7. The "Commercial-Diplomatic" Third Bench

By 2015, the East African Court of Justice (EACJ) was most celebrated by scholars for its stand in protecting human rights in the region (Gathii 2010; 2013). As the previous chapter elucidated, the EACJ's second bench galvanised the court's intermediate authority[500] in human rights thanks to the pioneer bench's ground-breaking intervention in the *Katabazi* case. However, almost two decades later, the regional court remained largely underappreciated as a trade court, despite the East African Community's (EAC) three of four incremental significant stages of regional integration are overtly trade-based.[501]

The rest of the chapter explores why, despite the new bench's interest in painting itself with a new commercial brush, human rights breaches and the rule of law violations continued to populate the docket. It explores and explains the emergence of commercial litigation in the EACJ while centring the focal actors – judges and their allies. As the rest of the chapter explains, the judges were *intentional* and *purposeful* about shedding their image as a "human rights bench" in favour of a trade court. By illuminating why there is a dearth of trade cases 15 years into the court's existence, the chapter intends to explore why, despite the EAC's primary goal of trade and economic integration, it has not attracted significant trade-related disputes. Additionally, by underscoring the court's initial intervention in these cases and understanding the trend set from the commencement of commercial adjudication, the chapter sets the stage for appreciating the third bench's successful intervention in forging a commercial bench. It also broadly discusses other prominent cases, besides economic ones, that highlight the nature of judicial interventions in the third bench.

500 For a discussion on international court authority, see Alter, Helfer and Madsen (2016).

501 The EAC has established a Customs Union, a Common Market and is in the process of establishing a Monetary Union after which it will embark on establishing a political federation (see Chapter 4 for details on the EAC integration project).

7.1 Cooperative Solutions over Litigation

As James Gathii convincingly argues, business actors' aversion to antagonising governments through adversarial litigation, a post-colonial mistrust of the judicial system, and the lack of public awareness of legal norms continue to affect the court's role in promoting trade and economic links among the partner states (Gathii 2016b). As such, business actors have tended to resolve their business problems in other, less strenuous ways than litigation in the EACJ. The colonial origins of international law, their forceful imposition and their irrelevance to the previously colonised are well-documented (Gathii 2007; Caserta and Madsen 2016; Sanchez 2023). The fact that they are colonial remnants, disconnected from the everyday needs of local businesses, has affected their legitimacy and relevance, particularly for informal businesses. An overwhelming amount of EAC business happens in the informal sector – encompassing manufacturing, commerce, finance, and the mining sector – and most deals are orally sealed rather than contractually signed (Gathii 2016, 50). Thus, trade disputes among small and medium enterprises, especially in this sector, have not surfaced at the EACJ. The limited intervention is attributed to several factors, such as the lack of public awareness of the conceivable remedies for breaching regional economic obligations.

Most EAC citizens lack knowledge of the regional courts' underlying trade-integration mandates. Instead, they have relied upon customary modes of dispute settlement based on socially understood and accepted norms rather than formal legal business rules (Gathii 2016). In the same manner, even educated young lawyers across the EAC have favoured national laws over EAC law, which has had an opposing effect on the growth of EAC jurisprudence. Interviews with regional lawyers revealed that even those commercial lawyers who advise multinational corporations in the region tend to disregard regional trade rules as options for their clients.[502]

Additionally, business actors perceive the existence and persistence of non-tariff barriers (NTBs) as a "political challenge" which can best be solved through political engagements with the Council, whose decisions on integration processes are binding[503] on EAC actors (Gathii 2016b, 47). Therefore, it can make, propel, annul and push forward EAC agendas – even those that decide the future of economic integration, such as NTBs

502 Interview, Ugandan repeat Lawyer, October 20, 2021, Kampala, Uganda.

503 This applies to all EAC organs and institutions except the Summit, EALA and EACJ (Art. 16 EAC Treaty).

– because its decisions are binding on EAC states. Unlike the Council, whose authority is uncontested, the court has yet to establish its role as an equal stakeholder in the EAC integration agenda (East African Court of Justice 2018, 17). The apparent lack of appreciation, especially in economic integration, shadows the court.

Another layer is that large businesses in the EAC also refrain from dragging governments to the EACJ because governments are usually their clients, offering large procurement budgets and contracts, from which the businesses primarily benefit. Rather than create enmity through suing governments, business actors prefer to resolve the issues amicably through less formal channels. The aversion to antagonising governments could shed light on why there has been a dearth of cross-border trade cases over the court's lifespan.

7.2 Limited Jurisdiction

While the previous section explored possible reasons for a dearth of commercial litigation, this one turns to the deterrents that have steered litigants away from exploring the EACJ as a potential avenue of trade and commercial adjudication.

As of June 2023, only 16 trade-related cases had been filed compared to only four trade cases that had been filed at the EACJ ten years before.[504] Of the total number of trade-based cases that were litigated, 68.8 % were dismissed over limitations in the formal powers that the court possesses to entertain business cases. Table 10 provides a summary of all trade cases that were litigated in the EACJ over its lifespan. The first six cases (until 2014) were *all* dismissed due to a lack of jurisdiction or cause of action by the second bench, which could explain why business actors preferred national courts and continued to affect the number and success of trade-related cases in the EACJ.

504 By June 2013, only four trade cases out of sixty had been filed at the EACJ (Gathii 2016, 41).

Table 10: Commercial Cases (Third Bench)

Year filed	Case Name	Case content	Verdict in favour of	Reason for dismissal
2008	Modern Holdings (EA) Ltd v. Kenya Ports Authority and other	Loss of perishable goods	Dismissed	No jurisdiction
2010	Alcon International Limited v. Standard Chartered Bank of Uganda and other	Common Market dispute		No cause of action[505]
2011				
2013				
	Benoit Ndorimana v. The Attorney General (AG) of Burundi	Arbitrary arrest and business closure		
2014	Henry Kyarimpa v. AG of Uganda	Irregular procurement of construction project	Applicant (partially)	n/a
2016	Grands Lacs Supplier SARL & Others v. AG of Burundi	Unlawfully Seized goods (EAC Customs Union & Common Market)	Applicant	n/a
2017	Pontrilas Investments Ltd v. Central Bank of Kenya & Other	Monetary Union	Dismissed	No cause of action
2017	BAT Uganda v. AG of Uganda	EAC Customs Union Protocol (discriminatory excise duty)	Applicant	n/a
2018	Mironko Francois Xavier v. AG Of Rwanda	Refusal to pay debt of military equipment	Dismissed	No jurisdiction
	G & T Enterprise Trading Ltd v. AG of Burundi	Delays in the delivery of goods		Time barred

505 In Appeal No of 2011, the appeal was allowed, and the Ruling and Order of the First Instance Division (FID) were set aside. Furthermore, the FID was directed to specifically determine the merits of the Reference before the court. See https://www.eacj.org/wp-content/uploads/2019/03/Appeal-No.-2-of-2011-Alcon-International-Limited-Vs-The-Standard-Chartered-Bank-Ltd-Uganda-2-Others.pdf, 19.

2020	Chester House Ltd v. AG of Uganda	Flooding and resulting closure of business	Dismissed	Time barred
	Kioo Ltd v. AG of Kenya	EAC Customs Union Protocol (discriminatory excise duty)	Applicant	n/a
	Central Bank of Kenya & Other v. Pontrilas Investments Ltd	Monetary Union		
	Christopher Ayieko &Another v. AG of Kenya and another	Bilateral FTA with US		
2021	AG of Kenya v. Kioo Limited	Unlawfully Seized goods (EAC Customs Union & Common Market)	Dismissed	Overtaken by events

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

While the third bench only dismissed half of its trade-related caseload, owing to similar reasons, it also started like its predecessor, displaying limitations in the formal powers to grant orders requested by the business community. Most prominently, the third bench continued with a strict reading of time limitations set out by the second bench to dismiss these cases. However, with an increased caseload, the third bench dealt with even more commercial cases than ever before, starting on shaky ground but later finding its footing in business-oriented jurisprudence.

The EACJ has broad jurisdiction over the interpretation and application of the EAC Treaty[506] as well as arbitral jurisdiction in commercial contracts between private parties that come into agreement with EAC institutions and partner states.[507] Any EAC resident can initiate litigation, provided they file against a partner state or an institution of the EAC for breaching Treaty provisions.[508] Nonetheless, jurisdiction is deferred to an institution of a partner state if "a*n Act, regulation, directive, decision or action has been reserved*" under the Treaty to that institution.[509] Moreover, the EACJ was

506 Art. 27 (1) EAC Treaty.
507 Art. 32 (a) and (c) EAC Treaty. See the EACJ Rules of Arbitration 2012. Note that only partner states – not individuals – may refer disputes between themselves for arbitration by the EACJ (Art. 32 (b) EAC Treaty).
508 Art. 30 (1) EAC Treaty.
509 Art. 30 (3) EAC Treaty.

not given jurisdiction over the Customs Union[510] and Common Market[511] Protocols (Gathii 2013, 289) even though it was extended to include commercial, investment and trade matters arising under the EAC's Monetary Union treaty (Gathii 2016, 40).[512] EAC partner states intended for national courts to play an essential role in the Common Market and to reserve the enforcement of this Protocol at the national level, thereby limiting the EACJ's jurisdiction by giving original jurisdiction over the Common Market Protocol to national courts.[513] As a case before the court confirmed, the dispute settlement mechanisms provided for in both the Customs Union and Common Market Protocols indeed "*limit/deny the jurisdiction to the EACJ by transferring matters reserved for the EACJ under the Treaty to Partner State institutions and organs.*"[514] Judges agreed that the EACJ had broad jurisdiction before these amendments and that the amendments excluded the EACJ, where partner state organs take precedence on specific issues, albeit vaguely stating what those "organs" are.

Moreover, in *Eric Kabalisa Makala,*[515] the court clarified the three aspects in which a party can claim a lack of jurisdiction. Firstly, the party must demonstrate the absence of *ratione personae/locus standi,* which refers to jurisdiction on account of the person concerned.[516] In the EACJ, only the East African Community (and its organs), partner states and parastatals can be sued in court. Other entities will not be entertained and, as such, have been grounds for dismissal of commercial disputes. In the case of *Modern Holdings (EA) Ltd v Kenya Ports Authority*[517]*,* filed by a Tanzanian

510 Protocol on EAC Customs Union (2005).

511 The Common Market Protocol (2010) gave a quasi-administrative agency the power to determine any disputes under the Protocol. Original jurisdiction over the Common Market Protocol was given to national courts in Article 54 (2) EAC Common Market Protocol.

512 See Protocol on the Establishment of the East African Community Monetary Union 2013.

513 Art. 27 (1) EAC Treaty & Article 54 (2) EAC Common Market Protocol.

514 *The East African Center for Trade Policy and Law vs Secretary General of the EAC*, Reference Number 9 of 2012. Page 7. https://www.eacj.org//wp-content/uploads/2013/09/FI_EACommunity-EACTPL.pdf.

515 *Eric Kabalisa Makala vs. Attorney General of Rwanda.* Reference No, 1 of 2017. June 18, 2020. https://africanlii.org/akn/aa-au/judgment/eacj/2020/23/eng@2020-06-18. Hereafter *Makala*.

516 To be sued, an entity ought to be either a Partner State or an Institution of the EAC with legal persona before the court under Article 30 (1) of the Treaty (*Makala*, 7).

517 *Modern Holdings (EA) Ltd v Kenya Ports Authority,* Reference No. 1 of 2008. http://eacj.org/wp-content/uploads/ 2012/11/no-1-of-2008.pdf.

company, the company sought EACJ's intervention after it incurred losses in revenue following the Respondent's failure to clear its perishable goods from its warehouses promptly.[518] The EACJ dismissed the case for lack of jurisdiction as the Respondent was neither a partner state nor a Community organ.[519] In this case, the applicant did not have jurisdiction on account of the person concerned.

Similar reasoning was given in *Alcon International v Standard Chartered Bank & Others*.[520] In this case, a Kenyan company sued a Ugandan corporation (Standard Chartered Bank), the Ugandan government and the National Social Security Fund (NSSF), alleging contravention of the protections of cross-border investment under the EAC's Common Market Protocol.[521] Standard Chartered Bank was meant to award a guarantee, made on behalf of the NSSF, to Alcon International, which had not been paid. The trial court dismissed the case, citing a lack of jurisdiction, as the bank was not a member state of the EAC.In contrast, the case against Uganda was dismissed based on a lack of cause of action.[522]

The lack of cause of action falls in the second limb of a claim for lack of jurisdiction *ratione materiae*.[523] A party must illustrate jurisdiction on account of the matter involved. Precisely, the issue raised or the matter complained of must constitute an infringement of the EAC Treaty.[524] For instance, in *Benoit Ndorimana v. Attorney General of Burundi*,[525] the applicant contested his imprisonment, the closure of his business, and the

518 Ibid., 3.
519 Ibid., 11.
520 *Alcon International Ltd. vs. The Standard Chartered Bank of Uganda and others*, Reference No. 6 of 2010. August 23, 2011. http://eacj.org/wp-content/uploads/2012/11/Alcon-International-2010-6judgment-2011.pdf.
521 Under Art. 54 (2) of the EAC Common Market Protocol.
522 *Alcon International Ltd,* 13, 14. It was later appealed (in 2013) and dismissed again on the same grounds. The EACJ Appellate Division held, among other things, that commercial disputes brought by a commercial entity against a Partner State to enforce the EAC Common Market Protocol could only be heard by national courts under Art. 54 (2) EAC Common Market Protocol.
523 This second limb of "lack of jurisdiction" points towards the grounds on which a matter may be presented to the court for intervention (*Makala*, 8).
524 The duty of the EACJ is specified as ensuring "adherence to law in the interpretation and application of and compliance with" the EAC Treaty (Art. 27 (1) EAC Treaty).
525 *Benoit Ndorimana v. Attorney General of Burundi*, Reference No. 2 of 2013. November 28, 2014**.** https://www.eacj.org//wp-content/uploads/2014/11/REFERENCE-NO-2-OF-2013-BENOIT-NDORIMANA-28-NOVEMBER-2014.pdf.

resultant losses, seeking damages.[526] However, this case was dismissed due to a lack of cause of action as the court argued that "although the Applicant does have locus standi as he need not exhaust local remedies before coming to this court, his Reference did not disclose a cause of action."[527] The court defines cause of action as "a set of facts or circumstances that in law give rise to a right to sue or to take out an action in court for redress or remedy."[528] Thus, the applicant must have a legal basis to approach the bench.

This limitation led to the dismissal of *Henry Kyarimpa vs Attorney General of Uganda,*[529] in which the Ugandan government was sued over its irregular procurement of the construction of a hydroelectric power project. This case, too, was dismissed whilst upholding the sovereignty of the Ugandan state, saying, "*It is not the role of this Court to superintend the Republic of Uganda in its executive or other functions*."[530] This reasoning was carried forward in *Pontrilas Investments vs Central Bank of Kenya and other,*[531] as well as *Mironko Francois Xavier vs Attorney General of Rwanda* cases,[532] which were dismissed on the grounds of lack of jurisdiction.

Finally, the third limb for lack of jurisdiction is *ratione temporis* (the time element).[533] The strict time limitations were already enforced by the second bench and were carried on to the third bench. As already clarified, Treaty amendments following the *Nyong'o* backlash imposed time restrictions on litigants – cases ought to be filed within 60 days after the occurrence; otherwise, they are time-barred.[534] The bench's strict reading of time limitations

526 Ibid., 3.
527 Ibid., 12.
528 Ibid., 12.
529 *Henry Kyarimpa vs Attorney General of Uganda*, Reference No. 4 of 2013. November 28, 2014. https://www.eacj.org/wp-content/uploads/2016/03/Judgement-Ref.-No.4-of-2013.pdf/.
530 Ibid., 21. However, when the decision was appealed, the Applicant won the case. See *Henry Kyarimpa vs Attorney General of Uganda*, Appeal No. 6 of 2014. February 19, 2016. https://www.eacj.org/wp-content/uploads/2023/08/Appeal-No.-6-of-2014-Henry-Kyarimpa-vs-the-Attorney-General-of-the-Republic-of-Uganda-1.pdf.
531 *Pontrilas Investments vs Central Bank of Kenya and other,* Reference No. 8 of 2017. July 4, 2019. https://www.eacj.org/wp-content/uploads/2019/07/Ref.-No.8-of-2017.pdf.
532 *Mironko Francois Xavier vs Attorney General of Rwanda*, Reference No. 11 of 2018. April 6, 2022. https://media.africanlii.org/files/judgments/eacj/2022/1/2022-eacj-1.pdf.
533 *Makal*a, 6.
534 Art. 30 (2) EAC Treaty.

continued when the Rwandan company *G & T Enterprises*[535] dragged Burundi to the EACJ, aggrieved by losses due to the delays in the delivery of goods. While the court claimed its jurisdiction in the matter,[536] it resolved that the matter was time-barred, dismissing it entirely.[537] In another case, *Chester House Ltd vs Attorney General of Uganda and others,* a Kenyan Eco lodge sued Eskom Uganda Limited over flooding at the shores of Lake Victoria, which resulted in excessive damages and business closure.[538] The FID did not continue with the matter, citing time limitations. These two cases exemplify the hindrance that the two-month statute of limitations creates for litigation of commercial cases in the EACJ. In sum, the first set of commercial disputes was discouraging trade integration. Until 2016, the first cases had all been dismissed on procedural grounds -jurisdiction, cause of action and time limitations – which derailed business actors and had chilling effects on the court's role in the Community's economic transformation.

