CHALLENGES IN HARMONISING CONSERVATION LAWS ON LIVING MARINE RESOURCES WITHIN THE FRAMEWORK OF THE EAC: CASE STUDY OF TANZANIA AND KENYA

*Felix Otieno Odhiambo**

Abstract

Marine ecosystems compirese of transboundary resources which occupy up to 71% of the earth's surface. Up to 90% of the world's living marine resources exist within the Exclusive Economic Zone (EEZ). The 1982 UN LOSC confers management and conservation of the EEZ to the coastal State's jurisdiction. It is, however, argued that since oceans are transboundary, effective conservation of their living resources requires coordinated approach between neighbouring coastal States. Such approaches would help to avoid a situation where living marine resources of the same ecosystem are possibly conflicting conservation measures.

One way through which neighbouring Coastal States can coordinate conservation measures for their living marine resources is through the process of harmonisation of laws. Harmonisation leads to establishment of common legal structures and institutions to aid with the intended coordination. It is therefore argued that, through harmonisation, Kenya and Tanzania would enhance their

* PhD in Law Candidate (UDSM), LL.M & LL.B (UoN), Postgraduate Diploma in Law (KSL), B.Ed-Sc. (Kenyatta), and Advocate of the High Court of Kenya. The article is an extract of the author's ongoing PhD research. His can be reached at: +254-721914859. felixkinmath@gmail.com

respective conservation capacities for their living marine resources.

Key Words: *Harmonisation of Conservation Laws, Transboundary Living Marine Resources, Exclusive Economic Zones, Kenya and Tanzania.*

1. INTRODUCTION

Marine ecosystems are transboundary in nature with the most dominant management approach being the zonal approach which parcels them out into zones. The marine zones include territorial sea, the Exclusive Economic Zone (EEZ), and the high seas. Each of these zones is, however, subject to different sovereign jurisdictions. Up to 90% of the living marine resources exist within the EEZ.[1] Under the United Nations Law of the Sea Convention of 1982 (LOSC), management and conservation of living resources of the EEZ is subject to national jurisdiction of respective coastal States.[2] Effective conservation of these resources however requires coordinated approaches between neighbouring coastal States to avoid subjecting living marine resources within the same ecosystems to different conservation measures.

This article explores the possibility for implementation of coordinated conservation measures for the EEZs of Kenya and Tanzania, neighbouring coastal States within the East African Community (EAC) region. In this regard, this article is organised into seven parts. This first part offers an introduction. The second part offers a case for justification for harmonisation. The third part provides the contextual setting of harmonisation. The fourth part explores various general concerns that would require to be addressed for effective implementation of harmonisation of

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[1] Keyuan Z., "Maritime Jurisdiction over Vessel-Source Pollution in the Exclusive Economic Zone: The Chinese Experience", 7 *Asian Yearbook of International Law*, 1997, at p. 243.

[2] See generally the provisions of Article 56 of the UN LOSC, 1982.

laws. The fifth part examines the viability of harmonisation of the two countries' laws. The sixth part draws useful lessons from the European Union's (EU's) Common Fisheries Policy (CFP) as a form of regional cooperation in the conservation of living marine resources. The final part shall then provide the conclusion to the article.

2. JUSTIFICATION FOR *HARMONISATION* OF LAWS IN CONSERVATION OF LIVING MARINE RESOURCES

Law-making is an essential attribute of States' sovereignty.[3] Consequently, there are bound to be inherent differences between different States' laws.[4] For African countries such as Kenya and Tanzania, diversities in their laws are also attributable to their adherence to different legal traditions arising from colonial antecedents.[5] However, diversities in laws sometimes exist even where States have the same legal traditions.[6] Such diversities are caused by factors like differences in levels of economic development, political orientation, the impact of customary laws, law reform initiatives, the role of judicial interpretation, and lack of engagement with international developments on harmonisation, etc.[7]

These diversities have affected all areas of the law, including the conservation of living marine resources. Generally, the interplay of laws in the conservation of living marine resources is, at best, disjointed and uncoordinated. This reality is entrenched by the fact that each coastal State

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[3] Oppong, R.F., "Legal Harmonisation in African Regional Economic Communities: Progress, Inertia or Regress," in Doveling, J., Majamba, H.I., Oppong, R.F., and Wanitzek, U., (eds.), *Harmonisation of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and Other Regional Economic Communities*, Nairobi: LawAfrica Publishing, 2018, p. 114.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] Ibid.

enacts their respective marine conservation and related laws independently without reference to and or in coordination with their neighbours. This causes diversity of laws within the area of conservation of the living marine resources.

Diversity of laws undermines realisation of the objectives of economic integration.[8] Diversity usually manifests itself in three ways.[9] First, is through internal diversity within respective States.[10] Secondly, it also manifests itself as diversity among different countries.[11] Finally, it exists between States of one region/continent and those of others.[12] For this article, only two forms of diversity in the laws exist. The first is internal diversity, especially that within Tanzania as between Zanzibar and the Union. The second is inter-state diversity, i.e. diversity between Kenya and Tanzania as separate sovereign jurisdictions.

However, given that marine resources are transboundary, their governance is therefore affected by multiplicity of uncoordinated and, oftentimes, disjointed laws and even policies. The uncoordinated and disjointedness in laws undermines effective conservation of living marine resources. Effective conservation of such resources requires the harmonisation of laws and policies for sustainable conservation. The effect of disjointedness and uncoordinated nature of laws relating to the conservation of living marine resources has best been captured thus;

> The legal regimes currently in place to effectuate sustainability of living marine species are at best disjointed

8 Oppong, R.F., *Legal Aspects of Economic Integration in Africa*, Cambridge: Cambridge University Press, 2011, p. 107.
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.

> attempts to conserve, manage, and protect species; they are directed at the various parts rather than the whole. These systems lack order and coherence and are thus ineffective in sustaining the living marine ecosystem. The failure is due primarily to the fact that the regimes do not conform to an ecopolicy approach to marine species stewardship.[13]

3. HARMONISATION IN CONTEXT

The term harmonisation is sometimes used interchangeably with terms such as approximation, coordination, legal integration, unification, convergence or even standardisation.[14] It is the minimisation of the degree of variation and reduction in the differences in order to realise similarity between legal systems.[15] It involves the adoption of laws, by a common regional body, which are designed to bring about certain intended changes within the internal legal systems of the concerned Member States.[16] Harmonisation entails the mutual adjustment of national laws in order to bring them into conformity with certain agreed regional norms or standards.[17] It involves modification of existing laws to obtain congruence among them.[18]

3.1 Purpose of harmonisation

Harmonisation creates a uniform international regulatory standard which offers a higher degree of certainty, efficiency, consistency and more effective

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13 Von Zharen W.M., "An Ecopolicy Perspective for Sustaining Living Marine Species, 1(30) *Ocean Development & International Law*, 1999, p. 1.

