transferred from the collecting state to the consuming state. Also by Article 18(2) the owner or other transferor of goods who had paid a higher rate than was applicable in the consuming state would receive from the E.A. Excise Department, on proof of transfer of goods to the consuming state, a refund of the difference between those rates of duty.

Two points are worth attention about the customs and excise arrangements of the EAC Treaty: (1) since revenues made from customs and excise are never a major proportion of the total trade revenues in any country, the benefits hoped to be derived from the distribution of equities were of a limited nature, and, (2) so far as customs policy is concerned, since the internal tariff on East African goods was abolished by Article 11, the problem of protection of particular industries located in a Partner State and benefitting from the entire East African Market was removed. Thus the ghost of the arguments advanced against Kenya since the 1920s was finally laid to rest.

3. Rule of Origin in the EAC Treaty

Article 11 of the EAC Treaty provided that, 'No Partner State shall impose a duty in the nature of a customs duty or import duty in respect of goods which are transferred to that Partner State from one or the other Partner States and originate in the Partner States'. Goods were considered to originate in a Partner State if (a) they were wholly produced in the Partner State or (b) the value of the materials imported from a foreign country used for production did not exceed 70 percent of the ex-factory price of the goods.

The goods which fall under (a) and which are considered to originate from the Partner States are generally products of nature such as, inter-alia:

- (a) mineral products extracted from the ground within the Partner State;
- (b) vegetable products harvested within the Partner States;
- (c) live animals born and raised within the Partner States;
- (d) products obtained within the Partner States from live animals;
- (e) products obtained by hunting or fishing conducted within the Partner States;
- (f) marine products taken from the sea by a vessel of a Partner State ....<sup>1</sup>

It would appear the rule under which these products fall is the ancestor of the rather elaborate 'Rules of Origin' in the PTA Treaty. Unfortunately, perhaps because of the need to attract foreign capital around 1967, the rule was set rather low so that almost

anything could pass it. It will be noticed that in the EAC Treaty nothing was said about equity holding levels or nationality of management of the concerns involved in the extraction or harvesting of the mineral and vegetable products as the case may be. Nor was there any requirement laid down as to the nationality of the vessel which takes the product from the sea: the only requirement was that it should be registered in a Partner State.

As regards (b) above, it will be noticed it covers goods which are the product of manufacture. Such goods are the subject of our next headline 'Transfer Taxes'.

#### 4. Transfer Taxes

The transfer tax was essentially an aspect of the customs policy. The Treaty recognised that the benefits from market integration would be distributed inequitably. The transfer tax system was a form of intra-common market protection for domestic industries against imports from surplus members, it was also meant to earn revenue for the deficit country. The system was intended for the relatively disadvantaged countries (Tanzania and Uganda) who could use it under specified circumstances. It replaced the Raisman Commission's system of fiscal compensation and was considered superior to the Kampala Agreement provision of jointly agreed quantitative restrictions against the surplus state by the deficit state.

According to the Treaty, a transfer tax was to be imposed under the following conditions:

- (a) only on imports of manufactures from the Partner State(s) with which the importing country had a deficit;

- (b) only on the goods for which the importing country has a productive capacity sufficient to meet at least 15 percent of domestic demand;
- (c) at a rate not exceeding 50 percent of the external tariff rate for the same product; and
- (d) in case the transfer tax had trade diversion effects, the tax imposing country was to take measures which would rectify the diversion.

Finally it was provided that the whole system would be terminated after 15 years of existence by which time it was assumed the disadvantaged member(s) would have caught up with the privileged member(s).

As a regional protective tariff the transfer tax arose from an acceptance of the duplication of industrial capacity within the Common Market which it in fact encouraged. In discussing clause (c) of the Kampala Agreement in chapter I we have identified the consequences attendant upon the duplication of industry. We need not repeat the arguments here except to point out that the transfer tax system provided a short-term improvement in the balance of intra-regional trade but it neither led to a long-lasting solution to the balance of trade deficits for the industrially-lagging members, nor solved the problem of industrial imbalance.

The transfer tax system could not significantly solve the problem of industrial imbalance among the Member States because the conditions set for imposing

them were so stringent that only a negligible percentage of intra-regional trade could be affected by them. It is pertinent at this point to look at the effect of the transfer tax system had on Tanzania and Uganda, and especially on Tanzania's position which was widely accepted as the most industrially-lagging member within the EAC in order to see the minimal effect of the system. Figures for revenue earned in Tanzania and Uganda are also shown to demonstrate the insignificance of the tax system (Table 2:1).

Table 2:1: TRANSFER-TAXED GOODS FOR TANZANIA AND UGANDA AND REVENUE EARNED BY TANZANIA AND UGANDA FROM TRANSFER-TAXED GOODS FOR 1968-1974. (Values in million shillings)

Year	1968	1969	1970	1971	1972	1973	1974
1. Kenya to Tanzania	45	50	57	42	44	42	31
2. Uganda to Tanzania	11	4	3	2	-	-	-
3. Total of 1+2	56	54	60	44	44	42	31
4. Tanzania imports from E.A.	302	291	335	311	331	339	381
5. 3 as % of 4	18	18	18	14	13	12	8
6. Comparable % for Uganda	6	6	13	12	7	13	10
7. Tanzania revenue from transfer taxed goods	10.5	8.7	10.4	8.6	9.1	11.9	7.0

8.	Uganda's revenue from transfer- taxed goods	2.2	2.8	6.6	8.1	4.6	9.1	11.2
9.	Total of 7+8	12.7	12.5	17.0	16.7	13.7	21.0	18.2

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Source: East African Statistical Review, March, 1976.

It will be noticed from Table 2:1 that the amount of trade affected barely exceeded 18 per cent in the case of Tanzania and 13 per cent in the case of Uganda for the period 1968-74. In terms of revenue, Tanzania and Uganda earned insignificant amounts: neither of the two countries earned in excess of 12 million shillings for any one year in those years (1968-74); nor did the combined total for the two countries ever exceed 21 million shillings. These were insignificant figures within the context of the development needs of the two countries. Thus, besides failing to redress industrial imbalance and to promote a common market with common market characteristics, the transfer tax system was of marginal value in providing revenue for development to the industrially lagging members.

5. The East African Development Bank (EADB)

The EADB was empowered to play a redistributive role in industrial development in favour of Tanzania and Uganda. According to Article 13 of Annex VI, the EADB's allocation of financial resources over a period of five years was to be as follows: Tanzania and Uganda  $38\frac{3}{4}$  per cent each; Kenya  $22\frac{1}{2}$  per cent. The purpose of this provision was to help the industrial development in the less developed members of the Common Market, that is,

Tanzania and Uganda. However, the Bank could only achieve this purpose to the extent that it had enough funds at its disposal to do what it was empowered to do. It would appear the Bank did not have the money: between January 1968 and December 1972, the cumulative lending amounted to a meagre 83.5 million shillings: 17.0 million shillings had been disbursed to Uganda; 28.8 million shillings to Kenya; and 37.7 million shillings to Tanzania. A total of 83.5 million shillings over a period of 5 years is an infinitesimal figure indeed!

