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**THE LEGAL FRAMEWORK ON TRADE RELATIONS WITH THIRD PARTIES IN
KENYA**

Submitted in partial fulfilment of the requirement for the Degree of Master of Laws

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DECLARATION

Student's declaration:

I, Leyla Ahmed Dahir, declare that this research paper is my original work and has not been presented for a degree or for any other purpose to any other institution other than the University of Pretoria.

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Supervisor's declaration:

This work has been submitted with my approval as supervisor.

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University of Pretoria

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'If I have seen further than others, it is by standing upon the shoulders of giants.' - Isaac Newton

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TABLE OF ACRONYMS

ACP	African, Caribbean and Pacific
AfCFTA	African Continental Free Trade Area
AGOA	African Growth and Opportunity Act
ARII	Regional Integration Index
BTA	Bilateral Trade Agreement
CET	Common External Tariff
CU	Custom Union
EAC	East African Community
EPA	Economic Partnership Agreement
EU Treaty	Treaty Establishing the European Communities
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MFN	Most Favoured Nation
NT	National Treatment
RTA	Regional Trade Agreement
SACU	Southern African Customs Union
WTO	World Trade Organisation
WTO SPS	Agreement on the application of Sanitary and Phytosanitary Measures

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ABSTRACT

The East African Community (EAC) allows its signatories to pursue and sign trade deals with nations outside the CU as long as the trade agreement does not violate the EAC Treaty. The EAC is one of eight regional groups that comprise the African Continental Free Trade Agreement's foundation (AfCFTA). All eyes are on the continent at the moment, as the race for Africa is reignited. This is why it is critical to establish a framework that will serve as the foundation for future discussions between AfCFTA partner states and third nations. Whereas ties within the EAC are already fragile, Kenya proceeded to negotiate an Economic Trade Agreement (ETA) with the United Kingdom at the expense of other EAC member states, a move criticised by both the African Union and other EAC members. The purpose of this study is to examine the legal framework that governs EAC partner state trade relations with countries that are not members of the EAC in order to identify any gaps in the existing laws. Additionally, this research investigates the provisions of the Kenya-UK agreement in order to determine the agreement's impact on the EAC. Finally, proposals are offered to enhance the community's current position, which is adapted to EAC's status as a customs union. The research's fundamental finding is that, while the community has regulations governing member states' trade dealings with third nations, there are loopholes in the legislation that must be remedied as soon as possible to avoid another member state from exploiting the lacuna.

Chapter 1

Background Information

1.0 Introduction

Umoja ni nguvu utengano ni udhaifu is a well-known Kiswahili proverb that loosely translates to "union is power, division is weakness." There is so much that can be accomplished when people work together to attain a common goal. Tanyiwa and Constance¹ compare regional integration to a team in which people from all backgrounds come together to work toward a common goal. Integration helps countries overcome obstacles that impede the movement of commodities, resources, and people.

Kenya, Rwanda, Burundi, Uganda, Tanzania and South Sudan are members of EAC. Political federation, monetary union, customs union, and a common market are the integration pillars of the EAC. The CU was founded in 2005, and under this pillar, partner nations are required not to levy tariffs on goods originating in member countries, while goods originating in foreign countries are subject to a common tariff levied by EAC member states.² The EAC Treaty and its protocols govern member countries' interactions with third parties. While EAC member nations are free to negotiate and conclude trade deals, they must ensure that their agreements do not violate the terms of the EAC Treaty and its protocols.³ Furthermore, member states are required to handle their trade relations with third countries in such a way that it improves relations between the community and external countries.⁴ This study investigates the EAC member states' trade relations with third parties, focusing on the Kenya-UK EPA and the implications of the agreement for the EAC as a whole. This study examines the legal framework in place within the EAC regarding member states' ability to enter into trade relations with third parties, as well as whether the framework resolves any conflict between member states' obligations under the EAC Treaty and its protocols and their obligations under trade agreements with third parties.

¹ V T Tanyiwa & C Hakuna 'Challenges and Opportunities for Regional Integration in Africa: The Case of SADC' (2014) 19 *IOSR Journal Of Humanities And Social Science* 103-115

² <https://www.eac.int/customs-union> [Accessed 29 July 2021]

³ Article 37 (4)(b) of the EAC Customs Union Protocol signed on 2nd March, 2004

⁴ Article 37 (1) of the Protocol on the establishment of the East African Community Common Market signed on 20th November, 2009

1.1 Background to the research

The World Trade Organization (WTO)⁵ established the international trade regime. It is an international organization that regulates trade between nations, which has been accompanied by a large number of bilateral, regional, free, or preferential trade agreements.⁶ Market access is at the heart of these agreements, with the goal of removing all trade barriers, as envisioned in Article XXIV of the General Agreement on Tariffs and Trade (GATT)⁷ and article V of the General Agreement on Trade in Services (GATS).⁸ The Most Favoured Nation (MFN) principle, which states that a state cannot discriminate between trading partners, is one of GATT's fundamental principles.⁹ There are several exceptions to this rule, such as when countries band together to establish regional blocs. Because the WTO has faced challenges in regulating these agreements, its members have turned to the 'coalition of the willing' to promote trade liberalization.¹⁰

In the last ten years, regionalism has resurfaced as a key policy agenda.¹¹ The motivation for the general increase of regional cooperation is trade.¹² The rise in the number of regional trade agreements (RTAs) has resulted in membership overlap. States with high levels of trade may benefit the most from joining more RTAs by obtaining or improving access to new trade partners and markets. Africa wants to accomplish the African Union's Pan-African Vision of "an integrated, wealthy, and peaceful Africa, driven by its own population, representing a powerful force in the world arena," and the continent seeks to do so through Agenda 2063.¹³ Africa will meet its global commitments under the global goals by adopting Agenda 2063.¹⁴ Agenda 2063 is Africa's blueprint and master plan for transforming the continent into a future global superpower through important flagship projects.¹⁵

⁵ WTO was established by the Agreement establishing the WTO signed on 1st January, 1995. WTO currently has 164 members. Available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [Accessed 29 July 2021]

⁶ T. Rensmann (ed.) *Mega-Regional Trade Agreements* (2017)

⁷ https://www.wto.org/english/res_e/booksp_e/agrmntseries2_gatt_e.pdf [Accessed 29 July 2021]

⁸ https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm [Accessed 29 July 2021]

⁹ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm [Accessed on 29 July 2021]

¹⁰ n 9

¹¹ I Soloaga & L A Winters 'Regionalism in the nineties; what effect on trade?' (2001) *North American Journal of Economics and Finance* 1-29

¹² D. Panke 'Regional cooperation through the lens of states: why do states nurture regional integration' (2020) *Review of International Organizations*

¹³ <https://www.tralac.org/resources/by-region/14352-african-union-agenda-2063.html> (Accessed 29 July 2021)

¹⁴ Tralac guide, 7th ed. August, 2020, the African continental Free Trade Area,

¹⁵ <https://au.int/en/agenda2063/overview> (Accessed 29 July 2021)

The AfCFTA, which was signed in March 2018 and entered into force on May 30, 2019, is one of Agenda 2063's major projects. AfCFTA connects 1.3 billion people in 55 countries with a total GDP of US\$3.4 trillion.¹⁶ According to the World Bank, the deal has the potential to elevate 30 million people out of extreme poverty.¹⁷ The necessity for AfCFTA is partly justified by the fact that intra-African trade remains low, over the last seven years, intra-imports have averaged 13 percent and intra-exports have averaged 20 percent.¹⁸ African countries appear to trade with countries outside of the continent more.¹⁹

The specific aims of the AfCFTA include gradually eliminating tariff and non-tariff barriers to goods trade, facilitating investment, cooperating on customs problems, and establishing a dispute settlement mechanism.²⁰ The RECS are an important pillars of AfCFTA, as AfCFTA intends to improve the trade liberalization gains made by the RECS.²¹ The Arab Maghreb Union (UMA), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC) are the eight RECs recognized by the AU (SADC).²² These RECs currently have overlapping memberships²³ and AfCFTA wants to address the issues of multiple and overlapping membership while also accelerating regional and continental integration processes. It is clear what the continent's objective is, and it is critical that the RECs comprehend this position so that they do not become an obstruction.

Kenya, along with Ghana, was among the first AU member states to ratify the AfCFTA. Kenya is currently a member of the EAC, COMESA, IGAD, and CEN-SAD. The scope of this research is confined to Kenya's membership in the EAC. The United States of America (USA) and Kenya commenced negotiations that are to culminate into a bilateral trade deal in 2020.

¹⁶ <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (Accessed 29 July 2021)

¹⁷ <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (Accessed 29 July, 2021)

¹⁸ The African Trade Statistics, 2020

¹⁹ Reflections on the value of Socia-legal Approaches to International Economic Law in Africa (Olabisi

²⁰ n 22

²¹ <https://www.tralac.org/news/article/10933-fast-tracking-the-continental-free-trade-area-regional-economic-communities-as-building-blocks.html> (Accessed 29 July, 2021)

²² Article 1 (t) AfCFTA

²³ <https://indd.adobe.com/view/f49ac87d-7aa3-4cf7-822e-841d674bbc92> (Last accessed on 29 July, 2021)

Currently, trade between the US and Sub-Saharan Africa (SSA) is done under the African Growth and Opportunity Act (AGOA), which was enacted on May 18, 2000.²⁴ According to the IMF, Kenya has significant development potential, with GDP predicted at roughly kshs. 15.8 trillion by 2024 and GDP growth estimated at 7.6 percent in 2021.²⁵ Ghana had the highest AGOA use rate (99.1 percent) among leading source markets in 2018, followed by Kenya (98.0 percent).²⁶ If the Kenya-US trade talks succeed, it will be the most significant trade development in the area since the implementation of AGOA in 2000.²⁷ The negotiations are still ongoing.

Despite resistance from other EAC member states, the parties signed the Kenya-UK EPA on December 8, 2020. Concerns about the agreement's possible impact on regional integration were expressed not just by other EAC and AU member nations, but also by the UK House of Lords' International Agreements Committee. Their fear was that the deal might disrupt the EAC's cohesion, thus the Committee asked the UK government to prolong the period for further scrutiny of the agreement before ratification.²⁸

1.2 Statement of the problem

While the EAC Treaty and its protocols allow member states to negotiate and enter into trade agreements with foreign nations on their own, such agreements must not be in violation of the Treaty and its protocols. Kenya attempted to exercise this right, and its choice was criticized by both the EAC and the AU for falling outside of the permissible framework in both the continental and regional blocks.

Kenya's choice was chastised not only regionally, but also nationally. Participation of the people is one of Kenya's national values and principles of governance that bind state organs, state officers, and all persons anytime they adopt any law or implement any public policy

²⁴ <https://agoa.info/about-agoa.html> (Accessed 29 July 2021)

²⁵ IMF World Economic Outlook, April, 2021 that can be accessed at <https://www.imf.org/en/Publications/WEO/Issues/2021/03/23/world-economic-outlook-april-2021> [Accessed 29 July 2021]

²⁶ US Trade and investment with Sub-Saharan Africa: Recent Trends and new developments 2020 that can be accessed at <https://www.usitc.gov/publications/332/pub5043.pdf> (Accessed 29 July 2021)

²⁷ <https://agoa.info/news/article/15846-the-opportunities-are-vast-in-a-potential-us-kenya-fta.html> (Accessed 29 July 2021)

²⁸ <https://lordslibrary.parliament.uk/uk-kenya-economic-partnership-agreement/> (Accessed 29 July 2021)

decisions.²⁹ Two lawyers have filed a complaint with the EACJ, saying that Kenya violated the rules of the EAC Treaty and protocols when it began negotiations with the US.³⁰ A group of small-scale farmers have also lodged a petition challenging the Kenya-UK deal, claiming that it was negotiated and signed without public participation and violated the farmers' right to access to information.³¹

With AfCFTA aiming to achieve a unified / completely integrated CU in the future, the key question is what these trade arrangements would imply for the region. A CU, like in the case of EAC, must have CET although the protocols allow for exceptions. Tanzania is also trading with SADC member countries under FTA preferences.³² This is a CU's CET modification. Some EAC member states' practices may jeopardize multilateral rules applicable to a CU.

While Kenya has obligations under the EAC Treaty and its protocols, it is clear that it may have competing commitments under agreements with countries outside the EAC CU. This study tries to investigate if Kenya's recent activities of negotiating trade deals with outside parties are in accordance with the rules outlined in the EAC Treaty, Protocols and legislations.

1.3 Research questions

The overall research issue addressed by this study is whether the current legal and institutional framework provides a clear procedure and guideline when EAC members states seek to enter into trade agreements with third countries. The following questions would be addressed in order to answer this crucial question;

- I. What is a CU, and how does it differ from an FTA?
- II. What is a CET and what are its objectives? What are the exceptions to a CUs CET?

²⁹ Article 10 of Kenya's 2010 Constitution which can be accessed at <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> (Accessed 29 July 2021)

³⁰ Reference No. 5 of 2020 Christopher Ayieko & Emily Osiemo vs The Attorney General of the Republic of Kenya & The Secretary General of the East African Community

³¹ <https://www.businessdailyafrica.com/bd/economy/british-mps-kenya-uk-trade-deal-over-eac-disputes-3292596> (Accessed 29 July 2021)

³² <https://www.tralac.org/blog/article/15008-the-kenya-uk-post-brexite-trade-agreement.html> (Accessed 29 July 2021)

- III. What laws govern EAC member states' trade agreements with third party states? Are there gaps in the law? If yes, what are the gaps in the laws?
- IV. What are the contents/provisions of the Kenya-UK EPA?
- V. Are there potential conflicts between Kenya's obligations under the EAC Treaty and its protocol and its obligations under its agreement with the UK? If yes, are there mechanisms under the EAC Treaty and the Protocols to resolve the conflict?

1.4 Significance of the study

The Abuja Treaty, which formed the African Economic Community (AEC), aspires for all RECs to achieve economic union and combine into a continent-wide economic union by 2028. In fact, AfCFTA recognizes that the RECs have achieved varying degrees of integration, and that the AfCFTA's successful implementation will be dependent on the RECs. According to the 2019 Africa Regional Integration Index (ARII), the EAC is the most integrated of the eight RECs. Kenya's economic agreements will have an impact not only on intra-EAC trade but also on intra-African trade. Furthermore, such an agreement will serve as a model for future African deals with non-members, as the entire world awaits the outcome of AfCFTA implementation.

