



OCCASIONAL PAPER SERIES

**ENERGY IN THE EAST
AFRICAN COMMUNITY:
THE ROLE OF THE
ENERGY CHARTER
TREATY**

VICTORIA RITAH NALULE

ENERGY CHARTER SECRETARIAT
KNOWLEDGE CENTRE
2016

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List of Abbreviations

ADF	African Development Fund
BRN	Big Results Now
BITs	Bilateral Investment Treaties
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EU	European Union
ECT	Energy Charter Treaty
EAPP	The Eastern Africa Power Pool
ECOWAS	Economic Community of West African States
EDPRS II Strategy	Economic Development and Poverty Reduction Strategy
EPP	Emergency Power Plants
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
GoB	Government of Burundi
GoT	Government of Tanzania
IEC	International Energy Charter
ICSID	International Centre for Settlement of Disputes
IPC	Investment Promotion Act
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce.
MDGs	Millennium Development Goals
MIGA	Multilateral Investment Guarantee Agency
NATOIL	Uganda National Oil Company
NBI	Nile Basin Initiative
NELSAP	Nile Equatorial Lakes Subsidiary Action Program
PEPD	Petroleum Exploration and Production Department
PPP	Public Private Partnership
RPTP	Regional Power Trade Project

REGIDESO	Régie de Production et Distribution d'Eau et d'Electricité
TIA	Tanzanian Investment Act
TIC	Tanzania Investment Centre
TANESCO	Tanzania Electric Supply Company
TDV	Tanzania Development Vision
UNCITRAL	United Nations Commission on International Trade Law
UEB	Uganda Electricity Board
UEGCL	Uganda Electricity Generation Company Limited
UEDCL	Uganda Electricity Distribution Company Limited

ABSTRACT

Modern energy is essential for socio-economic development, and such investments in the energy sector are crucial in realizing universal energy access in Africa. In this regard, the East African Community (EAC) has embraced regional cooperation as a means of developing regional markets and also as a means of attracting more energy investments in East Africa.

Market reforms have also been experienced at both the national and regional levels, and liberalization has been embraced as a means of attracting energy investments in East Africa. In moving towards the international energy market, some of the EAC Partner States, namely Burundi, Tanzania and Uganda, adopted and signed the International Energy Charter. This paper is therefore an endeavour to analyse how the International Energy Charter, together with the Energy Charter Treaty, can positively impact the EAC energy sector, especially with regard to attracting the needed energy investments in the region.

1. Introduction¹

Lack of access to modern energy services remains a major constraint to economic development in many regions.² The East African Community (EAC or Community), which is a regional intergovernmental organisation of six countries including Burundi, Kenya, Rwanda, the United Republic of Tanzania, South Sudan and Uganda,³ is still struggling with the challenge of access to modern energy. It is argued that in the absence of additional dedicated policy actions, the number of people lacking access to modern energy services may decline only marginally in the coming decades, and will likely increase in some parts of the world.⁴

EAC member states have experienced various market reforms and liberalization of their energy sectors as a means of attracting the required investments. In moving further towards the international energy market, some of the EAC Partner States such as Burundi, Tanzania and Uganda adopted and signed the International Energy Charter (IEC) at the Ministerial Conference at The Hague on 20-21 May 2015. Regional organisations such as the Economic Community of West African States (ECOWAS) and the European Union (EU) also signed the IEC. The IEC is a political declaration on energy cooperation which does not impose any legal or financial obligation.

The focus of this paper is to discuss various reforms in the energy sector, at both national and regional level, and how these could be enhanced further to attract energy investments at an international level by signing the International Energy Charter. The paper concludes by pointing out the fact that the Energy Charter Treaty

¹ This Report was prepared by Victoria Ritah Nalule, during an internship at the Energy Charter Secretariat, and supervised by Dr Ernesto Bonafé, regulatory expert at the Energy Charter Secretariat. Comments were made by Mr Peter Kinuthia, senior energy officer at the East African Community, and Elisiana Stanley Malle.

² International Energy Agency: World Energy Outlook Special Report, 2014, page 13.

³ South Sudan officially joined the East African Community on 15 April 2016.

⁴ Bazilian, M., Nussbaumer, P., Ronger, H.-H., Brew-Hammond, A., Foster, V., Pachauri, S., Williams, E., Howells, M., Niyongabo, P., Musaba, L., Gallachoir, B.O., Radka, M., Kammen, D.M., 2012b. Energy access scenarios to 2030 for the power sector in Sub-Saharan Africa. Util. Policy 20, 1–16.

(ECT) and the IEC can positively impact the EAC energy sector, especially with regard to the principles of attracting foreign investors and ensuring access to sustainable energy.

2. Energy sectors at the national level

Under this section, market reforms in the energy sector and available investment initiatives of the six EAC member states are briefly discussed. This section is important to understand how national efforts are enhanced at a regional level, and how they can be further enhanced at an international level, by signing the IEC and later the ECT.

2.1 Republic of Burundi

Burundi is endowed with energy resources such as hydro, renewables, and others, but the country is still experiencing a major challenge in energy access. The energy sector is dominated by biomass, which contributes 94% of the energy mix, and electricity access is very low. In 2014 the installed capacity for hydro electricity in the country was estimated at 32 MW and thermal at 6 MW.⁵

The country has experienced reforms in the energy sector and recently these reforms are seen in a new law on the reorganization of the electricity sector, Law No. 1/13.⁶ This new law encourages public-private partnerships (PPP) as a means of attracting investments in the energy sector, and it repeals a law on liberalizing and regulating the water and electricity sector, Law No. 1/014, which was enacted in 2000.⁷

Besides liberalizing the energy sector and encouraging PPPs, the country has mechanisms intended to promote and protect investments. The Investment Code prohibits any nationalization or expropriation of investments except in legal

⁵ East African Community Secretariat: East African Community Facts and Figures, September 2015, Page 71.