6. Trade performance in the EAC

During the days of the EAC, the intra-regional trade of East Africa as a percentage total of East African trade was healthy. It was maintained at above 16 percent for the years 1967-71 but there was a considerable decline after 1971 and even the slight improvement of 1975 did not reach the pre-1972 levels. The decline was as a result of the 'negative effects of the balance of payments crises'.<sup>2</sup> The commonly good performance of the region was repeated in the trade of the Partners with each other although Kenya's performance was the most remarkable and she never faced the decline to the same degree as her neighbours even when this came. Part of the reason for her lot appears to be that within the EAC arrangements, trade and development tended to polarize around Kenya. By and large Tanzania remained under-industrialized and a net importer.

However, the EAC Treaty did not alter the established orientations of trade. Between 1967 and 1976 East Africa's exports of non-manufactures (such as coffee) ranged from

86 percent to 91 percent of total external East African exports while the exports of manufactures ranged from 9 percent to 14 percent for those ten years. Those figures of course show that East Africa is extremely dependent on the export of raw materials as she is not industrialized. Figures ranging from 59 percent to 80 percent for the same years for imported manufactures prove the same case. The differences which existed between the EAC Partners in this was not qualitative; it was one of degree only. And the EAC Treaty did nothing basic to change the situation.

In conclusion to this section, we can say that the customs regime instituted by the EAC Treaty managed to redistribute customs revenue equitably. But the amounts sought to be so redistributed were small in relation to developmental needs. The same is true of the excise duty in every respect. Transfer taxes which were meant to cater for the less developed members had little effect as well, mainly because of the stringent conditionalities of their application. And the EADB, in its turn, had its hands tied with little funds to make any meaningful impact on industrial imbalances between the States. The Rule of Origin which alone had the potential of realigning intra-regional patterns of demand was not developed to the extent necessary for it to lead to the desired results. And lastly, even if it is granted that EAC Treaty had the capability to dynamise trade it nevertheless also had the capability to polarize this trade in favour of the most developed member of the EAC.

SECTION B: THE PTA TREATY

7. The Rules of Origin

The Rules of Origin are contained in the Protocol on the Rules of Origin and are annexed to the PTA Treaty as Annex III. The Rules describe the conditions that must be fulfilled before goods are considered to have originated in the Partner State and therefore eligible for preferential treatment when traded in the PTA. A study of the conditions shows that they fall into three categories, viz: (i) ownership and management conditions, (ii) origin conditions and (iii) value-added conditions. For reasons of space and as an aid to study, the Rules have been reduced to Table 2:2 which coincides in almost every detail with Rules 1 to 3 of Annex III. The other Rules (4-12)<sup>3</sup> are relatively unimportant and for that reason they have been excluded from our discussion and from Table 2:2. It will be observed that, in Table 2:2 the information concerning each of the 3 conditionalities of the Rules falls into its own column. It might be useful to study Table 2:2 for a little while before entering into the discussion below.

(i) Ownership and management conditions

Rule 2 1(a) lays down that the Rules of Origin in respect of ownership shall be satisfied if 51 percent of equity holding is in the hands of nationals or Government(s)' agencies, enterprises or corporations. A 'national' is a natural or legal person regarded as a citizen or national of a Member State in accordance with the laws of that Member State.<sup>4</sup> However, in the case of a legal person,<sup>5</sup> the Treaty requires that it shall be established under the laws of that Member State, have its office in that Member State, and at least 51 percent of its equity held by citizens or agencies of the Government of that Member State.

Table 2: TABULATION OF THE RULES OF ORIGIN\*

EQUITY HOLDING (Management by Nationals of Member States assumed)	PRODUCT & MATERIALS [Origin criteria]	VALUE-ADDED [products with Import content]
<p>51% by:</p> <ul style="list-style-type: none"> <li>- nationals of MS</li> <li>- Govt or Govts of</li> <li>- Agencies, enter- prises, Corpns. of such Govt or Govts</li> </ul> <p>(Rule 2 1(a))</p> <p><u>Vessel of MS:</u></p> <p>Majority control &amp; equity holding by nationals of MS.</p> <ul style="list-style-type: none"> <li>- 75% of both crew and officers registered in M S (Rule 1 3(a) (b) (c)).</li> </ul>	<p><u>Wholly produced in M S</u></p> <ul style="list-style-type: none"> <li>- Mineral products ex- tracted from M S ; vegetable product; products or by pro- ducts of animals from M S live animals of M S ; products of hunting or fishing; products from sea, rivers, lakes of M S by vessel of MS; Products of waters &amp; vessel of M S manu- factured in factory; and goods produced mainly from all these in M S</li> </ul>	<p>Produced in M S with materials from outside less than 60% total cost of materials.</p> <p>(Rule 2 1(b) (ii) )</p> <p>Produced in M S mainly with external material but value added is at least 45% of ex factory price.</p> <p>(Rule 2 1(b) (iii))</p> <p>Produced in M S mainly with external materials and value added at least 25% but of particular importance to econ. dvlpt.</p>
<p><u>Comoros &amp; Djibouti</u> <u>(5 yrs)*25%</u></p> <p>(Rule 2 2(a))</p>	<p>(Rule 2 1(b) (i) &amp; Rule 3)</p>	<p>(Rule 2 1(b) (iv) (aa) )</p> <p>Produced in M S ext. material value added 30% but recommended to be in short supply in M S</p>
<p><u>Mauritius (2 yrs)-30%</u> (Another 2yrs)-40% (6th yr.)-51%</p> <p>(Rule 2 2(b))</p>		<p>(Rule 2 1(b) (iv) (bb))</p> <p>Imported but substantial transformation: Different CCCN tariff other than CCCN tariff at importation ('List A')</p>
<p>Botswana &amp; Swaziland ) Lesotho (5 yrs) ) 30% (after 5 yrs ) De- termination by Council M.</p>		<p>(Rule 2 1(b) (v) (aa) )</p> <p>Imported: no transformation. Theoretically accepted by Council as transformed ('List B')</p>
<p><u>Zimbabwe (2yrs) - 30%</u> (2yrs) - 40% (5th yr) 51%</p>	<p><u>Key</u></p>	<p>(Rule 2 1(b) (v) (bb) ).</p>

\*\* The number of years in bracket indicate the duration during which that level of equity-holding will be applicable.