As a result, this research examines the procedure in place within the EAC in relation to member countries' trade relations with third countries. After identifying the gaps, this paper provides an overview of the contents of the Kenya UK EPA and thereafter the impact of the agreement on EAC is given. The research suggests ways for resolving the conflicting positions between the Treaty and the EPA. This study aims to fill a knowledge gap regarding the requirement of EAC member states' trade relations with third countries. This study will add to the literature as there was no in depth examination of the contents of the EPA as well as an examination of its impact on the EAC Treaty as at the time of the study.

1.5 Literature review

Regionalism is not a new concept. Andre C Jordaan³³ in his article titled 'Regional integration in Africa versus higher levels of intra-Africa trade' states that regionalism proliferated in Africa

³³ A C Jordaan, Regional integration in Africa versus higher levels of intra-Africa trade, Development Southern Africa, (2014) DOI: 10.1080/0376835X.2014.887997 (Accessed 29 July 2021)

since the era of decolonization although the level of economic progress has not met the expectations. Jordaan³⁴ points out two reasons why regional integration is pursued; allocation effect and accumulation effect. The allocation effect is such that demand for goods direct their production.³⁵ The accumulation effect refers to the availability of various goods once a state's economy is integrated in a bigger market and thus with accumulation effect the regional integration expands regional market.³⁶

Jordaan further discusses the issue of overlapping memberships in different RECs which United Nations Conference on Trade and Development (UNCTAD) rightly points out causes disorder in terms of setting and achieving productive economic objective. He points out that out of the 53 African countries, 31 are members of atleast two RECs; 19 are members of atleast three RECs and that one country is a member of four RECs.³⁷ Out of the 53 countries, only three countries maintained membership in one REC. Jordaan then proceeds to discuss intra-African trade and trade between Africa and the rest of the world.³⁸ He notes that Africa trades more with the rest of the world as opposed to amongst the member countries. Jordaan questions whether the existence of many trade agreements makes any contribution towards higher intra-African trade.³⁹ He rightly points out that the process of regional integration through signing various agreements is just paperwork without any real economic progress. This literature is important to the study as it gives a crucial background information on regionalism in Africa.

There are several reasons given why regionalism projects have faced a lot of challenges over the years.⁴⁰ These is because (1) reluctance of African states to cede sovereignty to supranational organizations have greatly obstructed political cooperation and integration,⁴¹ (2) the political and ideological differences have led to challenges of reaching consensus;⁴² (3) the overlapping membership in multiple regional blocks leads to conflict of interest and finally (4) Limited intra-regional trade does not offer much to sustain regionalism within the continent.

³⁴ n 37

³⁵ n 37

³⁶ n 37

³⁷ n 37

³⁸ n 37

³⁹ n 37

⁴⁰ H. Zhai, What is the Future of Africa Regionalism (2016) <https://www.e-ir.info/2016/03/05/what-is-the-future-of-african-regionalism/> (Accessed 29 July 2021)

⁴¹ n 44

⁴² n 44

Wolfe Braude in his paper⁴³, ‘SADC, COMESA and the EAC: Conflicting regional and trade agendas’ discusses the implications of multiple REC memberships. Braude notes that eventually a country implements conflicting obligations as the integration agendas and obligations differ from one REC to another.⁴⁴ He further discusses the distinction between a CU and an FTA. In a CU, all the members must surrender control of their external tariff and allow them to be centralized and standardized as a common external tariff. Braude notes that parallel memberships arise because a bloc does not satisfy all the strategic, political and economic needs of a member state.⁴⁵ Could this perhaps be the reason why Kenya is seeking to advance its interests economically by initiating trade agreements as its needs are not fully being met within EAC? Braude notes that if commonality is replaced with disagreement then there is a real danger of the community collapsing like it did in 1977 because of economic differences.⁴⁶

In their article ‘Going Solo: What Is the Significance of a U.S.-Kenya Free Trade Agreement?’ Caporal Jack, John Hoffner and Sanvid Tuljapurkar⁴⁷ say that the reason USA selected Kenya to enter into an FTA was not based on its importance economically but rather because of Kenya’s self-initiative to strike a deal and the possession of leverage for negotiations. They proceed to analyse trade between the two countries and that ‘neither imports from nor exports to Kenya rank among the top five of U.S. trading partners in sub-Saharan Africa.’ In the minimal trade between the two countries, USA imports from Kenya low value products such as apparel, nuts and coffee whereas USA exports to Kenya high value products such as aircraft and machinery. Clearly demonstrating that developed countries could take advantage when negotiating with countries individually as opposed to negotiating with the entire block. The authors believe that the priorities and compromises Kenya could make would have significant implications on future deals. The authors further discuss the possible effect of the bilateral agreement in Africa. One possible effect is that it would discourage intra-regional trade in Africa and lead to a gradual disintegration of these multilateral bodies. And what is the exact gap that your research will address.

⁴³ Wolfe Braude (2008) ‘SADC, COMESA and the EAC: Conflicting regional and trade agendas’ Occasional paper 57, published in 2008 by the Institute for Global Dialogue Johannesburg, South Africa

⁴⁴ n 44

⁴⁵ n 44

⁴⁶ n 44

⁴⁷ Caporal Jack, Ruhasinga Hoffner and Sanvid Tuljapurkar ‘Going Solo: What Is the Significance of a U.S.-Kenya Free Trade Agreement?’ Critical Questions produced by the Centre for Strategic and International Studies (CSIS) (Washington) 18th March, 2020 that can be accessed at <https://www.csis.org/analysis/going-solo-what-significance-us-kenya-free-trade-agreement> (Accessed 29 July, 2021).

Ovadek and Willemyns⁴⁸ interrogate the conceptual variety, the legal ambiguity and the diverse practice when it comes to customs unions. They argue that whereas CUs may advance regional trade liberalization, it might affect the external welfare of the of countries that are not members of the CU whose protection is the objective of article xxiv of GATT.⁴⁹ A stricter review of CUs in the Committee on Regional Trade Agreement of th WTO is required if article XXIV is to be taken seriously.⁵⁰ But until that happens, they argue that CUs should be analysed on their own merit.

On the issue of the influence of interest groups on the EAC's tariff negotiations, Bündler⁵¹ looks at how individual interests have added to the vulnerability of the EAC CET from 2005 to 2015. Bündler also analyses whether derogation of a CET is permitted under the EAC Treaty and its protocols and who is responsible for the approvals of the derogations.

Rauschendorfer and Twum⁵² accessed EAC member states deviation from the EAC CET between 2009 and 2019 and made the following findings;

- a) CET has been rendered less 'common' because of the increased deviation from the agreed CET;
- b) Kenya, Tanzania and Uganda use unilateral deviations to increase external protections whereas Rwanda uses it to decrease tariffs;
- c) Although Kenya, Tanzania and Uganda increase tariffs for the same classes of products but they each target different industries;
- d) Instead of member countries using unilateral tariffs to improve consumer welfare, they are using the same to facilitate access to inputs;

⁴⁸ Michal Ovadek and Ines Willemyns, *International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice* the *European Journal of International Law* Vol. 30 no. 2, EJIL (2019), Vol. 30 No. 2, 361–389, Published by Oxford University Press on behalf of EJIL Ltd.

⁴⁹ n 49

⁵⁰ n 49

⁵¹ Bündler, T. 2018. "How Common Is the East African Community's Common External Tariff Really? The Influence of Interest Groups on the EAC's Tariff Negotiations", *SAGE Open* January-March 2018: 1–14 which can be accessed at <https://journals.sagepub.com/doi/full/10.1177/2158244017748235> (Last accessed on 29th July, 2021)

⁵² Working paper, unmaking of a customs Union, Regional (dis) integration in the East African Community, November, 2020 Jakob Rauschendorfer and Anna Twum Reference number: F-20020-UGA-1 which can be accessed at <https://www.theigc.org/wp-content/uploads/2021/01/Rauschendorfer-and-Twum-2020-Working-paper-1.pdf> (Last accessed on 29th July, 2021)

The South Centre Analytical note⁵³ on ‘understanding the Economic Partnership Agreements’ provides an overall introduction to what EPAs are; their nature and structure; their objectives and the timelines for their negotiations. This note is important as from a reading of the note one can infer what sequencing the Kenya-UK EPA should have followed.

Whereas the EAC CU has been in place since 2005, member states trade relations with third countries has not been interrogated in light of the legal and institutional framework in place. Kenya argues that its action of unilaterally negotiating an EPA with UK did not breach the EAC CU protocol and the Customs Market Protocol, other EAC member states maintain that Kenya’s action is in breach of the protocols.

1.6 Research methodology

This work is based on desktop and library research. It draws on primary and secondary sources of information, including treaties, protocols, laws, policy frameworks, international and national documents, electronic media, journals, articles, and published and unpublished works. This study is founded on qualitative research, specifically document analysis. The study gathered information from publications, compendiums, and online databases such as Lexis Nexis, Westlaw, and Hein online, as well as other legal sources.

1.7 Outline of chapters

This research is organized into five chapters. Chapter 1 contains an introduction, a background of the study, the problem statement, the significance of the study, the research questions, the methodology and the literature review.

Chapter 2 presents a conceptual framework for regional integration and CU. It briefly explains the history of the WTO and GATT, the motivation for regional integration, the different types of regional integration, the MFN principle and exceptions to the MFN principle under GATT

⁵³ Understanding the Economic Partnership Agreements (EPAs), Analytical Note SC/AN/TDP/EPA/1; March 2007 Geneva, Switzerland. The note can be accessed at https://www.southcentre.int/wp-content/uploads/2013/08/AN_EPA1_Understanding-The-EPAs_EN.pdf (Accessed 29 July 2021)

Article XXIV and the enabling clause. It concludes with a brief description of the CU and its requirements.

Chapter 3 analyses the legal and institutional framework which governs EAC member states trade relations with third countries.

Chapter 4 analyses the contents of the Kenya-UK EPA and its implications for the EAC Treaty, as well as the dispute resolution mechanisms in the event of any conflict between the EPA and the EAC Treaty.

Chapter 5 rehashes the findings from the previous chapters, provides a concise overview of the findings, the conclusion, and advice on how to reconcile differences between Kenya's responsibilities under the EAC Treaty and its obligations under its agreement with the UK.

Chapter 2

Conceptualizing Regional Integration and Customs Union

2.0 Introduction

States coming together to achieve certain common goals is not a new phenomenon. Historically RTAs have been used to either monopolize trade or liberalize it.⁵⁴ As early as the 1920s the Covenant of the League of Nations⁵⁵ recognized regional understandings⁵⁶. The Charter of the United Nations (UN) which sets out the basic principles of international relations recognized regional arrangements and encouraged member states to enter into regional arrangements to settle their disputes.⁵⁷ Regional arrangements were thus an essential element of post-world war II.⁵⁸

The challenges of attaining universalism and multilateral relations as a result of differences in needs, culture and power necessitated the need for regionalism since it is easier to reach consensus within a small regional grouping.⁵⁹ In July, 1944, delegates from 44 States met at the Bretton Woods Conference.⁶⁰ They agreed to come up with a system that will enable states recover from the devastating effects of the second world war.⁶¹ This led to the creation of the International Monetary Fund (IMF), the World Bank and eventually the World Trade Organization (WTO).⁶² This research is centred on WTO as it is the organization responsible for international trade with an objective to facilitate the implementation, administration and

⁵⁴ The political economy of PTAs, Olivier Cattaneo, *Bilateral and Regional Trade Agreements*, Commentary and analysis edited by Simon Lester and Bryan Mercurio, Cambridge University Press (2009)

⁵⁵ The League of Nations was an international organization create after the First World War in order to provide a form for resolving international disputes. The Covenant of the League of nations was signed on 28th June, 1919.

⁵⁶ Article 21 of the Covenant of the League of Nations Provided that ‘Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace’. This can be accessed at <https://history.state.gov/historicaldocuments/frus1919Parisv13/ch10subch1> (Accessed 29 July 2021)

⁵⁷ Article 52 of the Charter of the United Nations. This can be accessed at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (Last accessed on 30th July, 2021)

⁵⁸ When and How Is a Regional Trade Agreement Compatible with the WTO? By Gabrielle Marceau and Cornelis Reiman*- *Legal Issues of Economic Integration* 28(3): 297–336, 2001. © 2001 Kluwer Law International. Printed in the Netherlands

⁵⁹ n 56

⁶⁰ <https://www.worldbank.org/en/archive/history/exhibits/Bretton-Woods-and-the-Birth-of-the-World-Bank> (Accessed 29 July 2021)

⁶¹ n 58

⁶² n 58

operation of the multilateral trade agreements and plurilateral trade agreements.⁶³ This chapter provides a brief history of the General Agreement on Tariffs and Trade (GATT) and its successor WTO (2.1). Thereafter a distinction between multilateralism and regionalism is provided as well as the rationale for entering into RTAs. The WTO rules on RTAs (2.2) and the types of RTAs are also discussed before concluding with a brief discussion on CU.

2.1 A brief history of GATT and the WTO

The stock market crash in the USA in 1929, which was the beginning of the economic depression⁶⁴ is perceived to have been the result of restricted commerce and trade preferences.⁶⁵ The creation of GATT was driven by an objective to create an international economic order which was based on non-discrimination and for reciprocal reduction of trade barriers.⁶⁶ GATT was signed on 30th October, 1947 by 23 countries⁶⁷. There was an intention to create a third institution, the International Trade Organization (ITO).⁶⁸ The ITO Charter was agreed upon in Havana in March 1948 but never got ratification by some states like USA.⁶⁹ The main purpose of GATT is-

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and

⁶³ Article III (1) of the agreement establishing the World Trade Organization. This can be accessed https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (Accessed 29 July 2021)

⁶⁴ <https://www.khanacademy.org/humanities/us-history/rise-to-world-power/great-depression/a/the-great-depression> (Accessed 27 August 2021)

⁶⁵ *Bilateral and Trade Agreements, commentary and analysis*, edited by Simon Lester and Bryan Mercurio, Cambridge University Press (2009)

⁶⁶ n 63

⁶⁷ The twenty-three countries engaging were Australia, Belgium, Brazil, Burma (Myanmar), Canada, Ceylon (Sri Lanka), Chile, China, Cuba, Czechoslovakia (Czech Republic and Slovakia), France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Southern Rhodesia (Zimbabwe), Syria, United Kingdom, and United States.