⁶ Law No. 1/13 of 23 April 2015.

⁷ Law No. 1/014 of 11 August 2000.

circumstances of public interest, in a non-discriminatory basis and followed by adequate compensation.⁸ The Investment Code also sets out incentives such as a tax reduction for goods used to establish new businesses. In order to further promote investment, the government created the Burundian Investment and Promotion Authority, which is charged with the duty of assisting potential investors.⁹

2.2 Republic of Kenya

Kenya is endowed with massive energy resources, being currently the largest producer of geothermal energy in Africa followed by Ethiopia, however, access to modern energy is still a significant challenge. The country's energy sector is dominated by biomass which contributes to 68% of the total energy mix, followed by petroleum at 22% and electricity at 9%. The installed capacity for hydro electricity in Kenya was estimated at 797 MW in 2014, and installed geothermal increased from 237 MW in 2013 to 348 MW in 2014.¹⁰

The energy sector is governed by the Energy Act, which liberalized the electricity sector by paving the way for entry of other players into electricity transmission and distribution. The Energy Act repealed the Power Act of 1996, and it further consolidated all laws relating to electricity, petroleum and natural gas, renewable energy, energy efficiency and conversion.¹¹

Liberalization was embraced in Kenya in order to attract needed investments in the energy sector, specifically, the Investment Promotions Act (IPA) was enacted by the national assembly to encourage inward investment. The primary aim of the IPA is to reduce the bureaucracy faced by an investor in relation to licensing, immigration and negotiating tax incentives and exemptions from the relevant authorities.¹² Moreover,

⁸ Burundi Investment Code, Law No. 1/24 of 10 September 2008. The Investment Code has been in force since 1 January 2009.

⁹ The Burundi Investment Code was amended in August 2009.

¹⁰ East African Community Secretariat: East African Community Facts and Figures, September 2015, Page 71.

¹¹ The Energy Act No. 12 of 2006.

¹² The Investment Promotions Act, 2004, Laws of Kenya.

property of foreign investors is protected under the Foreign Investments Act, and it cannot be nationalized without full and adequate compensation.¹³

2.3 Republic of Rwanda

Rwanda has achieved impressive development progress in recent years. The country has been ranked as the third easiest place for doing business within Sub-Saharan Africa, after Mauritius and South Africa, according to the World Bank Doing Business Rankings report.¹⁴

Despite the above, access to modern energy is still a major challenge in Rwanda, as the primary use of energy is dominated by biomass (84% of the total primary consumption), electricity (5%) and petroleum products (the rest).¹⁵ The installed capacity for hydro electricity in Rwanda was estimated at 96 MW in 2014, while installed thermal increased from 31 MW in 2012 to 48 MW in 2014.¹⁶

Liberalization of the electricity sector is one of the major objectives of Electricity Law No. 21/2011, the law that governs the activities of electric power production, transmission, distribution and trading both within and outside the national territory.¹⁷ In addition to liberalization, Rwanda also protects the property of investors under the 2007 Expropriation Law, which requires compensation to be paid to the property owner prior to expropriation.¹⁸

¹³ Section 8 of the Foreign Investments Protection Act, Cap 518, Laws of Kenya.

¹⁴ World Bank Group: Doing Business, 2015 www.doingbusiness.org. The report measures regulations that encourages or constrain business activities across 10 core areas or indicators: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and closing a business.

¹⁵ Electricity consumption in Rwanda is low, it is estimated that the country has about 112 MW of installed capacity: African Development Bank: Rwanda Energy Sector Review and Action Plan, [http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Rwanda - Energy Sector Review and Action Plan.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Rwanda_-_Energy_Sector_Review_and_Action_Plan.pdf), last visited on 27th December 2015.

¹⁶ East African Community Secretariat: East African Community Facts and Figures, September 2015, Page 71.

¹⁷ The Electricity Law was enacted in June 2011 and gazette in July 2011.

¹⁸ 2007 Expropriation Law, Laws of Rwanda.

2.4 Republic of South Sudan

South Sudan is rich in energy resources such as oil and gas, however, the country has one of the lowest rates of electricity consumption per capita in Sub-Saharan Africa and it is estimated that only 1% of the country has access to grid electricity, a situation mainly attributed to underdeveloped energy infrastructure.¹⁹

Considering the fact that South Sudan is a young country that only gained independence on 9 July 2011, and also considering the decade of civil war the country suffered, it would require more legal and regulatory reforms to build investor confidence to attain the required capital to develop needed energy infrastructure.

2.5 United Republic of Tanzania

Tanzania is a country with abundant energy resources such as hydro, coal, geothermal, and natural gas proven reserves which are estimated at 53.28 TCF.²⁰ Despite this, access to modern energy is still a major challenge: energy consumption is dominated by biomass which accounts for 90% of the primary energy supply, while petroleum and electricity account for about 8% and 1.2%, respectively, of the primary energy used.²¹

The country embraced liberalization in the Electricity Act of 2008, which removed control of electricity production and distribution from the Tanzania Electric Supply Company (TANESCO).²² Besides liberalization, the country has put a lot of effort into improving the investment climate within the country's significant sectors such as energy, manufacturing, infrastructure, and mining, just to name a few. The Tanzania Investment Centre (TIC) and the Tanzanian Investment Act of 1997 (TIA) are intended to promote and protect foreign investments in the country. Tanzania also has

¹⁹ USAID: South Sudan, Power Africa Fact Sheet, <https://www.usaid.gov/powerafrica/south-sudan> last updated on 31st May 2016, last visited on 25 June 2016.