7.3 Finding its Voice in Economic Jurisprudence

While the previous cases painted a gloomy picture of the state of EACJ intervention in trade disputes, recent EACJ jurisprudence offers a more encouraging outlook on the court's role and potential in pushing forward economic integration. The third bench developed a more positive trend in handling business and trade-related matters.

Starting with the case of *Christopher Ayieko and Another vs Attorney General of Kenya and Another*,[539] two Kenyan advocates sued the government of Kenya over its alleged negotiations of a bilateral Free Trade Agreement (FTA) with the United States of America (USA). The applicants accused Kenya of jeopardising the EAC's common negotiation position

535 *G & T Enterprise Trading Ltd vs Attorney General of Burundi*, Reference No. 3 of 2018. October 8, 2021. https://africanlii.org/akn/aa-au/judgment/eacj/2021/9/eng@2021-10-08.

536 Ibid., 13.

537 Ibid., 24–25.

538 *Chester House Ltd vs Attorney General of Uganda and others*, Application N0. 18 of 2020. December 16, 2020. https://africanlii.org/akn/aa-au/judgment/eacj/2020/1/eng@2020-12-16.

539 *Christopher Ayieko and Another vs Attorney General of Kenya and another*, Reference No. 5 of 2020. December 2, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/35/eng@2022-12-02.

with the USA, failing to notify other EAC states of the pending deal, and requesting that the Council coordinate trade relations with the third parties.[540] The EACJ ruled that it had jurisdiction to entertain the case,[541] and that Kenya's intention to enter into an FTA without involving other EAC states violated the Customs Union Protocol.[542] In addition, it ruled that the EAC Secretary General ought to have raised the issue with the Council, alerting the Community to the intended violation of Treaty negotiations. The court was not sympathetic to the Secretary General's excuse of having written a letter to which there was no reply and pronounced that he had undeniably abdicated his obligations to uphold the EAC Customs Union and Common Market Protocols.[543] Not only did the court apprehend a partner state for disrupting the Community's shared vision of economic integration, but it also sent a message to the EAC executive heads to pay attention to similar violations and intervene accordingly.

7.3.1 Beyond Declaratory Orders

Another thorny aspect has been the court's hesitation in awarding monetary compensation, proving a deterrent for commercial litigators from approaching the EACJ (Ssemmanda 2018, 231–32). EACJ judges have delicately considered the orders they issue, preferring declaratory orders over mandatory orders to limit backlash and ensure that enforcement is feasible. Judges also carefully consider the types of remedies they issue, taking into account the fragile political environments in which they operate. Especially in deciding human rights claims in the EACJ over which the court does not have an express mandate, judges have issued declaratory judgments rather than mandatory ones to achieve two things. Rather than dismissing the cases altogether, judges encourage litigants to pursue human rights litigation and grant them legal avenues to judicialise obvious political questions (Ebobrah and Lando 2020). Secondly, this strategy avoids confrontation with authoritarian governments, which are easily threatened by the language of human rights. As the previous chapter highlighted, the Appellate Division has taken a more careful stance in adjudicating highly sensitive decisions, drawing on the strict interpretation of the two-month rule and

540 Ibid., 5.
541 Ibid., 15.
542 Ibid., 23.
543 Ibid., 32.

the non-declaration of the official human rights jurisdiction to engage in legal diplomacy.

Scholars have pointed to the EACJ's strategic issuance of declaratory rather than mandatory orders – usually at the litigants' request- leaving states with the option to ignore the orders instead of requiring compliance and implementation (Ebobrah and Lando 2020, 187). This approach has been lauded as a self-preservation strategy which restricts "direct confrontation" with partner states while rendering the necessary judgements and still maneuvering and challenging apparent obstacles to the rule of law (Ibid, 188). However, repeat players at the EACJ are challenging the court to move beyond issuing declaratory judgments to something *tangible* as a means of accountability towards partner states' violations of EAC commitments. A former CEO of the EALS and repeat litigant confirmed in an interview that judicial decisions in the EACJ must "have consequences" for partner states that fail to adhere to the rule of law, accountability and good governance, rather than issuing mere declarations:

> "Declarations must be followed by tangible consequences. That is what we are asking the court. A declaration is not enforcement. So, beyond declaring a violation, the court must exercise its second limb of jurisdiction, enforcement. Enforcement must be something real; it has to be something that can make the Partner States open their eyes and realise that it is not business as usual. If you declare a violation, stop there, or order meagre damages that do not act as deterrents against future violations, then you are underutilising the court. As to how many awards it can give, we, the practitioners, should shape the jurisprudence of the court in that area."[544]

This repeat player recognises the inescapable role that judicial allies ought to play – pushing the court to assert its authoritative position in regional integration processes. While they acknowledge the political realities that may hinder the judges from issuing mandatory orders in some instances, they see the potential in emboldening the court to exercise its mandate.

This concern was put to rest in *Margaret Zziwa v Secretary General of the East African Community,*[545] where the court awarded the former EALA

544 Interview, Former CEO of EALS, March 29, 2022, Nairobi, Kenya.

545 *Hon. Dr. Margaret Zziwa v Secretary General of the East African Community,* Appeal No. 2 of 2017. May 25, 2018. https://www.eacj.org/wp-content/uploads/2019/03/Appeal-No.-2-of-2017-Hon.-Dr.-Margaret-Zziwa-vs-The-Secretary-General-of-the-East-African-Community.pdf.

Speaker monetary damages for unlawful impeachment. When Honourable Margaret Zziwa was removed as EALA Speaker, her lawyers asked the court to reinstate her and compensate her for the salary that she had lost, among other damages. The First Instance Division (FID) merely declared the actions of her removal to be unlawful but did not grant her request for reinstatement.[546] The Appellate Division (AD) reversed that decision and set the stage for the issuance of compensatory damages.[547] This case marked the start of the court's issuance of mandatory pecuniary orders. It was often cited in interviews as an indication of the lawyers' success in persuading the court to do away with mere declarations. An interview with the litigating lawyer on the *Zziwa case* illustrates their efforts to push the court beyond declaratory judgments, which made this shift happen.[548]

Likewise, as witnessed in the commercial dispute, *Grands Lacs Supplier SARL & Others vs Attorney General of Burundi*,[549] the EACJ third bench dared to award pecuniary damages rather than mere declarations. In this instance, a Ugandan company sought compensatory damages against the Burundian government for having illegally seized its goods and preventing the free movement of goods within the EAC. The applicants had sought USD 218,849 in compensation for losses incurred in truck hire, profits and investments, as well as earnings. They were awarded USD 20,000 as the court could not assess the said damages, but rather issued general damages as it saw fit.[550] The court not only declared that Burundi had contravened the East African Community Customs Management Act of 2004 and thereby breached Treaty regulations, but it also issued monetary rewards to the applicant.[551] This trend continued in another landmark ruling, *British*

546 *Hon. Dr. Margaret Zziwa v Secretary General of the East African Community,* Reference No. 17 of 2014. February 3, 2017. https://www.eacj.org/wp-content/uploads/2019/03/REFERENCE-NO.-17-OF-2014.pdf.

547 *Appeal No. 2 of 2017*, 51.

548 "So, when we went to the Appellate Division, we told them, "You see, you have the power to apply. How do you tell me that you have no power to tell somebody to do ABC?" And they picked it up. I think that started the era of the court to stop saying that we can only make declarations, and we stop there. Because now they can say, "go and be compensated this amount of money" (Interview, Lawyer03, October 11, 2021, Kampala).

549 *Grands Lacs Supplier SARL & Others vs Attorney General of Burundi*, Reference No. 6 of 2016. June 19, 2018. https://new.africanlii.org/na/judgment/east-african-court-justice/2018/129.

550 Ibid., 29–36.

551 Ibid., 35.

American Tobacco (BAT) Uganda Ltd v Attorney General of Uganda,[552] the implications of which will be briefly discussed in the following section.

7.3.2 The BAT case: Pushback against a Trendsetter

BAT Uganda Limited filed a case before the EACJ challenging the legality of the Excise Duty Amendment Act (No 11 of 2017), which introduced designated differential excise duty rates for locally (in Uganda) manufactured goods versus imported products (in this case, Kenyan cigarettes). A brief background to the case highlights that categorising Kenyan products as 'foreign' defeats the purpose of the EAC Treaty, the EAC Customs Union, and the Common Market Protocols.

BAT was incorporated in Uganda to manufacture and deal with tobacco and tobacco products that are domiciled in Uganda.[553] Years later, BAT restructured its business operations to have its sister company in neighbouring Kenya (British American Tobacco Kenya Limited) manufacture and supply it with cigarettes for sale on the Uganda market.[554] It is important to note that the company is located in two countries that are both members and signatories to the EAC Treaty, the EAC Customs Union Protocol, and the EAC Common Market Protocol.[555] Accordingly, Uganda's Excise Duty Act No. 11 of 2014 made provisions for an excise duty that uniformly applied to all goods originating from any of the EAC partner states, including the cigarettes in question. However, in 2017, the Act was amended, and Uganda introduced the Excise Duty (Amendment) Bill No. 6 of 2017, which created a distinction between locally manufactured goods in Uganda and imported goods.[556] Thus, a higher duty was imposed on imported goods; hence, all BAT tobacco products manufactured outside of Uganda were subsequently reclassified as goods from a foreign country, as they originated from Kenya, and were subject to the applicable excise duty.[557]

552 *British American Tobacco (U) Ltd v Attorney General of Uganda*, Reference No. 7 of 2017. March 26, 2019. https://www.eacj.org//wp-content/uploads/2019/03/Reference-No.-7-of-2017-British-American-Tobacco-U-Ltf-vs-the-Attroney-General-o-fthe-Republic-of-Uganda.pdf.
553 Ibid., 2.
554 Ibid., 2.
555 Ibid., 2.
556 Ibid., 3. The Excise Duty (Amendment) Act was enacted in July 2017.
557 Ibid., 3.

Consequently, BAT filed this case, claiming that the differential treatment of the excise duty applicable to goods originating from Uganda, as opposed to like goods from elsewhere in the region, was discriminatory and a violation of the EAC Customs Union and the Common Market Protocols for the establishment of the East African Community.[558] By imposing this discriminatory tax, Uganda was, in essence, going against its commitment to free movement and equal treatment of goods from all EAC partner states.[559] BAT further argued that the enactment of this Act posed a threat to its business operations and thus sought a declaration that the Act violated the EAC Customs Union and Common Market Protocols and an order directing the respondent state to take immediate action to prevent such violations.

Uganda, on the other hand, argued that rather than being discriminatory, it merely sought to "promote the growth of local industries, encourage more companies to invest in Uganda and promote the consumption of locally manufactured cigarettes."[560] Additionally, the respondent state contended that the impugned law was "passed in good faith" and was meant to benefit Uganda and the EAC as a whole, and accordingly sought to have the reference dismissed with costs.[561]

In its interim ruling, the First Instance Division granted an interim injunction to BAT, prohibiting the government of Uganda and the Uganda Revenue Authority (URA) from collecting excise duty due to discriminatory rates, pending the hearing and determination of the case. In a first-of-its-kind judgement, the EACJ, rather than issuing declaratory orders as it usually did, directly ordered a partner state to pay costs and abstain from interfering in free trade in the region. The court categorically declared a violation of the EAC Treaty and its objectives. It held that the URA misconstrued the term 'import' as Kenya, which is a partner state of the EAC, belongs to "a single economic area characterised by the free movement of goods" as per the Customs Union Protocol and thus goods produced in Kenya should not be treated as imports.[562] The court went ahead to

558 Ibid., 4. The Applicant contended that the Act infringes Art. 6 (d) and (e), 7(1) (c), 75 (1), (4) and (6) and 80 (1) (f) of the EAC Treaty; Art. 15 (1) and (2) of the EAC Customs Union Protocol, as well as Art. 4, 5, 6 and 32 of the EAC Common Market Protocol.

559 Art. 15 EAC Customs Union Protocol.

560 Ibid., 7.

561 Ibid., 7.

562 Ibid., 19.

emphasise that "it is manifestly clear that the intention of the framers of the EAC Treaty and Customs Union Protocol was to establish the Community as a single economic area characterised by the free movement of goods, and in which goods from any of the partner states were not treated as imports."[563]

The BAT case was the first case in the history of the EACJ to address an international economic trade dispute, especially one touching on internal taxation of goods under the Common Market and Customs Union Protocols. It has been dubbed "a significant milestone in the process of judicialisation of trade, business and commercial disputes" in the EAC as the case was filed by a "multinational company with great economic and political muscle internationally" (Mbori 2020, 344). Without going into the legal merits of the case, it suffices to note that by granting mandatory orders, as opposed to the usual declaratory orders, the court broadened its remedial powers. Upon issuing the ruling, it was mostly well-received by the legal complex and scholars alike (Mbori 2020). However, the Ugandan government was not pleased with the verdict, as the Registrar at the time recalls:

> "In the BAT case, the Ugandan Speaker indeed attacked them and said, 'This *ka* small court there. Why is it issuing such decisions? Are they trying to bite the hand that feeds them?' Interestingly, she (*Ugandan Speaker*) later then became the Minister for EAC affairs. So, the same person who criticised the court ended up becoming EAC Minister! The court has merely been at the periphery of the EAC institutions."[564]

Uganda did not instigate a backlash but chose a subtler pushback. The speaker of Parliament at the time, Rebecca Kadaga, is quoted as having questioned the legitimacy of the Arusha-based court. Her words were meant to have a chilling effect on the court's newly exercised economic jurisdiction and to undermine its impact on regional trade intervention. A presiding judge on the case noted that she was not personally attacked but was made aware of the Ugandan Speaker's discontent, which she believed was merely a case of *sour grapes.* Interestingly, when a similar case arose, when Kenya was allegedly blocking the importation of Uganda's dairy products, Kadaga "called on Ugandan citizens to sue the Kenyan

563 Ibid., 20.
564 Interview, EACJ Former Registrar, October 1, 2021, Kampala, Uganda.

government for unfair trade practices that infringe on the treaty of the East African cooperation."[565]

Despite the pushback from Uganda upon the issuance of the BAT case, litigants had already picked up on the potential of utilising the EACJ as an avenue for adjudicating cross-border disputes. As a former EACJ judge recalls:

> "My feeling is that the decision of the BAT case opened the door for direct trade disputes. By the time I left last year (*2020*), we had a case where Kenya was imposing differential taxes on Tanzanian goods. In BAT, it was Uganda doing that to Kenyan cigarettes. So, my sense was that BAT redirected the discussion in a certain direction. And I believe it's going to open up more trade-related issues. If there are projects in the works, it was informed by the BAT decision because it was very well received across the board. Everybody agreed that this was the core function of the court: to direct regional trade. I think going forward, arbitration should be encouraged because even in the BAT case – that's public international trade law – when it comes to the private rights of citizens, they might want to explore arbitration instead of litigation."[566]

The judge referred to *Kioo Limited (TZ) v Attorney General of Kenya*,[567] which closely resembles the BAT Case. In *Kioo*, a Tanzanian glass manufacturing company sought orders against Kenya, aggrieved by the latter's discriminatory excise duty levied on the former's imported glass bottles. The EACJ granted the interim orders pertaining to the Customs Union and Common Market Protocols in this case and took a firm stance in protecting the applicant's business operations. Unlike the usual cases where EAC residents and companies file against their partner states, this case was the first of its kind, where a resident of one EAC partner state (in this case, Tanzania) sought orders against another State (Kenya). Remarkably, the Kenyan government responded swiftly and affirmatively, amending the law in response to the impugned Act.[568]

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565 Kabimba. 2021. "Speaker Kadaga has called on Ugandan citizens to sue the Kenyan government." *Sanyu FM News,* February 11. https://sanyufm.com/speaker-kadaga-has-called-on-ugandan-citizens-to-sue-the-kenyan-government/.

566 Interview, Third bench judge, September 29, 2021, Kampala, Uganda.

567 *Kioo Limited (TZ) v Attorney General of Kenya*, Application 9 of 2020. November 27, 2020. https://www.eacj.org/wp-content/uploads/2020/11/RULING.pdf.

568 Following the ruling, the Kenyan National Assembly proposed the introduction of a proviso to the Excise Duty Act 2015 – to the effect that glass bottles imported from any of the countries within the EAC would not be subjected to the 25 % excise tax

A presentation from the litigating lawyer on the case confirmed the influence of the success of the BAT case as the inspiration for litigating in *Kioo* (Macharia-Okaalo 2021). It is, thus, an indication that other industries and business actors may acknowledge the regional court as an additional avenue for dealing with member state violations of the trade liberalisation obligations under the EAC Treaty.