⁶⁸ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (Accessed 27 August, 2021)

⁶⁹ n 66

other barriers to trade and to the elimination of discriminatory treatment in international commerce,

GATT's main purpose of reduction of trade barriers was achieved through multilateral negotiations known as 'trade rounds.' Trade liberalization under GATT 1947 went hand in hand with an increase in the economic integration among member states.⁷⁰ The Uruguay Round culminated in the Marrakesh Agreement which established the WTO in 1994.⁷¹ GATT 1947 is used as main treaty while GATT 1994 encompassing the updates from the Uruguay Round.

2.2 Multilateralism and regionalism

Keohane defines multilateralism as the practice of co-ordinating national policies in groups of three or more states.⁷² However, Ruggie is of the view that this definition is nominal as it misses what he terms as the qualitative dimension.⁷³ Ruggie defines multilateralism as 'an institutional form that coordinates relations between three or more States based on generalized principles of conduct, that is, principles that specify the adequate conduct for each type of action, disregarding the particular interests of the parties or the strategic demands that may appear in each case in particular'.⁷⁴ Whereas Keohane's definition appears to concentrate only on the number of parties involved 'qualitative approach', Ruggie's definition not only focusses on the ability to coordinate relations but that the same should be based on certain principles of relation.⁷⁵ Mino and Olmedo⁷⁶ on the other hand define multilateralism as a set of beliefs and values to coordinate international relations. They argue that the term multilateralism implies a method to analyse multiple and varied relations and gives the example of the WTO and the UN General Assembly.⁷⁷ They refer to it as an instrument related to dispute resolution where

⁷⁰ When and How Is a Regional Trade Agreement Compatible with the WTO? By Gabrielle Marceau and Cornelis Reiman*- *Legal Issues of Economic Integration* 28(3): 297–336, 2001. © 2001 Kluwer Law International. Printed in the Netherlands

⁷¹ Marrakesh Agreement (<https://treaties.un.org/doc/publication/unts/volume%201867/volume-1867-i-31874-english.pdf>) (Accessed 29 October 2021)

⁷² Robert O. Keohane, "Multilateralism: An Agenda for Research," *International Journal* 45 (Autumn 1990)

⁷³ John Gerard Ruggie, 'Multilateralism: The Anatomy of an Institution', in John Gerard Ruggie ed., *Multilateralism Matters*, Columbia University Press, 1993

⁷⁴ n 71

⁷⁵ Miño, Paloma González and Olmedo, Concepción Anguita (2013). "State and multilateralism, a theoretical approach. Transformations in a globalized international society". *JANUS.NET ejournal of International Relations*, Vol. 4, N.º 2, November 2013-April 2014. Consulted [online] on date of last view, observare.ual.pt/janus.net/en_vol4_n2_art4

⁷⁶ n 73

⁷⁷ n 73

consensus and negotiations between the parties are essential.⁷⁸ For purposes of this research I adopt the definition by Mino and Olmedo which encompasses Ruggie's definition.

Winter⁷⁹ defines regionalism on the other hand as 'any policy designed to reduce trade barriers between a subset of countries regardless of whether those countries are close to each other. 'In regional integration partner countries agree to dismantle trade barriers on a reciprocal basis while barriers to imports from other countries remain fundamentally unchanged.⁸⁰ Regional forms of integration are widespread, and all the member nations of the WTO are currently party to at least one such agreement.⁸¹ A regional or bilateral trade agreement is rarely based on a single motive, most have diverse and sometimes conflicting motives such as market access and political support.⁸²

Integration arrangements are ranked in accordance with the level of integration achieved and can be characterized as follows-⁸³

- a) In Preferential Trade Areas countries lower trade tariffs when trading with each other but maintain their own tariffs with third parties;⁸⁴
- b) Free Trade Area where member countries agree to reduce trade barriers among the member states and each member state retains its respective tariff with foreign countries;
- c) Customs Union where in addition to removing trade tariffs amongst themselves they also have a common external tariff;⁸⁵
- d) Common Market in addition to what a customs union provide it aims to remove restrictions on capital, labour and liberalizing trade;⁸⁶
- e) Economic Union is where the member states pursue coordination of member states economic policies to ensure there is uniformity;⁸⁷and
- f) Monetary Union adopts a common currency as well as a common monetary policy.

⁷⁸ n 73

⁷⁹ L. Alan Winters, Regionalism versus multilateralism , Policy Research working paper, The World Bank International Economics Department International Trade Division, November, 1996

⁸⁰ Moser, Peter (1997) : Reasons for regional integration agreements, *Intereconomics*, ISSN 0020-5346, Nomos Verlagsgesellschaft, Baden-Baden, Vol. 32, Iss. 5, pp. 225-229, <http://dx.doi.org/10.1007/BF02929831> (Accessed on 3rd September, 2021)

⁸¹ n 78

⁸² O. Cattaneo The political economy of PTAs, Bilateral and Regional Trade Agreements, commentary and analysis edited by Simon Lester and Bryan Mercurio, Cambridge University Press (2009)

⁸³ <http://www.fao.org/3/y4793e/y4793e04.htm> (Accessed 8 September 2021)

⁸⁴ n 81

⁸⁵ n 81

⁸⁶ n 81

⁸⁷ n 81

2.3 Most Favoured Nation Principle (MFN)

Equality of treatment in tariff issues as between states had become a general principle long before the 19th century unless there were compelling justifiable reasons to depart from the principle.⁸⁸ One of the key principles in the multilateral trading system is trade without discrimination commonly referred to as the Most Favoured Nation (MFN) principle under which a country cannot discriminate amongst its trading partners by granting it preferential treatment.⁸⁹ This principle is captured in Article 1 of GATT.⁹⁰ Article 1.1 of GATT mandates WTO members to treat ‘like products’ of other WTO members with respect to tariffs, regulations on exports and imports, internal taxes and charges on imported products, and internal regulations.⁹¹

Notwithstanding the provisions of Article 1 of GATT, there are exceptions that allow WTO members to form blocks through RTAs under the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (commonly referred to as the ‘Enabling Clause’) or under article XXIV of GATT. Members of the WTO that enter into RTAs are required to ensure that the agreements are compliant with the requirements of either of these two exceptions under GATT. There has been a rapid increase in the number of RTAs over the last decade and it is no longer possible to view the WTO as a rule and RTAs as the exception.⁹² Presently, about 350 RTAs are in existence, out of which 318 have been reported to the WTO under article XXIV and about 62 have been reported under the enabling clause.⁹³ The EAC is one such regional grouping made and has been notified under the enabling clause.⁹⁴

⁸⁸ The Customs Union Issue- Jacob Viner edited and with an Introduction by Paul Oslington, published by the Oxford University Press (2014)

⁸⁹ https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (Last accessed on 10th September, 2021)

⁹⁰ https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm#articleI (Last accessed on 10th September, 2021)

⁹¹ https://www.meti.go.jp/english/report/data/2015WTO/02_01.pdf (last accessed on 10th September, 2021)

⁹² Hafez Zakir, (2004) The Dimensions of Regional Trade Integration in Southeast Asia ; International Law and Development, Volume, 3, Brill

⁹³ <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx> (Last accessed on 10th September, 2021)

⁹⁴ <https://www.wto.org> (Last accessed on 10th September, 2021)

2.4 Article XXIV of GATT

Article XXIV of GATT has been a source of vexation and puzzlement.⁹⁵ Article XXIV exempts states from the obligation to accord MFN treatment in international trade. However, it provides conditions which the different RTAs must fulfil in order to be consistent with the multilateral system;

i. Objective of RTAs

Article XXIV (4) recognizes the objective of RTAs which is to facilitate trade between territories and not to raise barriers to the trade of other contracting parties with such territories. This is a confirmation that WTO members have a right to conclude RTAs provided they do not raise barriers to trade.

ii. Types of RTAs

The following types of RTAs are recognized under article XXIV (5); a CU; FTA and interim agreements. A CU eliminates barriers to trade in goods among its member and adopts a common external tariff that all members of the CU apply to trade with third countries⁹⁶ while an FTA on the other hand eliminates barriers to trade in goods among its members and the members retain all of their pre-existing tariffs and other trade barriers in their trade relations with third-party state.⁹⁷

iii. Requirements under article XXIV

a) Elimination of ‘substantially all trade’

Article XXIV (8) requires a CU or FTA to eliminate trade barriers on substantially all the trade among its members. In CU, duties and restrictions on trade ought to be eliminated either with respect to substantially all the trade between the CU members, or with respect to substantially all trade in goods originating within the CU borders.⁹⁸ This requirement was to ensure that trade was liberalized among states to an RTA.⁹⁹ The question of what constitutes ‘substantially

⁹⁵ <https://people.brandeis.edu/~chase/research/wtr06.pdf> (Last accessed on 10th September, 2021)

⁹⁶ Article XXIV (8) of GATT

⁹⁷ n 94

⁹⁸ Article XXIV(8) a

⁹⁹ H. Bernard Trade Laws and Institutions: Good Practices and the World Trade Organization (1995)

all trade' has caused debates among members. One position advanced by members of the working party reviewing the Treaty establishing the European Economic Community was that a quantitative analysis is to be undertaken to ensure that 80% of the total volume of trade is liberalized in order to satisfy the requirement of 'substantially all trade'¹⁰⁰ while the other view is that a qualitative analysis must be undertaken. The Appellate Body in the **Turkey's Restriction on Textile case**¹⁰¹ held that 'substantially all trade' was not the same as all trade and but was also something that was considerably more trade than some trade.

b) Not On the Whole Higher Or More Restrictive requirement

In order to prevent third parties from suffering from the formation of a CU, article XXIV(5) of GATT requires duties and other regulations of commerce imposed at the institution of a customs union not to be higher or more restrictive than they were prior to the formation of the CU. The question that the working parties were faced with was whether the general incidents of duties should be calculated on a product by product or whether the same should be based on the assessment of each sector.¹⁰² The panel and the appellate body of the Turkey's Restriction on Textile case held that paragraph 5(1) of article XXIV provided for an economic test whether a CU is compatible with article XXIV.¹⁰³ However, the panel and the appellate body failed to provide the manner in which the economic test would be carried out and which organ of the WTO would be tasked with carrying out the economic test.¹⁰⁴

c) Adoption of substantially the same duties and other regulations of Commerce

Article XXIV (8) provides that duties and other restrictive regulations of commerce should be eliminated on substantially all trade between RTA members. States forming a CU must ensure

¹⁰⁰ E.K. Kessie „Trade Liberalization under ECOWAS: Prospects, Challenges and WTO Compatibility“ (1999)7 African Yearbook of International Law 42

¹⁰¹ Turkey-restrictions on imports of textile and clothing products WT/DS34/AB/R(22 October 1999) Paragraph 48. The full version of the decision of appellate body is accessible at https://www.wto.org/english/tratope/dispute/cases_e/ds34_e.htm (Accessed 12 September, 2021)

¹⁰² <https://core.ac.uk/download/pdf/151516424.pdf> (Accessed 12 September, 2021)

¹⁰³ https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=64010&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (Accessed 12 September, 2021)

¹⁰⁴ <https://commons.und.edu/cgi/viewcontent.cgi?article=1507&context=ndlr> (Accessed 12 September 2021)

that they adopt similar duties and regulations of commerce in trading with others. This distinguishes a CU from an FTA in that members of a CU are obligated to adopt a CET.¹⁰⁵

d) Notification

Sub-paragraph 7(a) of article XXIV requires that any contracting party entering into a CU, FTA or an interim agreement must notify the other contracting parties and avail to them information that will enable them to make reports or recommendation. The notifications submitted under this sub-paragraph are to be examined by a working party who shall thereafter submit a report to the Council for Trade in Goods¹⁰⁶. Sub-paragraph 7(a) of article XXIV does not provide what information should be contained in the notification and the time period within which such notification is to be made.

e) Negotiations with third parties who have been affected by new tariff arrangement as a result of the CU or FTA

Sub-paragraph 6 of XXIV requires a CU or FTA to enter into negotiations with the affected third party who might have been affected as a result of a CU or FTA.¹⁰⁷ The purpose of the negotiation is to provide compensation for change in the duties upon formation of the CU. The Uruguay understanding of these provisions provide that the negotiations are to be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment.

2.5 Enabling clause

Article XXIV is not the only GATT rules that permits a departure from the MFN principle. The enabling clause which was agreed to in the Tokyo Round of the WTO Rounds, permits this departure where it is to the advantage of those countries that are still developing. In the European Communities (EC) – Conditions for the Granting of Tariff Preferences to Developing Countries¹⁰⁸ case the parties to the dispute had a different understanding of the relationship

¹⁰⁵ n 102

¹⁰⁶ Paragraph 7 ‘Review of Customs Unions and Free-Trade Areas’ Understanding of the interpretation of Article XXIV on GATT

¹⁰⁷ Sub-paragraph 6 of article XXIV GATT

¹⁰⁸ European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R,

between Article 1(1) of GATT and the Enabling Clause. The panel defined the status of the enabling clause as being an exception to the MFN principles. The Appellate Body (AB) upheld this finding. The AB further held that in the event that there is a conflict between article 1(1) of GATT and the enabling clause, as a more specific rule the enabling clause prevails.

2.6 Customs Union

A CU in broad terms, is an arrangement whereby sovereign states agree to trade freely with each other while enacting common measures with respect to trade with non-members.¹⁰⁹ A CU is defined as the substitution of a single customs territory for two or more customs territories. Membership to a CU can have far-reaching consequences for the ability of states to conduct their international trade policy independently, including negotiations of FTAs with other states.

¹¹⁰

Krueger¹¹¹ distinguishes between an FTA and a CU. He notes that an FTA maintains¹¹² each countries individual external trade barriers¹¹³ and removes barriers on trade between member countries.¹¹⁴ He further notes that the effect of such is that the existence of different tariff rates by member countries implies that measures must be taken to prevent trade deflection.¹¹⁵ Krueger¹¹⁶ further argues that since there can be no more trade creation and there can be more trade diversion under an FTA than under a CU, thus potential welfare effects of an FTA must be inferior to those of a trade creating a CU.¹¹⁷

Divergent preferences allow goods in the territory of a CU to be traded at rates not agreed upon jointly by all members, which has a host of potential consequences. The most obvious one is the free internal circulation of goods on which a preferential tariff has been applied instead of the CET.¹¹⁸ The Dictionary of International Trade notes that it is only the EU and the Southern

¹⁰⁹ Michal Ovadek and Ines Willems, International Law of Customs Unions: Conceptual Variety, Legal Ambiguity and Diverse Practice the European Journal of International Law Vol. 30 no. 2, EJIL (2019), Vol. 30 No. 2, 361–389, Published by Oxford University Press on behalf of EJIL Ltd.