14 See for example, Twitchett, C.C., "Introduction," in Twitchett, C.C., (ed.), *Harmonisation in the EEC*, London: The Macmillan Press Ltd, 1981, p. 1.

15 Ibid.

16 Dashwood, A., "The Harmonisation Process," *Harmonisation in the EEC*, London, The Macmillan Press Ltd, 1981, p. 7.

17 Twitchett, above.

18 Matipe, J.A.P., "Legal Integration in Colonial and Immediate Post-Colonial Sub-Saharan Africa," in Dickerson, C.M. (ed.), *Unified Business Laws for Africa: Common Law Perspectives on OHADA*, London: IEDP, 2012, p. 7.

control.[19] The purpose of harmonisation is not to simply eliminate the disparities between the national legal systems.[20] The desired end should be the adjustment of national laws to fit into the requirements of the common market.[21] Harmonisation has several advantages but, more importantly, it decreases the economic costs that come with the management of resources with the corresponding potential of increasing ease of international trade.[22]

3.2 Forms *of harmonisation*

Harmonisation can be categorised into two forms, i.e. negative and positive harmonisation. Negative harmonisation seeks to remove obstacles to the unity of the market.[23] It, therefore, complements prohibitions against direct interference with the free movement of persons, capital, services and goods within the intended common market region. On its part, positive harmonisation arises from measures, which are designed to shape the legal systems of the Member States to the common laws and policies, being developed by the bloc.[24] The laws and policies need not only to be those that are specifically mentioned by the treaty, but also those whose creation has been necessitated in the course of the operation of the common market.[25]

4. CONCERNS RELATING TO HARMONISATION OF LAWS FOR KENYA AND TANZANIA

The process of harmonisation of laws relating to the conservation of living marine resources would, no doubt, be complex and challenging. This is

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19 Scott, H., "The Future Content of U.S. Securities Laws, Internationalis ation of Primary Public Securities Markets," 63 *Law and Contemporary Problems*, 2000, at p. 78.

20 Dashwood, above, p. 8.

21 Ibid.

22 Ashcroft, R., "Harmonisation of Substantive Legal Principles and Structures: Lessons from Environmental Laws in a Federal Legal System (Australia)," in Andenas, M., and Andersen, C.B., (eds.) *Theory and Practice of Harmonisation*, Cheltenham, UK: Edward Elgar Publishing Ltd, 2011, p. 65.

23 Dashwood, above, p. 14.

24 Ibid, p. 15.

25 Ibid.

illustrated by the existence of certain constitutional and structural dynamics within the two countries' governance systems. To enhance prospects of harmonisation, both countries would therefore need to thrash out these existing underlying concerns. Some of these concerns are discussed below.

4.1 Existing constitutional frameworks

Constitutions provide appropriate reference points for the intended process of harmonisation in various respects. For instance, they provide the mechanics of international relations, the institutional structures defining every country's legislative processes as well as the route for the adoption of international law within a country's laws, especially, by prescribing whether a country is a dualist or monist legal system.[26] In the context of Kenya and Tanzania, there are two "constitutionally-prescribed handicaps" which would affect harmonisation of laws relating to the conservation of living marine resources of the EEZ.

4.1.1 Incorporating Zanzibar in non-Union aspects of conservation

Article 4(3), read together with the First Schedule to the Constitution of the United Republic of Tanzania, 1977, lays down Union matters. These provisions delineate the functional competences between the Union Government (which also serves as the Government of Mainland Tanzania), and the Revolutionary Government of Zanzibar.[27] It is to be appreciated that harmonisation of laws of Kenya and Tanzania, whether undertaken directly between the two States, or indirectly through the EAC framework, would entail foreign relations. Further, the process also carries with it aspects of treaty making between Tanzania and other States. Under the Union Constitution, matters relating to foreign relations constitute Union Matters

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26 Ashcroft, above, p. 68.

27 Pursuant to Art. 34(1) of the Constitution of the United Republic of Tanzania, as read together with the provisions of S. 9 of The Government of the United Republic Authority Act No. 15 of 1984, the Government of the United Republic of Tanzania also serves as the Government of Mainland Tanzania.

and can, therefore, be undertaken only by the Union Government. However, issues relating to environmental conservation, including those of living marine resources, are outside the scope of Union Matters.

The corollary to the foregoing is, therefore, that issues relating to environmental conservation in Zanzibar are within the jurisdictional competence of the Revolutionary Government of Zanzibar.[28] Consequently, in compliance with Article 4(3), as read together with the First Schedule to the Constitution, the Union Government cannot act on behalf of the Revolutionary Government of Zanzibar or even bind Zanzibar on a non-Union matter such as environmental conservation.[29] This is because the powers of the Union Government are limited and specific in nature whereas those of Zanzibar are residual and indefinite.[30]

This reality precipitates a kind of dilemma for Tanzania regarding how best it could engage with Kenya or even the EAC on the issue of harmonisation of laws relating to the conservation of living marine resources. On the one hand, the process possesses aspects of obligations that touch upon international relations and treaty making functions. However, only the Union Government has the functional competence to handle these functions. On the other hand, the specific functions relating to environmental conservation, especially those of fisheries, exclusively reside within the functional competence of Zanzibar. A relevant question therefore would be how the Union Government, with treaty making and foreign relations competences, would create treaty obligations on matters on which it completely lacks jurisdiction? Would Zanzibar be bound to comply with the obligations of such a treaty? It is submitted that such a position would be largely untenable

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28 Maalim M.J., *The United Republic of Tanzania in the East African Community: Legal Challenges in Integrating Zanzibar*, Dar es Salaam: Dar es Salaam University Press, 2014, p. 76.

29 Ibid.

30 Ibid.

within the framework of the Constitution of the United Republic of Tanzania, 1977.

The flipside to the foregoing is the question of how Zanzibar would ever be able to enter into treaty obligations on non-Union matters which are within its exclusive jurisdictional competence. It is equally submitted that within the existing Constitutional framework, the same is an impossible legal feat. This is out of the fact that treaty making and foreign relations are exclusive functional competencies of the Union Government. A relevant question in the circumstances would then be how Tanzania could enter into treaty obligations regarding deserving non-Union matters.