²⁰ The United Republic of Tanzania: Ministry of Energy and Minerals, www.mem.go.tz last visited on 28 June 2015.

²¹ The National Energy Policy of Tanzania, 2003, https://mem.go.tz/wp-content/uploads/2014/02/0001_17022013_National_Energy_Policy_2003.pdf last visited on 27 March 2015.

²² The Electricity Act, 2008, Laws of Tanzania.

favourable investment incentives and promotions offered in the form of Lead and Priority Sectors and these are both provided in fiscal and non-fiscal form.²³

2.6 Republic of Uganda

Uganda is endowed with energy resources such as hydro, coal, renewables, natural gas and petroleum, with discoveries estimated at 6.5 billion barrels of oil.²⁴

Access to modern energy is a major challenge in the country as 93% of energy needs are met by biomass in the form of wood, whereas petroleum products and hydro-electricity account for 5% and 1%, respectively. The installed capacity for hydro electricity in Uganda was estimated at 695 MW in 2014, and installed thermal increased from 100 MW in 2013 to 136 MW in 2014.²⁵

Liberalization was introduced by the Electricity Act of 1999, which permitted private participation in the energy sector. The Uganda Electricity Board (UEB), which was the sole generator, transmitter, distributor and regulator of electricity in the country, was unbundled into three separate companies.²⁶ The liberation of the country's electricity sector was aimed at promoting efficiency through decentralization and specialization, as well as attracting investment in the industry. To further promote and protect investments in the country, Article 26(2) of the Constitution of Uganda²⁷ and Section 29 (1) & (2) of the Investment Code Act protect the property of individuals, including investments.²⁸

²³ The Lead Sector includes: agriculture, mining, infrastructure, power generation, telecommunications, water services and export processing zones, while the Priority Sectors are air aviation, commercial buildings, commercial development and microfinance banks, export processing, geographical special development areas, human resources development, manufacturing, natural resources including fishing, rehabilitation and expansion, radio and television broadcasting, tourism and tour operations

²⁴ The country five sedimentary basins: The Albertine Graben, Hoima Basin, Lake Kyoga Basin, Lake Wamala Basin and the Kadama-Moroto Basin. The Albertine Graben is the most prosperous basin for petroleum.

²⁵ East African Community Secretariat: East African Community Facts and Figures, September 2015, Page 71.

²⁶ UEB was unbundled in March 2001 into three entities, including: Uganda Electricity Generation Company Limited (UEGCL), Uganda Electricity Transmission Company Limited (UETCL) and Uganda Electricity Distribution Company Limited (UEDCL)

²⁷ Article 26 (2) of the Constitution of Uganda, 1995, Laws of Uganda.

²⁸ Investment Code, Statute No. 1 of 1991, Laws of Uganda.

3. Energy sectors at the regional level

The EAC does not have a common energy policy, despite its pivotal role, as a regional organization, in addressing energy issues in East Africa. In this section, the EAC will be introduced together with areas of cooperation in the energy sector. Other African regional organisations such as the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) will also be briefly discussed in comparison to the EAC, with regard to regional energy investment promotion and protection.

3.1 Introduction to the East Africa Community

The East African Community (EAC) is the regional intergovernmental organisation of the Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, the Republic of South Sudan and the Republic of Uganda. The EAC was originally founded in 1967 and dissolved in 1977 due to political and economic reasons. It was revamped in 1999 with the signature of the EAC Treaty, which, on 7 July 2000, came into force following its ratification by the original three Partner States: Kenya, Tanzania and Uganda. The Republic of Burundi and the Republic of Rwanda acceded to the EAC on 18 June 2007 and became full members of the Community on 1 July 2007. EAC Treaty objectives include widening and deepening co-operation among the Partner States in the political, economic and social fields, for their mutual benefit, and through increased competitiveness, value added production, trade and investments.²⁹

EAC regional integration is a progressive process with four major pillars: the Customs Union, Common Market, Monetary Union, and Political Federation. Moving from one level of integration to another is through negotiated protocols. In 2004, a Protocol for the establishment of the East African Custom Union was signed by the three

²⁹East African Community, http://www.eac.int/index.php?option=com_content&view=article&id=1&Itemid=53, last visited on 26 March 2015.

original Partner States, and it entered into force in 2005. Rwanda and Burundi joined the Custom Union in 2009. The main objective of the Customs Union is to establish a single area of customs integration. This was followed by establishment of a common market, which entered into force in 2010. The Protocol for establishing a Monetary Union was signed in November 2013 and its operationalization is ongoing, with a ten-year implementation phase before adopting a single currency for the region.

The EAC organs responsible for ensuring effective operation of the EAC. These include: The Summit comprising of heads of government of Partner States; The Council of Ministers; co-ordinating Committee; Sectoral Committees; The East African Court of Justice; The East African Legislative Assembly and The Secretariat.³⁰

3.2 Energy Investments in the EAC Region

The East African region is endowed with various energy resources that are spread throughout the region, and more investments are needed to develop these resources, which are expected to play a big role in ensuring economic development in the EAC. Unlike other African regional organizations like ECOWAS and SADC that have more specific protocols aimed at promoting and protecting energy investments in the region, the EAC does not have a specific energy protocol or policy.

ECOWAS, for instance, specifically has provisions aimed at promoting and protecting energy investments which are contained under Chapter III of the ECOWAS Protocol on Energy.³¹ It is worth noting that the provisions of the ECOWAS Protocol on Energy are very similar to the provisions of the Energy Charter Treaty (ECT) of 1994. It is therefore not surprising that ECOWAS is an observer regional organization to the Energy Charter Conference, having signed the International Energy Charter (IEC), a political declaration on energy cooperation which was adopted and signed on 21/22

³⁰ The Organs and Institutions of the Community are established under Article 9 of the EAC Treaty.