¹¹⁰ n 49

¹¹¹ Krueger, A. O. 1995. “Free Trade Agreements versus Customs Unions.”, NBER Working Paper 5084. April 1995 Accessible online at https://www.nber.org/system/files/working_papers/w5084/w5084.pdf (Last accessed on 15th September, 2021)

¹¹² Anne O. Krueger “Free Trade Agreement versus Customs Union” Journal of Development Economics, 1997

¹¹³ n 115

¹¹⁴ n 115

¹¹⁵ n 115

¹¹⁶ n 115

¹¹⁷ n 115

¹¹⁸ n 49

African Customs Union that are ‘pure’ as members have to strictly adhere to the agreed CET.¹¹⁹ Other CUs permit deviations yet it is not well known how prevalent such deviations are. The dictionary defines the common external tariff as a uniform tariff rate adopted by a customs union or common market such as the European community to imports from countries outside the union.¹²⁰

A perfect CU must meet the following conditions;¹²¹

- a) the complete elimination of tariffs as between the member territories;
- b) the establishment of a uniform tariff on imports from outside the union;
- c) apportionment of customs revenue between the members in accordance with an agreed form

The EAC Customs Union came into effect in 2005 and seeks to establish a CET, rules of origin, elimination of tariffs for goods as well as elimination of non-tariff barriers. Arguments have been raised that the commonality of tariffs in EAC is only in papers. EAC CET contains exceptions through either stay application which permits a member state to disregard the CET and apply a completely different tariff or through duty remissions which allow a company to pay lower duties on imports or be exempted from paying taxes completely.¹²² This will be discussed in depth under chapter 3.

2.7 Conclusion

The MFN principle requires that any trading preference granted to one member state should be granted to all WTO members. However, under article XXIV of GATT and the enabling clause, countries can form regional blocks. EAC has been notified to the WTO under the enabling clause. The levels of integration are characterized as either PTA, FTA, CU, Common Market, Economic Union and a Monetary Union. EAC CU was established in 2005 and whereas CU

¹¹⁹ <http://globalnegotiator.com/files/dictionary-of-international-trade.pdf> (Last accessed on 15th September, 2021)

¹²⁰ n 113

¹²¹ The Customs Union Issue- Jacob Viner edited and with an Introduction by Paul Oslington, published by the Oxford University Press (2014)

¹²² The EAC Customs Union Agreement accessed through <file:///C:/Users/LeylaAhmed/Downloads/9781316888896.006.pdf> (Last accessed on 12th September, 2021)

should have a CET, the EAC CET provides for exceptions which permit member states to deviate from the common agreed tariff.

Chapter 3

The Legal and Institutional Framework for EAC partner state trade relation with third countries

3. 0 Introduction

In 1967, Kenya, Tanzania and Uganda established EAC which lasted until 1977 when the community collapsed.¹²³ The preamble of the 1999 Treaty for the Establishment of the EAC highlights some of the root causes of the collapse including lack of political will, lack of strong participation on the part of the private sector and the civil society; disproportionate benefits of EAC among the then partner states because of their different levels of development. The other key thing that contributed to the collapse of EAC was the different economic ideologies among the member states, whereas Kenya pursued a liberalized market oriented economic policy, Tanzania pursued a socialist approach known as ujamaa. The situation within the community was aggravated by the military coup in Uganda in 1971 as it worsened the political differences between the member states. Once the community was dissolved in 1977, Uganda, Kenya and Tanzania signed a mediation agreement which contained the division of the community assets. In 1984 a working group was established to come up with ways of renewing cooperation among the countries and eventually after a series of consultation the EAC was revived upon signing of the Treaty in 1999.

It appears that the sour relation between the member states has never been fully resolved. Trade between Tanzania and Kenya has been declining since 2014 which decline points to the ideological and political differences between the two countries.¹²⁴ The difference between the two countries is not a new phenomenon as it was the closure of the border between Kenya and Tanzania that led ultimately to the collapse of EAC.¹²⁵ Uganda on the other hand has reneged on an agreement it had with Kenya to abolish 12% duty of Kenyan manufactured fruit juices as well as the removal of 12% verification fee on pharmaceutical exports.¹²⁶ Despite these

¹²³ Harmonization of Laws in the east African Community; the State with Comparative Insights from the European Union and other Regional Economic Community, Law Africa 2018

¹²⁴ Kenya: Why Tanzania, Kenya Trade Ties Blow Hot and Cold, *By Otianto Guguyu* Daily Nation 1st June, 2020 <https://allafrica.com/stories/202006020604.html> (Last accessed on 15th September, 2021)

¹²⁵ n 114

¹²⁶ The East African. 2020. "Uganda backtracks on deal to abolish taxes on Kenyan juices." Newspaper article from 28th September 2020. Accessible online <https://www.theeastafrican.co.ke/tea/business/uganda-backtracks-on-deal-to-abolish-taxes-on-kenyan-juices-2373684> (Last accessed on 15th September, 2021)

challenges, EAC is one of the growing regional blocks in the world¹²⁷, with a population of 177 million people as of 2019¹²⁸ and a combined Gross Domestic product (GDP) of US\$ 193 billion.¹²⁹

The functioning of EAC is guided by the Treaty establishing the community and its protocols. EAC's mission is to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of the people of East Africa.¹³⁰ EAC has stable economy, great market access to all regions in Africa, Middle East and Asia and preferential market access to the USA and EU.¹³¹ Regional integration process is currently in full swing as the EAC CU was established in 2005, Common Market in 2010 and Monetary Union Protocol was signed in 2013 and ultimately the community aims to reach a political federation. This chapter gives an overview of the laws that govern trade relation between EAC member states and third countries.

3.1 The Objectives of EAC

The objectives of EAC is to develop policies and programmes¹³² aimed at widening and deepening co-operation among the partner States¹³³ in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs,¹³⁴ for their mutual benefit.¹³⁵ In order to achieve these goals, surrender of some level of sovereignty to the community and institutions is required.¹³⁶ In addition, member states are obligated to co-operate in trade relations with foreign states.

3.2 EAC competencies in trade

¹²⁷ <https://www.eac.int/overview-of-eac> (Last accessed on 15th September, 2021)

¹²⁸ EAC statistics for 2019

¹²⁹ n 122

¹³⁰ <https://www.eac.int/integration-pillars> (Last accessed on 15th September, 2021)

¹³¹ East African Community Vision 2050

¹³² Joy Kategekwa "Opening markets for foreign skills: How can the WTO Help?" Springer Nature, 2014

¹³³ n 135

¹³⁴ n 135

¹³⁵ Article 5(1) of the EAC Treaty

¹³⁶ Richard Frimpong Oppong, Re-Imagining International Law: An Examination of Recent Trends in the Reception of International Law Into National Legal Systems in Africa, 30 *Fordham Int'l L.J.* 296 (2006). Available at: <https://ir.lawnet.fordham.edu/ilj/vol30/iss2/3> (Last accessed on 15th September, 2021)

The competencies of the Community is not expressly stated in the Treaty establishing the community, rather it can be inferred from the objectives of the EAC.¹³⁷ EAC competency is limited to enhancing cooperation in specific areas that the partner states have agreed to undertake in common.¹³⁸ EAC is a partner states led organization in accordance with its intergovernmentalism integration approach.¹³⁹

3.3. Legal and Institutional framework

3.3.1 Treaty and Protocols

a) The Treaty for the Establishment of the East African Community ('EAC Treaty')¹⁴⁰

The EAC Treaty defines a common external tariff as an identical rate of tariff imposed on goods imported from third countries while cooperation has been defined to include the undertaking by the member states in common, jointly or in concert, of activities undertaken in furtherance of the objectives of the EAC.¹⁴¹ Pursuant to the objectives of the EAC, partner states aim to regulate member states relations and with foreign countries by establishing a CU and a Common Market.¹⁴²

The community is centred around the principle of co-operation for mutual benefit.¹⁴³ The principles that govern the achievement of the objectives of the community include people-centred and market-driven co-operation;¹⁴⁴ the principle of complementarity;¹⁴⁵ and the principle of asymmetry.¹⁴⁶ Partner states are required to abstain from any measures likely to jeopardise the achievement of the objectives of the community.¹⁴⁷ The principle of complementarity defines the extent to which economic variables support each other in economic activity and thus does not only cover the relationship between the community and

¹³⁷ East African Community Law: Institutional, Substantive and Comparative EU Aspects (2017) edited by Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers published by Brill. Chapter Title: The Legal Framework of the EAC Chapter Author(s): Elvis Mbembe Binda

¹³⁸ n 8

¹³⁹ n 9

¹⁴⁰ Signed on 30th November, 1999 and entered into force on 7th July, 2000. The same was amended on 14th December, 2006 and on 20th August, 2007

¹⁴¹ Article 1 of the EAC Treaty

¹⁴² Article 5(2) of the EAC Treaty

¹⁴³ Article 6(f) of the EAC Treaty

¹⁴⁴ Article 7(1)(a) of the EAC Treaty

¹⁴⁵ Article 7(1)(g) of the EAC Treaty

¹⁴⁶ Article 7(1)(h) of the EAC Treaty

¹⁴⁷ Article 8 (1)(c) of the EAC Treaty

its members but also creates a bridge between the work of the community and other African institutions performing the same action. On the other hand, the principle of variable geometry allows the member states to implement the integration projects at different levels.

The Council of Ministers sought a clarification from the EACJ on the application of the principle of variable geometry.¹⁴⁸ The court stated that the principle is a strategy of implementation of the community decisions and that it was not a decision making tool in itself.¹⁴⁹ The court found no reason for the principle to conflict with the requirement of consensus in decision making.¹⁵⁰ Kamanga and Possi¹⁵¹ state that the main aim of the principle is to ensure that the integration agenda proceeds even if unwilling states are reluctant. The principle attempts to address the issue of inequalities among member states, however if applied under political influence it may lead to the fragmentation of the community.¹⁵² While invoking the ‘coalition of the willing’ in 2013 Kenya, Rwanda and Uganda held a meeting to the exclusion of Tanzania and Burundi.

The principle of subsidiarity requires regional organs to take action in areas which do not fall within the exclusive competence of the community only if the member state cannot sufficiently undertake the activity on its own.¹⁵³ The EU takes a similar approach and has even concluded a protocol on the application of the principle¹⁵⁴ which approach should be adopted by EAC. The protocol lays three criteria to determine whether intervention by EU is warranted;

- a) Are there elements of transnationalism that cannot be resolved by the member state;
- b) Would a national action or in action be contrary to the requirements of the Treaty; and
- c) Is there an advantage if the EU were to intervene.

In terms of relationship with other regional and international organizations and development partners the Treaty provides that;¹⁵⁵

¹⁴⁸ In the matter of a request by the Council of Ministers of the East African Community for an Advisory Opinion, Application No. 1 2008, EACJ, First Instance Division.

¹⁴⁹ n 135

¹⁵⁰ n 135

¹⁵¹ C.Kamnaga and A. Possi, General Principles Governing EAC Integration, Chapter 6, East African Community Law https://www.jstor.org/stable/10.1163/j.ctt1w76vj2.15?seq=1#metadata_info_tab_contents

¹⁵² n 138

¹⁵³ <https://epub.uni-bayreuth.de/3899/1/TGCL%20Series%205%20online.pdf>

¹⁵⁴ n 140

¹⁵⁵ Article 130 of the EAC Treaty

- a) The Partner States shall honour their commitments in respect of other multinational and international organisations of which they are members.
- b) The Partner States regard the Community as a step towards the achievement of the objectives of the Treaty Establishing the African Economic Community.
- c) The Community shall foster co-operative arrangements with other regional and international organisations whose activities have a bearing on the objectives of the Community.

Under Articles 8(2) and (4) of the Treaty, Community laws and organs take precedence over national laws. There are various organs and institutions established under the Treaty¹⁵⁶ which are briefly discussed below.

i. The Summit¹⁵⁷

The summit is the apex organ¹⁵⁸ of the EAC and is composed of head of states of partner states¹⁵⁹ whose function includes giving general directions and impetus as to the development and achievement of the objectives of the Community.¹⁶⁰ The summit meets at least once every year and may hold extraordinary meetings whenever required.¹⁶¹ Decisions are made at the summit by consensus.¹⁶² Pursuant to article 11(3) of the Treaty, the summit reviews state of peace, security and good governance within EAC as well as the progress towards achieving the ultimate goal of the community which is a political federation. The summit has the exclusive mandate to admit new members as well as grant observer state to foreign states.¹⁶³ The EAC summit may be equated to the Council of the European Union.

ii. The Council

¹⁵⁶ Article 9 of the EAC Treaty

¹⁵⁷ <https://www.eac.int/> (Last accessed 18th September, 2021)

¹⁵⁸ n 153

¹⁵⁹ Article 10 of the EAC Treaty

¹⁶⁰ Article 11 of the EAC Treaty

¹⁶¹ Article 12 (1) of the EAC Treaty

¹⁶² Article 12 (3) of the EAC Treaty

¹⁶³ Article 11 (9) of the EAC Treaty

The council is the policy organ of the community,¹⁶⁴ and consists of ministers responsible for the EAC community affairs, the Attorney general of the partner states and any minister the partner state may determine.¹⁶⁵

The council is mandated to meet atleast twice every year and extraordinary meetings are to be held at the request of partner state or at the request of the chairperson of the council.¹⁶⁶ The regulations and directions made by the council are binding on partner states, organs and institutions other than the summit, the court and the assembly.¹⁶⁷

iii. **Co-ordination Committee**

The Co-ordination Committee is composed of permanent secretaries responsible for affairs of EAC in each partner state¹⁶⁸ and its functions include implementing the decisions of the Council;¹⁶⁹ and submitting reports and recommendations to the Council on the implementation of the Treaty.¹⁷⁰ The committee meets atleast twice every year.¹⁷¹

iv. **Sectoral Committees**

Sectoral committees are established upon the recommendation by the Co-ordination Committee¹⁷². The main mandate of the sectoral committees is to prepare a comprehensive implementation programme and the setting out of priorities with respect to its sector,¹⁷³ and to monitor and keep the implementation of the programmes of the Community with respect to its sector.¹⁷⁴

v. **The East African Court of Justice (EACJ)**

¹⁶⁴ Article 14 of the EAC

¹⁶⁵ Article 13 of the EAC Treaty

¹⁶⁶ Article 15(1) of the EAC Treaty

¹⁶⁷ Article 16 of the EAC Treaty

¹⁶⁸ Article 17 of the EAC Treaty

¹⁶⁹ Article 18(b) of the EAC Treaty

¹⁷⁰ Article 18(a) of the EAC Treaty

¹⁷¹ Article 19(1) of the EAC Treaty

¹⁷² Article 20 of the EAC Treaty

¹⁷³ Article 21(a) of the EAC Treaty

¹⁷⁴ Article 21(b) of the EAC Treaty

The EACJ is the judicial organ of the community and the judges of the court are appointed by the summit¹⁷⁵. The jurisdiction of the court is primarily interpretation and application of the EAC Treaty.¹⁷⁶ The role is significant as it ensures uniformity and standardization in construction and interpretation of the Treaty among the Partner states.¹⁷⁷ The Summit, the Council or a Partner State may request the Court to give an advisory opinion regarding a question of law arising from the Treaty which affects the Community.¹⁷⁸ Article 33 (2) of the Treaty provides that decisions of the EACJ on the interpretation and application of the Treaty takes precedence over decisions of national courts on similar matters. Unlike in the European Union (EU) the judges of the EACJ are appointed directly by members of the Summit. In EU judges are appointed to the European Court of Justice after consultation with a panel of experts. It is interesting to note that nothing prevents a judge of EACJ from also being a national judge, a situation that is ripe for potential conflict of interest.¹⁷⁹