From the outset, it is to be acknowledged that the issue is purely an internal matter for Tanzania. However, considering the legitimate social, economic, political and constitutional sensitivity that the issue evokes, this article proposes two possible solutions to the problem. The first proposal is made in the context of the existing constitutional framework. It suggests that both the Union Government and the Revolutionary Government of Zanzibar could, on a need basis, enter into specific memoranda of understanding through which Zanzibar would then authorise the Union Government to enter into treaty obligations on pre-agreed specific non-Union Matters. With that kind of approach, the Union Government would create treaties with the assurance that it carries along with it both the Union and Zanzibar on the relevant non-Union matters.

The second proposal is one that would ultimately require some aspects of constitutional and legal reforms. Under this proposal, it is suggested that Tanzania could consider making amendments to both the Union Constitution and its consequent laws. Through an appropriate Constitutional amendment, Tanzania could choose to enhance the powers of Zanzibar by granting to it limited treaty making powers and foreign relations. In the alternative, such an amendment could just be contemplative in nature and

specifically make provisions for possibility of memoranda of understanding between the two Governments regarding non-union matters over which there could be need for Tanzania to enter into treaties about.

4.1.2 Capacity and role of Kenya's County Governments

Kenya has a two-tiered government consisting of the National Government and County Governments. Article 186, read together with the Fourth Schedule to the Constitution, distributes functions to the two levels of Government. On the one hand, the National Government has responsibility, inter alia, for the protection of the environment and natural resources, including fishing. In addition, it also has the responsibility over foreign affairs, foreign policy and international trade, use of international waters and water resources including marine navigation. On the other hand, the County Governments have the responsibility over agriculture, including fisheries. Further, they also have responsibility over County health services including refuse removal, refuse dumps and solid waste disposal.

One of the greatest forms of pollution that portends a logistical nightmare to marine conservation in Kenya is plastic pollution. As a result, the Coastal Counties have a pivotal role to play towards marine environmental conservation. Unfortunately, counties remain poorly equipped and have little capacity to enable them to fully discharge their respective constitutionally-prescribed functions.[31] Apart from capacity constraints, counties are also grossly underfunded and, with bloated workforce, much of their funds often end up being applied towards payment of salaries and other forms of recurrent expenditures.[32] Worse off still, is the fact that most of them are

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31 See generally Kiriga, B., D. Omanyo, H. Chemnyongoi and J. Ochieng', 'Economic Performance and Growth Prospects,' Odhiambo, P., H. Chemnyongoi, J. Gachanja, A. Gitonga-Karuoro, B. Munga and B.M. Musili (eds), *Opportunities and Challenges Under Devolved System of Government*, KIPPRA Policy Monitor, Issue 10 No. 2 October-December 2018, at p. 4.

32 Ibid.

riddled with corruption.[33] This reality makes it near-impossible for counties to have either the ability or capacity to deal with critical responsibilities such as handling plastic pollution which hugely undermines the conservation of living marine resources.

The foregoing situation is further exacerbated by the fact that the National Government has, more often than not, failed to assist County Governments to build their respective capacities in the area of pollution control. The consequence of this reality is therefore that Kenya would not fully comply with its obligations under the 1982 LOSC, especially those responsibilities touching upon pollution control. Since the two levels of government are distinct, each of the Coastal Counties therefore has the right to determine their respective resource-allocation priority areas. The National Government finds itself completely helpless towards attempting to enforce Kenya's compliance with its international obligations if respective Coastal County Governments fail to comply with the implementation of pollution control measures.

4.1.3 Lingering *mistrust arising from collapse of the first EAC of 1967-1977*

The first EAC, which had been established pursuant to the Treaty for East African Cooperation, only lasted between 1967 and 1977.[34] Its foundation had been laid by the British colonial authorities from as early as the 1920s through a number of institutions.[35] These included the East African Customs Union (EACU) in 1922, the East African High Commission (EAHC) in 1948, and the East African Common Services Organisation (EACSO) in 1961.[36] By the time the EAC collapsed in 1977, the region had achieved a

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33 Ibid.

34 Mwapachu J.V., *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community*, Dar es Salaam: E & D Vision Publishing, 2012, p. 326.

35 Ibid.

36 Ibid.

very high level of integration by all standards of the time, including a full-fledged Customs Union and Common Market. Besides, it also shared economic institutions including railways, harbours, airline, civil aviation, road transport, inland waterways, power and lightning, a common university, etc.[37]

However, despite this depth of the integration the first EAC, nonetheless, collapsed in 1977.[38] Various reasons have been offered to explain the disintegration. First, was the polaris ation of national development and the perceived unequal gains which saw Kenya's share of intra-community trade rising from 63 per cent in 1968 to 77 percent in1974, whereas Uganda's dipped sharply from 26 per cent to 6%.[39] The second reason was the insufficient compensatory and corrective measures.[40] The third reason was the ideological differences and the rise of economic nationalism among the Partner States.[41] The final reason was the impact of foreign influences arising from the global ideological differences perpetuated through the Cold War.[42]

During the existence of the first EAC, both Uganda and Tanzania felt that Kenya benefited more from the first EAC than both of them due to the trade asymmetry which heavily favoured Kenya.[43] Similarly, even upon its collapse, both Uganda and Tanzania felt that Kenya gained an unfair advantage over

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37 Ibid.

38 See generally, Biswaro J.M., *The Quest for Regional Integration in the Twenty First Century: Rhetoric versus Reality-A Comparative Article*, Dar es Salaam: Mkuki wa Nyota Publishers Ltd, 2012, p. 370.

39 Olatunde, J.C.B.O., "Regional Cooperation and Integration," in Ojo J.C.B., Orwa, D.K., & Utete, C.M.B., (eds.) *African International Relations*. London: Longman, 1985. See also Binda, E.M., "The Legal Framework of the EAC," in Ugirashebuja E., Ruhangisa, J.E., Ottervanger, T., and Cuyvers, A., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Leiden: Brill Nijhoff Publishers Ltd, 2017, p. 107.

40 Ibid.

41 Ibid.

42 Ibid.

43 Ibid.

them in accessing the assets of the defunct EAC.[44] This led to bad blood in subsequent bilateral relations, especially between Kenya and Tanzania to the point that Tanzania closed its common border with Kenya and then impounded several Kenyan vehicles and private aircraft.[45] The border remained closed until 1984 when it was reopened after negotiations between the late retired Presidents, Mwalimu Julius Nyerere and Daniel arap Moi.[46]

However, even though normalcy resumed in the relations between Kenya and Tanzania, the relations are sometimes still affected by the ghosts from the graveyard of the defunct EAC. These have led to near-hostile trade relations.[47] This has, for instance, been recently witnessed when Tanzania confiscated, and later auctioned, over 1000 cattle belonging to Kenyan pastoralist Maasai herdsmen who crossed over into Tanzania in search of water and pasture.[48] Similarly, Tanzania has also recently confiscated over one thousand one-day-old chicks, imported from Kenya, and destroyed them through burning.[49] Clearly, such incidents, even if considered as being few

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44 Mann R., "Kenya-Tanzania Border Tension Rises," *The Washington Post* (Washington), 27 April 1977, available at <https://www.washingtonpost.com/archive/politics/1977/04/27/kenya-tanzania-border-tension-rises/3d85043b-bddb-4aaa-8265-659c40b56ec6/> (accessed on 21 September 2019).