³¹ The ECOWAS Protocol on Energy, 2003.

May 2015, at a High Level Ministerial Conference in The Hague, Netherlands.³²

SADC, on the other hand, does not have a specific provision relating to the promotion and protection of energy investments in the region. There are, however, general investment provisions contained in the SADC Protocol on Finance and Investment (the "Protocol"), which contain international protections for foreign investors in the region.³³ The main objective of the Protocol on Finance and Investment is to harmonise the financial and investment policies of the state parties in order to make them consistent with the objectives of SADC.³⁴ Core investment protections are set out under Annex 1, where state parties are encouraged to facilitate and create favourable conditions to attract investments in their territory.³⁵ With respect to nationalization, Article 5 states that, "*Investments shall not be nationalised or expropriated in the territory of any State Party except for a public purpose, under due process of law, on a non-discriminatory basis and subject to the payment of prompt, adequate and effective compensation.*"³⁶

Despite not having a specific energy policy, the EAC Treaty nevertheless recognises the need for regional cooperation in the development of the energy sector in East Africa. The most important provision with regard to energy is Article 101 of the Treaty, which explicitly encourages Partner States to adopt policies and mechanisms to promote the efficient exploitation, development, joint research and utilisation of the various energy resources available in the region.³⁷ In order to achieve the above, Partner States under Article 101 (2) committed to promote the least cost development and transmission of electric power, efficient exploration and

³² Chapter III of the ECOWAS Protocol has the same provisions as contained in Part III of the Energy Charter Treaty, for this reason these provisions will be discussed in detail under the next section.

³³ The Protocol was entered into force on 16 April 2010 and it clearly provides international protections for foreign investors in SADC.

³⁴ Article 2 (1) of the Protocol on Finance and Investment, 2006.

³⁵ Article 2 (2) of Annex 1 of the Protocol on Finance and Investment, 2006.

³⁶ Article 5 of Annex 1 of the Protocol on Finance and Investment, 2006.

³⁷ Article 101 (1) of the Treaty for the Establishment of the East African Community.

exploitation of fossil fuels, and utilization of new and renewable energy sources.³⁸

These sectors are briefly discussed below:

a) *Regional Cooperation in the Power Sector*

The main objectives of the power sector include: co-operation on issues of regional interest, development of interconnections, development of a power market, and exchange of technical and strategic information.³⁹ To this end, the East Africa Power Master Plan (EAPMP) was developed jointly with the Eastern Africa Power Pool (EAPP). The EAPMP, which aims to achieve least cost development of the power sector, shows that there are economies of scale associated with electricity interconnections and trade within EAC countries.⁴⁰ In parallel with the EAPMP, the EAC and EAPP developed the Interconnection Code, a regional grid code to govern the design and operation of electricity interconnections in the region. The study commenced in October 2009 and aimed at defining the least cost power development plan for generation and transmission projects, catering to the region's power needs for 25 years from 2013 to 2038. The study was completed in February 2011 and adopted by the Sectoral Council of EAC Energy Ministers in June 2011.⁴¹ The EAPMP is at different stages of implementation by the Partner States, with continuous monitoring by the EAC.

The EAPP, on the other hand, was established in 2005 with the signing of an Inter-Governmental Memorandum of Understanding by seven Eastern Africa countries. Presently it constitutes ten member countries.⁴² It was adopted as a specialized institution by the heads of states of the Common Market for Eastern and Southern Africa (COMESA) region in 2006 to foster power system interconnectivity.

³⁸ Article 101 (2) (a) of the Treaty for the Establishment of the East African Community.

³⁹ The EAC secretariat based in Arusha, Tanzania: EAC Energy: Power Sub-Sector, http://www.energy.eac.int/index.php?option=com_content&view=article&id=111&Itemid=48 last visited on 27 March 2015.

⁴⁰ The Plan also demonstrated that the development of hydro projects in Uganda and Tanzania would increase the capacity to produce cost-effective electricity and reduce its dependence on imported oil.

⁴² EAPP Member countries which joined in 2005 include: Burundi, Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Rwanda, Sudan. Libya and Uganda joined the EAPP in March 2010, February 2011 and December 2012 respectively.

The EAC is also closely working with other regional organizations including the Nile Equatorial Lakes Subsidiary Action Plan (NELSAP) of Nile Basin Initiative (NBI) and the Economic Cooperation of the Great Lakes Country (CEPGL) to promote regional projects and programmes in order to ensure effective development of the power sector.⁴³

The EAC has also developed a cross-border electrification programme that enables border centres to access electricity from the nearest grid, which is intended to increase access in a cost effective manner. Under this programme, Partner States may access electricity from each other. For instance, Lunga Lunga (Kenya) is supplied from Horohoro (Tanzania) while Namaga (Tanzania) is supplied from Namanga (Kenya). Other potential cross-border electrification projects have been identified, although they are yet to be implemented.⁴⁴

b) *Regional Cooperation in Renewable energy*

The EAC region is rich in wind, solar, and geothermal, among others. Development of renewable resources is essential in curbing the challenge of energy poverty in the region. Total geothermal potential in the East African Rift Valley is estimated at between 10 GW and 15 GW, and this is more than East Africa's total existing power generation capacity.⁴⁵ East Africa is also rich in solar energy potential, with most of the region enjoying an average of more than 320 days per year of bright sunlight and experiencing irradiance levels of almost 2000 kWh per square metre annually.