The court is accessible to the following;

1. A Member state that considers that another member state or EAC organ has failed to fulfil an obligation under the Treaty.¹⁸⁰
2. The EAC Secretary General where the Secretary General considers a member state or organ has failed to fulfil its obligations under the Treaty.¹⁸¹
3. Any person who¹⁸² is a resident in a member state may refer to the court the legality of any directive, decision or action of or a member state or an organ of the EAC on the grounds that such decisions, or actions are unlawful or an infringement of the provisions of the Treaty.¹⁸³

As the court sits in Arusha, Tanzania, sub-registries have been established in all the member states to bring justice closer to the people.¹⁸⁴

¹⁷⁵ Article 24(1) of the EAC Treaty

¹⁷⁶ Article 27(1) of the EAC Treaty

¹⁷⁷ Law of regional integration- A case study of the East African Community by James Otieno-Odek (2018) appearing in the book Harmonisation of Laws in the East African Community, the State Affairs with Comparative Insights from the European Union and other Regional Economic Communities)

¹⁷⁸ Article 36 (1) of the EAC Treaty

¹⁷⁹ N 144

¹⁸⁰ Article 28 of the EAC Treaty

¹⁸¹ Article 29 of the EAC Treaty

¹⁸² www.eac.org (last accessed on 18th September, 2021)

¹⁸³ Article 31(1) of EAC Treaty

¹⁸⁴ https://www.eacj.org/?page_id=1269

vi. **The East African Legislative Assembly;**

The East African Legislative Assembly (EALA) function includes liaising with National Assemblies of Partner States on matters relating to the community¹⁸⁵ and is composed of nine members elected by the partner states, ex officio members consisting of ministers and assistant ministers responsible for EAC affairs from each partner state and the Secretary General and Counsel to the Community.¹⁸⁶

vii. **The Secretariat**

The Secretariat is the executive organ of the EAC whose responsibilities include the strategic planning, management and monitoring of programmes for the development of the Community; the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination; and the general promotion and dissemination of information on the Community to the stakeholders, the general public and the international community.¹⁸⁷

b) Protocol on the establishment of the East African Customs Union¹⁸⁸

The EAC Treaty provides for the establishment of a customs union (CU) to include;

- a) The application of the principle of asymmetry;
- b) The elimination of internal tariffs and other charges of equivalent effect;
- c) The elimination of non-tariff barriers;
- d) Establishment of a common external tariff
- e) Rules of origin;
- f) Dumping;
- g) Subsidies and countervailing duties;
- h) Security and other restrictions to trade;
- i) Competition;

¹⁸⁵ Article 49(2)(a) of the EAC Treaty

¹⁸⁶ Article 48 EAC Treaty

¹⁸⁷ Article 66 of the EAC Treaty

¹⁸⁸ Signed in November 2004 and is in force since January 2005 which can be accessed at www.wto.org (Last accessed on 5th September, 2021)

- j) Duty drawback, refund and remission of duties and taxes;
- k) Customs co-operation;
- l) Re-exportation of goods; and
- m) Simplification and harmonisation of trade documentation and procedures.

The Protocol was signed on 2nd March 2004 and came into force on 1st January, 2005. The Protocol seeks to implement article 75 of the EAC Treaty. The protocol requires a CET in respect of all goods imported into the Partner States from third countries to be established and maintained.¹⁸⁹ Under article 14 of the protocol goods are eligible for community tariff if they originate from the partner states and to this extent the community has adopted EAC rules of origin. Article 21 of the protocol prohibits any practice (competition) that adversely affects free trade including any agreement, undertaking or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Community. The implementation of competition within the community is undertaken in accordance with the EAC competition policy and law.

The protocol also establishes an EAC Committee on Trade Remedies to handle¹⁹⁰ any matters pertaining to including dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations.¹⁹¹ Trade arrangements with states outside the CU are handled through article 37 which requires;

- a) Partner states which belong to either multilateral or international organisations to honour their obligations,
- b) Coordination of trade relations with foreign countries to enable implementation of common policies in external trade;
- c) Once the protocol comes into force, Partner States shall identify the issues arising out of their current relationships with other integration blocs and multilateral and international organisations of which they are members in order to establish convergence on those matters for the purposes of the CU

¹⁸⁹ Article 2(4) of the Protocol establishing the Customs Union

¹⁹⁰ East African Centre for Trade Policy and Law Secretary -General of the East African Community, International Law Reports

¹⁹¹ Article 24 of the Protocol establishing the Customs Union

The Partner States were required to formulate a mechanism to guide the relationships between the CU and other integration blocs, multilateral and international organisations. To this date there is no such mechanism that has been formulated.

Under article 37 (4) (a) of the protocol, a member state may enter into trade agreements with foreign states provided that the obligations under those agreements do not conflict with the provisions of the Treaty. Where a partner states intends to conclude such an agreement, the Partner State is required to send its proposed agreement or amendment by registered mail to the Secretary General of the EAC who shall then communicate the proposed agreement by registered mail to the other Partner States within a period of thirty days, for their consideration. Upon receipt, partner states are required to make their comments to the proposed agreement within 90 days from receipt of the Secretary General's notification. Once the comments are received, the Secretary general is required to convene a meeting of the council within 60 days to consider the comments on the proposed agreement. Where no comments have been received, the concerned partner state may proceed to conclude its agreement with the third state.

Article 39 of the protocol provides that the customs law of the community which are to apply uniformly consists of;

- (a) relevant provisions of the Treaty;
- (b) this Protocol and its annexes;
- (c) regulations and directives made by the Council;
- (d) applicable decisions made by the Court;
- (e) Acts of the Community enacted by the Legislative Assembly; and
- (f) relevant principles of international law.

In the event of disputes arising within the CU, a comprehensive framework is provided under article 41 of the protocol on how the said disputes can be handled. Partner states are required to accord due consideration to the other Partner States' presentation or complaints; opportunity for consultation on representations made by other Partner States; and to implement in good faith any decisions made pursuant to the Community's dispute settlement mechanisms. The implementation of article 41 is in accordance with the East African Community Customs Union (Dispute Settlement Mechanism) Regulations.

Article 12(3) of the protocol allows the council to review the CET structure and approve measures designed to remedy any adverse effects which nay member state may experience by reason of implementation of the CET. Deviations from the CET are permitted under the stay application and duty remission scheme.¹⁹² The EAC Council of Ministers are the one that approve both the stay of applications and the duty remission scheme. The number of approved Stays of application have increased over the years, from below 100 in 2009/10 to more than 900 in 2019/20.¹⁹³

There are challenges associated with implementing the EAC CET. The creation of a Sensitive Items (SI) List of items which had rates more than 25%, The goal of the SI list is to provide protection to specific industries however this protection has not worked as the member states circumnavigate this by applying for the stay applications.¹⁹⁴ The other challenge in implementing a CET is the appropriate classification of goods as either raw or finished products, although currently the UN has assisted as it has attempted to make some classification through its Broad Economic Categories taxonomy of goods.¹⁹⁵

What is the role of the EACJ in the realization of the CU and the EAC Common Market? Hon. Justice Dr. Ruhangisa¹⁹⁶ argues that EACJ presents another forum with which the community can advance its integration objectives.¹⁹⁷ However, he points out that the dispute resolution mechanism provided under the CU and the Common Market protocols undermine the integration process within the community.¹⁹⁸ The mechanisms provided under the EAC CU protocol us amicable resolution of the dispute through good offices, conciliation, and mediation. Disputes handled by the EAC Committee on Trade Remedies include;

- a) Rules of origin provided for under the East African Community Customs Union (Rules of Origin) Rules, specified in Annex III to the Protocol;¹⁹⁹

¹⁹²n 49

¹⁹³ n 49

¹⁹⁴ n 49

¹⁹⁵ n 49

¹⁹⁶ The Role of the East African court of Justice in the Realization of Customs Union and Common Market by Dr. John Eudes Ruhangisa, Registrar East African Court of Justice Paper presented during the Inter-Parliamentary Relations Seminar (Nanyuki - V -) held at Burundi National Assembly, Bujumbura, Burundi, 27th – 31st January, 2010. Also see Also see John Ruhangisa. “Parallel Jurisdiction of courts: the view from the EACJ, Commonwealth Law Bulletin, 2010

¹⁹⁷ Also see John Ruhangisa. “Parallel Jurisdiction of courts: the view from the EACJ, Commonwealth Law Bulletin, 2010

¹⁹⁸ n 183

¹⁹⁹ Article 24(1)(1)(a) of the EAC Customs Union Protocol

- b) Anti-dumping measures provided for under the East African Community Customs Union (Anti-Dumping Measures) Regulations, specified in Annex IV to the Protocol;²⁰⁰
- c) Subsidies and countervailing measures provided for under the East African Community Customs Union (Subsidies and Countervailing Measures) Regulations, specified in Annex V to the Protocol;²⁰¹
- d) safeguard measures provided for under the East African Community Customs Union (Safeguard Measures) Regulations, specified in Annex VI to the Protocol;²⁰²
- e) dispute settlement provided for under the East African Community Customs Union (Dispute Settlement Mechanism) Regulations, specified in Annex IX to the Protocol.²⁰³

Article 24 (5) of the EAC CU Protocol provides that the decision of the Committee on Trade Remedies with respect to the settlement of disputes shall be final. Hon. Justice Dr. Ruhangia²⁰⁴ argues that the EACJ is left out the dispute process under the CU unless the decision is challenged on grounds of fraud, lack of jurisdiction or other illegality and the party moves to court to seek a review of the decision under article 28(2) of the Treaty. The EACJ is mandated to deal with compliance with the law within the community and the CU protocol is part of the laws of the community and thus the application, interpretation and compliance should have been the mandate of the EACJ.²⁰⁵

c) Protocol on the establishment of the East African Community Common Market²⁰⁶

In accordance with the provisions of article 76 of the EAC Treaty,²⁰⁷ a common market protocol was enacted which provides for;²⁰⁸

- a) free movement of goods;²⁰⁹

²⁰⁰ Article 24(1)(1)(b) of the EAC Customs Union Protocol. Also see Also see John Ruhangisa. “Parallel Jurisdiction of courts: the view from the EACJ, Commonwealth Law Bulletin, 2010

²⁰¹ Article 24(1)(1)(c) of the EAC Customs Union Protocol. Also see Also see John Ruhangisa. “Parallel Jurisdiction of courts: the view from the EACJ, Commonwealth Law Bulletin, 2010

²⁰² Article 24(1)(1)(d) of the EAC Customs Union Protocol. Also see Also see John Ruhangisa. “Parallel Jurisdiction of courts: the view from the EACJ, Commonwealth Law Bulletin, 2010

²⁰³ Article 24(1)(1)(e) of the EAC Customs Union Protocol. Also see Also see John Ruhangisa. “Parallel Jurisdiction of courts: the view from the EACJ, Commonwealth Law Bulletin, 2010

²⁰⁴ n 175

²⁰⁵ n 175

²⁰⁶ Signed in November 2009, in force since July 2010

²⁰⁷ www.eacj.org (Last accessed on 25th September, 2021)

²⁰⁸ n 198

²⁰⁹ n 198

- b) free movement of persons;²¹⁰
- c) free movement of labour;²¹¹
- d) right of establishment;²¹²
- e) right of residence;²¹³
- f) free movement of services;²¹⁴ and
- g) free movement of capital.²¹⁵

For purposes of implementing the common market, partner states are required to co-ordinate their trade relations to govern international trade and trade relations between the Community and third parties.²¹⁶ For purposes of co-ordination of the said trade relations, partner states are required to adopt common principles in relation to;²¹⁷

- a) tariff rates;
- b) conclusion of tariff and trade agreements;
- c) the achievements of uniformity of measures of liberalisation;
- d) export promotion strategies ; and
- e) trade remedies.

The EAC council was required to establish a mechanism for the co-ordination of trade relations with third parties in order to adopt common negotiating positions in the development of mutually beneficial trade agreements with third parties as well as promote participation and joint representation in international trade negotiations. Partner states are mandated to provide to the Council information on their trade relations with third parties. The protocol is clearly that for purposes of trade relations of the individual partner states with third parties, the provisions of the CU protocol shall be applicable.