7.3.3 The Emergence of Silent Compliance

A study conducted by the East Africa Law Society (EALS) on compliance with court decisions found that, as of June 2018, without considering the declaratory orders, 47% of the total number of cases that required implementation had been successfully enforced (Amol and Sigano 2019, 12). This study also confirmed that partner states mostly implemented orders of a pecuniary nature, favouring payments over "taking substantive steps to remedy situations for instances where there is a violation of human rights or the rule of law" (ibid., 13). This finding confirms what we already know, that non-compliant states go through various stages before they can achieve the desired behavioural change and compliance with international standards of human rights (Risse et al. 1999). Risse and colleagues presented five distinct phases – repression, denial, tactical concessions, prescriptive status and rule-consistent behaviour – which these states go through before any sustainable change can be observed (Ibid.). In the tactical concessions phase, "repressive states" use tactical concessions in order to get the international human rights community 'off their backs'" (Risse et al 2013, 6). Rather than commit fully to international norms, governments engage in "low-cost" concessions to save their image in the international sphere. Paying monetary compensation may be easier than changing repressive laws, for instance, and this is the type of tactical concession of which previous research speaks (Ibid).

My research adds to the debate by introducing the concept of silent compliance. In developing the concept of silent compliance, this study acknowledges that it remains difficult to empirically determine causal linkages between state behaviour and international court rulings (Hillebrecht 2009, 2014; Huneeus 2013; Abebe 2016). Moreover, compliance should be understood as an *outcome* of the implementation *process* (Biegon 2022,

– and the proposal was approved and introduced in the Finance Act 2021, which commenced on 1 July 2021 (Macharia-Okaalo 2021).

415). Implementation, therefore, may result in partial or full compliance with international rulings or compliance may even "be realised independently of implementation" (Ibid.). Biegon goes on to introduce the concept of situational or coincidental compliance, but limits it to a "result of sheer coincidence, change in circumstances or another neutral factor, and not the deliberate action of the concerned government" (Ibid.) In my understanding of silent compliance, governments *take deliberate action* and *move beyond the performative aspects of compliance* (which would also be classified as tactical concessions). Thus, silent compliance differs from tactical concessions and situational compliance in that it is not only performative, low cost or an extraversion tactic.

To illustrate what silent compliance is, I draw on the case of *Kioo Limited v Attorney General of Kenya*.[569] A Tanzanian glass bottle company, Kioo Limited, opposed the imposition of a 25% excise duty on its glass products that were entering Kenya. The court granted interim orders prohibiting the collection of excise duties on glass products from Tanzania pending the determination of the case. Subsequently, the matter of excise duty was debated in the Kenyan parliament, and provisions on excise duty were removed from the 2021 Finance Act before the law was enacted. In the Finance Act 2021, the importation of glass bottles was exempted from excise duty.[570] Thus, the Republic of Kenya complied with the court's ruling, engaging in a legislative review without much uproar and thereby contributing toward inter-state trade and harmonising taxation regimes.

In this case, the Republic of Kenya complied with the court's ruling, engaging in a legislative review and contributing toward inter-state trade and harmonising taxation regimes. Drawing on this incident, several interviewees (both judges and lawyers) highlighted that while it may appear that governments merely ignore the rulings of the court, they comply more than has been reported through what one judge implied as "silent compliance." According to this judge:

> "You know, the partner states, they comply but do not talk! So now Kenya has complied, but they comply silently. This is how governments operate. They comply but quietly" (Interview, EACJ Judge, November 9, 2021, Bujumbura, Burundi)

569 *Kioo Limited (TZ) v Attorney General of Kenya*, *supra* note 567.

570 The Kenyan Finance Act 2021 was gazetted on 30 June 2021. See "Exemption of glass bottles to excise duty." https://ronalds.co.ke/finance-act-2021/.

For this judge, governments tend to comply without being elaborate about it, opting for silent implementation rather than ignoring them completely. And yet, non-compliance has persisted in the literature despite silent compliance, which usually goes unnoticed in the media and scholarship.

A similar observation can be made in *Burundi Journalists Union v The Attorney General of the Republic of Burundi*,[571] where Civil Society Organisations challenged Burundi's 2013 Press Law, arguing that it restricts freedom of the press and violates the right to freedom of expression, which, in effect, violates EAC Principles.[572] The court found that Articles 19 (b) (g) (i) and (j) of Burundian Law No 1/11 of June 2013 violated the EAC Treaty.[573] Consequently, in March 2015, Burundi's national assembly approved a draft media law that would revise its restrictive Press law.[574] Likewise, in the case of *AG Tanzania v African Network for Animal Welfare,*[575] where the government of Tanzania complied with a permanent injunction that barred it from constructing a bitumen road in the Serengeti National Park. The EACJ argued that the construction of this road would have a negative impact on the environment and, therefore, infringe upon EAC Treaty provisions.[576] Experts described the move as "audacious because, as a regional court, it was exercising authority to essentially reverse the decision of a sovereign government to build a road within its own borders" (Gathii 2016a, 397). The fact that Tanzania complied and is only revisiting the idea upon seeking permission from UNESCO in 2024[577] is an indication that it heeded the court's ruling at the time.

From the two examples above, we see the member states silently complying. In Burundi, a draft media law that would revise its restrictive Press law

571 *Burundi Journalists Union v the Attorney General of Burundi and others.* Reference No 7 of 2013. May 15, 2015. https://ealaw.eastafricalaw.org/wp-content/uploads/2021/02/BURUNDI-JOURNALISTS-UNION-v.-THE-ATTORNEY-GENERAL-OF-THE-REPUBLIC-OF-BURUNDI.pdf.

572 Ibid., 3.

573 Ibid., 42.

574 Nduwimana Patrick. 2015. "Burundi lawmakers pass media bill to expand press freedoms." https://www.reuters.com/article/ozatp-uk-burundi-politics-press-idAFKBN0M11RA20150305/.

575 *African Network for Animal Welfare (ANAW) v. The Attorney General of the United Republic of Tanzania,* Reference No. 9 of 2010. June 20, 2014. https://www.eacj.org//wp-content/uploads/2014/06/Judgement-Ref.-No.9-of-2010-Final.pdf.

576 See Gathii 2016 for a brilliant discussion of the history and significance of this case.

577 "Tanzania seeks UNESCO permission to upgrade roads in Serengeti." *The Citizen*, March 11, 2024. https://www.thecitizen.co.tz/tanzania/news/national/tanzania-seeks-unesco-permission-to-upgrade-roads-in-serengeti-4551854.

was approved, whereas in Tanzania, the government seemed to respect the decision not to build a road across the Serengeti. Tanzania simply delayed action until further notice, but has gone ahead and displaced indigenous occupants of the same land, a case that was also brought before the EACJ. The government of Tanzania claimed that these communities occupied the Serengeti National Park and began violently evicting them from their homes.[578] This kind of compliance appears strategic and performative, aimed at maintaining international legitimacy for countries that intend to show their respect for international legal regimes, even if for a short time. Be that as it may, I hesitate to sweep the "small wins" of the court under the rug by simply calling it an extraversion tactic or a "tactical concession" (Risse et al. 2013, 6). Moreover, it differs in the sense that EAC governments have not only engaged in "low cost" concessions but have also responded by partaking in 'high cost' transactions, as in the case of Kioo discussed above.

Nevertheless, beyond the problems with compliance and the need for organised mobilisation to deepen the implementation of the court's rulings, the EACJ should be appreciated for its broader contribution to the regional integration agenda rather than its constraints in compliance. As one repeat litigant emphasised in an interview, it is the litigating lawyers' responsibility to follow up on the implementation of the case and to find a working solution to the implementation dilemma – including going the extra mile to suggest solutions to the partner states' representatives. Together with judicial allies, especially the East African Law Society (EALS) and the Pan African Lawyers' Union (PALU), court staff have embarked on mobilisation efforts to influence compliance with judicial rulings in the EAC.

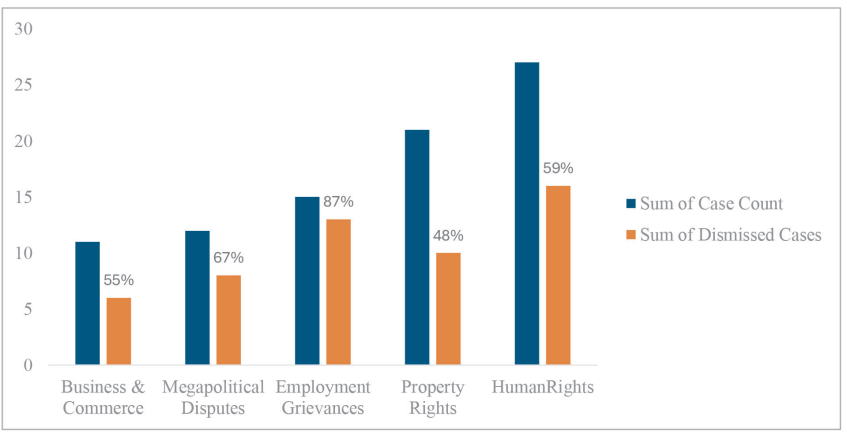
In conclusion, the EACJ has evolved in handling trade-related matters in the region. Recent EACJ jurisprudence offers a more encouraging outlook on the court's role and potential in advancing economic integration. The court has emerged from a very formalistic legal interpretation and from throwing cases out on technicalities to engaging with cases on their merits, daring to issue monetary damages, and issuing rulings that prompt changes in legislation. It has even highlighted its role in upholding the promises of the EAC Customs Union and Common Market Protocols. However, the infrequent assembly of judges, who continue to serve on an irregular basis, depending on funding availability, affects the duration of cases and delays

578 See https://www.lawyersofafrica.org/court-delivers-judgment-on-loliondo-case/.

their disposal. Even if cases are brought under a "certificate of urgency,"[579] they cannot be scheduled for hearing expeditiously, which impacts the urgent determination of matters and the efficiency of the court. Nevertheless, the urgent nature of cross-border trade issues does not favour business actors who are discouraged by lengthy and drawn-out court processes. As a result, this affects the types of cases brought to the court, as business actors may not opt for the slow process.

7.4 Shedding the Human Rights Image

A mapping of decisions dispensed between 2015 and July 2022[580] elucidates that the third bench had issued a total of 101 judgements across a diverse array of themes ranging from property rights to environmental rights. As shown in Figure 3 below, human rights violations still dominate the EACJ docket.



Making up almost a third of the cases (26.7%), human rights cases could not be ignored, even though they were not the priority of the third bench judges. A quick look at the top five categories of cases that dominated the docket reveals that property rights violations (20.8%), employment

579 Under EACJ Rules of Procedure, Rule 65 (2) (a), the court can take note of the urgency of matters and act accordingly.

580 July 2022 marks the end of the third bench, as defined by the study. See Chapter 3.

grievances (14.9%) and megapolitical affairs affecting the legislative and executive bodies in partner states (11.9%) were all more prevalent than commercial cases. Business-related cases were a mere 10.9% of the entire docket.[581] This finding resonates with what we already know about the EACJ's unforeseen role in becoming an avenue for political mobilisation (Gathii 2020).

Although the judges did not deviate from repurposing the court's mandates to include deciding human rights, they were keen to shed the image of the EACJ as a human rights bench.[582] Without elaborating on all the human rights violations tackled by the third bench, suffice to note that 27 judgements across the two divisions were decided, touching on various facets of human rights. For instance, civil society challenged the crackdown on civic space in Burundi[583] in the EACJ. Likewise, arbitrary arrests and detention of citizens in Uganda,[584] South Sudan[585] and Rwanda[586] have also been heard and decided by the third bench. Noteworthy is that slightly more than half (59.2 %) of these cases were dismissed with similar reasoning as in the previous bench. As the last chapter elucidated, the Appellate Division of the second bench set the stage for a strict interpretation of the two-month rule, using it as a means to deal with human rights-oriented cases and other politically salient matters. This approach trickled down to the First Instance Division in subsequent cases.

581 Table 11 provides a summary of all judgements – by type and across divisions – issued by the third bench. It also details the number of dismissals across categories and court divisions.

582 Interviews with four judges who served on both the second and third benches, September 2021 – June 2022.

583 *Forum Pour Le Reinforcement La Societe Civile & 4 Others vs Attorney General of Burundi*, Appeal No. 2 of 2020. November 19, 2021. https://x.com/EACJCourt/status/1461745309147713540.

584 *Izeere Jean Luc & 8 others vs Attorney General of Uganda,* Reference No. 18 of 2018. November 30, 2022. https://www.eacj.org/wp-content/uploads/2022/12/REFERNCE-NO.18-OF-2019.pdf.

585 *Garang Michael Mahok vs Attorney General of South Sudan*, Reference No. 19 of 2018. December 5, 2019. https://www.lawyersofafrica.org/eacj-ruled/.

586 *Dr Mpozayo Christophe vs Attorney General of Rwanda,* Appeal No. 1 of 2021. May 27, 2022. https://www.eacj.org/wp-content/uploads/2022/06/Appeal-No.-1-of-2021.pdf.

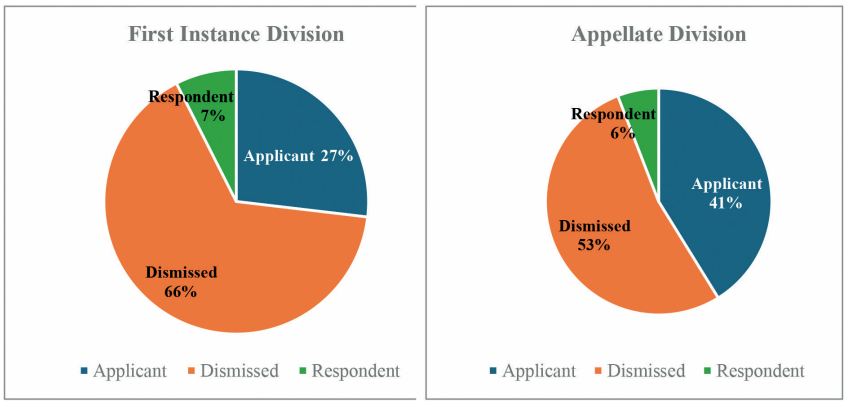
Table 11: Third Bench (2015–2022) Judgements

Judgement type	First Instance Division		Appellate Division		Decisions (total)	Dismissals (total)
	Decisions issued	Dismissals	Decisions issued	Dismissals		
Environmental issue			1		1	1
EAC Organs Performance	1	1			1	1
EAC Political affair	1		1	1	2	1
EACJ appointment	1	1	1	1	2	2
EACJ Jurisdiction	1	1			1	1
Electoral dispute	2	1	6	2	8	3
Business & Commerce	7	4	4	2	11	6
Mega-political disputes	8	6	4	2	12	8
Employment Grievance	10	8	5	5	15	13
Property Rights	15	8	6	2	21	10
Human Rights	21	13	6	3	27	16
Grand Total	67	43	34	18	101	62

Source: compiled by the author from the EACJ Case Mapping dataset (with the author on file).

Furthermore, the dismissal rate of human rights cases does not starkly differ from the average dismissal rate of 61%. Most strikingly, unlike in the second bench, where the appellate bench tended to be more stringent, the dismissal rate across the third bench divisions is not starkly different. If anything, it is tilted in favour of the trial court. While the appellate bench only had to dismiss half of its cases, the FID dismissed 12% more than that and ruled favourably in only 20% of the cases. Overall, of the 67 judgements issued by the FID, a 64% dismissal rate was observed. Likewise, there is a 53% dismissal rate at the Appellate Division (see *Table 11*). While examining the dismissal rate can reveal the intricacies of the politics of judging (Odermatt 2018; Squatrito 2022), it is illuminating to inquire into the cases where judges either explicitly defer to states in their rulings or when they expressly rule against states in favour of individuals.

Figure 4 summarises how judges of the third bench voted. The bench has mostly avoided confronting partner states through dismissals of cases and has only granted them a few overt wins.



At the trial court, applicants are typically private entities that sue member state governments and their affiliated institutions or the East African Community for breaches of the EAC Treaty. Of the decisions issued at First Instance, private applicants were only favoured in 26% of the cases. Rather than explicitly ruling in favour of member states – who are usually the respondents at the trial court – the bench dismissed the various complaints relying on the lack of jurisdiction on account of the person concerned or of the matter involved and the time element, as discussed above. Governments were accorded explicit wins in 5 cases. Moreover, 65% of the total cases were dismissed across the board. Likewise, at the appellate court, where partner states are usually the complainants owing to an unfavourable decision, the success rate was 41%. Still, the majority of the cases were dismissed due to similar reasoning to those in the first instance.