MS = Member State; CCCN = Customs Co-operation Council Nomenclature.

\* This Table has been developed by the writer from the Rules of Origin.

The reasoning behind the requirement of the equity holding itself (as opposed to the management requirement) is that the benefits that may accrue from trade should advantage the Member State. So far as the management condition is concerned, it is felt that those who decide on the excute policy should be nationals who, it is presumed, will not act to the detriment of the Member State. In both cases, the desired end seems to be the development of indigenous human economic/capital resources of the region.

It will be seen from Annex III (and Table 2.2) that Comoros and Djibouti; Mauritius. Botswana; Swaziland and Lesotho; and Zimbabwe were allowed special schemes of equity holding. This was a result of a realistic appraisal of the positions of these countries. For example, Comoros and Djibouti have virtually no local enterprises; Botswana; Swaziland and Lesotho are all landlocked 'hostages' of the South African economy; while Zimbabwe had just emerged from the Independence War at the time of the Treaty.

(ii) Product origin conditions

The conditions for preference here related to products wholly produced in the Member States; no imported components whatsoever are involved in the production process. Thus the range covered are mineral products which have been grown entirely in the region, extracted from the soil or harvested within the Member States or manufactured exclusively from any of these products. In this category, the products qualify for preferential treatment to the extent that they have no imported content in them. Thus a wooden table from Zambian timber fails to qualify in this category if it is polished with French vanish. Equal well, milk obtained from cows imported from a non-Member State country does not qualify if the cattle have come from outside of the Member State countries.<sup>6</sup> It will be quite clear that the rule of origin here addressed the development of indigenous physical/natural resources.

(iii) Value-added conditions

Under the conditions applicable here, the products are produced in Member States with materials from the outside but the value of such materials is less than 60 percent of the cost of all the materials used; or the value added by virtue of the process of production is at least 45 percent of the ex-factory price; or, 25 percent if the goods are of particular importance to the economic development of the Member State; or, 30 percent if the goods are recommended by virtue of being in short supply in the Member States. Other classifications will be found in Table 2:2.

According to the Treaty, a pre-requisite for these products to qualify for preferential treatment is that they must be consigned directly from one Member State to another Member State and they must have been produced in the Member States by enterprises managed by majority of nationals and 51 percent equity holding of Member States.

8. The Common List

The Common List consists of a list of commodities that originate in the PTA Member States which are of both export and import interest in the trade of the Member States and which will receive preferential treatment when traded in the PTA region. For these commodities, tariff and non-tariff barriers are not abolished altogether at once but are progressively reduced until such a time as the zero-duty mark, and, removal of non-tariff barriers' will have been achieved on the commodities

- supposedly by the year 1992 when the Member States can now think of entry into a full-fledged common market. This procedure of planning of trade among the Member States is also adopted in the case of an external customs tariff which by Article 12 is spoken of in terms of 'gradual evolution of a common external tariff in respect of all goods imported from third countries with a view to the eventual establishment of a common market among themselves'.

The classification of goods in the Common List is found in Article 4 of Annex IV (reproduced here as Table 2:3). Notice the most severe reductions are for goods needed for the industrial development of the region.

Table 2:3: CLASSIFICATION OF GOODS AND DETERMINATION OF TARIFF CONCESSIONS

		<u>Reduction</u>
Group I:	Food (excluding luxury items)	30 percent
Group II:	<u>Raw Materials:</u>	
	(a) agricultural	50 percent
	(b) Non-agricultural	60 percent
Group III:	Intermediate goods	65 percent
Group IV:	Manufactured consumer goods (excluding luxury items)	
	(a) Durable consumer goods (excluding (c) and (d) below)	40 per cent
	(b) Non-durable consumer goods (excluding (c) and (d) below)	35 percent
	(c) Highly competing consumer goods	30 percent
	(d) Consumer goods of particular importance to economic development	70 percent

Group V:	Capital goods (including transport equipment)	70 percent
Group VI:	Luxury goods	10 percent

For the commodities in the Common List, non-tariff barriers and concessions are given according to Article 5 of Annex IV (reproduced here as Table 2:4).

Table 2:4: NON-TARIFF BARRIERS AND CONCESSIONS

<u>Non-tariff barriers</u>	<u>Concessions</u>
(a) Quantitative restrictions	- Preferential treatment in allocation of quotas
(b) Export and Import Licencing	- Preferential treatment in issuing licences
(c) Foreign exchange Licencing	- - ditto -
(d) Stipulation of Import sources	- Preferential treatment
(e) Prohibition or temporary prohibition of Imports	- Exempted where possible.
(f) Advance import deposits	- Preferential treatment
(g) Conditional permission for imports	- Exempted
(h) Special charges for acquiring exchange licences	- Preferential treatment.

The procedure adopted in the negotiations for reduction and elimination of trade barriers is that the members will negotiate among themselves every two years commencing from the entry of the Treaty into force (in September 1982) concerning the commodities to be newly included in the Common List. The negotiations are undertaken by the Trade Committee of the PTA and the Common List so developed will be approved by the Council of Ministers. The Member States (by Article 7(4) ) have undertaken to furnish the PTA Secretariat with lists of commodities of export and import interest to them and any other relevant information which may at any time be needed for identifying the commodities to go into the Common List.

One of the problems that beset the Common List until May 1986 arose from the interpretation accorded by different states to the phrase 'commodities of both export and import interest'. By December 1983 when the first Common List was drawn up down to 1984, the phrase was interpreted to mean that for a commodity to qualify in the 'List' there must be interest expressed for it by one Member State for export matched by a corresponding interest by another Member State for import. In other words, export interest was to be matched with import interest. However, during negotiations for the second comprehensive list in 1984, some states expressed a new way of looking at the phrases 'of both export and import interest' arguing that the Treaty did not require matching of both export and import interests. Their arguments could be reduced to the following propositions:

- 1) if matching was the interpretation given to the phrase, then only a few commodities can be hoped to qualify for inclusion in the Common List by the end of the ten-year period

when all tariff and non-tariff barriers to trade will be eliminated. As a result of the necessity for matching, only 100 commodities had qualified out of a total of 735 submitted by Member States;

- 2) The unmatching procedure has the potential of dynamising structures of production in the Member States because when unmatched imports are included in the Common List, other Member States will have an incentive of producing such commodities to export them to the Member(s) who require(s) them;
- 3) Similarly to 2) (above), unmatched exports when included in the Common List will encourage Member States to switch from foreign sources of supply of such commodities to sources within the PTA States.

The contrary argument put across by those who favour matching was that inclusion of too many commodities regardless of correspondence in export and import interest would result in considerable loss of revenue arising from the granting of preferential treatment to a large number of commodities.