Disputes that arise from the interpretation or application of the Common Market Protocol between member states shall be settled in accordance with the provisions of the EAC Treaty.²¹⁸ Of importance to note is that the protocol provides that any persons whose rights have been

²¹⁰ n 198

²¹¹ n 198

²¹² n 198

²¹³ n 198

²¹⁴ n 198

²¹⁵ n 198

²¹⁶ Article 5 (3) of the Protocol Establishing the Common Market

²¹⁷ Article 37 of the Protocol Establishing the Common

²¹⁸ Article 54 (1) of the Protocol Establishing the Common Market

infringed shall have the right to redress even where the infringement has been committed by a person acting in their official capacity.²¹⁹

3.3.2 Legislations

a) The EAC Trade Negotiations Act, 2008

The objective of this Act is to facilitate the promotion of regional and international trade for the sustainable development of the partner states, to establish a mechanism for joint negotiations of the partner states in bilateral, regional and multilateral trade, and to develop an East African trade regime in accordance with the Treaty and the protocol establishing the CU.²²⁰ The EAC partner states are required to negotiate as a block in all matters relating to regional and multilateral trade²²¹ and every partner state may establish a national trade negotiations committee which shall prepare the national position on each and every issue or items for negotiations at the regional and multilateral level. Under article 5 of the Act, East African Joint Trade Negotiations Commissions is established whose responsibility includes to harmonize trade policies, develop and EAC trade regime, conduct trade negotiations on behalf of EAC Partner states, and maintain a databank on trade matters. Decisions of the Commission on trade matters are required to be by consensus.²²² Prior to concluding any negotiated agreement, the Commission is mandated to consult the council of ministers who shall approve the final text of the agreement.²²³ It is not clear whether the Act was ever operationalized.

b) The East African Community Conflict Management Act, 2012

The Act makes provision for the community's conflict prevention, management and resolution mechanisms. A conflict is defined as a disagreement through which the parties involved perceive a threat to their needs, interests or concerns while conflict resolution is defined to mean. a wide range of methods of addressing sources of conflict and of finding means of resolving or containing it in less destructive form.²²⁴ The main objective of the Act is to

²¹⁹ Article 54(2)(a) of the Protocol Establishing the Common Market

²²⁰ Article 2 The EAC Trade Negotiations Act, 2008

²²¹ Article 3(2) The EAC Trade Negotiations Act, 2008

²²² Article 8(1) The EAC Trade Negotiations Act, 2008

²²³ Article 12 The EAC Trade Negotiations Act, 2008

²²⁴ Article 2 The East African Community Conflict Management Act, 2012

promote conflict prevention and peaceful resolution of conflicts that might arise in the community.²²⁵

Under Article 4 of the Act, the East African Community Panel of Eminent persons responsible for prevention, management and resolution of conflicts in the community is established whose mandate is to identify potential sources of conflict and to propose modalities for intervention and stabilization of conflict situations.²²⁶

3.3.4 Trade and Investment framework agreement (TIFA) between the East African Community and the Government of the USA

Desiring to enhance the bonds of friendship and spirit of cooperation and to expand trade and strengthen economic relations between EAC and the USA and recognizing the increased importance of trade in services between the two parties, EAC and USA entered into TIFA which was signed in Washinton on 16th July, 2008. Under article 1 of TIFA, the parties to the agreement affirm their desire to promote an attractive investment climate and to expand and diversify trade in products and services between EAC and USA. Article 2 of the agreement establishes a USA-EAC Council that will be responsible for trade and including monitoring trade and investment relations between EAC and the USA, identifying opportunities for expanding trade and investment, considering specific trade and investment matter of interests to the parties; identifying and working to remove impediments to trade and investment between the USA and the EAC and its partners.²²⁷ Article 6 of the agreement is clearly that the agreement shall come into force upon signature by the parties and the agreement having been signed by the respective parties in 2008, the same is currently in force.

3.3.5 The East African Community Trade Negotiations Framework, 2016

The introductory part of the framework notes that the EAC has sent positive signals to the international community as regards its openness with its progress in the CU and common market and that the community can benefit from being part of a multilateral, regional and bilateral agreements.²²⁸ The EAC Trade Negotiations Framework (TNF) will play a vital role

²²⁵ Article 3(1) The East African Community Conflict Management Act, 2012

²²⁶ Article 5 The East African Community Conflict Management Act, 2012

²²⁷ Article 3

²²⁸ The East African Community Trade Negotiations Framework, 2016

in articulating EAC's trade and development interests and ensuring that these are addressed in trade negotiations.²²⁹ In this regard, the TNF will be used to guide the EAC in negotiating trade agreements with third Parties taking into account its level of development based²³⁰ on the prevailing macro-economic indicators, interests and priority objectives of negotiating trade agreements.²³¹ The TNF describes areas that may be covered by negotiations with third parties.²³² TNF provides that principles of the agreement should include;²³³

- a) strengthening integration in the EAC region;²³⁴
- b) ensuring asymmetry²³⁵ or reciprocity on a case-by-case basis in the liberalisation of trade and in the application of trade-related measures and trade defence instruments;²³⁶
- c) maintaining regional preferences within Africa and other countries and regions without an obligation to extend them to the third party countries²³⁷; and
- d) contributing to enhance the production, supply and trading capacities of EAC partner states.²³⁸
- e) Maintaining the EAC CET and preferences of the Partner States under the Common Market Protocol.²³⁹

Any negotiations with third parties should aim at eliminating duties and charges of equivalent effect on bilateral trade, with the shared objective of achieving a substantial elimination of tariffs upon entry into force and a phasing out of all with the exception of sensitive tariffs within an agreed time frame. The EAC offer to third Parties on elimination of duties should be based on the EAC CET. Asymmetry in favour of the EAC should be an objective in tariff liberalization.²⁴⁰

3.3.6 The EAC Model Investment Treaty, 2016

²²⁹ n 56

²³⁰ (2014) EU Bilateral Trade Agreements and the intellectual property: For better or Worse? Springer Science and Business Media, LLC

²³¹ n 56

²³² n 56

²³³ Rule 2.5 of the East African Community Trade Negotiations Framework, 2016

²³⁴ Trade.ec.europa.eu

²³⁵ n 206

²³⁶ www.afornomicaslaw.org (Last accessed on 29th September, 2021)

²³⁷ n 206

²³⁸ n 206

²³⁹ n 206

²⁴⁰ n 56

The aim of the EAC model Investment Treaty is to serve as a template for investment negotiations of the EAC and/or individual EAC Partner States with third countries or a bloc of countries or as an instrument to help guide the EAC's negotiating position with a third country when it accepts the third country's negotiating text as the basis of negotiations²⁴¹. The model is not intended to be a legally binding document but rather it is meant to provide guidelines for the Partner States in any negotiations they enter into relating to an investment treaty.²⁴²

3.3.7 The East African Community Investment Policy (2019-2024)

The rationale for an EAC Investment Policy was due to the fact that EAC Partner States are still involved in protracted promotion of investment opportunities individually seeking to attract domestic, regional and foreign investments, thus the need to have Regional Investment Policy to pursue a coordinated region-wide approach.²⁴³ The policy was developed to address the challenges needed to improve the EAC investment climate, attract investments and promote EAC as a single investment destination in line with article 80 of the Treaty establishing EAC that prioritizes the harmonization and rationalization of investment initiatives and incentives aimed at promoting EAC as a single investment destination.²⁴⁴ The policy mission is to identify, streamline and harmonize Partner States investment regime with the aim of promoting the region as a single investment destination.²⁴⁵

3.4 Conclusion

From the analysis above of the laws and policies in place in EAC, it is clear that despite being a CU, EAC members states can enter into trade agreements with third countries. However, the only qualification is that the said agreements should not be in conflict with the EAC Treaty and its protocols. Although the legal and institutional framework provides a procedure member state should follow when negotiating agreements with third countries there is a gap both in the law and the practice as the law does not provide what happens in the event that one member state within EAC raises concerns regarding a proposed agreement with a third country. The law does not address what would happen in the event that a member states obligations under

²⁴¹ The EAC Model Investment Treaty, 2016

²⁴² n 62

²⁴³ The East African Community Investment Policy (2019-2024)

²⁴⁴ n 64

²⁴⁵ n 64

the agreement is in conflict with its obligations under the EAC Treaty and the protocols. Whereas the EAC Trade Negotiations Act of 2008 was enacted to establish a mechanisms for joint negotiations of EAC partner states in bilateral, regional and multilateral trade, it is not clear from research whether the Act was ever operationalized. If the Act had been operationalized, the East African Joint Trade Negotiations Commission that had been established would have developed an EAC trade regime. Both Kenya and USA have breached the Trade and Investment Framework between EAC and USA. Although the framework is operational, it is unclear whether the USA-EAC Council on Trade and Investment has been established. It is clear that there are a multitude of organs established under the various legislations discussed herein and for effective implementation of the objectives of the Treaty, harmonization of both the laws and institutions is required.

Chapter 4

The Kenya-UK Economic Partnership Agreement: The Contents and Implications on EAC

4.0 Introduction

Kenya's national blueprint aims transform the country into a globally competitive and prosperous country with a high quality of life by 2030²⁴⁶ and to change Kenya into a newly-industrialized middle income country that provides a high standard of living to the citizenry in a clean and secure environment.²⁴⁷ Except for Kenya, all EAC partner are classified as Least Developed Countries (LDCs) as categorized by the United Nations Conference on Trade and Development (UNCTAD).²⁴⁸ LDCs constitute low income countries and there are now 46 on the list.²⁴⁹ By virtue of their status as LDC countries, other EAC partner states enjoy trade preferential treatment unlike Kenya. The United Kingdom (UK) exited the European Union (EU) on 31st January, 2021 and until 31st December, 2020 it was a member of EU Customs Union. Kenya has been accessing the UK through the Market Access Regulation (MAR) which offer access to the markets in EU without any limitation on the particular goods to be imported or exported.²⁵⁰ According to the Memorandum to Parliament on the Kenya-UK Economic Partnership Agreement (EPA), the UK was Kenya's top export destination between 2015 and 2019 with an annual average value of Kshs. 39 billion²⁵¹ and in order to avoid trade disruptions caused by Kenyan products being unable to access markets in UK, the Members of Parliament (MPs) were encouraged to ratify the Kenya-UK EPA.²⁵² The EAC, on the other hand, requested the UK to grant Kenya preferential access to its market in order to enable the community to negotiate as a block.²⁵³ Kenya's action to enter into an agreement alone could lead to the community disintegrating as there are already trade tensions.

²⁴⁶ www.vision2030.co.ke (accessed 23rd September, 2021)

²⁴⁷ n 1

²⁴⁸ <https://www.un.org/development/desa/dpad/least-developed-country-category/lDCs-at-a-glance.html> (Accessed

²⁴⁹ The list of countries categorized as LDC is reviewed every three years led by a Committee of independent experts that reports to the United Nations Economic and Social Council (ECOSOC)

²⁵⁰ <https://trade.ec.europa.eu/access-to-markets/en/content/market-access-regulation-mar>

²⁵¹ [http://www.parliament.go.ke/sites/default/files/2021-](http://www.parliament.go.ke/sites/default/files/2021-01/ECONOMIC%20PARTNERSHIP%20AGREEMENT%20BTN%20UK%20%26%20KENYA%281%29.pdf)

[01/ECONOMIC%20PARTNERSHIP%20AGREEMENT%20BTN%20UK%20%26%20KENYA%281%29.pdf](http://www.parliament.go.ke/sites/default/files/2021-01/ECONOMIC%20PARTNERSHIP%20AGREEMENT%20BTN%20UK%20%26%20KENYA%281%29.pdf)
²⁵² n 6

²⁵³ UK-Kenya deal triggers East African trade tension; Nairobi's efforts to negotiate alone with London could undermine the East African Community's customs union that can be accessed at www.publication.Parliament.uk (Last accessed on 25th September, 2021)

It was against this background that the trade negotiations between Kenya and UK began in August, 2020 and after several rounds of negotiation the initial text was produced on 3rd November, 2020. On December 2, the agreement was approved for signature and the Kenya-UK EPA was signed on December 8, 2020. Whereas UK preferred a regional approach in order to secure a regional market at one go, Kenya opted for a reciprocal approach as UK's exit from the EU was looming and Kenya desired to ensure that there were no restrictions on the goods it could import and export to the UK and that its goods were tax exempt.²⁵⁴ Whereas the EAC Customs Protocol permits partner states to separately conclude trade agreement with third countries; the same should not conflict with the legal framework in place for EAC partner states trade relations with third countries as discussed in chapter 3. Whereas a lot has been written in terms of Kenya and UK negotiating and signing a trade agreement, much less has been said and written about the contents of the agreement. This chapter briefly defines what EPAs are; looks at trade relation between Kenya and UK; then proceeds to discuss the contents of the Kenya-UK EPA and finally at the end the implication of the Kenya-UK EPA on EAC is discussed.

4.1 Trade between UK and Kenya

Over the years there has been increased interest in Kenya, what can be equated to scramble for Kenya. The country's geo-strategic location is conducive for the interests of US, China, UK and other western interests.²⁵⁵ Kenya is regarded as an economic powerhouse and a gateway to the West, not just on a continental scale, but also on a regional scale. In the 2020 report²⁵⁶ on the Ease of Doing Business²⁵⁷, Kenya was ranked at no. 56 out of the 90 economies with a score of 73.2²⁵⁸. This placed it at 2nd position within EAC after Rwanda which had been ranked at no. 38 with a score of 76.5.²⁵⁹ Uganda was ranked no. 116 with a score of 60.0²⁶⁰; Tanzania

²⁵⁴ n 6

²⁵⁵ M Ogotu 'Caught between Africa and the West: Kenya's proposed US free trade agreement' African Portal 19th June, 2020 <https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/> (Accessed 25 September 2021)

²⁵⁶ <https://www.doingbusiness.org/en/data/exploreeconomies/kenya> (Accessed 25 September 2021)

²⁵⁷ The Report discusses founding a business, obtaining permits, obtaining electricity, registering property, obtaining loans, safeguarding minority investors, paying taxes, trading internationally, enforcing contracts, and resolving insolvency. Additionally, it takes into account the cost of hiring personnel and the convenience of contracting with the government. (See n 11)

²⁵⁸ n 11

²⁵⁹ <https://www.doingbusiness.org/en/data/exploreeconomies/rwanda>(Accessed 25 September, 2021)

²⁶⁰ <https://www.doingbusiness.org/en/data/exploreeconomies/uganda>(Accessed 28 September, 2021)

ranked no. 141 with a score of 54.5;²⁶¹ Burundi no.166 with a score of 46.8²⁶² and South Sudan ranked 185 with a score of 34.6.²⁶³ Kenya was a colony of the UK and it attained its independence from UK in 1963. The largest European foreign investor in Kenya is UK.²⁶⁴ Kenya is the UK's 73rd largest commercial partner, accounting for less than 0.1 percent of overall commerce.

In 2019, the UK market accounted for 43% of Kenya's exports²⁶⁵ with UK exports to Kenya totalling £800 million²⁶⁶ ranking Kenya as the country's 68th largest export market,²⁶⁷ and imports from Kenya totalling £607 million²⁶⁸, ranking Kenya as the country's 71st largest importer.