⁴³ A technical team meets regularly to share information and make appropriate plans. The organizations have agreed to collectively promote projects in a common geographical area, with each organization taking a lead in promoting the project to which it is best suited.

⁴⁵ International Energy Agency: World Energy Outlook Special Report, 2014, page 59.

EAC countries are trying to increase their wind capacity, for instance Kenya is planning to add over 400 MW of wind capacity by 2020.⁴⁶

Developments in the renewable sector include the establishment of the East African Centre for Renewable Energy and Energy Efficiency, which is in progress.⁴⁷ The centre will aim at improving energy access, energy security and climate change mitigation by promoting an enabling environment for renewable energy and energy efficiency investments and industries in the East African Community.

c) Regional Cooperation in Fossil fuels

The EAC region is endowed with resources such as coal, oil and natural gas. The EAC has emerged as a region of interest especially due to the discovery of natural gas in Tanzania, with proven reserves currently standing at over 50 trillion cubic feet. The country is now looking to gain traction in its bid to become the first exporter of East African natural gas.⁴⁸ In Uganda, petroleum discoveries are now estimated at 6.5 billion barrels of oil, from 21 oil and gas site discoveries.⁴⁹ This is up from an August 2012 estimate of 3.5 billion barrels. Moreover, to date, an estimated 500 billion cubic feet of gas has also been discovered in Uganda.⁵⁰ According to the Rwanda Environment Management Authority, Rwanda's Lake Kivu is estimated to contain about 55 billion m³ of dissolved methane gas and it is submitted that the methane potential in the lake is equivalent to 40 million tons oil equivalent.⁵¹ Rwanda is developing a 100 MW methane gas-powered power plant, of which the first phase of 25 MW is nearing commissioning.

⁴⁶ International Energy Agency: World Energy Outlook Special Report, 2014, page 59.

⁴⁷ The project document for the establishment of EACREEE was adopted by Partner States at the 9th Meeting of the EAC Sectoral Council on Energy, which was held on 21 April 2014.

⁴⁸ Norton Rose Fulbright: A snapshot of Tanzanian natural gas, www.m.nortonrosefulbright.com last visited on 28 June 2015.

⁴⁹ The first commercial discovery was discovered in 2006, in Kaiso-Tonya area Mputa-1 well near lake Albert.

⁵⁰ East African Community Power sub-sector, http://www.eac.int/energy/index.php?option=com_content&view=article&id=114&Itemid=126 last visited on 12 June 2015, last updated on 13 March 2015.

⁵¹ Rwanda State of Environment and Outlook Report, www.rema.gov.rw, last visited on 26 June 2015.

A key development in the fossil sector includes, among others, the establishment of a refineries development strategy which endeavours to address all aspects of the petroleum distribution system in the region.⁵² One of the key recommendations of the strategy is to develop a new refinery in Uganda to enable the EAC region to benefit from the oil which was discovered in the country,⁵³ and in this regard the Ugandan government undertook a feasibility study for a refinery development in 2011. It has extended an invitation to the EAC Partner States to participate in the public share of the investment.⁵⁴

There are also East African conferences which are held every 2 years since 2003.⁵⁵ The Seventh edition of the Conference themed: *East Africa Region - Proven Destination for Investment in Petroleum Resources for Regional Energy Efficiency and Lasting Socio-Economic Development* was held in March 2015 in Kigali. The objectives of these conferences are: to promote petroleum exploration potential and investment opportunities in East Africa, and to bring together government, international oil companies, oil industry service companies and academia.

3.3 EAC Energy Challenges

Whilst the EAC is striving to improve the region's energy sector, and to some extent the effort has shown considerable improvements, EAC Partner States are facing common drawbacks within their energy sectors. Major challenges relate to limited access to electricity, over dependence on biomass and high costs of electricity generation, among others.

⁵² There is an ongoing oil and gas pipeline project, where the EAC continuously assesses the overall feasibility of implementing routing for pipelines for oil and gas in the region.

⁵³ Other key recommendations of the Strategy include: accelerate planned upgrading of the Mombasa refinery, and improving the handling, transportation, storage and distribution facilities in the Region for efficient and economic distribution of petroleum products.

⁵⁴ The 2011 feasibility study for a refinery development made recommendations, for instance, with regard to financing options (a Public Private Partnership with the private being 60% and the public share 40%) and refinery capacity of 60,000 barrels per day.

⁵⁵ In 2011, the Conference transformed into the East African Petroleum Conference and Exhibition.

- *Limited access to electricity.* According to World Bank data, only 5.3% of the population in Burundi have access to electricity, in Kenya only 23.0%, in Rwanda only 10.8%, in South Sudan only 1%, and only 14.6% of the population in Uganda have access to electricity.⁵⁶ Inefficient access to electricity is a huge barrier to investments and economic growth in the EAC region and this is directly linked to the underdeveloped energy infrastructure in the region.
- *Over dependence on biomass.* A majority of the people in rural areas have no access to electricity, and as such they heavily rely on the use of biomass for cooking. In Burundi biomass contributes to 94% of the total primary consumption, in Kenya it accounts for 68%, in Rwanda 84%, in Tanzania 90%, and finally in Uganda it accounts for 93% of the total primary consumption.⁵⁷
- *High costs of electricity generation.* All EAC Partner States are faced with the challenge of high electricity tariffs. For instance, in Uganda, there is a challenge of high tariffs of power generated, especially by Bujagali Hydro Power Project, which stands at \$12 cents per unit.⁵⁸ In Rwanda approximately 45% of the existing generation capacity runs on expensive imported diesel.⁵⁹ Tanzania also highly relies on expensive thermal and emergency generation sources that utilize diesel, heavy fuel oil or jet fuel, and these have made the energy sector financially unviable.⁶⁰

Some of the solutions to the above challenges include: increasing foreign energy investments, development of energy infrastructure, transfer of the required technology, and others as discussed below. In order to address some of the energy challenges in the sector, energy supply and energy access were integrated into the

⁵⁶ The World Bank: Percentage of Population with access to Electricity, www.data.worldbank.org last visited on 20 June 2015.