This basic problem in the interpretation of the phrase of 'both export and import interest' has now been resolved in the First Extraordinary Meeting of the Authority in Bujumbura in May 1986 and the procedure of unmatching will go on for five years during which time the issue will be re-examined in the light of a study on the implication of including all commodities on the Common List (irrespective of matching them), on the customs

revenue and establishment of the Common Market by 1992. To date, there are about 1,000 commodities in the Common List already!

9. The Clearing House

The Clearing House is the last major pillar of trade in the PTA. Article 22 of the PTA Treaty the Member States undertake to promote clearing and payments arrangements to promote trade in goods and services within the PTA by:

- (a) encouraging the use of national currencies in the settlement of eligible transactions between themselves;
- (b) establishing adequate machinery for the settlement of payments among themselves;
- (c) reducing as much as possible the use of foreign exchange by the Member States in their inter-state transactions; and
- (d) consulting regularly among themselves on monetary and financial matters.

The Clearing House is established by Article 4 of Annex VI and functions in the following manner: Members are able to trade in their national currencies expressed in PTA Units of account (UAPTA). The Clearing House draw debits and credits of trade of each PTA Member on a multi-lateral basis and only the outstanding amounts on total trade are paid to each Member in convertible currency (see Article 6 (4) ).

The functions of the Clearing House are, inter-alia,

- (a) to undertake clearing operations in respect

of eligible transactions among the Member States;

- (b) to regulate and oversee transfers of payments expressed in UAPTA and made in pursuance of eligible transactions;
- (c) to facilitate the efficient and speedy transfers of payments between the Member States, the efficient use of credit facilities available through the Clearing House and the use of national currencies expressed in UAPTA for transactions made within the framework of the PTA;....

From February 1984 when the Clearing House started operation, there were difficulties experienced by the House owing to certain factors that were identified by a study team<sup>7</sup> which visited all the PTA Member States. These were identified as:

- (i) lack of commitment to the Clearing House by Governments and Central Banks;
- (ii) lack of information and knowledge in the part of Commercial Banks, the business community and even some Central Banks on the working of the Clearing House;
- (iii) the existence of bilateral arrangements contrary to Paragraph 1 of Article 6 of the Protocol on Clearing and Payments arrangements of the Treaty;
- (iv) Insistence by some Member States to be paid in hard currencies for certain commodities such as electricity, zinc, lead, chrome, aluminium, cement, meat and oil contrary to spirit of PTA;

- (v) Existence of licencing systems which require foreign exchange cover.

By December 1986, however, the Secretary-General was able to inform the PTA Authority that most of these problems had been overcome and in the last six months of 1986, practically all the PTA States were utilizing the Clearing House and the volume of trade undertaken through the Clearing House had increased tremendously.<sup>8</sup>

SECTION C: PROBLEMS AND COMPROMISES IN  
THE PTA (Rule 2 1(a))<sup>9</sup>

The history of the problem of Rule 2 1(a) of the Rules of Origin which lays down the requirement of 51 per cent equity holding and majority management by nationals has been traced down to the time of the signing of the Treaty in 1981 (see chapter 1). As we saw in that chapter, the Treaty had adopted a compromise formula agreed to by all the states before the Treaty was signed but that 6 months after the Operational Phase of the PTA was launched in July 1984, the problems that had been attendant to the negotiation of the Treaty as far back as 1978 in relation to this Rule resurfaced all over again.

In December 1984 at the Fifth Meeting of the Council of Ministers, arguments were expressed by some states that the 51 per cent equity holding requirement was too high and it had both the effect of restricting intra-PTA Trade as well as the potential of discouraging additional foreign investment if implemented all at once. Other States countered this argument by asserting that the Rule was necessary for the attainment of full control by the Member States of the means of production in the PTA

region so that the Member States may derive substantial benefits from the PTA arrangement. In any case, these States went on to argue, the 51 per cent equity holding requirement had only been arrived at after painstaking negotiations over a period of years and, as no trade had been carried out since the launching of the Operational Phase of the Treaty in July 1984, there was no way of determining whether the requirement was restrictive to intra-PTA Trade or not.

The Fifth Council of Ministers after debating the issues without reaching agreement directed the PTA Secretariat to undertake a study assisted by consultants from Member States. The results of this study were presented to the Sixth Meeting of the Council of Ministers in July 1985. No agreement was reached on the findings of the Study and the Secretariat was directed to undertake another study assisted by consultants from Member States, UNCTAD and the UN Centre for Transnational Corporations. The report of that second study is entitled 'Report of the Second Study on Rule 2 1(a) of the Protocol on Rules of Origin of the PTA Treaty'<sup>10</sup> Each and every one of the Member States is analysed in terms of its General Economic Situation, Current Major Economic Problems, and General Views on Rule 2 1(a). All the Member States were also analysed in reference to the equity holding levels of the enterprises therein. When this report was submitted to the Seventh Council of Ministers in December 1985, no consensus was reached and the issue was referred to the Authority.

Four common denominators were identified which led to the new equity scheme which was adopted.

First, all the States agreed Rule 2 1(a) was the key mechanism for attaining the objectives of the PTA, namely, the internalization of the process of economic development in the PTA subregion, to achieve self-reliant and sustained transformation of the structure of production and pattern of trade from low productivity and dependent economies producing mainly unprocessed and semi-processed agricultural products for export, to high productivity and dynamic economies producing consumer, intermediate and capital goods primarily for the markets of the sub-region.

The Rules of Origin facilitate this process in the PTA market by minimising the circulation of essentially foreign goods imported or produced by foreign companies while promoting the growth of internally oriented PTA production units using locally produced inputs and labour. Thus, the first denominator was agreement on retention of Rule 2 1(a) of the rules in the Treaty.

The second denominator: derogation should be allowed for some time from the strict provisions of the Treaty in view of the lack of immediate resources to buy out enterprises that did not accord with 51 per cent equity holding at a time when there is difficulty of attracting foreign investment. Thus, the essence of agreement here is on derogation from the provisions of the Treaty for some grace period during which the products of the enterprises below 51 per cent would receive preferential treatment.

Third, agreement was reached that derogation should not be allowed on a case-by-case basis as this would lead to several levels of derogation which would be difficult to monitor.

And the fourth area of agreement was that full recognition for preferential treatment should be given to enterprises which already were 51 per cent locally owned.

The essence of all these four areas of agreement was the entry into Treaty of those enterprises which satisfied the 51 per cent equity requirement and the granting of a grace period during which the products of these enterprises which did not so qualify would be granted preferential treatment along a sliding scale. Rule 2 1(a) has now been suspended for 5 years and now applies as in Table 2:5.