4.2 Defining an EPA

EPAs are free trade agreements that establish a duty-free zone between signatory states in which commodities imported or exported between these countries are duty-free.²⁶⁹ EPAs are built on the principle of reciprocity.²⁷⁰ In 1975, the forerunner of the European Union(EU), the Economic Community (EEC) ratified a trade and aid agreement between the EEC and ACP countries.²⁷¹ These were agreements for five years which granted ACP goods privileged access to the EU market.²⁷² However, these agreements known as Lomé Convention came to an end in 2000 and was succeeded by the Cotonou Partnership Agreement .²⁷³ The agreement's objective was to reduce and eradicate poverty in accordance with the goals of sustainable development and the ACP countries' eventual entry into the global economy.²⁷⁴ The ACP lacked bargaining power as their both their technical and institutional capacity was insufficient.²⁷⁵ National interest still prevail over regional integration in the process of

²⁶¹ <https://www.doingbusiness.org/content/dam/doingBusiness/country/t/tanzania/TZA.pdf>(Last accessed 28th September, 2021)

²⁶² <https://www.doingbusiness.org/en/data/exploreconomies/burundi>(Last accessed 28th September, 2021)

²⁶³ <https://www.doingbusiness.org/en/data/exploreconomies/south-sudan>(Last accessed 28th September, 2021)

²⁶⁴ <https://www.kenyahighcom.org.uk/kenya-uk-relations>(Last accessed 28th September, 2021)

²⁶⁵ www.gov.uk (Last accessed 28th September, 2021)

²⁶⁶ n 266

²⁶⁷ n 266

²⁶⁸ n 266

²⁶⁹ https://www.southcentre.int/wp-content/uploads/2013/08/AN_EPA1_Understanding-The-EPAs_EN.pdf

²⁷⁰ n 18

²⁷¹ <https://www.britannica.com/topic/European-Union/Creation-of-the-European-Economic-Community#ref750327>

²⁷² n 20

²⁷³ n 18

²⁷⁴ Article 1 of the Cotonou Agreement

²⁷⁵ EPA negotiations and regional integration in Africa: Building or stumbling blocks Paper prepared for the Trade Policy Centre in Africa (trapca) 3rd Annual Conference “Strengthening and deepening economic

negotiations of EPA.²⁷⁶ Concerns have been raised by ACP countries that there is little synergy between the EPA's that were being concluded and regional integration; conflicting market access commitments as countries in the same economical region may liberalize different products.²⁷⁷ The issues handled by an EPA should be representative of both national and regional concerns.²⁷⁸ The Cotonou Agreement established four principles upon which EPAs should be based-

- a) Development-EPAs must be economically beneficial to ACP countries, as they are intended to promote development and economic progress within the ACP region,
- b) Reciprocity- ACP countries were also required to liberalize their domestic markets in order to boost intra-ACP competitiveness;
- c) Regionalism- EU envisaged negotiations with regional groupings as regional integration is important in order to promote investment;
- d) Differentiation- Because EPAs are supposed to take into consideration the parties' varying stages of development, they should allow for specific and varied treatment.

EAC member states have negotiated an EPA agreement with the EU (EAC-EU EPA)²⁷⁹, however the agreement is not in force as it is only Kenya that has ratified the agreement whereas Rwanda has only signed it.²⁸⁰

4.3 Contents of the Kenya-UK EPA

This section provides an outline of the important provisions of the Kenya-UK EPA.

4.3.1 The preamble

The preamble makes it apparent that both the UK and Kenya entered into the agreement with an awareness of the EAC Treaty while also emphasising the importance of achieving the

integration in LDCs: current situation, challenges and way forward” Arusha, Tanzania 13-15 November 2008 by Sanoussi Bilal and Corinna Braun-Munzinger (ECDPM) <https://ecdpm.org/wp-content/uploads/2013/11/EPA-Negotiations-Regional-Integration-Africa-2008.pdf> (last accessed 3rd October, 2021)

²⁷⁶ n 231

²⁷⁷ n 231

²⁷⁸ n 231

²⁷⁹ <https://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/> (Last accessed 3rd October, 2021)

²⁸⁰ Trade Policy Review Report by the East African Community, 2019. The Report can be accessed at https://www.wto.org/english/tratop_e/tpr_e/g384_e.pdf (Last accessed 18th September, 2021)

Treaty's objectives.²⁸¹ Both parties reiterate the need to ensure that prominence is laid on the integration of the region.²⁸²

4.3.2 Scope of the Agreement

The EPA regulates the following areas, goods, fishery, agriculture, economic and development cooperation, institutional provisions, dispute resolution, and general exclusions.²⁸³

4.3.3 Objectives of the EPA

Kenya-UK EPA intends to conclude an agreement in accordance with Article XXIV of the GATT, 1994²⁸⁴ and to this extent,²⁸⁵

- a) Regional integration, economic cooperation, and good governance in the EAC are all being promoted,²⁸⁶
- b) Promoting the EAC's gradual progressive integration into the global economy in accordance with its political decisions and development priorities,²⁸⁷
- c) Facilitate the structural transformation of EAC economies, as well as their diversification and competitiveness, by strengthening their production, supply, and trading capacities,²⁸⁸
- d) Strengthen EAC capability in trade policy and associated issues.
- e) To create an effective and transparent regional regulatory framework for trade and investment in the EAC Partner State,²⁸⁹

4.4.4 Rendez-vous clause

Rendez-vous clauses are assurances that specific provisions will be negotiated at a later date. Kenya and the United Kingdom have committed to concluding negotiations on trade, competition policy, investor and private sector development, trade, the environment and

²⁸¹ n 206

²⁸² www.afronomicslaw.org (last accessed on 29th September, 2021)

²⁸³ Article 1 of the UK-Kenya EPA (www.afronomicslaw.org) (Last accessed on 29th September, 2021)

²⁸⁴ Article 2(a) UK-Kenya EPA (www.afronomicslaw.org) (Last accessed on 29th September, 2021)

²⁸⁵ Article 2 of UK-Kenya EPA (www.afronomicslaw.org) (Last accessed on 29th September, 2021)

²⁸⁶ Article 1(b) of the UK-Kenya EPA (www.afronomicslaw.org) (Last accessed on 29th September, 2021)

²⁸⁷ Article 1(c) of the UK-Kenya EPA (www.afronomicslaw.org) (Last accessed on 29th September, 2021)

²⁸⁸ Article 1(d) of the UK-Kenya EPA (www.afronomicslaw.org) (Last accessed on 29th September, 2021)

²⁸⁹ Article 1(f) of the UK-Kenya EPA (www.afronomicslaw.org) (Last accessed on 29th September, 2021)

sustainable development, intellectual property rights, and public procurement transparency within five years of the agreement's entry into force.²⁹⁰

4.4.5 Principle

The EPA is predicated on several principles²⁹¹ including strengthening integration within the EAC region,²⁹² ensuring symmetry in favour of the EAC Partner state(s) in the liberalization of trade and in the application of trade related measures.²⁹³ Thus the member states are permitted to maintain preferences within their region and other regions without having to do the same for the UK.²⁹⁴

4.4.6 Trade in goods

The pact aims to ensure, long-term, and predictable access for goods originating in EAC partner states (s) to the UK market and gradually goods from the UK are similarly expected to have access to the EAC market.²⁹⁵

4.4.7 Customs cooperation and trade facilitation

Under clause 22(2) of the agreement, The parties recognize the critical role of customs cooperation and facilitation in commerce,²⁹⁶ promote regional harmonization of customs legislation and processes,²⁹⁷ assist the EAC partner state (s) in enhancing trade facilitation;²⁹⁸ give assistance to the customs administrations of EAC partner state (s) in implementing this agreement and other institutions' best practices,²⁹⁹ and to strengthen collaboration between the nations' customs authority and other border-related agencies. To accomplish these goals, parties must exchange information on customs legislation and procedures,³⁰⁰ develop joint initiatives in mutually agreed upon areas,³⁰¹ modernize customs systems and procedures, as

²⁹⁰ Article 3 of the UK-Kenya EPA

²⁹¹ www.afronomicslaw.org (Last accessed on 29th September, 2021)

²⁹² Article 4(b) of the UK-Kenya EPA

²⁹³ Article 4 (c) of the UK-Kenya EPA

²⁹⁴ Article 4(d) of the UK-Kenya EPA

²⁹⁵ Article 5(2)(a) of the UK-Kenya EPA

²⁹⁶ Article 22(2)(a) of the UK-Kenya EPA

²⁹⁷ Article 22(2)(b) of the UK-Kenya EPA

²⁹⁸ Article 22(2)(c) of the UK-Kenya EPA

²⁹⁹ Article 22(2)(d) of the UK-Kenya EPA

³⁰⁰ Article 23(1)(a) of the UK-Kenya EPA

³⁰¹ Article 23(1)(b) of the UK-Kenya EPA

well as reduce customs clearance time; simplify and harmonize customs procedures and trade formalities, including those relating to import, export, and transit.³⁰²

4.4.8 Legislations and procedures

In accordance with the provisions of article 24 of the agreement parties agree that their respective trade and customs legislation and procedures will be founded on the following- the support trade through robust enforcement mechanisms and compliance with applicable customs laws. The use of single written or electronic document for customs declarations between the UK and the relevant EAC partner state, as well as a system of binding rulings on customs matters most notably tariff clarification origin regulations, in conformity with regional and national legislation. Additionally, article 27 provides for a five year transition period following the agreement's entry into effect in order to strengthen the EAC member state's capacity in the field of customs and trade facilitation.

4.4.9 Harmonization of customs standards at regional level

The parties recognize the importance of harmonizing customs standards and trade facilitation measures. This includes the implementation of appropriate customs and trade facilitation reforms.³⁰³

4.4.10 Sanitary and phytosanitary measures

Article 31 of the EPA requires parties to facilitate the parties inter and intra- regional trade whilst safeguarding human, animal and plant life in accordance with the WTO SPS Agreement,³⁰⁴ enhance intra-regional harmonization of measures with international standards in accordance with the WTO SPS Agreement and the development of appropriate policies, legislative, regulatory and institutional frameworks within EAC partner state (s).³⁰⁵

³⁰² Article 23(1)(d) of the UK-Kenya EPA

³⁰³ Article 28 of the UK-Kenya EPA

³⁰⁴ Article 31(a) of the UK-Kenya EPA

³⁰⁵ Article 31(e) of the UK-Kenya EPA

4.4.11 Mutual Recognition Agreements

The parties have reserved their right to negotiate reciprocal agreements in sectors where they have common economic interest.³⁰⁶

4.4.12 Anti-dumping and countervailing measures

UK and Kenya may adopt anti-dumping or countervailing measures on their own or jointly.³⁰⁷ Interestingly, the agreement provides that Where any party has imposed anti-dumping or countervailing measures, a single judicial review forum shall exist..³⁰⁸ The agreement is clear that the countervailing measures can be imposed either regionally or nationally. Such procedures, however, may not be used concurrently to the same product.³⁰⁹

4.4.13 Fisheries

The parties have agreed to collaborate on fisheries and economic development issues, including marine, inland, and aquaculture fisheries.³¹⁰ Some of the principles for cooperation in this sector includes and aiding development and bolstering regional integration.³¹¹ The agreement makes it clear that EAC partner states may take reasonable steps to protect their coastal sovereignty and ensure the viability of artisanal and coastal fishing.³¹²

4.4.14 Agriculture

Agriculture encompasses both crops and livestock,³¹³ and the objectives of the cooperation in this area include promoting collaboration between the various parties involved with the goal of generating wealth and improving the quality of life of the parties involved in agricultural

³⁰⁶ Article 43 of UK-Kenya EPA

³⁰⁷ Article 48(1) of the UK-Kenya EPA

³⁰⁸ Article 48(3) of the UK- Kenya EPA

³⁰⁹ Article 48(4) of the UK-Kenya EPA

³¹⁰ Article 51 of the UK-Kenya EPA

³¹¹ Article 52(1)(a) of the UK-Kenya EPA

³¹² Article 54(2) of the Kenya-UK EPA

³¹³ Article 57(1) of the Kenya-UK EPA

activities engaged in agricultural activities,³¹⁴ improve food and nutrition security in the EAC partner state (s) through enhancing value addition.³¹⁵

4.4.15 Comprehensive dialogue

Whereas the agreement is between Kenya and UK, it requires Kenya and UK to establish an EAC-UK comprehensive Dialogue on Agriculture and Rural Development Policy ('the Agriculture Dialogue') tasked with overseeing the implementation on the section on agriculture. Additionally, the conversation will serve as a forum for the parties to exchange information and cooperate on their various domestic agriculture policies.³¹⁶

4.4.16 Economic and Development Cooperation

As development cooperation is a critical component of the agreement and is essential in to achieving the agreement's objectives;³¹⁷ collaboration between the parties shall encompass the following areas- infrastructure, agriculture and livestock, environmental challenges, market access issues, EPA adjustment measures as well as resource mobilization.³¹⁸

4.5. Institutions/ Committees established under EPA

4.5.1 EPA Council

Once the agreement becomes operational, an EPA council will be constituted.³¹⁹ It will be composed of members from the parties at ministerial level.³²⁰ The Council shall be responsible for the following- the operation and implementation of the agreement,³²¹ the examination of any significant that arises within the agreement's framework as well as any other matters of common interest affecting trade between the parties,³²² and the examination of proposals and

³¹⁴ Article 58(2)(a) of the Kenya-UK EPA

³¹⁵ Article 58(2)(k) of the Kenya-UK EPA

³¹⁶ Article 60 of the Kenya-UK EPA

³¹⁷ Article 75(1) of the Kenya-UK EPA

³¹⁸ Article 77 of the Kenya-UK EPA

³¹⁹ Article 104(1) of the Kenya-UK EPA

³²⁰ Article 104(2) of the Kenya-UK EPA

³²¹ Article 104(6) (a) of the Kenya-UK EPA

³²² Article 104(6) (b) of the Kenya-UK EPA

recommendations regarding the review or amendment of the agreement.³²³ The Council has the powers to take decisions and may adopt recommendations from the committee of Senior Officials in writing by mutual agreement. The decisions taken by the Council will be binding on the parties.³²⁴ The Council is obligated to establish and adopt the Rules of Procedure for the creation of the Arbitration Panel within six months of the agreement taking effect.³²⁵ Where an EAC partner state acts independently the council may accept such actions only with the consent of the other EAC Partner States concerned.³²⁶

4.5.2 Special Committee on Customs and Trade Facilitation

Under Article 29, a Special Committee on Customs and Trade Facilitation is established whose functions include monitoring the implementation of the Rules of Origin,³²⁷ providing a forum for consultation and discussion of all custom related issues, including rules of origin, general customs procedures, customs valuation, tariff classification, transit and mutual administrative assistance in customs matters,³²⁸ and enhancing mutual administrative assistance in customs matters.³²⁹

4.5.3 Committee of Senior Officials

The committee is established pursuant to article 106 of the agreement and is composed of Permanent Secretaries or Principal Secretaries as the case may be from the EAC Partner state (s) and representatives from the UK at Senior Official level.³³⁰ The committee's responsibilities include; assisting the EPA council in the performance of its duties,³³¹ receiving and considering reports of the specialized committees, working sessions, task force or any of the bodies established by the committee³³² and submitting its reports and recommendations on the implementation of the agreement to the EPA council either on its own initiative or upon the

³²³ Article 104(6) (c) of the Kenya-UK EPA

³²⁴ Article 105(2) of the Kenya-UK EPA

³²⁵ Article 105(3) of the Kenya-UK EPA

³²⁶ Article 105(4) of the Kenya-UK EPA

³²⁷ Article 29 (2)(a) of the kenya-UK EPA

³²⁸ Article 29 (2)(b) of the kenya-UK EPA

³²⁹ Article 29 (2)(d) of the kenya-UK EPA

³³⁰ Article 106 (2) of the kenya-UK EPA

³³¹ Article 106 (5) (a)of the kenya-UK EPA

³³² Article 106 (5) (b)of the kenya-UK EPA

request of EPA Council or upon request by either party.³³³ Article 107 of the agreement provides for the powers of the this committee which include to consider any issue under the agreement and to take appropriate actions.