Avoidance through dismissal, as assumed by the third bench, can be interpreted as a form of deference to partner states that challenge Treaty violations by member countries. This is not to diminish the wins that are accorded applicants (who are usually private entities), even though they are negligible. So, while the EACJ demonstrates an apparent capacity and willingness to declare states in violation of the law, it has, since the creation of the appellate bench, tended towards more strict legal interpretation, moving away from the path set by the bold pioneers. Indeed, changes in the political climate and the several pressures that impact the various benches shape the trajectory of decision-making. Recall that by the end of the first bench, the new court was flexing its judicial muscle, trying to raise its profile within the Community by not only tackling cases that streamlined EAC institutions but also veering into uncharted territory with human rights

jurisprudence. However, the resulting backlash following *Anyang Nyong'o* – punishment for going against one Member State government's wishes – led to the creation of a more restrained appellate body on the second bench.

7.4.1 Intervention in Megapolitical Disputes

Ran Hirschl defines mega-political disputes as "core moral predicaments, public policy questions, and political controversies" that have the potential to divide countries or societies (Hirschl 2008, 94). Thus, the study examined national political affairs facing the legislative and executive bodies in the partner states, which have the potential to disrupt entire polities or create immense tension between EAC partner states, thereby risking the collapse of the EAC, and categorised them as "mega-political disputes".[587] For instance, in challenging the 2019 border closure between Uganda and Rwanda, Ugandan lawyer Steven Kalali sought out the EACJ.[588] Kalali alleged that Rwanda's closure of its border points with Uganda had restricted the flow of traders and their goods from travelling between the two countries, which he argued contravened the principles of good neighbourliness and the Common Market Protocol, among others.[589] He sought declarations on the unlawfulness of these acts and a permanent injunction restraining Rwanda from further action.[590] The FID ruled in favour of the applicant regarding the unlawfulness of the closure of border points,[591] the restriction of freedom of movement of Rwandan citizens to Uganda against their will,[592] and the denial of entry of Ugandan traders to Rwanda,[593] but did not grant costs to the applicant as the court believed it would "not serve the interest of justice."[594]

587 Except for electoral disputes as these were coded as such.
588 *Kalali Steven vs Attorney General of the Republic of Rwanda*, Reference No. 2 of 2019. June 23, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/12/eng@2022-06-23. Hereafter *Kalali.*
589 Ibid., 3.
590 Ibid., 3–5.
591 Ibid., 10.
592 Ibid., 11.
593 It contravenes Art. 7 (7) of the East African Common Market Protocol (ibid., 11).
594 *Kalali*, 12.

Equally, the Political Parties (Amendment) Act in Tanzania was challenged at the EACJ. In *Freeman Mbowe*,[595] five politicians from the Chama cha Demokrasia na Maendeleo, Alliance for Change and Transparency -Wazalendo and Chama cha Umma political parties in Tanzania, together with the NGO, Legal and Human Rights Centre, challenged the Political Parties (Amendment) Act No. 1 of 2019.[596] The applicants purported that the Act imposed restrictions on democracy, good governance and freedom of association, which are fundamental and operational principles of the Treaty.[597] The FID declared that the Act violated the said principles and directed Tanzania to bring the Act into conformity with the Treaty.[598] Tanzania appealed[599] this decision, but the Appellate Division upheld the trial court's ruling. While the *Kalali* and *Mbowe* decisions discussed here were decided in favour of the applicants, this is not representative of the stance taken by the third bench when it adjudicated overtly political cases.

Like the previous bench, the third bench dismissed 67 percent of the cases that involved megapolitical disputes across both divisions. Of the eight megapolitical disputes raised at the FID, six were dismissed. Likewise, half of the cases were also dismissed at appeal (see *Table 11*). These results echo what we already know regarding the sensitivity of specific politically charged questions at the international court (IC) level. ICs worldwide have avoided tackling controversial questions – especially those that intervene in overt political affairs of member states – through avoidance techniques such as deference to member states or deciding that a dispute is 'non-legal' in nature, denying standing to the party bringing the dispute (locus standi) or adjudicating in a way that sidesteps the most politically sensitive issues (Odermatt 2018). Over time, the EACJ has employed the same tactics, especially when confronted with megapolitical disputes. Judges have either relied on strict time limitations, declared lack of legal merits of the case, cited insufficient evidence, and (or) lack of jurisdiction to dismiss cases.

595 *Freeman Mbowe & Others vs Attorney General of Tanzania*, Consolidated References Nos. 3 & 4 of 2019. March 25, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/4/eng@2022-03-25. Hereafter *Mbowe*.

596 Enacted by the Parliament of the United Republic of Tanzania on 29th January 2019 and assented to by the President of the said United Republic of Tanzania on 13 February 2019. The Act was gazetted on 22 February 2019 (*Mbowe*, 4).

597 *Mbowe*, 4.

598 *Mbowe*, 52.

599 *Attorney General of Tanzania vs Freeman Mbowe & Others*, Appeal No. 5 of 2022. June 6, 2023. https://africanlii.org/akn/aa-au/judgment/eacj/2023/8/eng@2023-05-26.

The third bench assumed similar circumvention tactics to avoid confrontation with partner states in the eight electoral disputes that were raised. Decided mainly in favour of applicants against partner states, the third bench still dismissed 37.5 per cent (see *Table* 11). Recall that the first and most controversial case thus far, *Anyang Nyong'o,* paved the way for a successful intervention in the electoral procedure of representatives to the East African Legislative Assembly (EALA). Thus, when Burundi contested the speakership of EALA, alleging that the election of a Rwandan citizen as its speaker was unlawful, it was hoping for the judicial organ's favourable intervention. In *Attorney General of the Republic of Burundi v. The Secretary General of the East African Community*,[600] Burundi argued that the EAC parliament had failed to follow regulations on quorum that require half of the elected members of the assembly to be present during the poll. They claimed EALA Speaker Martin Ngoga was elected despite the absence of Burundi and Tanzania members of the assembly. Thus, Burundi wanted to have him barred from holding office and urged the court to order re-election, citing irregularities in the voting process. As the lead Counsel on the case clarified:

> "In the past, countries would discuss and agree. So, now, they could not agree because there was a political difficulty. The Burundian Minister of EAC was also a member of EALA. She had worked with Ngoga. So now, the personal went up to the court level. I didn't know. So, I told her we didn't have a case. The problem was that Burundi's candidate got three votes while Ngoga got 29 or 39. Then Burundi went out. They said there was no quorum. But I told them quorum was there because if you enter and then get out, quorum is there. Now, the affidavits. Normally, affidavits are sworn by the members there. I told them that if I swore the affidavits, it would be hearsay because I wasn't there. But Burundi insisted. You do what you are told! Now, the court said that Burundi failed to show that the members of EALA from Burundi were not there. So, my affidavits were defective."[601]

The EALA speakership occurs on a rotational basis in the EAC. In 2017, it was clear that either Rwanda or Burundi, the newer entrants into the

600 *Attorney General of the Republic of Burundi v. The Secretary General of the East African Community (Respondent) and Hon. Fred Mukasa Mbidde (Intervener)*, Reference No. 2 of 2018. July 2, 2019. https://www.eacj.org/wp-content/uploads/2019/07/Ref.-No.2-of-2018-1.pdf.

601 Interview, Nestor Kayobera, November 17, 2021, Bujumbura, Burundi.

regional bloc, would vie for the seat. Although it is an informal institutional arrangement amongst the partner states, there has been no disagreement about the EALA speakership thus far. This time, however, the Burundian Minister of East African Community Affairs,[602] who had fancied the speakership for herself, insisted on taking Rwanda to court over the post.

As we learned from this case, Burundi disputed the electoral process, leading to the announcement of Martin Ngoga as speaker, primarily due to politically motivated rather than legally sound reasons. Appreciating the political weight of the case and afraid of disrupting EALA on unreasonable grounds rooted in political conflicts between the two countries,[603] Hon. Fred Mukasa Mbidde, a Ugandan EALA member, assumed the role of the intervener and was represented by EACJ ally, Pan African Lawyers Union (PALU).

Predictably, the trial court struck down the affidavit evidence produced by Burundi as the State Counsel, Mr Nestor Kayobera, had sworn the affidavit claiming a lack of quorum despite not attending the event.[604] Consequently, the EACJ dismissed the case in the FID. Burundi sought an appeal, which was also dismissed.[605] The appellant was ordered to bear the costs of the Appeal and Cross-Appeal as a punishment for disrupting the EALA electoral process and thereby slowing down the integration process.[606]

Despite the lack of success in the Burundian electoral process case, PALU did not recoil in its intent to address the issue of electoral malpractice in the EAC.[607] In April 2021, PALU, with six citizens from Uganda, Kenya and Tanzania, lodged a petition at the EACJ challenging the conduct of the January 2021 presidential election in Uganda.[608] They asked the court to intervene in electoral violence and human rights abuses whilst shining

602 Nzeyimana Léontine, Minister of EAC Affairs, 3rd Assembly 2012 – 2017, Burundi.
603 Interview, EACJ judge, November 11, 2021, Bujumbura, Burundi.
604 Magubira Patty. 2019. "Burundi loses case challenging election of EALA speaker." *The East African,* July 3. https://www.theeastafrican.co.ke/tea/news/east-africa/burundi-loses-case-challenging-election-of-eala-speaker-1421632.
605 *The Attorney General of the Republic of Burundi v. The Secretary General of the East African Community (Respondent) & Hon. Mukasa Mbidde (Intervener)*. Appeal No. 2 of 2019. August 26, 2019. https://www.eacj.org//wp-content/uploads/2020/06/APPEAL-NO-.02-OF-2019.pdf.
606 Interview, Counsel to the Community, November 12, 2021, Bujumbura, Burundi.
607 Interview, PALU official, March 2, 2022, Arusha.
608 PALU News, April 21, 2021. "PALU and Partners file Uganda election petition filed at EACJ." https://www.lawyersofafrica.org/14684-2/ (last accessed September 21, 2024).

a light on the intimidation of citizens and opposition supporters by the Ugandan police, military and Special Forces Command. PALU and other human rights defenders filed this case to highlight the flawed, violent and corruptible nature of elections in the region and call for accountability, as they believed that the East African Community had not adequately intervened to ensure a free, fair and credible election in the country. As an interview confirms:

> "In late 2020 and early 2021, we filed cases that lifted Pandora's Box on the entire Tanzanian and Ugandan electoral processes. [] We are not in a hurry for the cases to get expedited. There was nothing we could do to stop the Ugandans from swearing in Museveni, and there was nothing we could do to stop the Tanzanians from swearing in Magufuli in 2020. But we said, 'Okay, you get sworn in. Let the dust settle. Let us drag the people of East Africa through the mud, blow by blow, to show how we got to the president. And let us not just say you rigged; let us call for moral accountability.'"[609]

While the case is still underway, it is vital to note the tone of megapolitical jurisprudence that is emerging in the EACJ. Judicial allies are pushing the court to uncharted territories – asking it to intervene in regional electoral malpractice and demand what has not been done before. These cases, as brought forth by allies, are vital in empowering the EACJ on various fronts. First, they raise violations of electoral conduct in an authoritarian regime. EASCOF used the court to "promote new norms and ideas about rights, but also to undermine justifications of authoritarian rule inconsistent with the observance and respect for rights" (Gathii 2020, 16–17). Secondly, the EASCOF case helped to continue the dialogue on the appellate role of the EACJ, putting earlier doubts to rest and affirming the place and hierarchy of the EACJ vis-à-vis municipal courts.

Thirdly, these cases also aim to streamline EAC institutions and consolidate informally institutionalised mechanisms such as the election of the EALA Speaker, which occurs on a rotational basis. Moreover, the case challenging the speakership of EALA also led to the first dissent in the history of the EACJ.

609 Interview, PALU official, March 2, 2022, Arusha.

7.4.2 Challenging Judicial Appointments

By 2015, cases challenging the institutional structures of the EAC remained relevant, accounting for 20 percent of the docket (see *Table 11*). Being a Regional Economic Community (REC) court, not least one in its formative stages, the prevalence of matters touching on the institutionalisation of the REC would be expected, even if they do not make up the majority of the docket. While this was the case in previous benches, most of the cases coming to the EACJ 15 years later were mainly concerned with consolidating the REC body organs through performance monitoring and seeking to streamline the decision-making of the various bodies. Likewise, employment disputes within the EAC were also raised.

Most notable amongst performance monitoring and seeking to streamline the functioning of the EAC bodies is the first-ever case that challenged judicial appointments at the EACJ. In *East African Law Society vs The Attorney General of the United Republic of Tanzania & Secretary General of the East African Community*,[610] the regional Bar dragged Tanzania to court, citing flaws in the appointment procedure as their nominee, Lady Justice Sauda Mjasiri, had already retired from the national judiciary and was thus unqualified for appointment at the REC court.[611] The Community watchdog expressed grievances over the lack of public participation and consultation with key stakeholders, which would have provided fairness and accountability.[612] Even though the First Instance dismissed the case, ruling that Mjasiri's appointment met the Treaty requirements, this case drew attention[613] to how the EAC Member States select judges for the regional bench. As expected, EALS appealed the decision, and predictably, the appellate chamber upheld the trial court's decision.[614]

610 *East African Law Society vs The Attorney General of the United Republic of Tanzania & Secretary General of the East African Community*, Reference No. 1 of 2019. November 25, 2020. https://www.eacj.org/wp-content/uploads/2020/11/Judgment2.pdf. Hereafter *Mjasiri*.

611 Ibid., 3.

612 Ibid., 4–5.

613 Kiyonga, Derrick. 2019. "Foreign job puts JSC, Judiciary on war path." *The Observer*, September 25. https://observer.ug/news/headlines/62090-foreign-job-puts-jsc-judiciary-on-war-path.

614 *East African Law Society vs Attorney General of the United Republic of Tanzania & Secretary General of the East African Community*, Appeal No. 2 of 2021. August 31, 2022. https://www.eacj.org/wp-content/uploads/2022/09/Appeal-no-2-of-2021.pdf.

This case highlighted that the opacity of the selection process in the EACJ is a result of a lack of participation and pressure from relevant interest groups and the public to interfere in the selection process. Instead, a few privileged insider gatekeepers – usually placed in the executive – manage the appointment process. These insiders select candidates who are either thoroughly connected within political and judicial circles, have direct links to the top executive offices or exhibit observable loyalties that tie them to the appointing authorities from their partner states. While this was not *necessarily*[615] the case with Mjasiri, the regional Bar intervened in judicial appointments to the EACJ to remedy the opaque and mysterious nature of these appointments, in a bid to bolster the institutionalisation of the EACJ. Before approaching the court, EALS had voiced its concerns in previous Summit meetings through its observer status function, but to no avail.[616] Litigation seemed like the most expeditious way to raise the issue while leaving it on record that judicial appointments had been conducted without public scrutiny or approval.

Following this case, Tanzania's next appointment was viewed favourably by the EALS, which believed that it had, in effect, won the case. Moreover, EALS has confidence that there has been a positive spillover effect in subsequent appointments from other EAC partner states, as one official reported:

> "And so, countries like Rwanda also became aware that these things are now under the spotlight. So even before a substantive determination by the Appellate Division, there was already a shift" (Interview, former CEO of EALS, Hannington Amol, March 29, 2022, Nairobi, Kenya).

The *Mjasiri Case* illustrates the concern for regulating judicial appointments to the EACJ. Even if the case was dismissed, it brought visibility to the irregularities in appointments and was symbolic in its attempt to check the nominating governments.

615 Interviewed lawyers on the case affirm that Mjasiri is a well-respected jurist of recognized competence within the national judiciary in Tanzania. However, it was the fact that she was already retired from judicial service in her home country that they took issue with and sought to use her appointment as a means to address the problem (Interviews, EALS officials, 19 February 2022, Arusha, Tanzania).

616 Interview, former CEO of EALS, Hannington Amol, March 29, 2022, Nairobi, Kenya.

7.5 Judicial-led Intervention

Even though judicial appointments to sub-regional benches in Africa are thinly regulated and often opaque, regional judicial appointers believe that *it matters who* sits on the bench for court performance (Stroh and Kisakye 2024). Our exploratory insights into two country cases suggest that national government interests depend on the historical relations that individual member states tie to the regional community. Thus, we can learn a great deal about the type of court and how it is perceived by the appointers by looking at the individuals on the bench. Likewise, the individuals on the bench contribute to the performance and trajectory of the court. Thus, this chapter attributes the shift in decision-making, from human rights to commercial bench, to the change in judicial biographies and competencies coupled with the growing political relevance of the court. The change in judges to those who are more commercially inclined (with some judges being experts in international trade law), coupled with the urge to steer clear of being labelled an activist bench, has shaped the bench's inclination towards less politicised cases like human rights to core issues of regional trade and commerce.