Table 2:5 PREFERENTIAL LEVELS DURING 5-YEARS PERIOD OF SUSPENSION OF RULE 2 1(a)\*

% Equity holding		Margin of Preference
Enterprises with	51%+	100%
Mauritius & Zimbabwe	40%+	
Lesotho & Swaziland	30%+	
Comoros & Djibouti	25%+	
Enterprises with	40%-50%	60%
Mauritius & Zimbabwe	32%-39%	
Lesotho & Swaziland	24%-29%	
Comoros & Djibouti	20%-24%	
Enterprises with	30%-39%	30%
Mauritius & Zimbabwe (2 years)	24%-31%	
Lesotho & Swaziland	18%-23%	
Comoros & Djibouti	15%-19%	

\* This table has been developed by the present writer for ease of reference.

SECTION D: CONCLUSION: DIFFERING APPROACHES OF  
THE EAC AND THE PTA

The main purpose of this chapter has been to introduce the Treaties of the EAC and the PTA respectively. The main provisions for trade in the two Treaties have been examined in some amount of detail as well as the effect and/or import these provisions had/have on trade.

There are differences to be observed between the EAC and PTA Treaties. Obviously some of these differences arise from the kind of organizations that were intended to be formed by the Treaties. In the case of the EAC, a Common Market was immediately formed by the Treaty upon the Treaty's entry into force on 1st December, 1967, whereas, in the case of the PTA, it is a preferential trade area which was intended to be formed; the common market is hoped/intended to develop only in the very long run.

By definition a common market is a much more regimented, all-embracing formation than a preferential trade area. Evidence of these two elements in the specific matters examined above will be observed in the EAC Treaty's tendency to hold the Partner States firmly together and in its coverage of all trade thereby leaving little room for the autonomy of the individual state. Not so in the PTA Treaty where the issue of customs duty in general, for example, has been left to the discretion of the individual Member States and where the products regulated for are only those that originate in the Member States; and, even in this regard, a Common List has had to be developed. Therein is one major difference between the two Treaties: in the relative degree of autonomy left to the Member States.

The second difference between the Treaties concerns the issue of orientations. In the EAC Treaty, the general orientation of trade is towards the outside. In the Treaty, the Partner States are, as it were, looking towards the outside of their region, and the issue of customs collection, for example, (consonant upon trade with the outside of the region), as well as its redistribution is extremely important. This revenue collection of course happens within the established patterns of trade: thus there were no redirections of the patterns of supply and demand anticipated within the framework of the EAC Treaty. The approach of the EAC Treaty has been called the 'trade approach'<sup>11</sup> to describe its tendency of not disturbing established trade.

The approach of the PTA Treaty differs from that of the EAC Treaty in that it looks towards the inside and seeks to realign and rechannel trade towards the Member States themselves. Further, it is 'planned trade': the carefully worked out Rules of Origin and the Common List constitute the backbone of the plan to re-orient the trade towards the PTA region.

Having said this, it becomes clear that the suspension of the Rules of Origin as has happened in the PTA introduces a tendency verging towards the EAC's position. The next chapter which mainly centres on the shortcomings of the EAC will show that this is not an extremely fortunate circumstance.

CHAPTER 3:

REASONS FOR THE COLLAPSE OF THE EAC AND  
PROSPECTS OF THE PTA

This essay started as an examination of trade in the defunct EAC so as to establish the lessons that the EAC has for the PTA. Thus the factors that lay behind the creation of the EAC - which were the correction of imbalance amongst the Members and the redistribution of revenue - have been subjected to analysis in the first two chapters both in the context of their historical evolution and of the Treaties themselves. This last chapter is a conclusion. It draws from the substance of the two earlier chapters in order to demonstrate two things:

- 1) Given the background of the EAC, the Treaty of the EAC was not competent to resolve the trade problems of the region as it did not constitute a fresh and new approach of looking at trade in the region nor were certain crucial issues such as the orientation of the trade itself addressed by the Treaty.
- 2) The PTA Treaty is, by comparison, a distinctly superior document which seems to have built on the lessons learned from the mistakes made in the defunct East African Community.

One of the problems (perhaps 'the' major problem) of East African trade which she of course shares with other ex-colonies and which has always needed a solution, at any

rate, after independence, is that of the marginality of intra-trade. D.A.K. Mbogoro described the situation succinctly when he said, 'the countries produced little of what they consumed and consumed little of what they produce!'<sup>1</sup> The origin of this situation is to be found in the colonial patterns of production whereby the colonies became both a source of non-manufactured goods (such as coffee) and a market for manufactured goods produced by the metropolis. We have found in chapter 2 that, as late as 1967-1976 - the period coinciding with the life of the EAC - the export of raw materials ranged from 86 per cent to 91 per cent of total East African exports while the imports of manufactures was up to 59 per cent to 80 per cent for the same years. These figures denote an orientation of patterns of demand and supply towards the outside: in East Africa itself the patterns were asymmetrical with little complementarity created in the demand for and supply of each others' products within East Africa. Thus even in the best years, East African trade never exceeded a dismal 20 per cent of total East African trade. To push the point a little further, that portion of trade concerned only with the manufactures reflected paltry figures indeed; in the case of Tanzania manufactured goods representing a mere 2 per cent to 3 per cent of Monetary GDP entered intra-regional trade. Actually, in the circumstances of East Africa, this marginality of trade in manufactures is not very surprising because, as we saw while discussing Clause (a) of the Kampala Agreement, the firms sought to be reallocated by the clause produced cement, shoes, beer and cigarettes and yet in the region the majority of the people neither live in stone houses, nor wear shoes (as a permanent activity), nor drink, nor smoke.

The EAC Treaty did little to change the traditional pattern of trade. Rather, it was a kind of pastiche written

over the existing frameworks and it adopted formulas which had already proved unworkable. A good example of this was the transfer tax in the EAC Treaty which was, in a way, a reincarnated version of Clause 1 of the Kampala Agreement in that both accepted duplication of industry in an already small market so as, it was said, to close the gaps in industrial development among the Member States. We have seen that these policies proved a failure because Members could change from one line of production to another line which was unaffected by the policy. Another example is the customs and excise redistribution mechanisms of the EAC Treaty which had their replication in the 'distributable pool' of the Raisman Commission. We do not need to repeat the arguments advanced against both of these in the first two chapters of this essay. It seems R.H. Green was right when he wrote, 'to prevent collapse [in 1967] each country sought to secure certain key gains and to offer compromises on a variety of issues to achieve a package which would be mutually acceptable'.<sup>2</sup> By saying this, Green implicitly made the point that there was little which was new in the whole approach of the EAC Treaty - compromises made in a hurry are surely not the sterner stuff that new approaches are made of. And yet if we look at the studies undertaken before the formation of the EAC, we find that the arguments offered for its creation were either, (1) that the individual Members would not be better without it than with it or (2) in the study by Brown<sup>3</sup> which compared the trade potential of East Africa with that of Britain, the East African Community had been justified in terms of its potential rather than by its actuality. Brown's estimation that East Africa as a whole had the potential of reaching some 70 per cent to 80 per cent of the performance of British trade was of course criticised as an over-estimate by, amongst others, Masell,<sup>4</sup> on the ground that comparable

British firms could rely on the external economies of outside services which may not be available in East Africa. But Masell did not go on to make the point that those levels could not hope to be achieved in East Africa for the difference that, while Britain is symmetrical and auto-directed in its patterns of trade within itself, the patterns in East Africa are asymmetrical and directed towards the outside. The Treaty that was signed in 1967, in failing to address this basic issue of orientation was then inherently incapable of achieving what the signatories hoped it might achieve.