45 Ibid.

46 The Citizen, "Query Arises Over Kenya's $1m Project,' *The Citizen* (Nairobi), 23 February 2017, available at <https://www.thecitizen.co.tz/news/business/Query-arises-over-Kenya-s--1m-project/1840414-3824642-oedh0yz/index.html> (accessed on 21 September 2019).

47 Kajilwa G., "Magufuli Unapologetic for Auctioning Kenyan Cattle, Says He Could Do it Again," *Standard Digital* (Nairobi), 8 November 2017, available at <https://www.standardmedia.co.ke/Article/2001259656/magufuli-i-don-t-regret-auctioning-kenya-s-cattle> (accessed on 21 September 2019).

48 Ibid.

49 Daily Nation, "Tanzania Destroys Another 5,000 Kenya-Sourced Chicks," *Daily Nation* (Nairobi), 13 February 2018, available at

and far in between, point towards some unsettled diplomatic and economic undercurrents between the two countries. Successful implementation of harmonisation of laws, would, no doubt, require unbridled trust and understanding between these States.

4.1.4 Political will

Since harmonisation of laws is a largely political process, it therefore needs requisite political will from the concerned States. In the event that there is a clash between national politics and the ideals of regional integration, then such clash undermines the intended goals of harmonisation. In fact, it has been the common view that the collapse of the first EAC arose from widened political differences and differing political orientations that then led to a divergence in economic management among the Partner States.[50]

Given the history of political differences during the first EAC, it is therefore understood that in designing the present Treaty of the EAC, the Member States made provisions to expressly accommodate national political interests within the regional integration matrix. Some of these provisions, for instance, include Article 6(e) on equitable distribution of benefits, Article 7(1) (d) on the principle of subsidiarity, Article 8(4) on the domestication of EAC law by the Partners States, Article 151(3) on the ratification of protocols, Article 7(1) (e) on the principle of variable geometry, and Article 7(1) (h) on asymmetry.[51] In the context of the present discussion, the principles of variable geometry and asymmetry are the most important.

<https://www.nation.co.ke/news/Tanzania-destroys-another-5-000-chicks/1056-4303090-r1idwuz/index.html> (accessed on 21 September, 2019).

50 Goldstein A., and Ndung'u, N.S., *Regional Integration Experience in the Eastern African Region,* Paris: OECD Development Centre (Working Paper No. 171), March 2001, as cited in Mwapachu, J.V., *Challenging the Frontiers of African Integration: The Dynamics of Policies, Politics and Transformation in the East African Community*, Dar es Salaam: E & D Vision Publishing, 2012, p. 362.

51 Mwapachu, above, pp. 362-366.

The principle of variable geometry provides the flexibility which allows for progression in cooperation among a sub-group of members of the EAC in a variety of areas and at different speeds.[52] It allows States within an integration bloc to implement integration projects at different paces based on their own individual needs and abilities.[53] Thus, some states are permitted to inch forward with integration initiatives, while leaving others behind, to join at a later date, based on their convenience and programmes of action.[54] As a result, the principle offers flexibility during the implementation of projects or programmes by some of the partners, as opposed to all the Partner States during the same time.[55] On its part, the principle of asymmetry addresses differences in the implementation of measures in the integration process for the purpose of achieving a common objective.[56]

The Treaty of the EAC incorporated these two principles in order to address the differentiated development levels among the EAC Partner States.[57] The principles were considered necessary in order to assuage the fears of both Tanzania and Uganda that, owing to their relatively lower levels of development, there would have been the risk that their markets would have been swamped by Kenyan goods were it to be required that all Partner States liberalise at the same rate.[58] Given that Tanzania required market safeguards

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52 Kamanga, K.C. and A. Possi, "General Principles Governing EAC Integration," in Ugirashebuja E., Ruhangisa, J.E., Ottervanger, T. and Cuyvers, A., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Leiden: Brill Nijhoff Publishers Ltd, 2017, p. 207.

53 Ibid.

54 Ibid.

55 Ibid.

56 See for instance, Binda, E.M., "The Legal Framework of the EAC," in Ugirashebuja, E., Ruhangisa, J.E., Ottervanger, T., and Cuyvers, A., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Leiden: Brill Nijhoff Publishers Ltd, 2017, p. 107.

57 Mwapachu, above, p. 365.

58 Mutai, H.K., "Regional Trade Integration Strategies under SADC and EAC: A Comparative Analysis," 1 *SADC Law Journal*, 2011, p. 83. See also Binda, E.M.,

within the EAC over its concerns of possible economic domination of its market by Kenya's goods, there are no guarantees that those fears have now dissipated. Thus, it could still be the case that Tanzania still harbours similar concerns even in the context of harmonisation of laws relating to the conservation of living marine resources.

4.1.5 Lack of adequate public participation and sensitisation

For harmonisation to succeed, concerned States require to engage in concerted public sensitisation through education and understanding.[59] This is because harmonisation entails reconfigurations of certain governance structures that are often within confined sovereign jurisdictions. Therefore, whenever changes are considered necessary, the basis of the changes should be explained to the citizenry.[60]

Given that the harmonisation contemplated in this article envisages that it be undertaken within the framework of the EAC, public sensitisation therefore becomes all the more critical. This is because the EAC regional integration process has always been perceived as being highly elitist because the majority of the citizenry are not particularly enlightened about the process.[61] To a great extent, the integration agenda remains one that is only at the table of the political leaderships of the Partner States without the same discourse getting

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"The Legal Framework of the EAC," in Ugirashebuja E., Ruhangisa, J.E., Ottervanger, T. and Cuyvers, A., *East African Community Law: Institutional, Substantive and Comparative EU Aspects*, Leiden: Brill Nijhoff Publishers Ltd, 2017, p. 107.