Table 12: Third Bench Judges (2015–2022)

Appellate Division		**First Instance Division**	
President	Dr Emmanuel Ugirashebuja (Rwanda)/ Nestor Kayobera (Burundi)	Principal Judge (PJ)	Monica Mugenyi (Uganda)/ Yohane Bokobora Masara (Tanzania)
Vice-President	Liboire Nkurunziza (Burundi)/ Geoffrey Kiryabwire (Uganda)	Deputy PJ	Isaac Lenaola (Kenya)/ Dr Faustin Ntezilyayo (Rwanda)
Members	Aaron Ringera (Kenya)	Members	Dr Charles Oyo Nyawello (South Sudan)
	Edward Rutakangwa (Tanzania)		Charles Nyachae (Kenya)
			Fakihi Abdalla Jundu (Tanzania)
	Sauda Mjasiri (Tanzania)		Audace Ngiye (Burundi)
	Kathurima M'Inoti (Kenya)		Richard Wejuli Wabwire (Uganda)
	Anita Mugeni (Rwanda)		Richard Muhumuza (Uganda)
Registrar	Yufnalis Okubo (Kenya)		

Source: Author's compilation from publicly available data and judicial CVs.

The third bench experienced a change in leadership across divisions as the terms of judicial leaders expired and new ones were appointed. Court

President Dr Emmanuel Ugirashebuja from Rwanda and Principal Judge Monica Kalyegira Mugenyi from Uganda both left the bench in November 2020 following the expiry of their non-renewable tenures. Observers feared that the functioning of the court would grind to a halt when these "two top judges" were leaving the bench, "with no replacements in sight."[617] As predicted, court activity came to a standstill for over five months following the departure of these two leaders in November 2020.[618] This was the longest time without judicial replacements at the court, even though appointments had usually been "drawn out" until the Summit eventually met to make the necessary appointments.[619]

In the past, staggered appointments had catered to the fact that even though appointments would not happen promptly, no more than two judges would exit the bench at the same time. However, the COVID-19 pandemic – coupled with already existing intra-EAC disputes -led to a two-year delay in the EAC Heads of State Summit meeting, during which time seven EACJ judges retired without being replaced.[620] It was only in February 2021 that six judges were appointed to fill the bench: Nestor Kayobera (Burundi), Yohane Bokobora Masara (Tanzania), Kathurima M'Inoti (Kenya), Anita Mugeni (Rwanda), Richard Muhumuza (Rwanda) and Richard Wejuli Wabwire (Uganda). As such, Nestor Kayobera replaced Emmanuel Ugirashebuja shortly after his appointment as President of the EACJ. Similarly, Yohane Bokobora Masara replaced Monica Mugenyi as Principal Judge.

Looking at the First Instance Division (FID) of the third bench, Ugandan Monica Kalyegira Mugenyi was the first female administrative head of the FID. At the time of her appointment, Mugenyi was a judge of the High Court of Uganda. She holds an LLM in international trade law from the University of Essex (UK). A member of several international women judges' associations, the Principal Judge had amassed leadership ex-

617 Anami, Luke. 2020. "Justice in the dock at Arusha-based EA court as Bench empties." *The East African*. October 12. https://www.theeastafrican.co.ke/tea/news/east-africa/justice-dock-arusha-based-ea-court-as-bench-empties-2463610.

618 Anami, Luke. 2021. "Long wait for justice draws to a close as Summit set to appoint judges." *The East African*. February 23. https://www.theeastafrican.co.ke/tea/news/east-africa/summit-set-to-appoint-judges-3300064.

619 Anami, Luke. 2022. "Okubo: EAC Court limping along under difficult conditions." *The East African*. May 17. https://www.theeastafrican.co.ke/tea/news/east-africa/eac-court-limping-along-under-difficult-conditions-3814736.

620 Anami 2020.

perience through her extensive service in municipal and regional courts.[621] Mugenyi's judicial journey has been remarkable. She joined the High Court of Uganda in 2010 and served as the youngest judge on the bench. Only three years later, she was appointed as the first woman head of the FID of the EACJ. While at the EACJ, in December 2019, Mugenyi was elevated to the position of Judge of the Court of Appeal. In January 2024, she rose to the highest post in the Ugandan judiciary, joining the Supreme Court bench.[622]

Unlike the previous cohort of judges whose experience was mainly in human rights instruments, Mugenyi's legal and judicial expertise is generally in the public sector, having spent 15 years as a senior transactional and courtroom lawyer dealing with the legal aspects of foreign direct investment, privatisation and private sector development.[623] With this experience, it would not be far-fetched to link the growing trend of commercialised jurisprudence of the third bench's trial court to Mugenyi's leadership. In an interview, she divulged:

> "I think the court is a lot more relevant today than it was when it adjudicated human rights matters only. Human rights tend to be individual, and maybe the security agencies that have violated these rights will be asked to tread with caution. The nature of matters coming now tends to be broader – if a person says, 'This court did not address access to justice issues in this way,' or 'You are taxing me irregularly as per the Protocol on Common Market and Customs Union, like what happened in BAT case.' We were sending a message to all traders that there must be uniformity in the taxation of goods (*in the BAT case*). So, those broad implications are being felt in the region – our president (*Museveni*) and the late Tanzanian president (*Magufuli*) addressed that issue. Today, it is cigarettes, and the next day, it will be sugar. I don't think the court is as irrelevant as it has been in the past."[624]

Indeed, under Mugenyi's leadership, the trial bench handled the bulk of the caseload during the court's existence, resulting in a total of 51 final

621 CV, Monica Kalyegira Mugenyi, https://africanarbitrationatlas.org/wp-content/uploads/2020/12/Monica-CV.pdf.
622 *The Daily Monitor*, January 17, 2024. "Justices Bamugemereire, Mugenyi appointed to Supreme Court." https://www.monitor.co.ug/uganda/news/national/justices-bamugemereire-mugenyi-appointed-to-supreme-court-4495358.
623 CV, Monica Kalyegira Mugenyi.
624 Interview, Monica Kalyegira Mugenyi, September 29, 2021, Kampala, Uganda.

judgements. It is common knowledge that Mugenyi wrote and delivered the first judgement of its kind in a commercial case, *British American Tobacco (BAT) Uganda Ltd v Attorney General of Uganda*[625], which opened the floodgates for future commercial disputes. The significance of this case has already been highlighted, and the resulting pushback is explained in the preceding section. Taking Mugenyi's arguments seriously reveals that her bench sought to actively steer the court away from individually focussed human rights jurisprudence to commercialised jurisprudence. In her explanation, we can infer that the bench found relevance and greater political weight in engaging in trade-related disputes over human rights. Moreover, some judges perceived the existence of the African Court on Human and Peoples' Rights in Arusha as a more suitable ground for litigating human rights cases.

Replacing Mugenyi as Principal Judge, Tanzanian Yohane Bokobora Masara was a High Court judge at the time of appointment.[626] Masara, whose background was in the Tanzania Revenue Authority and the Attorney General's office, had been exposed to regional integration initiatives in various capacities. As a Senior Technical Adviser to the Executive Secretary of SADC and representing the government of Tanzania at the EACJ, the SADC Tribunal, and the African Court on Human and Peoples' Rights. Masara was also involved in negotiating and drafting various EAC integration milestones, such as the Protocol for the Establishment of the EAC Common Market, the Monetary Union Protocol and the roadmap towards the EAC Political Federation. He was also a member of the expert team that negotiated South Sudan's admission to the EAC. Masara also has experience negotiating funds for REC initiatives and was Tanzania's senior legal officer at several EAC and SADC senior official meetings.[627] In sum, even though he was relatively new in the judiciary at the time of his appointment, Masara's vast expertise in regional integration affairs, political negotiations, administration and litigation was helpful in his new role as court leader.

Following Mugenyi's exit, the Masara bench had only dealt with 16 judgements by July 2022. Informal conversations with judges on the Masara bench and Masara himself also alluded to sentiments similar to those of their predecessor, Mugenyi. As opposed to the second bench, which dismissed three-quarters of its business and trade-related cases, citing limi-

625 *British American Tobacco (U) Ltd v Attorney General of Uganda*, *supra* note 554.
626 CV, Yohane Bokobora Masara (available with author).
627 Ibid., 3.

ted remedial powers, the third bench, mainly comprised of judges with a commercial law background, saw an increase in favourable commercial rulings. The fact that the judges were well-versed and partial to international economic law could explain why this bench passed the first landmark rulings in commercial law. In this case, the undertaking in economic cases is linked to the expertise of judges on the bench, which is comparable to the human rights interventions in previous benches.

Likewise, the third bench saw a change in leadership at the Registry. Noteworthy is that while judicial leadership has changed every six years since the court's establishment, the pioneer Registrar served for the first 15 years, whereas his counterpart, Yufnalis Okubo, only served half of this duration. Moreover, both Registrars served at different historical and political junctures. Amidst an unprecedented pandemic and changes in judicial leadership and the Registry, the third bench makes for an interesting comparison with the earlier two benches, as not only the judges' backgrounds starkly differed, but also the Registrar's. Dr John Eudes Ruhangisa's tenure expired, and Yufnalis Okubo replaced him in early 2016. While registrars are typically just administrators of the court, in the case of a REC court, they take on a broader role. Registrars in the EACJ have been responsible for influencing the trajectory of the caseload as they move around the partner states, doing most of the court's publicity work. In these sessions, they set the agenda for the types of questions that need to be addressed and guide the litigants in appropriate ways to approach the bench. Working together with the court presidents, registrars often serve as the voice of the judges in these instances, informing litigants about the types of cases the bench would like to receive and how they can directly influence the caseload of the EACJ.

For instance, Registrar Yufnalis Okubo has previous administrative and regional integration affairs experience through his service as the Legal Counsel and Head of Institutional Affairs at the Intergovernmental Authority for Development (IGAD).[628] While at IGAD, Okubo dealt with trade and commercial-related legal work, which also shaped his understanding of his role as an administrator of a trade court. In several discussions with him, it became clear that, unlike his predecessor, who was well-versed in human rights instruments and whose vision for the EACJ was for the bench to become an avenue for legal and political mobilisation, Okubo perceived the bench as primarily a regional trade court. In fact, he hailed

628 Staff, East African Court of Justice, *Yufnalis Okubo*. https://www.eacj.org/?page_id=1024 (last accessed September 21, 2024).

Judge Mugenyi's pioneering role in the BAT case and was hopeful for the emergence of a trade and commercial bench. I witnessed how he conducted legal training sessions across the region and noticed that he, like the court leaders, envisioned a court that was more authoritative in economic and trade affairs rather than being known for human rights alone, which is not its core responsibility.

Turning to the Appellate Division, its first head, Rwandan academic Dr Emmanuel Ugirashebuja, was appointed EACJ president shortly after his nomination to the EACJ in 2014.[629] Holding a doctorate in international law from the University of Edinburgh, Ugirashebuja was Dean of the Faculty of Law at the National University of Rwanda at the time of his posting to the regional bench. Not a stranger to regional integration initiatives, the academic had been a member of the team of experts that assessed and advised on the fears, challenges and concerns of EAC citizens regarding the attainment of the EAC Political Federation. Ugirashebuja was also a lecturer on the legal challenges to EAC integration and was well-versed in international human rights frameworks and international law.[630]

For his part, the succeeding court president, Burundian lawyer Nestor Kayobera, was a senior State Attorney in Burundi and the Director General of Judicial Organisation at the time of appointment in February 2021.[631] Kayobera had routinely appeared before the EACJ as the principal legal advisor and defender of the Burundian government and was familiar with the court's work. As Director General of Judicial Organisation, Kayobera had expertise in judicial administration, coordination, evaluation, budget preparation and outreach programs. A holder of a master's degree in public international law from Hope Africa University (Burundi), he also demonstrated experience in international legal regimes.

Even though Kayobera was appointed president without any prior experience as a judge on the regional bench, he worked alongside the long-serving Ugandan judge Geoffrey Wilfred Mupere Kiryabwire, who, by virtue of seniority on the bench, served as its Vice President. According to interviews and my observations,[632] Kiryabwire tended to take the lead in many pro-

629 CV, Emmanuel Ugirashebuja (available with author).
630 Interview, Former EACJ judge from Kenya (EA01) March 29, 2022, Nairobi, Kenya.
631 CV, Nestor Kayobera (available with author).
632 During fieldwork in Bujumbura, I observed how Vice President Kiryabwire usually led the questioning round when the appellate bench was in session. It was apparent that he was in charge, or at least respected by his colleagues, who were barely a few months old on the bench at the time.

ceedings at the appellate chamber, owing to his wealth of experience and longevity on the bench. Holding a Master's of Laws Degree in International Law (with a bias in International Economic Law) from the University of London, Kiryabwire was Head of the Commercial Court Division of the High Court at his appointment in 2015.[633] As head of the commercial court division, Kiryabwire amassed expertise in investment disputes, banking, insurance, capital markets, sale of goods and services and alternative dispute resolution (ADR) methods.[634] He is hailed as having led the Division to become a "model court for increased access to justice, judicial innovation and expeditious disposal of cases."[635] Before his appointment, he had attended judicial seminars on regional integration, investment and business legal frameworks, mediation and alternative dispute resolution mechanisms, judgement writing, and effective case management, amongst other trainings.

During his time on the bench, Kiryabwire took part in two study visits to the European Court of Human Rights in Strasbourg (March 2017) and to the European Court of Justice in Luxembourg (March 2018), from which he drew inspiration to move the EACJ beyond a human rights focus.[636] Moreover, the judge was already well-respected in the EAC owing to his social and political capital within the national, regional and international Bar and judges' associations. At the time of this writing, he was the longest-serving judge on the Appellate Division and clearly the most experienced in regional jurisprudence. Therefore, despite the delayed appointments and the simultaneous appointments of new judges, the fact that Kiryabwire was on the appellate bench for at least another year before his tenure expired provided the bench with a level of continuity, while allowing for a shift toward a more commercial bench.

In conclusion, it is safe to say that the leadership of the third bench *intentionally* steered the bench toward a commercial stance. An interview with one of the judges attributes the shift in direction to the third bench:

> "If you notice, most of the cases that come to us are regarding the violation of Articles 5, 6 and 7 (*of the EAC Treaty*). Now, we are moving further. We are now pushing the boundaries. I must say that it is during

633 CV, Geoffrey Wilfred Mupere Kiryabwire, https://icsid.worldbank.org/sites/default/files/arbitrators/2021-03/CV_Kiryabwire.pdf.
634 Ibid., 10.
635 Ibid., 10.
636 Online Interview, Third bench judge, Geoffrey Kiryabwire, June 18, 2020.

> my time at the court that you are really starting to see the court stretch itself into what it can or cannot do. If you look at our decisions, we have now given decisions that impact commerce. We are not just talking about the rule of law, good governance and human rights. Decisions have been rendered concerning the environment and infrastructure development. We have recently been involved in decisions relating to whether elections had been held properly in partner states. All these things are stretching the mandate. Some people have said, 'It's good.' Others have said, 'It's timid.' It depends on the strength of coffee you want to drink. It is really a matter of perception."[637]

The interviewee alludes to his bench as a trailblazer in trade and commercial jurisprudence at the EACJ. He also mentions that the bench faced both criticism and praise in equal measure over the direction they sought to steer their jurisprudence. According to him, his bench chose to push the boundaries beyond the rule of law, good governance and human rights, in order to pronounce itself on issues of commerce, the environment and infrastructure development. Moreover, they saw value in intervening in electoral procedures and other underexplored areas. The following sections will explore these avenues whilst paying attention to the role that judges and their allies played in shaping the future of the EACJ.

7.5.1 Between Avoidance and Activism

Another underexplored area that the third bench routinely handles is the growing number of property rights cases – involving seizure, destruction and wrongful eviction – by the Special Court on Lands and Other Assets (the Special Court) in Burundi. Violent conflicts and forced migration have exacerbated the ambiguity in regulating land dispute resolution and restitution processes in Burundi, which gives the state the upper hand to expand its control over customary land tenure (Tchatchoua-Djomo and Van Dijk 2022). Thus, land rights have become increasingly politicised in Burundi, with several cases being litigated in the supranational court after being dismissed by the top municipal courts.

637 Online Interview, Kiryabwire, June 18, 2020.

For instance, in the *Ngaruko*[638] case, the National Commission of Land and Other Property (the Land Commission) is alleged to have unlawfully declared the applicant's land state property. Ngaruko sought to regain his property through an appeal to the Special Court. However, the Special Court reaffirmed that it was state property, acquired by the state without due compensation. The applicant sought the EACJ's resolution of these issues and prayed for his land tob e restored and compensated in monetary terms.[639] The FID ruled in favour of Ngaruko, condemning the Burundian Courts for their involvement in land redistribution and unlawful repossession by the state:

> "It is not the duty of a Court of law to fetch pieces of land and give them to whomever they desire. Courts of law are established to determine matters brought to them by parties. This case presents a unique situation where Courts of the Respondent constituted themselves as parties to the dispute and not umpires of the matter brought to them by parties. That, on the records before us, constituted a breach of the laws of Burundi relating to right to property and consequently, an abrogation of the Treaty as submitted by the Applicant's Counsel" (Ngaruko, 19–20).