⁵⁷ Percentage of biomass for each country discussed in detail under the sub-section, energy at national level.

⁵⁸ New Vision, Uganda: NRM Manifesto-Energy Sector, Tuesday, May, 2015.

⁵⁹ Rwanda Energy Sector Strategic Plan (2013-2018), Ministry of Infrastructure, published in June 2013.

⁶⁰ USAID: What Power Africa means for Tanzania, <https://www.usaid.gov/powerafrica/partners/african-governments/tanzania> last updated 17 July 2015, last visited on 31 August 2015.

2011/2012 - 2015/2016 EAC Development Strategy, and this is aimed at facilitating the broader EAC objective of attracting investments, competitiveness and trade for the mutual benefit of the East Africans.⁶¹

4. Energy Investments at an international level

As discussed in section 2, all EAC Partner States have experienced national reforms in terms of liberalizing the energy market with the objective of promoting investments in the energy sector. The countries also have investment laws offering protection to foreign investors, and this is enhanced with regional cooperation efforts to develop the energy resources in the EAC.

In an endeavour to further promote international foreign investments, member states have gone ahead and signed regional and multilateral agreements such as the Multilateral Investment Guarantee Agency (MIGA), which is a member of the World Bank Group with the mission of promoting foreign direct investment into developing countries. All EAC countries are also member states in the World Trade Organization (WTO), which is an international organization dealing with rules of trade between nations with the main goal of assisting producers of goods and services, exporters, and importers in conducting their business. Finally, all EAC states are members of the International Centre for Settlement of Investment Disputes (ICSID) convention, whose objective is to settle international investment disputes.

These multilateral agreements are intended to increase investors' confidence in the member states. Under this next section, we will discuss the International Energy Charter and the Energy Charter Treaty and how they can also positively impact on the EAC energy sector at an international level.

⁶¹ The EAC Development Strategy of 2011/12-2015/2016 is the fourth one since the establishment of the EAC.

4.1 The Energy Charter Treaty and The International Energy Charter

a) The Energy Charter Treaty (ECT)

The ECT is an internationally legally binding text providing clear and predictable rules in the areas of investments, trade and transit, and energy efficiency. It provides dispute resolution mechanisms, while explicitly recognizing and protecting national sovereignty over natural resources. The Energy Charter Treaty creates an environment in which international energy markets can function effectively, and thereby helps to create an internationally level playing field and promote the rule of law in the energy sector.

As stipulated in Article 18 of the ECT, national sovereignty over energy resources is a core principle of the Treaty. While the ECT aims at promoting transparency and efficiency in the operation of energy markets, it is totally for governments to define the structure of their national energy sectors.⁶²

The Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects were signed in December 1994 and entered into force in April 1998. To date, the Treaty has been signed or acceded to by fifty-two states, the European Union and Euratom.

b) The European Energy Charter

The Treaty was developed on the basis of the 1991 European Energy Charter, a political declaration expressing the commitment of a signatory country to move towards an upgraded international legal system. The European Energy Charter was adopted in The Hague on 17 December 1991, and it has been signed by over sixty-four European, Asian, Australasian, North American and African states, as well as the EU and EURATOM.

⁶² Energy Charter Treaty, 1994.

The origins of the Energy Charter date back to a political initiative from the Netherlands, which was immediately adopted by the EU in the early 1990s. The time at end of the Cold War offered an unprecedented opportunity to overcome previous economic divisions between the nations on both sides of the Iron Curtain. There was a need to ensure that a commonly accepted foundation was established for developing energy cooperation among the states of Eurasia. On the basis of these considerations, the Energy Charter Process was born. The conciliation of interests led the negotiating countries to agree on a political declaration called the European Energy Charter.

In an effort to expand the principles of the Energy Charter Treaty beyond the traditional borders, the International Energy Charter of 2015 was adopted.

c) *The 2015 International Energy Charter (IEC)*

The IEC is a political declaration on energy cooperation which does not bear any legal or financial obligation. It was adopted and signed by more than 70 organisations and states on 22 May 2015, during a high level Ministerial Conference in The Hague, Netherlands. The IEC reflects some of the most topical energy challenges of the 21st century, such as the growing weight of developing and emerging countries for global energy security, the “trilemma” between energy security, economic development and environmental protection, the need to promote access to modern energy services, diversification of energy sources and routes, and regional integration of energy markets.⁶³

In an effort to expand the principles of the ECT to African countries, the Energy Charter Secretariat (ECS) introduced a capacity building programme, which for three months brings secondees from African governments to the Secretariat in Brussels. So far Nigeria, Mozambique, Tanzania and Mauritania have sent government officials

⁶³ International Energy Charter, 2015

from their ministries to come as secondees at the Energy Charter Secretariat. This programme is intended to introduce the African countries to the universal market-based principles enshrined in the International Energy Charter and the Energy Charter Treaty, and to assess their energy sectors against these universal principles.

By signing the IEC, a state acquires observer status, which does not oblige in any way a state to accede to the Energy Charter Treaty, but rather gives non-members the opportunity to learn more about the Treaty, its benefits and obligations. This is essential to enable non-members to make an informed decision about possible further steps.