59 Ashcroft, above, p. 69.

60 Ibid.

61 See for example, Makame, A.H., "The East African Integration: Achievement and Challenges," 1(6) *GREAT Insights*, August 2012. Maastricht, European Centre for Development Policy Management (ECDPM). Available at <https://ecdpm.org/great-insights/trade-and-development-making-the-link/east-african-integration-achievements-challenges/> (accessed on 4 October 2019).

to trickle down to the masses. This therefore makes its achievements to be elitist political discourses that are not generally appreciated by the common citizenry as argued by one author thus;[62]

> Most academics concede that the East African Federation is an elitist project, even though they find it appealing as such. So far the grassroots hardly have an inkling of what a federation is about. The academics echo the concerns of all other categories of interviewees that the process of integration is not yet owned by the peoples of East Africa. The avant-garde of politicians and civil servants are so far ahead of the rank and file that they lose contact with reality…[63]

4.1.6 Tanzania's seeming preference for Southern African Development Community

Regional integration is premised upon two theories, namely, the neo-functionalism (supranationality) theory and the intergovernmentalism theory.[64] Neo-functionalism theories that regional integration is a broad-based political process that involves multiple stakeholders and, consequently, the speed, direction and intensity of integration is determined by politicisation.[65] On the other hand, intergovernmentalism theories that regional integration is a product of the bargains driven by the relevant

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62 Ibid.

63 Kibua, T.N. and Tostensen, A., *Fast-tracking East African Integration: Assessing the Feasibility of a Political Federation by 2010*, Chr. Michelsen Institute (CMI) Report, 2005.

64 Hooghe E.A.E.B., and Marks, G.W., "The Neo-functionalists Were (Almost) Right: Politicisation and European Integration," in Crouch C. and Streeck, W., (eds.), *The Diversity of Democracy: Corporatism, Social Order and Political Conflict*, Cheltenham: Edward Elgar Publishing Ltd, 2006, pp. 205-222. This is as cited in Mwapachu, J.V., above, p. 354.

65 Mwapachu, above, p. 355.

national States.[66] However, these theories are not mutually exclusive as they are considered to operate within a continuum.[67]

Even though Kenya and Tanzania are members of the EAC, each of them, nonetheless, has their own political, diplomatic and economic preferences. For Tanzania, there is every indication that it has a higher affinity for the Southern African Development Community, SADC bloc.[68] In fact, it is considered that one of the reasons that informed Tanzania's decision to withdraw from the Common Market for Eastern and Southern Africa (COMESA) was COMESA's conflicting obligations with those of SADC.[69] Tanzania developed its closer social, economic and political ties with the Southern African countries, especially South Africa, during the struggle against *apartheid.*[70] During the struggle, President Nyerere made Tanzania a safe haven for many of South Africa's African National Congress (ANC)

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66 Ibid.

67 Sweet A.S. and S. Wayne, "European Integration and Supranational Governance," 4(3) *Journal of European Public Policy*, 1997, pp. 297-317.

68 See, for example, Kalinda, M., "Tanzania Should Choose between EAC and SADC," *The New Times* (Kigali), 11 August 2019, available at <https://www.newtimes.co.rw/section/read/68537> (accessed on 8 October 2019).

69 Chemelil, P.K., "Tanzania's Dilemmas and Prospects in East African Community: A Case of Trepidation and Suspicion," 6(1) *IISTE*, 2016, p. 29. Further, see Cooksey, B., "Tanzania and the East African Community: A Comparative Political Economy," *European Centre for Development Policy Management*, Discussion Paper No.186 of May 2016.

70 Mandela, N.R., *Long Walk to Freedom: The Autobiography of Nelson Mandela*, Back Bay Books, London: Little, Brown and Company Publishers, 1994, pp. 69, 80 and 94. See also Mandela N., *Conversations with Myself*, New York: Picador Publishers, 2010, pp. 413, 418-419. See also Thorn, H., *Documenting Liberation Struggles in Southern Africa,* Select Papers from the Nordic Africa Documentation Project workshop, 26–27 November 2009, Pretoria, South Africa, Saunders C., (ed.), Uppsala, Nordic Africa Institute, 2010, p. 15. Workshop Report available at <www.nai.uu.se> (accessed on 8 October, 2019). See also Schroeder, R.A., "South African Capital in the Land of Ujamaa: Contested Terrain in Tanzania," 12(1) *African Sociological Review / Revue Africaine de Sociologie*, 2008, pp. 20-34.

exiles.[71] Further, Tanzania facilitated most of ANC's exiles by even issuing them with Tanzania's passports.[72]

Thus, Tanzania cultivated much closer diplomatic and economic ties with South Africa and the SADC economic bloc than its EAC Members States.[73] This is demonstrated by the fact that under the aegis of SADC, South Africa has previously provided Tanzania with technical support in the area of maritime security through surveillance ship, *Sarah Baartman*.[74] With the pre-existing closer ties between Tanzania and South Africa, it would be imperative that efforts geared towards harmonisation of laws under the aegis of the EAC, not only appreciate the country's existing ties but also be used to build upon its capacity within the gaps already identified through its present arrangement with South Africa. Thus, new efforts need not be introduced to undermine the ones which are already in existence but, rather, to complement them.

4.1.7 Residual effects of divergent economic policies between Kenya and Tanzania

After independence, Kenya briefly flirted with an amorphous economic policy known as African Socialism.[75] Conceptually, it was founded on government planning as a tool for the country's social-economic development.[76] However, the experiment was short-lived as the country soon

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71 Thorn, above.

72 SABC, "Jakaya Kikwete Recalls How Nelson Mandela Left His Army-Style Boots in Tanzania," *Standard* (Nairobi) 16 December 2013, available at <https://www.standardmedia.co.ke/Article/2000100182/jakaya-kiwete-recalls-how-nelson-mandela-left-his-army-style-boots-in-tanzania> (accessed on 15 September 2019).

73 See Thorn, above.

74 Wambua P.M., "The Challenge of Controlling African Maritime Zones: Command, Control and Cooperation: How Do We Do It?," 3(1) *The Law Society of Kenya Journal*, 2006, p. 93.