To say that the EAC Treaty did not, on the whole, either alter the established patterns of trade or reach the potentials claimed for it does not also mean it achieved nothing either on its own or in combination with other factors, in the expansion of trade. We have seen that it did in fact lead to some satisfactory performance in the first four years down to 1971 after which time there was considerable decline. But what was significant about the whole arrangement was the element of polarization of both trade and development in favour of Kenya which it brought about. In this tendency towards polarization there is in fact nothing surprising. Studies by leading economists (Misekell,<sup>6</sup> Meier, Prebisch) have shown that regional organizations formed by Least Developed Country (LDC) Members who are at different levels of development tend to polarize the development in the most developed member. These economists have rejected the arguments such as are advanced by A.J. Brown<sup>7</sup> to the effect that when a common market is formed, certain automatic forces normally ensure that the rapid development in one region will spread to other regions through spill-over or spread effects. They have shown that this generalization is based on the experience of advanced, diversified and flexible economies; what actually happens in customs unions formed among LDCs is the opposite, that

is, polarization effects. They have argued that polarization is bound to occur in the LDC regional organizations owing to the low level of cohesion of economic forces and the low level of development of economic structures. These economists have nevertheless justified regional groupings among LDCs on other ground such as (1) a large market is likely to attract greater market, (2) need for protection of infant import substituting industry is better fulfilled in a regional organization than in the national arena, and (3) a regional organization may offer some gains from specialization according to comparative advantage.

But to return to polarization: We have already seen how assiduously the industrially lagging members of the EAC sought to be placed on an equal footing with Kenya even as far back as the 1920s. In the EAC Treaty itself, the workings of the EADB, the transfer taxes, the careful balancing of customs/excise revenues, the approach to industrial allocation all reveal great dedication amongst the unequal members for equality. This being so, it is not surprising that the underdeveloped members were bound to react extremely negatively to a treaty which effectively enhanced rather than curtailed, the advantages that were enjoyed by the superior Members.

So, what kind of Treaty did East Africa need in 1967? In the late 70s, Professor K. Kim<sup>8</sup> addressed the problem of the whole thrust of the EAC Treaty and argued that its 'trade approach' within which trade had become liberalized within the confines of its traditional setting was unsuitable for East Africa. He argued clearly that economies which had little complementarity in production could not hope to acquire a long-lasting improvement in their trade through the 'trade approach'. What East Africa needed, Professor Kim argued, was a 'planning approach' capable of reconstituting the internal patterns of supply

and demand. And, if we may add, capable also of cutting out the tendency towards polarization.

I would submit that the PTA Treaty is the kind of documents East Africa needed in 1967. This Treaty adopts the 'planning approach' to trade (as we saw in chapter 2) and its main objective is to eliminate the marginality of the trade of the Members amongst themselves. Accordingly, a rather elaborate Rules of Origin is developed in favour of enterprises owned by Member States and managed by their nationals. For the same purpose, an elaborate, negotiated Common List is also put in place consisting of products originating in Member States which are of import and export interest among the Member States. We have attempted a comprehensive discussion of these in the last chapter. The Secretary-General of the PTA has advised that by present reckoning, the PTA Member States will be able to save some US \$3.1bn by virtue of The Rules and the Common List.

The PTA Treaty has also taken care of the problem of polarization. It is significant in this respect that the PTA is not an all-embracing Common Market but a looser form of organization in which trade is subjected to a great deal of management. Also, the combination of provisions of equity-holding ratios based on a realistic assessment of the circumstances of each Member State, the Compensatory finance facility advanced for net importers such as Tanzania, facility for the conducting of trade in the local currencies, as well as the great number of members with varying orientations in trade will ensure that there can be little polarization. It must be emphasized that the PTA Treaty is an extremely careful document especially in its attempts to cater for the particular predicaments of the Members and, although criticisms have been made of it in not caring for certain situations, those are extremely

few indeed. It seems at least clear that the combination of elements I have enumerated above are superior to the transfer taxes and the mechanisms promoted through the EADB for the elimination of polarization. One discouraging element, nevertheless (although again it might be too early to judge) is the recent suspension of the Rules of Origin for a period of five years. This move may well have the effect of polarizing trade in Kenya and Zimbabwe which are the more developed Members of the PTA and thus giving those countries another edge of five years over the advantages which those countries already enjoy.

Another factor which was responsible for the demise of the EAC was that, from a certain point of view, the organization was far too ambitious. In a paper which contrasted the laws of the EAC with those of the European Economic Community (EEC), F.X. Njenga observed, 'the EEC has nothing comparable to (the) impressive range of services which has for long formed the backbone of E.A. cooperation. Essentially, the EEC establishes a customs union within which a unified market is to be established for the free flow of goods and factors of production and a common external tariff is adopted [as well].... elimination of the internal restrictions to trade within the Community'.<sup>9</sup> But Njenga's next point was an admonition that the Community therefore need to 'include political as well economic affairs, for it is only by so doing that we shall resolve disintegrative forces that are likely to develop'.<sup>10</sup> He included the political element in his estimate of EAC's needs because he thought such an all-embracing organization as the EAC was likely to produce certain clashes between itself and the Members constituting it. Njenga's words were to prove prophetic in view of the

events that overtook the corporations leading the EAC to ruin.

The first corporation<sup>11</sup> which seriously affected the life of the EAC was the Railways and Harbours Corporation. Down to about 1973, its disease was not terminal. But by 1974 the problems of the Railways and Harbours became acute. Tanzania, fresh from draconic action and reasonable success in a somewhat parallel clearing up exercise of state-trading, demanded:

- (1) wholesale management removals (including of several senior officials who were Tanzanian);
- (2) radical structural reform.