As already seen in the case of commercial disputes where the court issued compensatory pecuniary orders rather than mere declarations, the FID, in this case, did not shy away from issuing mandatory orders. The court directed the government of Burundi to either return Ngaruko's land or compensate him adequately for the property based on its current market value:

> "In our view, as the applicant has proved to the satisfaction of this Court that the property in question legally belonged to him, the prayer to restore the applicant's title is well founded. We, therefore, direct that the applicant be restored back to the property taken from him and given to the respondent or, in the alternative, be adequately compensated for the value of the property (Ngaruko, 21–22).

The fact that the EACJ has dared to intervene in land rights, which have resulted from the protracted conflict and authoritarian governance in Burundi since 2015, shows its willingness to become an avenue for galvanising

638 *Francis Ngaruko vs Attorney General of Burundi*, Reference No. 9 of 2019. September 30, 2022. https://africanlii.org/akn/aa-au/judgment/eacj/2022/24/eng@2022-09-30.

639 *Ngaruko*, pages 7–9.

resistance against continued authoritarian rule in this country (Heinrich 2020). Even if the Ngaruko case exhibits a positive trend, a closer examination of the growing property rights disputes reveals careful consideration of remedies by the third bench. Given the gravity of the cases and the nature of the land dispute in question, judges have chosen to order compensation rather than return the land, as they do not believe the latter is feasible in the Burundian context. Considering the fragile nature of cases at hand, judges would instead send signals to the partner states through their decision-making, such as issuing warnings, rather than touching upon issues that have proven divisive.[640] The display of caution and exercise of legal diplomacy by the bench can also be observed in the number of dismissals. The bench dismissed half of the cases over lack of jurisdiction or time restrictions, ruling in favour of the respondent states in only three of the 21 cases, and the applicants had favour with the court in only eight cases.[641]

Judges will carefully weigh their options concerning enforcement and compliance with decisions depending on the magnitude of the matters raised. They must be considerate of the nature of remedies they issue. Pecuniary redress may be preferable as a low-risk remedy instead of mandatory decisions that compel partner states to address highly politicised issues, such as land reform policies. For instance, asking governments for monetary compensation[642] or directing them to conduct an election rather than an appointment is more accessible than pursuing land restitution[643] or returning seized property[644] in post-conflict autocracies. Overall, making decisions that do not cater to their specific contexts could cause more turmoil in these countries, provoke a backlash and even risk decisions

640 As seen in issuing declaratory rulings over mandatory ones in human rights related cases.

641 The author's compilation from the EACJ Case Mapping Dataset.

642 The East African Court of Justice. 2018. "Appellate Court rules in favour of Hon Margaret Zziwa and awards her $114,000 as special damages and other costs." https://www.eac.int/press-releases/1107-appellate-court-rules-in-favour-of-hon-margaret-zzziwa-and-awards-her-$114,000-as-special-damages-and-other-costs (Accessed July 27, 2022).

643 *Venant Masenge vs Attorney General (AG) of Burundi*, Application No. 5 of 2013. June 18, 2014. https://www.eacj.org/wp-content/uploads/2014/06/APPLICATION-NO.-05-OF-2013-Venant-Masenge-18-June-2014-final.pdf and *Niyongabo Theodore and 2 others vs AG of Burundi*, Reference No. 4 of 2017. June 16, 2020. https://www.eacj.org/wp-content/uploads/2020/06/JUDGMENT-2.pdf.

644 Julius Barigaba. 2020. "Rwanda: Court Orders Kigali to Pay UTC U.S. $0.5 Million for Illegal Seizure and Sale of Mall." *The East African*. December 1. https://allafrica.com/stories/202012020056.html.

being seen as merely "academic"[645] if they are not easily enforceable. It is for this reason that judges tended to make decisions that avoided confrontation with the partner states and usually issued declarations over making mandatory judgements that might put partner states in a difficult position.

Equally, two decades later, the EACJ is still treading a tightrope between extending its authority to intervene in megapolitical jurisprudence and risking upheaval and threats to its existence or issuing a noncommittal declaratory order and saving itself from undue interference. Interventions in two of the electoral disputes handled by the third bench provide a perfect illustration: the contested 2015 presidential electoral process in Burundi and the 2017 General Election in Kenya, where a gubernatorial candidate, Martha Karua, lost the election. While the third bench refrained from reviewing Burundi's constitutional decision to hold elections in the former, it did not hesitate to "review"[646] the Kenyan Supreme Court's decision in the Martha Karua petition. A brief background to the cases elucidates the difference in tactics.

In July 2015, the East African Civil Society Organisations Forum (EASCOF), represented by Deya, intervened in the Burundi presidential election, in which Pierre Nkurunziza unlawfully participated and subsequently emerged victorious despite the parliament's rejection of a constitutional amendment that would have made him eligible to run for a third term.[647] Accordingly, the applicants sought an order directing Burundi to postpone the 2015 presidential and senatorial elections due to concerns about civic disorder and unrest.[648] The EACJ disallowed EASCOF's request, clarifying that while it is mandated to review provisions of a partner state's national law regarding its compliance with the Treaty, it would not interfere in

645 Interview, Ugandan Lawyer, October 5, 2021, Kampala, Uganda.

646 Kiplagat Sam. 2024. "Kenya Supreme Court rules that EACJ can't review its decisions." *The East African*, June 2. https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-supreme-court-rules-that-eacj-can-t-review-its-decisions-4643464.

647 *The East African Civil Society Organisations Forum (EASCOF) v. the Att'y Gen. of Burundi, Commission Electorale Nationale Independent (CENI) & EAC Secretary General*, Reference No 2 of 2015. December 3, 2019. https://www.eacj.org//wp-content/uploads/2020/02/Reference-No.-2-of-2015.pdf.

648 *EASCOF v. the Att'y Gen. of Burundi, CENI & EAC Secretary General,* Application No. 5 of 2015. July 29, 2015. https://www.eacj.org//wp-content/uploads/2015/07/Appliation-No-5-of-2015.pdf.

national politics.[649] In the final judgement,[650] the matter was dismissed, reasoning that while FID had jurisdiction to determine whether any action taken amounted to an infringement of the Treaty, its mandate did not extend to the judicial review of decisions of other courts. The EACJ categorically stated that "manifestly insufficient governmental action" does not constitute a wrongful judicial act.[651] Moreover, the court pronounced itself on its position vis-à-vis national courts:

> "We [...] take due cognisance of the fundamental role of apex domestic courts in the development of municipal jurisprudence, which role cannot and should not be usurped by an international court or tribunal. […] we are hard-pressed to appreciate the circumstances under which an international court can 'put aside a national decision presented before it and (to) scrutinise its grounds of fact and law.' It seems to us that such an eventuality would run contrary to the counter-exigencies of the international review of domestic decisions viz the appellate function of domestic apex courts."[652]

The trial bench also reiterated that its role in reviewing the decisions of apex domestic courts is still limited to verifying the domestic court's compliance with the EAC Treaty.

In a subsequent appeal, *Appeal No. 4 of 2016*[653], EASCOF was pushing the EACJ to assert its supremacy in reviewing whether decisions of superior courts of partner states on the constitutionality of their domestic laws – which are not otherwise appealable – contravene the EAC Treaty and whether the EACJ can pronounce itself on such matters.[654] This wish

649 "This Court has no jurisdiction interpret the provisions of the Burundi Constitution or Arusha Peace Agreement for purposes of determining the correctness of the Burundi Constitutional Court's decision, as appears to be the thrust of the present application. That is entirely different from the Court reviewing the provisions of a Partner State's national law with a view to determining its compliance with the Treaty" (ibid, 10).

650 EASCOF v. the Att'y Gen. of Burundi, *supra* note 647.

651 Ibid., 24.

652 Ibid., 26.

653 *The East African Civil Society Organisations Forum (EASCOF) v. the Att'y Gen. of Burundi, Commission Electorale Nationale Independent (CENI) & EAC Secretary General*. Appeal No. 4 of 2016. May 24, 2018. https://www.eacj.org/wp-content/uploads/2020/07/Appeal-no-4-of-2016.pdf.

654 EASCOF succeeded, in part, and the case was reverted to the FID to be heard on its merits and to determine whether the Constitutional Court of Burundi had violated the EAC treaty (page 44).

was granted in the final judgement, *Appeal No.1 of 2020,*[655] where the appellate bench perceived the applicant's prayer as "not only challenging the impugned Supreme Court Judgement's inconsistency with the internal laws and the Constitution of Burundi *per se*," but rather, faulted Burundi for non-compliance with the EAC Treaty.[656] The appellate bench called for Burundi's international responsibility under international law and the EAC Treaty, and by extension, for the state to assume the wrongful acts of its judicial organ.[657] However, since the case had been overtaken by events, the applicant could only succeed partially.

The Burundian presidential case above is central as it set the pace for the court's activist stance in the Martha Karua case. While the trial court had exhibited restraint in dealing with the former, the appellate bench emphasised that such issues should not be viewed as the EACJ playing an appellate role over the highest courts in the partner states, but rather as applying "international responsibility under international law and the EAC Treaty."[658] Thus, it urged the trial court not to shy away from taking action against state irresponsibility. Subsequently, when Martha Karua contested the loss of the governor seat to Anne Waiguru in Kirinyaga County, the EACJ trial bench did not hesitate to go against the Supreme Court decision in the same matter.[659] The EACJ declared that Kenya had violated Martha Karua's right to access justice through its Supreme Court ruling, in effect, breaching the fundamental and operational principles of the EAC. The FID not only declared violations against the opposition politician's right to a fair hearing but also issued compensatory damages of up to U.S. Dollars 25,000 at an interest rate of 6% per annum.[660] By granting monetary damages, not just declaratory orders, the case is significant for testing the remedial power of the EACJ. While this ruling was heavily celebrated,[661] especially for painting the EACJ as an attractive avenue for more politically salient cases than human rights violations, Martha Karua was never compensated.

655 *The East African Civil Society Organisations Forum (EASCOF) v. the Att'y Gen. of Burundi, Commission Electorale Nationale Independent (CENI) & EAC Secretary General*, Appeal No. 1 of 2020. November 25, 2021. https://www.eacj.org/wp-content/uploads/2022/01/Appeal-No.-1-of-2020.pdf.

656 Ibid., 28.

657 Ibid., 31.

658 Ibid., 37.

659 *Martha Wangari Karua vs The Attorney General of the Republic of Kenya,* Reference No. 20 of 2019. November 30, 2020. https://www.eacj.org/wp-content/uploads/2020/12/JUDGMENT4.pdf.

660 Ibid., 27–28.

661 Kiplagat 2024, *supra* note 646.

Instead, the EACJ received a massive blow for ruling as it did. Kenya's Supreme Court ruled against the decisions of the EACJ, encroaching on the country's sovereignty by overturning the top court's opinion, thereby creating legally conflicting consequences and effects for its citizens. At the time of writing, this decision had only just been handed out within the week of writing. Therefore, its effects are yet to be seen. However, national apex courts in the region were finally attempting to establish the regional court in its rightful legal position. By daring to rule as it did, the EACJ had forsaken its initial restraint in reviewing the decisions of a sovereign state, which received pushback from the national courts.

7.5.2 Whither Consensual Decision-making?

The role of dissents in international courts is becoming ever more pertinent (Dunoff and Pollack 2022; Maučec and Dothan 2022). Because international tribunals "typically lack the democratic legitimation and enforcement capabilities associated with many of their domestic counterparts" (Dunoff and Pollack 2022, 342), dissenting judgements could either enhance or undermine the court's legitimacy. However, dissent, in and of itself, does not raise legitimacy concerns; rather, it is the patterns of dissent that do (Dunoff and Pollack 2022). Similarly, dissents do not undermine judicial independence, but a combination of dissents, independence and reappointment does (Ibid.).

In the case of the EACJ, scholars have referred to it as a "low-dissent court" (Dunoff and Pollack 2022, 394). Over time, EACJ judges across different benches have developed an informal agreement to present a united front, choosing to act collectively despite the possibility for individual dissents and the absence of any formal requirement for unanimous decisions. The Treaty provides that "the judgment of the Court (should be) reached in private by majority verdict, provided that a Judge may deliver a dissenting judgment."[662] Thus, judges would be at liberty to dissent, in deference to their appointing states, if they so wished. However, in all its 264 rulings (across divisions and benches), the EACJ has issued unanimous decisions in all but two judgments. The very first case of judicial dissent arose at

662 Art. 35 (2) EAC Treaty.

appeal[663] when Burundi challenged the election of the Rwandan EALA speaker, Martin Ngoga. Burundi challenged the elections to EALA, arguing that the assembly had failed to follow regulations on quorum, which required half of the elected members of the assembly to be present during the poll. In this case, Burundian judge Liboire Nkurunziza dissented from the majority opinion, which dismissed the appeal and issued costs to the Respondent Intervener.[664] In his opinion, Nkurunziza saw the trial court's ruling as imposing "undue technicalities", which defeated the purpose of administering justice.[665]

The other notable dissent arose in the *Manariyo case*,[666] where "the two dissenting judges questioned the trial court's position on circumstances when a decision of the domestic court may be impugned" (Njiru 2021, 510). For the dissenting judges, the concern was whether only a resident of the Community should initiate proceedings at the EACJ. An interview with one of the dissenting judges highlighted that the narrow reading of what constitutes a resident was detrimental to the purposes of enforcing principles of good governance and the rule of law before the EACJ. He saw it as discouraging for the diaspora, who may not be residents but seek to use the court.[667] In their final verdict, the two judges argued categorically that "the holding of the trial court is without support in international law as it stands today."[668]

Until 2019, the court had avoided dissenting voices in favour of unanimity, as judges sought to speak with one voice, especially in the court's early years, as a sign of unity and uniformity of jurisprudence within the new judicial organ. They were concerned that dissenting voices would cause confusion among the litigants, who were still trying to identify with the new court. Likewise, given that judges emerge from different partner states with varying levels of judicial independence and deference to the executive,

663 *Attorney General of the Republic of Burundi v. The Secretary General of the East African Community (Respondent) & Hon. Mukasa Mbidde (Intervener)*, Appeal No. 02 of 2019 (diss. op.,Nkurunziza, V.P), https://www.eacj.org/wp-content/uploads/2020/07/Dissenting-judgement.pdf.

664 PALU News, June 4, 2020. "EACJ dismisses the appeal by the Attorney General of Burundi." https://www.lawyersofafrica.org/east-african-court-of-justice-dismisses-the-appeal-by-the-attorney-general-of-burundi/ (Accessed July 27, 2022).

665 *Supra* note 666, 31.

666 *Manariyo Désiré vs The Attorney General of the Republic of Burundi*, Appeal No. 1 of 2017. Dissenting judgment. November 29, 2018. https://www.eacj.org/wp-content/uploads/2020/07/Appeal-no-1-of-2017Dissent.pdf.

667 Interview, EACJ judge, June 18, 2020, online.

668 *Manariyo supra* note 666, paragraph 79.

the EACJ sought to establish collective ownership of their decision-making rather than attribute it to individual judges. That way, they would seek to enhance the court's credibility, as clearly articulated in an interview:

> "The reason for decisions by consensus is that there is this feeling that if I am going to sit on a case from my country, then it will come out as a decision of the court, owned by all five judges. Even if my country were to perceive me as being anti-government, all five votes would not have been anti-government. So, this is a decision made by five judges, not just me. Five judges have sat and deliberated and agreed that this is the decision. In a sense, it is to protect the judges and to give a semblance of unity. The court should speak with one voice for unity and uniformity of jurisprudence, but also protect them."[669]

Moreover, unanimous decision-making acts as protective armour against pushback, especially to judges from more vulnerable states prone to personalised attacks. As one judge mentioned in an interview, the more vulnerable judges can "hide behind their colleagues"[670] and issue unanimous decisions without the fear that the particular decision will be attributed to them. Case in point, the dissenting opinion by Burundian Judge Nkurunziza was seen by some observers as a deference to the Burundian state.[671] An interview with the lead lawyer on the case, who had represented the Burundian government at the FID complaint, echoed similar sentiments when he reasoned that the case was politically motivated by Burundi to unseat Rwanda's nominee for EALA speakership. The government lawyer on the case reports that they have declined to take the case to appeal, believing that the FID ruling was the best-case scenario, given that the EALA speaker election was conducted lawfully.[672] However, the persistence of the Burundian Minister of East African Community Affairs, who had fancied the speakership for herself, led to the filing of the moot appeal.