75 Sessional Paper No. 10 of 1965.

76 See for example, Speich, D., "The Kenyan Style of "African Socialism": Developmental Knowledge Claims and the Explanatory Limits of the Cold War,"

abandoned its pretentious flirtations with the socialist economic policy ideals by plunging into capitalism full-throttle.[77] The capitalistic economic orientation thus placed Kenya within an ideological alignment with the West.[78]

On its part, Tanzania actively pursued the *Ujamaa* economic policy pursuant to the *Azimio la Arusha* (Arusha Declaration) of 5th February 1967.[79] Some of the core foundational principles of *Azimio la Arusha* included the call for national self-reliance, emphasis on the need for development to begin from the lowest rural level, and the State's right to control all major factors of production and change.[80] Consequently, Tanzania became ideologically aligned towards the East.[81] This is because its social-economic alignment attracted liberal and socialist progressives who were anxious to challenge the then dominant neo-capitalism.[82]

The divergent economic policies placed both countries on very different development trajectories. For one, Tanzania opted for a slower growth through self-reliance but with emphasis on development of the peasant agricultural economy.[83] However, this approach worsened an already bad development situation given that the country had suffered

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33(3) *The Journal of the Society for Historians of American Foreign Relations: Diplomatic History*, Special Forum: Modernization as a Global Project (June 2009), pp. 449-466.

77 Ibid.

78 Speich, above.

79 Meredith M., *The State of Africa: A History of the Continent Since Independence*, London: Simon & Schuster, 2011, p. 249.

80 Ibid, p. 250.

81 Coulson, A., *Tanzania: A Political Economy*, (2nd edn.), Oxford: Oxford University Press, 2013.

82 Meredith, above, p. 250.

83 Meredith, above, p. 251.

underdevelopment as a British-mandated territory.[84] As a British-mandated territory, Tanganyika's development interests had played second fiddle to those of Kenya and Uganda since the interests of the white settlers in Kenya largely dictated the British colonial agenda.[85] These policies inspired inequalities that undermined Tanzania's infrastructural and social-economic development.[86] Unlike Tanzania, Kenya's capitalist policies gave it a slightly better edge in attracting more trade and other development opportunities.[87] Owing to these divergent social-economic and political ideologies between both countries, citizens of both countries developed mutual recriminations against each other during the 1970s.[88] For instance, Tanzanians referred to Kenya as being "a man-eat-man society", while Kenyans referred to Tanzania as "a man-eat-nothing society".[89] Even though the differences are now long ended, a number of citizens from both countries, especially those of the older generation, still remain stuck with the remnants of these ideological hangovers. As a result, there still exists an element of mutual mistrust that oftentimes cloud governmental decisions within and relations between the two countries.[90]

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84 See generally, Brett E.A., *Colonialism and Underdevelopment in East Africa: The Politics of Economic Change*, *1919-39*, London: Westview, 1973, as cited in Cooksey, B., "Tanzania and the East African Community: A Comparative Political Economy," *European Centre for Development Policy Management*, Discussion Paper No.186 of May 2016.

85 Ibid.

86 Cooksey, above, p. 2.

87 Chege, M., "Introducing Race as a Variable into the Political Economy of Kenya Debate: An Incendiary Idea," 97(378) *African Affairs*, 1998**,** pp**.** 209-230.

88 Friedenfels R., *Social Change: An Anthropology*, New York: Gen Hall, Inc Publishers, 1998, pp. 58-59

89 Ibid.

90 See for example, Mutambo, A., "State Explains Why Tanzania was excluded from Oil Pipeline Talks," *Daily Nation* (Nairobi) 25 March 2016, available at <https://www.nation.co.ke/news/State-explains-why-Tanzania-was-excluded-from-oil-pipeline-talks/1056-3132806-f3uvqd/index.html> (accessed on 6 October 2019).

This has sometimes led to unhealthy cut-throat competition between the two countries for the few available business opportunities.[91] Thus, whereas the diplomatic relations between these countries is generally good, sometimes, the two States engage in unnecessary diplomatic tiffs as was recently witnessed when Tanzania Government officials briefly arrested and detained a Kenyan Government delegation led by the Energy Cabinet Secretary, Charles Keter, at Tanga.[92] This arose when both Tanzania and Kenya vied to partner with Uganda for the development of an oil pipeline to transport landlocked Uganda's oil from Hoima to a seaport for export.[93] Initially, Uganda had committed to have the pipeline developed in partnership with Kenya through the Lamu Port.[94]

However, Uganda later on shifted its commitment to Tanzania and had its oil exported through the Port of Tanga.[95] Whereas it could be argued that such little diplomatic disagreements cannot be entirely eliminated between any neighbouring countries, once in a while, it is however submitted that they

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91 Ibid.

92 Leftie, P. and Okwany, R., "Officials Recall 'Nasty' Treatment in Tanga," *Daily Nation* (Nairobi), 25 March 2016 available at <https://www.nation.co.ke/news/Officials-recall-nasty-treatment-in-Tanga/1056-3133026-yvkg9s/index.html> (accessed on 6 October 2019).

93 See for example, Namunane, B. and Mutambo, A., "Tanzania Seized Keter Passport in Tanga Port Tour," *Daily Nation* (Nairobi) 24 March 2016, available at <https://www.nation.co.ke/news/Keter-passport-seized-in-Tanga-trip/1056-3131404-14320h3z/index.html> (accessed on 6 October 2019).

94 The East African Team, "Pipeline: Tanzania Minister Says Uganda Chose Tanga Port," *The East African* (Nairobi), 23 April 2016 available at <https://www.theeastafrican.co.ke/news/Pipeline-Tanzania-minister-says-Uganda-chose-Tanga-port/2558-3173096-view-printVersion-ihu4fk/index.html> (accessed on 6 October 2019). See also, Omondi, D., "Uganda Snubs Kenya, Partners with Dar on Oil Pipeline Deal," *The Standard* (Nairobi), 3 March 2016, available at <https://www.standardmedia.co.ke/business/article/2000193662/uganda-snubs-kenya-partners-with-dar-on-oil-pipeline-deal> (accessed on 6 October 2019).

95 Ibid.

are detrimental to the process of harmonisation that is proposed herein. Thus, it is imperative for both countries to engage their diplomatic channels with openness, trust and forthrightness in order to enable them to break into new frontiers of cooperation and development for ease of harmonisation.

4.1.8 Balancing interests of equity vis-à-vis equality

Tanzania has a coastline measuring 1,400 kilometres long, with an EEZ of 242,000 km².[96] On its part, Kenya's coastline measures 640 kilometres long with an EEZ of 142,400 km².[97] These statistics therefore give the presumption that the volume of Tanzania's marine resources are much higher than Kenya's. This then raises the question of just how a harmonised framework on access to these resources would apportion resources, as well as the responsibility for their conservation, between both countries given differentiated volumes of resources.

Thus, it would be appropriate to set resource quotas that mainstream equitability in the access to the said resources. The necessity for equitable quotas derives from lessons from the EU's Common Fisheries Policy. This is because a major complaint against the CFP is the fact that it grants equal rights of access to EU States' EEZ without reference to the equitability.[98] UK citizens however hold the view that, owing to the UK's relatively larger EEZ than most of its EU neighbours, equal rights of access to the EU fishing fleet offers higher fishing advantages to the other EU States than the UK.[99]

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96 Christophe, B. and Damien, G., "Fisheries in the ESA-IO Region: Profile and Trends-Country Review 2014 for Tanzania," *Smart Fish*, 2014, p. 10.