4.2 The Energy Charter Conference and the Energy Charter Secretariat

a) The Energy Charter Conference

The Energy Charter Conference (or the Conference) is the political decision making body established under the Energy Charter Treaty. Signatories of the Energy Charter Treaty are members of the Conference, and signatories of the European Energy Charter and the International Energy Charter, together with some invited countries, are observers to the Conference.

The Conference has different subsidiary bodies including: the Strategy Group, Legal Advisory Committee, Investment Group, Working Group on Energy Efficiency and Related Environmental Aspect, Budget Committee, Trade and Transit Group, and Working Group on Procedural Issues. In addition, the Industry Advisory Panel is a consultative board that presents the private sector's views on relevant issues related to energy investments, cross-border flows and energy efficiency to the Conference and its groups.

b) The Energy Charter Secretariat

The Energy Charter Secretariat (or the Secretariat) is the permanent office based in Brussels supporting the Energy Charter Conference in the implementation of the

Energy Charter Treaty. Some of the functions of the Secretariat are to offer promotion, organization and legal support for the Conference. The Secretariat also monitors the enforcement of Treaty obligations in the contracting members.

4.3 Benefits of signing the International Energy Charter / the Energy Charter Treaty

Attracting investments is the major focus of this paper, however, other benefits of the IEC and ECT will also be discussed in this section.

4.3.1 Attracting investments

According to the Priority Projects for Power Sector Development, in the EAC report, massive investments are needed in the power sector.⁶⁴ As discussed above, there are many people with no access to electricity in the EAC region and the use of traditional biomass is rampant.

Energy investments are generally risky and expensive ventures, and investors always strive to protect their investments in host states. As such it is essential for developing countries to guarantee stability on the market and transparent rules for investment flows.⁶⁵

Even though EAC Partner States have local investment laws which are intended to promote and protect foreign investments, and are also party to other multilateral treaties such as MIGA and the WTO, an international treaty with a focus on the energy sector and whose principals have been tested and accepted globally by more than 50 states will facilitate and encourage energy investors' confidence in those countries which sign the Treaty. Signing the IEC and later the ECT would provide long-term stability and thus would increase the flow of foreign direct investments into national energy markets.

⁶⁴ East African Community: Priority Projects for Power Sector Development in the East African Community, May 2015. For instance, the estimated cost of Stieglers Gorge Hydropower plant of 2,100 MW in Tanzania is expected to be 3.6 billion USD; Ayago Hydropower Plant of 600 MW in Uganda is expected at 2.3 billion, and many others.

⁶⁵ Peter D Cameron: International Energy Investment Law: The Pursuit of Stability, Oxford University Press, Page xlvii.

The key points of development of investment protection under the ECT are as below.

a) *Definition of investment, economic activity, materials and products.*

All investments related to an economic activity in the energy sector are covered by the concept of investment. The concept is quite broad and includes any assets owned or controlled by an investor.⁶⁶

b) *Equal treatment of foreign investors*

It is very important for investors to know how they will be treated by the governmental, judicial and legislative authorities of the host state. Under the ECT, protection against discrimination is addressed under the obligation of contracting parties to treat any activity of a foreign investor, including management, maintenance, use, enjoyment or disposal, at least as favourably as the way they treat investment of their own nationals or investors from other countries.⁶⁷

c) *Expropriation*

A key requirement for investors is a clear picture of what would happen to the investment if the government of the host state decided to expropriate it. This is particularly important in the case of energy projects, which may have a payback time of 20 years or more. Therefore, a clear set of rules for the case when the government decides to take over ownership of an investment are essential to provide certainty to foreign investors.

In this context, the ECT establishes that expropriation is valid only under certain conditions. The expropriation needs to be in the public interest, non-discriminatory, carried out under due process of law and accompanied by the payment of prompt, adequate and effective compensation for its effects.

⁶⁶ The definition also includes tangible and intangible, movable and immovable property, as well as as shares, stock, bonds or any other debt, claims for money, intellectual property, returns or any right conferred by law, contract or licence.

⁶⁷ The mentioned treatment has two exceptions: according to international practice, the principle of non-discrimination does not apply to taxation affairs; intellectual property rights are governed according to international agreements.

d) *Transfer of payments.*

The investor may face certain risks connected to the legal, regulatory or factual impossibility of repatriating the profit from the investment to his/her own country. These situations may occur in countries with high inflation or barriers to currency exchange.

The ECT has established that its contracting parties must proceed with the transfer of capital without any delay at the market rate of exchange on a freely convertible currency. As an exception to the rule, contracting parties may protect the rights of creditors according to the equitable, non-discriminatory, and good faith application of its laws and regulations.

Furthermore, in order to promote investments, signatory states must take steps towards the formulation of a stable and transparent legal framework, creating conditions for development of energy resources, in accordance with the relevant international rules. It is important that signatory states sign and ratify international instruments that protect investment and use international warranty mechanisms. If the framework is the same in a region, this projection could make use of economies of scale to create a regional development that benefits not only one signatory state but the entire area.

4.3.2 Open energy markets

The EAC can achieve more in the development of the region's energy sector if it can utilize international open energy markets, which can be enjoyed by signing the IEC/ECT. Within the context of the IEC, open markets imply having a competitive market for energy products, materials, equipment and services. It also includes transparent access to energy resources, removal of barriers, promoting the development and interconnection of energy transport, promoting access to capital, and facilitating the transit of the energy. Liberalization of the energy sector is also encouraged together

with the promotion of market-oriented reforms and modernization of the energy sector.⁶⁸

4.3.3 International cooperation

Already the EAC recognizes the importance of international cooperation—all the countries in the East African Community are members of the WTO.