Uganda agreed, as did Kenya, to the Tanzanian approach but at the decision-making level, Kenya demurred. Tanzania then turned towards radical decentralization so that it could at least sort out its piece of the railways. By the end of 1974, Tanzania and Kenya agreed to dissolve the Railways and Harbours Corporation but landlocked Uganda was desperate to keep them united so as to maintain her leverage over access to the sea. The problem of the Railways set in motion the problem in the East African Airways Corporation a few years later. Kenya, dissatisfied with the losses made in the internal routes was anxious to dissolve the Corporation or at best to restrict it to its international routes. Tanzania and Uganda were for the status-quo. Kenya proceeded to expel the non-Kenyan staff of the Corporation from Nairobi. Tanzania warned she would leave the Community if Kenya did not reinstate matters. Apparently Kenya did not fully comprehend the Tanzania threat quickly enough and Tanzania left the EAC. Just as for the Airways, Kenya was for the dissolution of the Posts and Telecommunications while the other Member States were against the move. But this was not an area of actual conflict.

The problem of the Corporations underscores the dangers of too much joint ownership of such Corporations. It would appear the PTA is not intending such joint ownership unless perhaps (given the PTA's rather cautious moves) if such joint ownership comes out of very natural growth into the concept of joint ownership. At the movement, the PTA has restricted its efforts to synchronization of time-tables and such matters.

The problems of the Corporations in the 1970s were exacerbated by the problems of foreign exchange caused by the rise in oil prices. Because of these problems, each of the three countries of East Africa was adopting a stringent approach to the management of foreign exchange and of the means of acquiring it. Thus, Kenya by 1974 had started to drag her feet on foreign exchange payments to the Headquarters in Tanzania while Tanzania in her turn (in opposition to Kenya's arguments for complete restoration of laissez-faire approach in the common market) was thinking it would benefit more from nailing down the evolution of the EAC toward a planned and more balanced trade pattern which she believed was part of the Kampala Treaty and surrounding agreements. At the very root of this division was the political sovereignty of these nations and also the difference between the Sessional Paper No. 10 of Kenya and the Arusha Declaration (blueprint for socialist development). There was no easy way therefore of resolving such a problem under which were major rifts. It might be well to remember that the grand idea of an East African Federation had been sucked into such rifts and gone underground forever!

The final and most crucial non-trade issue which affected the EAC was the coming to power of Idi Amin in

1971. Nyerere was adamant he would never sit at the same negotiating table with Idi Amin. As we have noted, Tanzania and Uganda had joined the EAC from the belief that together they could squeeze greater benefit out of Kenya than they would separately. Therefore the 'rules of the club' were somewhat affected by Idi Amin's accession to power and by Nyerere's refusal to sit with him. More importantly, and, in the event, the 3 Authorities in the EAC could not convene and decide together on major issues of the life of the Community. It was a pity, therefore, that the EAC had only three members to it and it is of course salutary in this respect that the PTA has so many Members such that a disagreement between even three of them may not, of necessity, maim the organization.

Therefore, the PTA Treaty is modelled along the right lines. But one question remains: what lesson can be drawn from the defunct EAC that is of significance to the new organization? I suppose the greatest lesson the EAC has for the PTA is the need for commitment to create an organization which thrives. It is important to note in this respect that East African cooperation was bedevilled with crises even before there was anything to quarrel about - as far back as the twenties. Indeed right down to the sixties, cooperation in East Africa was still spoken of in terms of its potential; and intra-trade, even in its hey-days, never exceeded 20 per cent of total trade in East Africa - in view of the marginal orientation discussed above. So there never really was anything to quarrel about; instead, there was every case for commitment to create something! In the meantime, however, East Africans carried themselves around with their swords on them, as it were, too quick to draw them against each other rather like some modern versions of the Montagues and the Capulets in Shakespeare's Romeo and Juliet. The PTA could be wasting too much of its potential if it gave room for wrangles, but it could also gain so much from itself if the provisions

of its Treaty were not written only on paper but also in the hearts of men who alone have the capability to make the organization live and thrive!

## FOOTNOTES AND REFERENCES

### Chapter 1: Background to the EAC and the PTA

1. 17 Herslets Treaties and Conventions, London, Butterworths, 1893, p.65.
2. 564 House of Common Debates 58, 6th February, 1957, Mr. Lennox Boyd.
3. Imperial Laws (Tanganyika), 1920-57 (revised), No.1, Art. 5.
4. Report on the Administration of Tanganyika Territory for the Year 1932, Colonial No. 81 (HMSO; 1932) Apprndix VII (5), p.128.
5. Report by Sir Sidney Armitage-Smith, K.B.E., C.B., on a financial mission to Tanganyika, September 1932, Cmd 4182 (HMSO 1932).
6. Thomas M. Frank, East African Unity through Law, Yale University Press, New Haven and London, 1964, p.23.
7. Tanganyika Times, Feb 22, 1926, p.2.
8. Future Policy in Regard to East Africa, Cmd 2904 (HMSO, 1927).
9. Despatch from the Governor of Kenya to the Secretary of State for the Colonies, 1930, Papers Relating to the Question of Closer Union, p.5.
10. Letter from the King of Buganda to Secretary of State for the Colonies, 1930, Papers Relating to the Question of Closer Union, p.85.

11. Tanganyika Standard, April 16, 1931, p.5.
12. Despatch from the Government of India to Secretary of State for India, 1930, Papers Relating to the Questions of Closer Union, p. 127.
13. Carl Rosberg and Aaron Segal, 'An East African Federation', International Conciliation NO. 543 (May 1963), pp. 12-13.
14. It did come up again just before Kenya's independence in 1963. But Uganda's Minister of Broadcasting and Tourism, Mr. Adoko Nekyon, broke the vow of silence that had bound the negotiators in the high-powered ministerial party working in Dar-es-Salaam. He evoked national fear to fit the occasion. Uganda, he maintained, needed more time to study 'exactly where she is going... and to whom we are surrendering our powers... I am not prepared just to throw my nation into darkness'. [Tanganyika Standard, August 21, 1963, p.1]

It is ironic that whilst Adoko Nekyon was asserting the Uganda position, his own President, Kabaka Mutesa who was also the King of Buganda, had received a mandate three months previously from the Great Lukiko, the Parliament of Buganda, to enter into negotiations with the Government of Uganda with a view to according Buganda federal status in a reconstituted Uganda. Buganda would then have entered into the proposed federation on a par with Zanzibar.

15. Colonial No. 191, p.5.
16. H.W. Ord established that in 1958, of the 474 companies registered in East Africa, 404 were registered in Kenya. See, H.W. Ord, 'E.A. Companies' East African Economic Review, June 1960, p.47.
17. P.K. Lomas, 'The Report of the East African Economic and Fiscal Commission, East African Economic Review, June 1963.