97 FAO, "Fishery and Aquaculture Country Profiles: The Republic of Kenya for 2015," *FAO*. Available at <http://www.fao.org/fishery/facp/KEN/en> (accessed on 6 October 2019).

98 Institute for Government, *Common Fisheries Policy*, Institute for Government, 20 March 2018 and available at <https://www.instituteforgovernment.org.uk/explainers/common-fisheries-policy> (accessed on 6 October 2019).

99 Ibid.

Thus, if harmonisation, as proposed under this article, is to tick, it is important to have EAC Member States address and delicately balance the principles of equitability *vis-à-vis* equality in the access of living marine resources. This could be realised through prorated quotas, while taking into account their respective needs in addition to investments and capacity.

4.2 Viability of harmonisation

Harmonisation of laws substantially depends on the level of regional integration or cooperation. The existing legal frameworks for both Kenya and Tanzania have certain inherent problems that impede both countries' abilities to effectively conserve the said resources. Examples of such problems include jurisdictional overlaps of legal and institutional frameworks, weaker institutional capacities, and lower funding for marine research and conservation initiatives, etc. Therefore, for a cohesive regional approach towards effective conservation of the living marine resources, the foregoing problems need to be addressed.

Given the foregoing challenges, a most critical question for this article would then be that of whether harmonisation would be a viable alternative towards the enhancement of conservation of living marine resources, or not? The straight answer is a yes. However, implementation of harmonisation would require that both countries put into place certain safeguards to address the existing concerns and realities for both countries.

4.2.1 Lessons from the European Union (EU) cooperation experience in the conservation of living marine resources

Having examined the challenges that impede initiatives on conservation of living marine resources of the EEZs for both Kenya and Tanzania, and the inherent concerns that hamper harmonisation, it is now proposed that this section considers lessons on conservation of such resources from the EU. The choice of the EU is justified on two grounds. First, despite challenges

like the *Brexit,*[100] the EU still remains a very solid regional integration initiative which has withstood the test of time and from which the EAC could pick certain lessons on regional integration.[101] Secondly, the EU is the only regional bloc that has put into place a common regional policy that merges its Member States' EEZs into one common zone to be accessed and used by all its Member States. This has been achieved through the Common Fisheries Policy (CFP).

The CFP arrangement is specific to the conservation of living marine resources of the EU's EEZ. CFP's EEZ-specific conservation approach generally departs from other regional conservation initiatives such as those of the Economic Community of West African States (ECOWAS), i.e. ECOWAS Integrated Marine Strategy (EIMS), SADC's Protocol on Fisheries, Fisheries Programme, African Union's (AU's) Pan-African Fisheries and Aquaculture Policy Framework, or even AU'S 2050 Africa's Integrated Maritime Strategy (AIMS). The distinction between the CFP's approach and these other initiatives is that whereas the CFP is specific to the conservation of living marine resources of the EEZ, all these other regional initiatives are very general in nature and approach. This is because the other initiatives are concerned with the totality of conservation for living resources for all water bodies like lakes, oceans, rivers, etc. These initiatives look at conservation from the perspective of integrated wholes. The approach being examined under this article is the EEZ specific type that closely mirrors that of the CFP as compared to the integrated ones.

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100 Brexit is the acronym for British Exit, i.e. Britain's exit from the European Union bloc after the Britons voted in a referendum on 23rd June 2016 to exit the EU. See, for instance, Mueller, B., "What Is Brexit? A Simple Guide to Why It Matters and What Happens Next," *The New York Times* (New York) 13 December 2019, available at <https://www.nytimes.com/interactive/2019/world/europe/what-is-brexit.html> (accessed on 10 January 2020).

101 Anastasakis, O., "The Europeanization of the Balkans," XII (1), *Brown Journal of World Affairs*, Summer/Fall 2005.

4.2.2 The EU's Common Fisheries Policy

The CFP is a set of rules for the management of EU's fishing fleets and fish stocks.[102] It was necessitated by the realisation that EU's fish stocks were being fast-depleted hence the need for introduction of a management system to determine the conditions for access of the resources.[103] Functionally, the CFP grants all EU's fishing fleets equal access to the whole of the EU's EEZ.[104] It aims to ensure sustainability of the fisheries sector by delicately balancing the desire for maximisation of fishery catches with conservation of the available stocks.[105] However, despite CFP's efforts, sustainability still remains elusive due to overfishing and overcapacity.[106]

CFP has four key areas, namely; fisheries management, international policy and cooperation, market and trade policy, and funding.[107] Fisheries management deals with the responsibility of ensuring sustainable long-term viability of EU's fisheries stocks.[108] The international policy and cooperation works with non-EU States as well as other international organisations towards the management of shared fisheries between the EU and the non-EU States as well as international organisations such as Regional Fisheries Management Organisations.[109] Market and trade policy serves to create fair competition within the EU's fisheries market in addition to setting standards on EU's seafood products.[110] The funding provides financing to fishermen

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102 Institute for Government, *Common Fisheries Policy*, Institute for Government, 20 March 2018, available at <https://www.instituteforgovernment.org.uk/explainers/common-fisheries-policy> (accessed on 30 September 2019).

103 Ibid.

104 Ibid.

105 Ibid.

106 Wakefield J., "The Problem of Regulation in EU Fisheries," 15(3), *Environmental Law Review*, 2013, at p. 191.

107 Ibid.

108 Ibid.

109 Ibid.

110 Institute for Government, above.

for transition into more sustainable fishing.[111] The context of sustainable fishing is significant to the context of EEZ fishing within the East African region. Thus, the idea of a fund for sustainable fishing is one that, if adopted by both Kenya and Tanzania, could be of benefit to their EEZ marine fisheries.