Given the political enormity of this case and Burundi's stake in losing it (they had to pay costs following the loss at the appellate level), it does not seem far-fetched that Judge Nkurunziza saw no way out of dissent. While the only clear-cut evidence of judicial interference at the EACJ is in the *Anyang' Nyong'o* case, where Kenyan judges were not only harassed but suspended at the national level, Nkuruniziza's dissenting voice may

669 Interview, EACJ judge (EA07), September 29, 2021, Kampala, Uganda.
670 Interview, EACJ judge (EA01), March 29, 2022, Nairobi, Kenya.
671 Interview, Repeat Lawyer, March 29, 2022, Nairobi, Kenya.
672 Interview, Burundian government lawyer, November 17, 2021, Bujumbura, Burundi.

have roots in similar fears. An interview with a former Burundian judge at the EACJ alluded that Nkurunziza was rewarded for his loyalty with an appointment to the Burundian Constitutional Court a few months after his tenure at the EACJ expired.[673]

Without delving into the credibility of such allegations, it is sufficient to note that judicial interference in East African states is not a new phenomenon. Cases of judicial interference in Kenya (Mutua 2001), Burundi (Masengu 2017), and Uganda, where judges are clearly threatened and resort to judicial review only "so sparingly and with the greatest reluctance" (Oloka-Onyango 2017, 270). Cases of executive interference and the lengths to which the executive has gone to silence judges are documented elsewhere (VonDoepp and Ellett 2011; Ellett 2013). Thus, by unanimously deciding cases, the EACJ has supported the courts' work without fear of being singled out, as one judge noted in an interview:

> "In young regional and international courts, like ours, having one judgment is a good practice. It avoids speculations by people, including governments, saying that this was a judgment of one judge. It is easier for judgments to be accepted if they are court judgments. It is very easy to criticise judgments if they are identified with individual judges."[674]

EACJ judges have also adopted the practice of minimising dissent as they sought to build their fledgling legitimacy following initial backlash. Moreover, this strategy enables them to put on a brave front as a unified court. As witnessed in the Anyang Nyong'o case, after the government of Kenya lost the case, it justified its interference by accusing the Kenyan judges of perceived bias in the matter:

> "As a human being, the judge *[Justice Keiwua]* would harbour animosity against the Government that suspended him from his duty and subjected him to the resultant disadvantages and would seek to hit back by deciding the case against the Government of Kenya."[675]

Ultimately, this informal institutional tactic has prevented backlash and targeted attacks on particular judges, sheltered the judges from scrutiny and resulting pressures from the partner states, and, most importantly, given the

673 Government of Burundi. Office of the President. December 21, 2020. "The New members of the Constitutional Court take an oath." https://presidence.gov.bi/2020/12/21/the-new-members-of-the-constitutional-court-take-an-oath/.

674 Interview, EACJ judge (EA01), March 29, 2022, Nairobi, Kenya.

675 *AG Kenya vs Anyang' Nyong'o,* 24.

court ownership of decisions rather than single judges, which enhances the court's credibility.

7.6 Determined Off-bench Diplomacy

Recall that the EACJ is one of the organs of a regional intergovernmental body comprising seven partner states. As such, the court ought to engage not only with the various heads of EAC organs – the Summit, the Council of Ministers, the East African Legislative Assembly (EALA) and the Secretariat – but it must also earn the appreciation of various partner state institutions. While states may threaten ICs, they are also "always crucial to ICs' performance, as they are the actors that create ICs, accept their jurisdiction, and supply courts with their operational resources" (De Silva 2018b, 301). In this sense, IC judges, through their leadership, have devised astute ways to navigate their strategic space by engaging in *strategic dialogue* to pre-emptively circumvent conflicts with the relevant stakeholders in the EAC, thereby mitigating the looming threats to judicial independence.

EACJ judges seek support by forging regional and international support networks and drawing on their political ties and networks of EAC leadership. The court leadership, EACJ judges, and the Registrar regularly pay formal "courtesy calls" to potential judicial allies.[676] Courtesy calls, broadly perceived, are official visits by the court leadership and administration to politically influential figures at the EAC level, in the EAC partner states, to regional and national Law Societies, and other ICs, among others. The EACJ, in its courtesy calls, seeks out allies through the following avenues: 1) providing information to bolster their understanding of its mandate, progress and development; 2) maintaining and strengthening or even forging relationships; and 3) explicitly imploring them to support the court and its activities in specific ways.[677] At the partner states' level, EACJ judges reach out to senior government officials to build a bridge between the executives and the court. The court leadership and the Registrar, usually accompanied by EACJ judges from the respective partner states, pay regular courtesy calls to the regional Chief Justices, beseeching "support and cooperation"[678] with their national judiciaries.

676 East African Court of Justice 2021, 47.
677 Ibid., 47.
678 EACJ, Twitter post, September 17, 2021, 5:38 pm. https://twitter.com/EACJCourt/status/1438890074188492807.

We already know from previous scholarship that judicial leadership in African domestic courts plays a crucial role in building the rule of law. Widner's study on the life of Tanzanian former Chief Justice Francis Nyalali highlights the role of judicial actors in shaping political realities in periods of political and economic uncertainty in Africa (Widner 2001a). Likewise, in regional courts, the role of judicial leadership cannot be overlooked. While EACJ leadership in the past years was also actively mobilising alliances from EAC Heads of State, senior government officials in the partner states and other relevant politicians, it was not as clearly strategically motivated as it appears to be under the leadership of Justice Kayobera. Since his ascent to judicial leadership in February 2021, the Judge President (JP) has explicitly spelt out three principles – Teamwork, Good Faith and Judicial Diplomacy – as his guiding tools for a "better transparent, accountable, sustainable and prosperous court."[679] Under these principles, the JP has worked with other Heads of EAC Organs and Institutions, such as the Secretary General of the EAC and the Speaker of EALA,[680] with whom he arranged quarterly meetings to discuss issues affecting the court and the Community.[681]

7.6.1 Lobbying for Funding

As clarified in Chapter 4, the court is funded by resources that are planned and approved as part of the annual EAC budget. Thus, the leaders of EAC organs are vital players in the budgetary allocation of the court. Together with other leaders of EAC organs, the EACJ leadership has been involved in launching political appeals to Heads of State in the EAC – in Rwanda, Uganda, South Sudan, Burundi, Zanzibar and Tanzania – seeking their support for court funding and the court's activities.[682] They have also held strategic dialogue with other relevant EAC heads like the Chairperson of the Council of Ministers to "discuss key issues affecting the work of the Court."[683] As recounted on the court's official website, the judges use these

679 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.
680 EACJ has also established relations with EALA to enable them to fight interference from the Partner States.
681 Interview, EACJ judge, November 9, 2021, Bujumbura.
682 Interview, EACJ judge, November 9, 2021, Bujumbura.
683 EACJ, Twitter post, July 20, 2021, 146 pm. https://twitter.com/EACJCourt/status/1417450775010287653.

encounters to lobby for financial independence, advocate for amendments in the court's jurisdiction, and solve the nagging issue of the ad-hoc nature of the bench.[684]

To mitigate its financial challenges, the court also seeks out alliances with various development partners – such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO), International Development Law Organisation (IDLO), Konrad Adenauer-Stiftung (KAS),[685] the *Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH* (GIZ), and The Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI)[686] – to generate funding for its activities (East African Court of Justice 2023, 46-48). Likewise, ambassadors and representatives from the relevant Ministries of Economic Development in major donor countries to the EAC, such as the Ambassador of Norway to Tanzania,[687] the Ambassador of Belgium,[688] and the US Embassy in Dar es Salaam,[689] as well as Germany[690], among others, have also engaged the EACJ.

In their engagements, judges have also continually sought support for the pending *2016 EACJ Administration Justice Bill*.[691] As Principal Judge on the third bench, Justice Mugenyi led the institutionalisation of the Court Plenary in the 2017 Administration of the EACJ Act.[692] She successfully advocated for the adoption of this Act by the EACJ, following best practice models in other international courts. The Heads of State are yet to assent to the *2016 EACJ Administration of Justice Bill*, which was passed by the East African Legislative Assembly (EALA) six years ago. Consequently, the

684 EACJ. "EACJ President pays a courtesy call on the chairperson of EAC Council of Ministers." July 20, 2021. https://www.eacj.org/?news=eacj-president-pays-a-courtesy-call-on-the-chairperson-of-the-eac-council-of-ministers.

685 KAS was a key funder of the past two Annual EACJ Judicial Conferences.

686 RWI has been a long-standing partner of the EACJ, which has heavily steered the Court's intervention in human rights jurisprudence.

687 Her Excellency Elisabeth Jacobsen visited the court on May 25, 2022 (East African Court of Justice 2023, 49).

688 His Excellency Paul Cartier visited the EACJ on May 11, 2022 (East African Court of Justice 2023, 49).

689 Mr. Bion N. Bliss, the Deputy Political and Economic Chief of the U.S. Embassy in Dar es Salaam visited the court on August 26, 2022 (East African Court of Justice 2023, 49).

690 Ms Claudia Imwolde-Kraemer, Senior Policy Officer from the German Federal Ministry for Economic Cooperation and Development, July 5, 2022 (East African Court of Justice 2023, 49).

691 East African Community. "The administration of East African Court of Justice Bill, 2016." November 18, 2016. https://www.eala.org/uploads/EACJ_bill2.pdf.

692 CV, Monica Kalyegira Mugenyi (available with author).

EACJ is unable to engage directly in resource mobilization as prescribed by the Treaty, which stipulates that this is to be done through the EAC Secretariat (East African Court of Justice 2022, 32).

In the same vein, President Kayobera has, since the beginning of his tenure, visited the Chief Justices of Rwanda,[693] Kenya,[694] Uganda,[695] and Tanzania[696] as part of his three core principles. Likewise, he has also reached out to Attorneys General (AGs) of selected EAC states[697] – primarily when the said AGs serve as the rotational Chair of the EAC Sectoral Council on Legal and Judicial Affairs.[698] When Kenyan AG Justice Kihara Kariuki served in this position, the current Judge President sought his support in resolving the court's "outstanding issues,"[699] imploring him to secure the court's "support to strengthen and protect its independence."[700] The court leadership used this visit to plead its case and seek allyship with the AG, who "pledged to follow up on the status of the Protocol on extended jurisdiction of the court to enable it to promote the objectives of the Community."[701]

Under Kayobera's leadership, the court has prioritized judicial diplomacy activities to "strengthen the relationship" that the court has with its stakeholders as well as to mobilise support for "some of the issues that affect the operation of the Court (East African Court of Justice 2023, 43). While in Uganda in October 2021, the president and registrar of the court paid six courtesy calls to senior government officials, the national judiciary, the Chief Justice and Deputy Chief Justice of Uganda, the Attorney General, the Minister Responsible for EAC Affairs, Uganda, and the Chief Registrar

693 CV, Monica Kalyegira Mugenyi (available with author).
694 East African Court of Justice 2021, 47.
695 EACJ, Twitter post, October 2, 2021, 2:08 pm. https://twitter.com/EACJCourt/status/1444272954355879940.
696 East African Court of Justice 2023, 49.
697 For example, the current EACJ President, Vice President Justice Geoffrey Kiryabwire, and Registrar Yufnalis Okubo paid a courtesy call to the Attorney General of Uganda, Hon Kiryowa Kiwanuka. See East African Court of Justice, Twitter post, October 2, 2021, 2:10 pm. https://twitter.com/EACJCourt/status/1444273562056073217.
698 A rotational role which occurs when the Partner State also serves as the Chair of EAC. The Attorney General (AG) automatically serves as the Chair of the Sectoral Council on Legal and Judicial Affairs of the region. In that role, the AG becomes a member of the Council of Ministers.
699 EACJ, Twitter post, July 12, 2021, 9:20 pm. https://twitter.com/EACJCourt/status/1414666100504252423.
700 Ibid., 9:23 pm. https://twitter.com/EACJCourt/status/1414666634585858052.
701 Ibid., 6:14 pm. https://twitter.com/EACJCourt/status/1414619134646759425.

(East African Court of Justice 2021, 42–43). He also visited relevant national Ministries of justice to engage them in the work of the EACJ and the national courts (East African Court of Justice 2023, 49).

7.6.2 Localisation of Hearings

Since November 2021, when the court had its first annual *rotational court* sessions in Bujumbura, the Arusha-based court has been moving to a different EAC partner state to conduct its work there at the end of each year. As part of the rotational court, EACJ judges conduct hearings open to the public at the different national courts. With the localisation of hearings, EACJ "aims to increase its visibility and to take its services closer to the people."[702] The rotational court program is also tied to an *Annual Judicial Conference*, a ceremony bringing together all the relevant stakeholders[703] to "stimulate high-level conversations and discussion on current and emerging legal and judicial issues between judges, court users and academia in the EAC" (East African Court of Justice 2023, 57). There have been two such conferences, in Uganda,[704] and another in Burundi,[705] and the next one was hosted in Rwanda.[706]

Likewise, they invite EAC Heads of State to their Annual EACJ Judicial Conference so that they can witness the court's work and develop an appreciation for its mandate. For example, the President of Uganda, Yoweri Kaguta Museveni, attended the 2nd Annual EACJ Judicial Conference in Kampala, where he interacted with the judges, urging them to do more to support regional integration (East African Court of Justice 2022, 42). While his speech did not directly address the deficits in the court's independence and autonomy, his presence at the event presented an opportunity for the court leadership to address their concerns and seek his commitment to

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702 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.

703 Such as former EACJ judges, national chief justices, legal practitioners, Civil Society Organizations, Heads of EAC organs and institutions, Ministers of EAC Affairs, relevant national Ministers of Justice, Attorneys General, academia and the private sector.

704 The 2nd Annual EACJ Judicial Conference. "Transforming access to justice in the EAC." October 26 – 28, 2022, Kampala, Uganda.

705 EACJ Judicial Symposium, *supra* note 62.

706 The 3rd Annual EACJ Judicial Conference was held on October 30 – November 1, 2023, in Kigali, Rwanda. https://twitter.com/EACJCourt/status/1651595625044090880.

addressing the issues. This was underlined by the presence of Hon. Rebecca Kadaga, the first Deputy Prime Minister and Minister for EAC Affairs in Uganda, who assured the judges that she "took note of the challenges of the court" (ibid., 42). Kadaga was Uganda's Speaker of Parliament when the BAT case was handed out. Despite showing her discontentment with the regional court's intervention, she later implored Ugandans to use the court (see previous chapter). This example of the court engaging in diplomacy with leading political figures in the region – even those who were once opposed to its mandate – exemplifies the type of leadership the third bench set out to practice.

7.6.3 Forging Judicial Alliances

Another group of potential allies is similarly positioned ICs in the region and abroad. Internationally, the EACJ has sought the support of the United Nations International Residual Mechanism for Criminal Tribunal (UNICTR)[707] and undertaken several benchmarking activities with EU courts.[708] An avid international law expert, Justice Kiryabwire amassed expertise through his study visits to other international courts, including the European Court of Human Rights in Strasbourg (March 2018) and the European Court of Justice in Luxembourg (March 2017).[709]

Regionally, the EACJ organised the first tripartite forum with the African Court on Human and Peoples' Rights (African Court) and the ECOWAS Court of Justice (CCJ), bringing together judges and staff from the three courts, representatives of the partner institutions and members of the academy. Such arrangements indicate the awareness and willingness of Africa's regional courts to engage in transnational judicial dialogue and a timely exchange of ideas. In his speech, the EACJ President clearly articulated the importance of the meeting:

> "This is an important gathering which allows participants to share knowledge and experience, exchange judicial experiences, explore av-

707 EACJ Judges (Appellate Division) paid a courtesy call to the President of the United Nations-IRMCT, Justice Carmel Agius, to learn from the Mechanism and promote good working relations, sharing experiences on the progress made in digitising court processes and information resources (East African Court of Justice 2023, 46).

708 The EACJ President is seen appreciating the involvement of the CJEU in their work. See EACJ Twitter. https://twitter.com/EACJCourt/status/1638128714914430977.

709 CV, Geoffrey Wilfred Mupere Kiryabwire.

> enues to strengthen existing cooperation and establish new relations, and discuss issues of common interest and challenges."[710]

In its own words, the court sought to "discuss issues of common interest, including the challenges faced by the courts and how to strengthen cooperation among them" (East African Court of Justice 2023, 50). One of the results of this exchange was an agreement by the three courts to "promote and strengthen the contextualisation of human rights standards and their implementation. The courts also recommended holding similar bi-annual dialogues and regular jurisprudential and procedural exchange between international, regional and sub-regional courts" (ibid., 50). EACJ judges perceive these off-bench engagements with other ICs as an avenue to elicit support against threats to their independence, foster knowledge exchange, and spark dialogue on common interest issue areas, such as judicial and staff capacity building and plans to share library resources.[711]

These engagements are sustained over time through the formal signing of a memorandum of understanding,[712] paying official visits[713] to each of their institutions, and regularly attending and contributing to each other's events[714] to share experiences and promote working relations. Correspondingly, the court reports exchanging with senior judicial officers from the Common Market for Eastern and Southern Africa (COMESA) Court of Justice (East African Court of Justice 2021, 48). Other important partners for the court are regional and international judicial organisations such as the East Africa Magistrates and Judges Association (EAMJA) and the Commonwealth Magistrates and Judges Association (CMJA). EACJ offered to house the EAMJA in its precincts in Arusha to deepen collaboration and working relations (ibid., 48). The court reports that this arrangement has

710 Speech by Hon. Justice Nestor Kayobera, *supra* note 133.

711 The Tripartite Forum was attended by the President of Zanzibar, representatives from the UN Human Rights Treaty, Raoul Wallenberg Institute of Human Rights, Konrad Adenauer Stiftung (KAS), and the media, among others. Held on June 7 – 29, 2022, at Hotel Verde, Zanzibar.