18. C.P. Hudson - Cave, 'Real Growth of the East African Territories, 1954-60' East African Economic Review, June, 1961.
19. See Colin Leys, East African Study Materials in Political Science, Department of Political Science and Administration. This is a bound volume of unpublished materials in UNZA library.
20. D. Walker and J.D. Nyhart, East African Economic Review, 1959.
21. Ian Stewart, 'Customs Union in East Africa', Scottish Journal of Political Economy, Edinburgh, February 1962.
22. A.J. Brown, 'Customs Unions versus Economic Separations, in Developing Countries', Hull, May 1961.
23. IBRD, The Economic Implications of East African Federation: Report by a UN Technical Assistance Mission to the Government of Tanganyika, June 1962, mimeo, pp. 16-17.
24. A copy of the Kampala Agreement may be found in Colin Leys, Study Materials, (see footnote 19).
25. See, R.H. Green, 'EAC A Valediction Forbidding Mourning', African Review, vol 8, Nos 1 and 2, 1978, p.3.
26. I am indebted to R.H. Green for this analysis. Green, 'EAC: A Valediction', p.4.
27. R.H. Green, Op cit, p.4.
28. R.H. Green, Op cit. p.5, writes, 'autonomism implied a need to end Kenyan hegemony and to build joint autonomy in terms of joint self-reliance and bargaining power beyond what Tanzania could achieve alone. Because the transition to socialism (or even state capitalism required growth of productive forces - the EAC was a potentially valuable medium if it

could be a planned economic area; but it also raised problems because Kenya's inegalitarian capitalist patterns and institutions both conflicted with a planned EAC... and had damaging demonstration and seepage effects on Tanzania. As a result there was skepticism in Tanzania that regional co-operation could move towards planned integration'.

29. The phrase is Ngila Mwase's. Ngila Mwase, 'The PTA: Towards a Sub-Regional Economic Community in Eastern and Southern Africa', Journal of World Trade Law, November, 1985.
30. Secretary-General's address to the Authority - PTA/AUTH/V/3, December 1986, Annex II, p.7.
31. My discussion of the Rules of Origin from this point is highly dependent on the Secretary-General's address to the Authority in Bujumbura, Burundi, 27th to 28th May 1986. See PTA/EXT/AUTH/5, pp.2ff.
32. We shall discuss the problems appertaining to the Common List and the Clearing House in Section B of chapter 2 but the problems of Rule 2 1(a) on the Rules of Origin is reserved for more extensive discussion in Section C of the same chapter.
33. See, PTA/CT/GEN/3rd October, 1985. This document is discussed in some detail later.
34. Kennedy Hansungule, The PTA: A Legal Analysis, unpublished LLM Thesis UNZA, October 1985, p.6.

Chapter 2: The Treaties of the EAC and the PTA

1. A full list of these products will be found in Annex I of the EAC Treaty. Incidentally, they are the very same products which are reproduced in the PTA Treaty (See, Annex III of the PTA Treaty a tabulated version of which is reproduced in this essay as Table 2:2).
2. D.A.K. Mbogoro, 'The Common Market Concept and Economic Development: Tanzania Experience', ERB 76.7 Univ. of Dar, 1978, p.18.
3. The issues are: Rule 4 is on the application of the percentage of imported materials and value added criteria. It is therefore an interpretive Rule of the issues of Rule 1, 2, and 3; Rule 5 enumerates the processes that may not confer origin (such as simple packaging, mixing and assembly of parts, process of preservation of merchandise such as spreading out, placing in brine...)etc etc; Rule 6 specifies that each item in a consignment will be considered separately; Rule 7 provides that materials which cannot be separated physically can be separated through accounting systems; Rule 8 spells out that for mixtures to qualify under the rules of origin, they must change in characteristics if parts that would qualify have been mixed with parts which would not qualify; Rule 9 is about assessing customs where the packing materials happen not to have come from Member State; Rule 10 is about the documentary evidence required to satisfy origin; Rule 11 is on infringement and penalties; while Rule 12, the last rule, says the Council may make regulations for the better carrying out of the Protocol of Annex III.
4. Annex III, Rule I.
5. Ibid.
6. I am indebted to Kennedy M. Hansungule, The PTA: A Legal Analysis, Unpublished LLM thesis, University of Zambia, p.64, for those examples.
7. See, Report of the First Extraordinary Meeting of the Authority, Bujumbura, Burundi, 27-28 May 1986, PTA/EXT/AUT/5 at p.6.
8. See, Secretary-General's address to the Fifth Meeting of the Authority, Addis Ababa, 3rd-4th December, 1986, PTA/AUTH/V/3, December 1986, p.7.

9. A discussion of this Rule has been set apart in this chapter because it is the backbone of the PTA. The discussion below is dependent on the PTA Secretary-General's analysis - See Report of the First Extraordinary Meeting of the Authority, Bujumbura, Burundi, 27-28 May, 1986, PTA/EXT/AUT/5, p.2ff.
10. See, PTA/CT/GEN/3, October, 1985.
11. See, Prof. K. Kim, 'An Appraisal of the E.A. Integration Scheme: Critical Issues and Possibilities', Economic Research Bureau Paper 76.7, University of Dar-es-Salaam.

Chapter 3: Problems of the EAC and  
Prospects of the PTA

1. D.A.K. Mbogoro, 'The Common Market Concept: Tanzania's Experience in the East African Common Market', Economic Research Bureau, Paper 77.8, University of Dar-es-Salaam, August 1978.
2. R.H. Green, 'EAC: A Valediction Forbidding Mourning', Africa Review, Vol 8, Nos 1 & 2, 1978, p.4.
3. A.J. Brown 'Customs Unions versus Economic Separation in Developing Countries', Yorkshire Bulletin of Economic and Social Research, May and November, 1971.
4. B.F. Massell, 'Industrialization and Economic Union in Greater East Africa' E.A. Economic Review, December, 1962.
5. See R.F. Mikesell, 'The Theory of Common Markets as Applied to Regional Arrangements among Developing Countries', International Trade Theory in a Developing World, Harrod, R. and Hague, D. (eds), London, Macmillan & Co. Ltd, 1964.
6. G.M. Meier, 'Problems of Integration in LDCs', Inter-economics, A Monthly Review of International Trade and Development, February, 1970.
7. A.J. Brown, 'Customs Unions Versus Economic Separation in Developing Countries', Yorkshire Bulletin of Economic and Social Research, May and November 1971.
8. Professor K. Kim, 'An Appraisal of the East African Economic Integration Scheme: Critical Issues and Possibilities', ERB Paper 76.7, University of Dar-es-Salaam.
9. F.X. Njenga, 'Contrast Between the Effect of Laws of the EEC and the EAC in the Constituent Territories', p.138.
10. F.X. Njenga, Ibid. p.152.
11. For the following discussions on the Corporation's, I am indebted to R.H. Green, Ibid.

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