The CFP pools together EU States' EEZs and considers them as one fishing area for the EU fishing fleet.[112] Essentially, CFP serves to have each of the EU States, ceding to the EU, their respective sovereign rights over their individual EEZs. It then employs a dichotomous mix of input and output control measures for the sustainable management of EU's fishery stocks within the EU's fishing area.[113] Some of the input controls employed by CFP include control over the type of vessels can access EU's fishing areas, setting limits over the length of time at sea or the number of vessels within a fleet which can be permitted to go out to sea at any given time, and regulating the gears and methods that fishermen may use while at sea.[114]

CFP employs various output controls which includes, for example, setting of the Total Allowable Catch.[115] TAC quotas are set annually by the EU's Agriculture and Fisheries Council from advice given by both international and EU bodies like the International Council on the Exploration of the Sea, and the Scientific, Technical and Economic Committee for Fisheries.[116] The CFP sets two main types of quotas.[117] The first type is the catch quota, i.e. the allocation of production rights that prescribe the maximum permissible

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111 Ibid.
112 Ibid.
113 Wakefield, above.
114 Ibid.
115 Ibid.
116 Ibid.
117 Valatin, G., "Quota Trading Systems in EU Fisheries," 9(3), *Review of European, Comparative & International Environmental Law*, 2000, at p. 296.

weight of fish which can be landed within a specific stock's TAC.[118] The second type is referred to either as effort or capacity controls. This is the allocation of input exploitation rights which specify the types of vessels that can participate in the fishing, the engine power, vessel tonnage, and even time at sea.[119]

Once annual fisheries quotas are agreed upon, each State then gets a percentage allocation of its quota out of its relative stability.[120] Relative stability is determined by factors like the respective State's historical catch and needs of its coastal communities who are traditionally dependent on fisheries.[121] Once every State receives its respective quota, it then sets quotas for their respective individual vessels.[122] Quotas shared with non-EU States are agreed upon either bilaterally or multilaterally between the EU and the respective States and or RFMOs.[123]

Even though the successes of CFP have been highly extolled, there are however certain criticisms against it. One of these is the allegation that it is a highly centralised system which operates in a top-down manner.[124] This criticism arises from the general feeling that the development of the CFP and its implementation were not adequately consultative among various stakeholders in the industry.[125] A second criticism is the contentious issue of equal access of EU vessels to UK's waters.[126] Proponents of this view argue that owing to the UK's relatively larger fishing zone, granting equal access to the EU fishing fleet offers higher fishing advantages to the other EU States

118 Ibid.
119 Ibid.
120 Institute for Government, above.
121 Ibid.
122 Valatin, above.
123 Ibid.
124 Institute for Government, above.
125 Ibid.
126 Ibid.

than the UK.[127] Thus, this criticism requires the EU to delicately balance equality of access, vis-à-vis equitability. A third criticism of the CFP is the view that it fails to protect EU's fish stocks.[128] This criticism is premised on the discovery that, between 2001 and 2006, quotas were often set above the scientific data.[129]

The CFP has often been considered to be a programme that is susceptible to international tragedy of commons given that the people who exploit the resources bear no responsibility for the sustainable use of the resources.[130] The CFP's predisposition towards international tragedy of the commons is attributed to the problem of nested Prisoner's Dilemma (PD).[131] The PD arises from the fact that under the CFP, each State has two choices in the enforcement of the Regulations. The first choice involves the indiscriminate enforcement of Regulations in order to ensure that every fisherman fully complies with their respective set quotas, without exception. Such an option would be prohibitively expensive for every State. Besides, no State may have the capacity to engage in such an expensive adventure.[132] The second choice for every State would involve selective enforcement of the Regulations, especially against its non-citizen fishermen. This would, however, be discriminatory and therefore invite sanctions from the Commission.[133]

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127 Ibid.

128 Ibid. See also Proutière-Maulion, G., "From Resource Conservation to Sustainability: An Assessment of Two Decades of the European Union's Common Fisheries Policy, *Ocean & Coastal Law Journal*, Volume 11, (2005-2006).

129 Valatin, above.

130 Wakefield, above, p. 191.

131 Payne D.C., "Policy-Making in Nested Institutions: Explaining the Conservation Failure of the EU's Common Fisheries Policy," 38(2), *Journal of Common Market Studies*, June 2000, pp. 303-324, p. 319.

132 Ibid.

133 Ibid.

However, each State has the flexibility to determine three things. First, is how much resources they would allocate for the enforcement of the Regulations. Secondly, they also set the targets to be met. Finally, they have the flexibility to determine the basic structure of the PD game.[134] Whereas the ideal situation would be met if each Member State indiscriminately enforced the Regulations, it is noteworthy that the incentive structures brought about by the principle of subsidiarity predispose States' decisions towards choosing sub-optimal enforcement strategies. A State which chooses to enforce the regulations indiscriminately stands the risk of having its fishermen losing the value of the foregone catch since fishermen from any other State where the regulations are not enforced as indiscriminately, may catch all of the fish that fishermen of the first State may not have taken.[135] The choice of sub-optimal enforcement strategies leads to poor state enforcement as well as the equal access principle that recreates PD incentive structures at the level of individual fishermen.[136]

Besides setting unsustainable quotas, environmentalists also criticise the fact that negotiations for quota allocations by the Agriculture and Fisheries Council were often shrouded in opaqueness.[137] Accusations of decisions being opaque simply raise the issue of adequacy or otherwise of citizen participation in decision-making process. The Commission has proposed to reform the CFP's unsustainable fishing through a raft of measures. The proposed measures involve further regulatory control of access in mandatory schemes of individual transferable rights, increased stakeholders' participation in the policy implementation at regional level, as well as the adoption of Maximum Sustainable Yield targets for extraction of the available fisheries resources.[138]

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134 Ibid.
135 Ibid.
136 Ibid.
137 See Valatin, above, p. 300.
138 Ibid.

The CFP's approach of pooling together the EEZs of various countries and then considering them as one fishing area is an idea which the EAC could borrow from. In this context, Kenya and Tanzania could cede their sovereign rights over their EEZs to the EAC which would then have it as a common fishing area for both countries. Like the EU, the EAC would then have the responsibility of setting the region's TACs, the MSYs, and the type of vessels that would be permitted to operate within the common fishing area. This measure, coupled with the ideas of a common funding mechanism as well as adequate enforcement measures, should help the EAC in enhancing sustainable fishing within the EEZs of both Kenya and Tanzania. This would have the ultimate benefit of improving conservation imperatives for the two countries' living marine resources.

5. CONCLUSION

This article has examined the viability of harmonisation of Kenya's and Tanzania's laws on the conservation of living marine resources. On the overall, while drawing certain useful lessons from EU's CFP, the article returns a positive verdict regarding the feasibility of this process. However, it has been noted that the process of harmonisation would not be a straight-jacket case. This is because the viability would substantially depend on the satisfaction of both countries regarding how their respective concerns would be addressed. Besides, it has also been noted that successful harmonisation would also require that both countries make adjustments in their laws so as to accommodate intended new legal and or institutional structures to aid towards a successful harmonisation for a more effective conservation of living and marine resources.