The concept of non-reciprocity has not only been a focus for EU member countries, but also for the EAC Partner States. In 2007, EAC countries initialled an interim Economic Partnership Agreement (EPA) with the EU which they agreed upon in October 2014. The main thrust of the later agreement on trade includes duty free, quota-free market access for rice and sugar. On this part, the EAC agreed a gradual removal of duties for a period of 25 years, with a two year moratorium.⁶⁹

It is therefore clear that the EAC will benefit from the wide range of international cooperation offered by the IEC. One of the objectives of the IEC is to ensure the development of trade in energy consistent with major relevant multilateral agreements. The WTO is one of the multilateral agreements expressly referred to in the IEC final draft text, and, to add on that, the IEC also affirms the importance of full access to adequate dispute settlement mechanisms, including national mechanisms and international arbitration, in accordance with national laws and regulations and all relevant bilateral and multilateral treaties and international agreements.⁷⁰ EAC principles and objectives are in line with the IEC and as such the EAC can enjoy further international recognition by joining the IEC.

⁶⁸ 2015 International Energy Charter, http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf

⁶⁹ Annex 1 of the EAC-EU interim EPA titled "Custom Duties on Products Originating in the EAC party". Exports to the EU from EAC are dominated by coffee, cut flowers, tea, tobacco, fish and vegetables. Imports from the EU into the region are dominated by machinery and mechanical appliances, equipment and parts, vehicles and pharmaceutical products: European Commission, Trade: The East African Community, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/> last visited on 1 April 2015.

⁷⁰ 2015 International Energy Charter, http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf

4.3.4 Regional integration

East Africa is a geographically and economically homogeneous region committed to regional integration. As discussed in Chapter 3, the EAC is working closely with other regional organisations such as COMESA, NELSAP and others.

It is clear that the EAC is already benefiting from regional cooperation, however, if all EAC countries adopt and sign the IEC, and then later the ECT, more achievements will be enjoyed in this aspect. This is due to the fact that the IEC acknowledges that enhanced energy trade is a powerful catalyst for strengthening regional cooperation for energy security and, as such, it firmly supports its signatories enhancing regional cooperation in order to meet common energy challenges. Furthermore, the IEC recognizes how the freedom of movement of energy products, and the development of an efficient regional energy infrastructure, is essential to facilitate the development of stable and transparent trade in energy.⁷¹

In this regard, the EAC will be able to share experiences from the members of the IEC and share specific examples from national practice in the areas of sustainable development, access to modern energy services, energy poverty reduction, clean energy, energy efficiency, as well as the development and broader use of new clean technologies.

4.3.5 Sustainable energy

The EAC will also benefit when it comes to sustainable energy since the 2015 IEC recognises the importance of renewable energy sources and energy efficiency. Signatories to the IEC acknowledge the importance of efficient systems in the production, conversion, transport, distribution and use of energy for energy security, poverty alleviation, sustainable development and for the protection of the environment. They also agree to promote a more sustainable energy mix to minimise

⁷¹ 2015 International Energy Charter, http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf

negative environment consequences in a cost-effective manner by sharing best practices on clean energy development and investment.⁷²

4.3.6 Research and transfer of technology

The EAC will enjoy sharing international research and also benefit from the transfer of technology, since the signatories to the 2015 International Energy Charter recognise the need to promote research and technological cooperation amongst members. To this end, they agree to cooperate to enhance capacity building among signatories and mutual access to technical and economic data (as consistent with proprietary rights), and to facilitate the exchange of technological information and know-how in the energy and environmental sectors. They also agree to promote cooperation to further research and development activities, encourage pilot and demonstration projects, as well as encourage the application of technological innovations. In addition to this, signatories recognise the industry's role in promoting vocational education and training in the energy sector and agree to cooperate in such activities, including: professional education, occupational training, and the dissemination of public information on energy efficiency and on renewable energy.⁷³

4.3.7 Dispute resolution mechanisms

The EAC can also utilize the Energy Charter's mechanism of resolving energy disputes. All the objectives and values regarding free markets, liberalisation, equal treatment, and the protection of national sovereignty over national resources would need a way to make them applicable and enforceable if a binding document existed.

The ECT established a two-sided dispute resolution system, one for state-state arbitration and another for investor-state arbitration. The latter system establishes different steps for investors and states to proceed with the resolution of disputes. This system includes prior consultations, the choice between international and

⁷² 2015 International Energy Charter, http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf

⁷³ Ibid.

domestic dispute settlement and also different arbitration forums such as the International Centre for Settlement of Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), and the Stockholm Chamber of Commerce (SCC).

In any case the arbitration will be decided under the provisions of the Treaty and the principles of international law, and it will be binding.

4.3.8 Security of supply and universal access

The EAC's goal of ensuring universal access to energy in the region will also be achieved since the 2015 International Energy Charter recognises the importance of energy security, a concept that embraces the needs of energy producing, transit and consuming countries, as well as access to modern energy services that is based on environmentally sound, socially acceptable and economically viable policies. In order to achieve energy security, IEC signatories affirm the importance of freedom of movement of energy products and of developing an efficient international energy infrastructure in order to facilitate stable and transparent trade in energy. In addition to this, signatories to the IEC highlight the importance of diverse energy sources and supply routes to enhance energy security.⁷⁴

5. Conclusion

As discussed, there are already reforms in the East African region intended to attract more energy investments, which are enhanced at the regional and international level. However, EAC countries can achieve even more in the energy sector by signing the International Energy Charter, since committing to its ideas, and later the Energy Charter Treaty, sends a signal to the international community that the country shares a number of international energy principles on trade, investment, transit and energy

⁷⁴ Ibid.

efficiency. It upgrades national energy sectors according to international guidelines, which would raise national profiles and help to attract foreign investment.

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