712 The EACJ and African Court signed one in 2019, pledging to "strengthen their relationship and explore better ways to enhance promotion and protection of human rights," among others (East African Court of Justice 2022, 6).

713 On April 12, 2022, the EACJ President paid a courtesy call to the African Court head, Hon. Lady Justice Imani Aboud, where it was agreed that the two courts would make efforts to undertake joint activities and programmes aimed at improving and strengthening their collaboration (East African Court of Justice 2023, 46).

714 Hon. Aboud also attended and actively participated in the EACJ 2nd Annual Judicial Symposium, where she reiterated the two courts' pledge to work together (ibid).

"contributed to strengthening collaboration, sharing of knowledge, skills and exchange of experiences in international legal procedures" (ibid., 48).

Mobilising allies may also be directed toward potential compliance constituencies such as national judges and leaders of national justice systems. EACJ leadership arranges meetings with national judges to construct, strengthen and advocate for a relationship between the EACJ and the national judiciaries, especially regarding the role of the EACJ, seek their cooperation in the preliminary reference procedure, and urge them to advocate for the enforcement of decisions under their respective mandates.[715] In these meetings with the national judiciary and others among legal elites, the court shares information materials and holds discussions on "the role, implementation of the court's decisions and its jurisprudence among others" (East African Court of Justice 2021, 40). It shows that these legitimation tactics (Squatrito 2021, 83) are crucial to the performance of the EACJ.

In short, through partnerships with other national, regional and international courts, organised judicial action can often be a compelling voice in advocating judicial independence against executive antagonism. This is because judicial associations create opportunities for networking as they typically have access to critical political networks while enjoying some official competencies, which allows them to intervene publicly through more accessible communication with the media and other important judicial allies. As already witnessed in the Hungarian and Polish contexts, judicial associations play a crucial role in mobilising judicial resistance (Gyöngyi 2024).

7.6.4 Allies in the Media and Academy

In addition to judicial, legal and political allies, the media can play an important role in judicial publicity and support. In the EACJ, judges go off-bench to mobilise the media in various forms: through television and radio broadcasting,[716] engaging in dialogue with regional media houses,[717] and

715 For example, President Kayobera met with 420 judges and magistrates from Bujumbura Municipality to advocate for these positions (East African Court of Justice 2021, 38–39).

716 For instance, the Sub-registry officials in Bujumbura report having conducted four televised and radio talk shows in one year (East African Court of Justice 2021, 38).

717 The Court hosted journalists from all Media Houses in Tanzania on June 17, 2022, as part of its mobilisation strategies (East African Court of Justice 2023, 49).

offering media training to regional journalists and editors on the court's mandate to enhance their reportage on judicial activities (East African Court of Justice 2023, 48). Through these activities, the court leverages the support of the media to sensitise diverse stakeholders on its legal regimes and attract potential litigants by publicizing its work. As former Judge President Nsekela[718] once aptly stated:

> "The Court may not have 'juicy' stuff within the media context in order to secure space within media circles, but the need to publicise it and its activities remains valid. The media, of course, in this context, faces the challenge of balancing its commercial interests by publishing juicy stuff to its readers and those interests of the EAC organs such as the Court, which may not be financially well to buy media space" (Nsekela 2009, 11).

Although the above statement was made 14 years ago, financing the court's media publicity remains challenging, even though its general reportage has grown exponentially. This is because the court has made provisions in its budget for purchasing space in various national newspapers to which it has remained committed (East African Court of Justice 2023, 48).

Similarly, essential alliances can be found in academia and Law Schools within the region, both as judicial allies and future constituents. Since 2021, the court judges and staff have made strategic visits to various law schools in Burundi[719] and Uganda,[720] where they have organized workshops to sensitise the students and lecturers, thereby boosting the awareness of the court within the universities. They also highlighted the court's rotational program across the region[721] and urged students to partake in the moot court competition.

The court also routinely cultivates relations with academics – through invitations to its Annual Judicial Conferences – to discuss its work, allowing for feedback, criticism, or reflection.[722] My experience researching the EACJ across space and time and receiving overwhelming support from the

718 He was the leader of the EACJ from October 2008 to June 2014.

719 EACJ, Twitter post, October 8, 2021, 3:59 pm. https://twitter.com/eacjcourt/status/1446475403154100229.

720 EACJ, Twitter post, November 30, 2022, 6:59 pm. https://twitter.com/EACJCourt/status/1598013926243196928.

721 EACJ, Facebook post, November 30, 2022, 5:17 pm.

722 A paper presented by Prof. Tomasz Milej at the 2nd Annual Symposium challenged judges to reflect on the thesis raised by Gathii (2020b) regarding sub-regional courts acting as agents of social and political change (East African Court of Justice 2022, 37).

court leadership, the Registrar, and the court staff is a testament to their openness to engaging in academic discourse.[723] The fact that the court opens up room for such dialogue and close partnership with all potential allies shows their willingness to appear transparent and people-centred.

7.6.5 Digital Socialisation

Another area in which the court has socialised its future constituents, litigants, judges, lawyers, and existing allies regarding its functioning and mandate is the successful pioneering of ICT infrastructure. Previous scholarship suggests that "public confidence in courts is conditioned by many cultural, political, and individual factors, including individual characteristics and experience of citizens (Lühiste 2006; Stoutenborough and Haider-Markel 2008; Salzman and Ramsey 2013). As such, public confidence in courts is typically very low in countries with muted electoral competition or no popular rights culture (Helmke and Rosenbluth 2009). Therefore, it is noteworthy that the EACJ has sought to socialise its users into its work by embracing digital tools while promoting its work to potential users.

Until 2016, the EACJ heavily relied on paper to conduct its work, with paper having to be filed, stored and physically moved from one place to another manually, which proved difficult and unsustainable for the court. EACJ now offers litigants and their advocates the flexibility to attend in person or virtually – saving litigants costs that were incurred when physical attendance was mandatory. The ability to hold court sessions virtually saves resources and time that would otherwise be needed to travel to Arusha. In the same light, filing cases online and processing digital cases reduces manual contact with and transmission of data, which is essential when dealing with vices like corruption, primarily due to excessive human interaction. This is not to say that computer programs cannot be tampered with and are immune to such malpractices. However, integrating ICT into the judicial processes has enabled the EACJ to socialise its users into its work more broadly through information sharing, allowing the users to access quicker and more efficient judicial processes, which enhances transparency, accountability and good governance. Repeat lawyers have confirmed in interviews that the ease of filing cases from the comfort of their home countries has eased their quest for justice. For instance, Ugandan lawyer

723 Refer to Chapter 3 on research methodology.

Male Mabirizi filed several cases during the pandemic alone – from opposing lockdown measures[724] to challenging presidential and parliamentary elections[725] and suing the government of Uganda over extrajudicial killings of terrorism suspects in the country.[726]

Furthermore, EACJ revamping its existing website into a web portal – where interested EAC citizens and other stakeholders can catch live proceedings – removes the mystery from courtroom proceedings and unveils the courtroom for what it is: an avenue to seek redress by aggrieved parties. An approachable space that is no longer shrouded in mystery and legal jargon- but a space that welcomes EAC residents and enables them to get closer to justice. Most significantly, it set up a video-conference system and started live-streaming hearings over the EACJ website so interested people outside the court could follow live proceedings – cementing its quest to bring justice closer to people. Given that EAC citizens can regularly follow the live streaming of selected cases of interest, they can participate in the current discourse and attend court sessions that affect their livelihood and social and economic stability as they occur. This fosters attentiveness to the court's work, exposes impunity by EAC governments and encourages citizens to seek justice. Most importantly, online court sessions coupled with live streaming, enhance judicial transparency and equalise access to justice for all EAC residents, regardless of their economic standing. Additionally, recordings of all sessions are available on demand, promoting transparency in judicial proceedings. The court hearings are video- and audio-recorded, with a digital transcript available almost instantly, which makes the courtroom experience more interactive and transparent.

A different, albeit helpful addition to the court's ICT infrastructure is its robust digital presence through its official website[727] and social media

724 Anami, Luke. "*Ugandan takes govt to EACJ, says lockdown against the law*." April 11, 2020. https://www.theeastafrican.co.ke/tea/news/east-africa/ugandan-takes-govt-to-eacj-says-lockdown-against-the-law-1439834.

725 *Male H. Mabirizi Kiwanuka vs Attorney General of Uganda*, Reference No. 6 of 2019. September 30, 2020. https://africanlii.org/akn/aa-au/judgment/eacj/2020/18/eng@2020-09-30/source.pdf.

726 Kukunda, Judith. 2021. "Mabirizi Sues Gov't Over Extra Judicial Killings of 'Terror' Suspects." November 22. https://ugandaradionetwork.net/story/mabirizi-sues-govt-over-extra-judicial-killings-of-terror-suspects.

727 EACJ. Website. https://www.eacj.org/.

platforms – Twitter[728], YouTube[729] and Facebook[730] – which it regularly uses to raise public awareness and educate the public about the court. The YouTube page is used to broadcast, sometimes live broadcasts, of EACJ activities, functions and other happenings relating to the court. Interested members of the public can access all videos of the two previous Annual Judicial Symposia and various informational broadcasts relating to the EACJ's mandate, functioning and performance. These platforms target the public and audiences where knowledge of the court may be deficient, hoping to communicate using easily understandable legal language that self-references. A quick check of the court's Twitter platform reveals norm-referential narratives around its role in advancing good governance, the rule of law, social justice, and accepted human rights standards.

The court utilises its social media platforms to promote capacity-building activities like upcoming seminars, conferences, trainings and other forms of information sharing. They also release timely press statements detailing updates on the role of the court and its several engagements, seeking to keep interested users and potential allies informed about its work. The court also socialises people into its work by bridging the gap between itself and its observers. Sharing daily updates on the social events that judges attend, especially the purely non-judicial activities, portrays judges as social actors who prioritise "the people" they serve. At the same time, the accompanying self-referencing language emphasises that it is people-centred, using phrases like "the Court belongs to the people."[731] Likewise, references to its contribution to the integration agenda underscore its commitment to the political purpose and mandate of the court in regional politics. This way, the judges socialise relevant actors to perceive their function as broader than adjudication, encompassing outreach to the community through non-judicial activity.

Consequently, ICT usage has facilitated easy access for all the court's stakeholders to the Court, ensuring that the EACJ does not become a court of the few privileged EAC citizens and residents. By following these events and through available information, citizens gaib a better understanding of how the court works and the legal instruments they need to recognise their rights, which increases beneficiaries' confidence and provides greater

728 EACJ. Twitter. https://twitter.com/EACJCourt.
729 EACJ. YouTube. https://www.youtube.com/@eacjcourttv.
730 EACJ. Facebook Page. https://www.facebook.com/eacjcourt/.
731 EACJ, Twitter post, May 17, 2022. https://twitter.com/EACJCourt/status/1526567465622331393.

legitimacy for the court and judicial power.[732] Scholars warn that increased court publicity and knowledge of its work does not translate into greater confidence in the court (Llanos and Weber 2021). Without idealising the role that court publicity may play in judicial empowerment, there is good reason to postulate that the socialisation of actors in ICT usage not only brings justice closer to the people but also creates a cultural change in how judicial work is done – it ceases to be secluded in judicial chambers. It becomes an object of interest for all.

7.7 Towards a "Commercial" Bench

For third-bench judicial leaders, off-bench judicial diplomacy is just as important as the work they do on-bench. Although part of the official mandate of court leadership, these visits may pose a risk to the judicial reputation and independence, sparking questions about their impartiality (Squatrito 2021, 65). However, as we know, these visits are purposive, strategic, and vital in targeting potential compliance constituencies. They aim to cultivate legitimacy and build influential networks that, in turn, will protect the court against undue interference.

Drawing on a novel usage of the notion of *judicial diplomacy*, the chapter elucidated how African ICs respond to multiple audiences and decision-makers amidst the increased pressures of the job. *Off-bench*, the third bench has emerged very strategic in its untiring efforts to conduct strategic dialogue with the relevant national and regional politicians, lobbied for funds to support its work, and even conducted annual rotational court sessions to bring its services closer to citizens in the EAC countries. Compared to the previous benches, the third bench stands out as the most "diplomatic" bench due to its increased off-bench efforts, which have been vocal, unafraid and even use the term judicial diplomacy as the leader's governing motto. The Kayobera bench has openly spoken about employing judicial diplomacy as an essential guiding principle for international adjudication. As the chapter has shown, judges perceive their role *not* as neutral arbiters

732 For a detailed account of how ICT usage brings justice closer to the people, the author and a colleague have a working paper on embracing the administration of justice through ICT usage. See Kisakye Diana and Arnaud Gahimbare. 2021. "Of paperless hybrid Courts: Embracing the administration of justice through ICT in the East African Court of Justice." Presented at the VAD 2022 conference. "Africa-Europe: Reciprocal Perspectives," Thursday, June 9, 2021, Freiburg, Germany (available with author on file).

who merely stick to the confines of the law but as one that entails carefully balancing their judicial role with the existing realities of their political surroundings.

On the bench, even though the third bench was more progressive, ruling on controversial issues such as property rights in Burundi, the border closure between Rwanda and Uganda and the changes in legislation in Tanzania, the majority of its megapolitical affairs were dismissed. The judges seemed to shy away from overtly politicised regional jurisprudence. 61 % of all cases litigated within these seven years were dismissed as part of a tactical avoidance of adjudicating politically salient questions. As the property rights disputes illustrated, the bench exercised considerable caution and legal diplomacy to navigate threats to its existence.

Serving as an intermediary in the regional integration process presents an additional challenge to African REC courts. They ought to navigate a strategic space between having a delegated mandate and overseeing integration initiatives whilst catering to the contextual dynamics of dealing with member state governments. Thus, the aforementioned tactics – issuing decisions by consensus and carefully considering the remedies issued, thereby ensuring compliance through careful decision-making – mirror arguments put forth by constrained independence theory. This theory suggests that these judges must tread carefully on very shaky political grounds whilst catering to the demands of their support networks and global networks of law. Taking the two dissenting judgements mentioned above reveals the intricacies of decision-making within a strategic space. While the *EALA Speaker case* from Burundi could be perceived as a case of acquiescence to the needs of a judge's appointers, the dissenting voices on the *Manariyo case* were expansively interpreting the Treaty in favour of advancing the regional integration agenda. One notable difference here is that the Burundian judge emerges from a judicial system within an autocratic government, where judicial independence is hardly a virtue. This case exemplifies that the strategies above, though applicable across the board, may not serve the same purpose for different judges. Those from overtly autocratic appointing member states may even employ similar tactics, but to their advantage and to the detriment of the REC body and the court itself.

Moreover, most of these judges are still employed in public office or on the bench in their national jurisdictions. This set-up complicates the issue even further, considering that REC courts are international institutions to which judges are sent as agents of their appointing member states. As such, the complex interplay between judges' roles as judicial diplomats of their

member state to the REC body and as employees of the REC body, whose interests should be in advancing the integration agenda, as well as their judicial expectation as "neutral" legal norm interpreters who demystify the REC Treaty poses a trilemma. Therefore, the strategies mentioned above should not be perceived as static, serving only one purpose, but rather as an attempt at resolving that trilemma, and how the various benches employ them is also open to interpretation.

Likewise, the change in judges over time has impacted the trajectory, firmness and audacity of the regional bench. This chapter finds that the professional backgrounds of the judges significantly influenced their desire to shift the bench toward a more commercial orientation. Unlike the previous bench, the third bench was populated by specialised commercial law experts who were strategically selected to bring the court back from bold political ambitions and human rights jurisdiction to its core business of economic integration. Recognising that the EACJ had primarily become known and appreciated for its human rights jurisprudence alone, the third bench judges set out to forge legitimacy as a trade and commercial court. This approach was a defensive tactic aimed at strengthening the institutionalisation of the court. Especially having witnessed what occurred in the Southern African Development Community (SADC) Tribunal, where adjudicating human rights led to the early demise of the sub-regional court, EAC judges sought to change the image of the court as one that primarily deals with human rights to one that caters to issues of economic integration.

Following the success of the *BAT case* and the increase in trade-related matters, the judges perceived their court as growing in political and economic relevance. However, they also noted that alternative dispute resolution, rather than litigation, may be the most suitable path for dealing with trade disputes in the region. This sentiment resonates with the reasons given above for business actors' distaste for resolving their commercial problems through litigation and instead opting for a more harmonious resolution. Such underlying issues have contributed to the scarcity of commercial cases and the development of a commercial trajectory. Worse still, at the time of writing, the EACJ had just received a massive blow from Kenya's Supreme Court ruling in the Martha Karua case. It had just ruled against the supremacy of EACJ decisions and warned the court against encroaching on the decisions of top domestic courts. By daring to rule as it did, the EACJ had forsaken its initial restraint in reviewing the decisions of a sovereign state, which received pushback from the national courts. While

the judges are keen on growing their influence in trade-related disputes and even issuing pecuniary damages, the future of the EACJ in this sphere remains to be seen.