4.5.4 Consultative Committee

The Committee will be constitute pursuant to article 106 of the agreement and is consisting of Permanent Secretaries or Principal Secretaries, as the case may be, from the EAC Partner states and senior officials from the UK. The committee's responsibilities include assisting the EPA council in carrying out its duties, receiving and considering reports from specialized committees, working sessions, task forces, or any other bodies established by the committee, and submitting reports and recommendations to the EPA council on the agreement's implementation to the EPA council on its own initiative or at the request of either party.³³⁴ The Committee is to adopt its own Rules of procedure three months after its establishment in consultation with the Committee of Senior Officials.³³⁵ Under article 107 of the agreement the committee has authority to consider and take appropriate action on any subject arising under the agreement.

4.6 Dispute Avoidance and Settlement

The parties wish to prevent any conflicts and, if any do arise on the interpretation or implementation of the agreement, parties are required at the first instance to settle the dispute in good faith and resolve the dispute amicably.³³⁶

i. Consultations

At the first instance, parties are required to enter into consultations.³³⁷The party seeking consultations shall send a written request to the other party identifying the issues and the provisions of the agreement that has been breached. The request shall be copied to the

³³³ Article 106 (5) (c)of the kenya-UK EPA

³³⁴ Article 108 (2) of the kenya-UK EPA

³³⁵ Article 108 (4) of the kenya-UK EPA

³³⁶ Article 109 (1) and (2) of the kenya-UK EPA

³³⁷ Article 110 (1)of the kenya-UK EPA

Committee of Senior Officials.³³⁸ Unless otherwise agreed by the parties, the consultations are to take in the area of the party against whom a complaint was lodged. The consultations are to be conducted within 20 days of the receipt of the request for consultation and shall be deemed concluded within 60 days.³³⁹ If there is no response within 10 days of the request for consultations or the consultations are not held within the time frame provided in the agreement, or in the event that the consultations have been concluded but the parties were unable to agree, either party is at liberty to request the dispute to be resolved through arbitration.³⁴⁰

ii. Mediations

Where consultations have failed, the parties may proceed to mediation or may proceed directly to arbitration.³⁴¹ Upon the request for mediation by either party, the parties are to agree on a mediator within 15 days failure by which the Chairperson of the Committee of Senior Officials shall select by lot a mediator.³⁴² The mediators will be selected from a list of mediators and shall not be nationals of either party.³⁴³ Within 25 days upon receipt of the request for mediation, a mediator shall be appointed who shall convene a meeting within 30 days of his appointment.³⁴⁴ The mediator will deliver his opinion on the issues raised within 45 days after being appointed and may include recommendations on how to resolve the dispute.³⁴⁵ However, the mediator's opinion is non-binding.³⁴⁶ The timelines provided for the mediation maybe amended by the parties or by the mediator either on request by the parties or on his own volition.³⁴⁷

iii. Arbitration

If an amicable resolution of the dispute through conciliation or mediation fails, the complainant may request for the formation of an arbitral who shall be comprised of three arbitrators.³⁴⁸ Each party will appoint one arbitrator and in the absence of an appointment by one side, the arbitrator

³³⁸ Article 110 (2) of the Kenya-UK EPA

³³⁹ Article 110 (2) of the Kenya-UK EPA

³⁴⁰ Article 110 (5) of the Kenya-UK EPA

³⁴¹ Article 111 (1) of the kenya-UK EPA

³⁴² Article 111 (3) of the kenya-UK EPA

³⁴³ n 92

³⁴⁴ n 92

³⁴⁵ n 92

³⁴⁶ Article 111 (4) of the kenya-UK EPA

³⁴⁷ Article 111 (5) of the kenya-UK EPA

³⁴⁸ Article 113 (1) of the Kenya-UK EPA

will be appointed by Chairperson of the Committee of Senior Officials.³⁴⁹ The two arbitrators shall then appoint the arbitral panel's chairperson.³⁵⁰ The arbitral procedures will be governed by the Rules of Procedure approved by the EPA Council within six months of the agreement's entry into effect.³⁵¹ The tribunal shall reach unanimity on all issues, failing which the matter shall be settled by majority vote. Additionally, the agreement states that the arbitral tribunal shall not hear any issues between the parties arising under the WTO agreement.³⁵²

4.7 Denunciation, Review and Amendment Clauses

Upon giving a written notice, a party may denounce the EPA which denunciation will take effect one year after the notification.³⁵³ Parties may review the agreement every five years from the date the agreement comes into force³⁵⁴ and a party may submit through the EPA Council proposed amendments to the agreement.³⁵⁵

4.8 The Implication of the Kenya-UK EPA on EAC

From an analysis of the EPA above, the following are the key conflicting issues have been flagged out which could have an implication on EAC-

i. The parties to the agreement

One key glaring issue is the fact that throughout the agreement Kenya is not referred by its name but rather as EAC partner state and a letter (s) in bracket is added after the word state. Although the agreement is between Kenya and UK, pursuant to article 143 the agreement is open to accession by other EAC partner states. The request for admission as a party to the agreement must be filed to the EPA Council, which will determine any necessary transitional or modifying procedures.³⁵⁶ The agreement provides that following the approval of the application for accession, the state party making the application is to deposit its instruments of accession, however the position is unclear as to what happens if the application for accession is rejected and the possible grounds for rejection of such an application.

³⁴⁹ Article 113 (3) of the Kenya-UK EPA

³⁵⁰ Article 113 (4) of the Kenya-UK EPA

³⁵¹ Article 120 of the Kenya-UK EPA

³⁵² Article 126 (1) of the Kenya-UK EPA

³⁵³ Article 139 of the Kenya-UK EPA

³⁵⁴ Article 141 of the Kenya-UK EPA

³⁵⁵ Article 142 of the Kenya-UK EPA

³⁵⁶ Article 143 (2) of the Kenya-UK EPA

ii. Conflicting approaches to the negotiations and the effect of obligations by EAC partner states

The Memorandum to Parliament is clear that a two-pronged approach was adopted in negotiating the EPA, the first one being a regional approach which was UK's preference as it would have secured for UK regional market access through one agreement. The second one which was Kenya's preference was a bilateral approach, an agreement between the two countries to secure duty free and quota free market access to the UK. From the consistent use of EAC partner state it is easy for one to mistake the agreement as being between UK and the EAC in its entirety and the possibility of other EAC member states to be bound in some of the provisions that specifically refer to the entire community.

Although the agreement is between Kenya and UK, the agreement seeks to promote regional integration, economic cooperation and good governance within EAC as well as foster the structural transformation of EAC economies and their diversification and competitiveness. The agreement also seeks to promote harmonization of customs legislation and procedures at regional level. All these objectives are aimed at enhancing regional integration with EAC although the rest of the partner states were not involved in the negotiation. Unless the other EAC partner states agree to be bound by these terms upon accession to the agreement, the practicability of implementing these provisions is non-existent at the moment. There is an EAC-UK Comprehensive Dialogue that is to be established to monitor implementation of the section on agriculture. What happens if the other EAC member states are in breach of some of the provisions discussed? Are they liable even though they were not part of the negotiations and can UK hold them accountable.

iii. Tariffs

The EAC has been a CU since 2005 and it applies zero customs duties on goods and services within EAC and a CET to goods from countries outside EAC. The main objective of the EAC CU is formation of a single customs territory and trade is at centre of the CU.³⁵⁷ The UK-Kenya agreement could potentially undermine this as essentially the agreement means that Kenya

³⁵⁷ <https://www.eac.int/customs/objectives>

must eliminate custom duties for goods from the UK thus applying a separate tariff from the agreed CET within EAC. Other EAC partner states had strongly opposed Kenya's unilateral decision to enter into an agreement with UK and instead had called for a joint negotiations as a block. The other EAC member states had argued that more time was needed to undertake negotiations.³⁵⁸ Some civil societies such as the Trade Justice Movement have noted that rushing to negotiating trade agreements could undermine developmental objectives including decent work as well as regional integration.³⁵⁹ They argue that signing trade agreements with a few countries will lead to countries erecting new trade barriers.³⁶⁰ Although EAC has a CU in place, trade within the region is still stifled by a number of trade restrictions.³⁶¹ Considering the already strained relations between the member states, this move by Kenya places it in a 'sticky wicket' position with other EAC member states.

iv. Principles under EAC Treaty and Protocols vis-à-vis principles under EPA

The EAC's operating principles are as follows- people-centred and people driven cooperation, provision of an enabling environment and basic infrastructure, establishment of an export oriented economy; principles of variable geometry, principle of complementarity and principle of asymmetry.³⁶² EPA has almost similar principles in that it seeks to strengthen integration in the EAC and UK seeks to contribute to strengthen the EAC member state's capacity for production, supply, and trading. Whereas the principles in EPA would have eventually contributed to the development of EAC, what is not clear is how these principles are to be applied when it comes to the other EAC member states who are not yet parties to the agreement.

V. Dispute Resolution

Article 37 of the EAC CU Protocol requires partner states who intend to enter into agreements with third countries to send to the EAC Secretary terms of the said agreement. The EAC Secretary is then to circulate the proposed agreement within the member states for their comments. What is unclear is what are the implications of the comments from the EAC member

³⁵⁸ www.parliament.uk (Last accessed on 25th September, 2021)

³⁵⁹ Trade Justice Movement, 'Letter to the Secretary of State for International Trade', (3 November 2020): <https://www.tjm.org.uk/documents/briefings/Letter-Rt-Hon-Elizabeth-Truss-re-Kenya-FTA031120-TJM.pdf>

³⁶⁰ n 109

³⁶¹ What types of non-tariff barriers affect the East African Community? Linda Calabrese and Andreas Eberhard-Ruiz, November, 2016 odi.org

³⁶² Article 7 of the Treaty establishing the EAC

states. There is a loophole within the legal framework as to whether comments from the member states can supersede trade agreements with foreign countries. In addition, whereas the EACJ has jurisdiction to interpret the Treaty and its protocols it is only the Committee on Trade that can deal with disputes under the CU Protocol. Yet, the Kenya-UK EPA provides for consultation, mediation then arbitration. Whether or not the UK will submit to the jurisdiction of the UK is something that could potentially cause conflict.

4.9 The place of EAC law in a member states national legal system

Having analysed the laws, policies and framework in place for trade relations between EAC member states and third countries, the crucial question is what is the place of these laws on each member's states legal system and what happens in the event there is a variance between the two sets of laws; national and the regional laws. Article 33 of the Treaty provides for the jurisdiction of the national courts and provides that national courts shall not be excluded from having jurisdiction on the ground that that the community is a party to the dispute. In addition article 5 (3)(h) provides that the EAC shall undertake such activities decided upon by the partner states for purposes of furthering the objectives of the community. Further, article 4(1) of the Treaty is clear that EAC has the legal status of a corporation in each of the EAC's member nations. According to an interpretation of these provisions, the community shall have only the competences conferred on it by member states on a temporary basis. As a result, it is apparent that the partner states have relinquished to EAC only functional, operational, and juridical jurisdiction over matters affecting the community, but not their sovereignty.³⁶³

In the case of James Katabazi and 21 others Vs Secretary General of the East African Community and Attorney General of the Republic of Uganda³⁶⁴ the EACJ held that as long as there as compliance on national laws of the partner state, the EACJ court had no jurisdiction to supervise how the member state exercised its executive function. Where there was compliance with the national laws, the court would not make a finding on whether or not the EAC Treaty was violated.³⁶⁵

³⁶³ <https://epub.uni-bayreuth.de/3899/1/TGCL%20Series%205%20online.pdf>

³⁶⁴ <https://www.eacj.org/?cases=james-katabazi-and-21-other-vs-secretary-general-of-the-east-african-community-and-attorney-general-of-the-republic-of-uganda> (Last accessed on 30th September, 2021)

³⁶⁵ Henry Kyarimpa vs Attorney general of Uganda, EACJ Reference No. 4 of 2013

Article 8(4) of the EAC Treaty provides that the community laws supersede that of national laws when it comes to the interpretation of the Treaty. In the case of Prof. Peter Anyang' Nyong'o vs Attorney General of Kenya³⁶⁶ the court held that article 8(4) of the Treaty provides a hierarchy of the legal order between community laws and national laws and this is to ensure uniformity of the EAC law.

4.10 Conclusion

Article 37 of the EAC Common Market protocol requires the coordination of trade relations and the said articles calls upon EAC partner state to adopt a common negotiating position in the development of mutually beneficial trade agreements with third countries; and promote participation and joint representation in international trade negotiations.³⁶⁷ To this extent we can conclude that Kenya is in breach of article 37 of the EAC Common Market Protocol. Whereas the urgency of entering into an agreement is appreciated due to Brexit, there were alternatives that Kenya could explore including entering into interim agreement with the UK so that trade is not interrupted between the two countries. Besides, there would be more time to negotiate comprehensively as a block. From a reading of the Kenya-UK EPA, it appears that UK believes that it is negotiating with EAC as a block or in the alternative it believes that if the obligations bind Kenya the other EAC member states are automatically bound. Despite this mistaken belief that UK may have negotiated the agreement upon, it is unclear what happens in the event other EAC member states apart are in breach of their apparent obligations under the Kenya-UK EPA. The potential conflict areas between the Kenya-UK EPA as discussed above and it is not clear who are the parties to the Kenya-UK EPA; areas of principles; tariffs issues as well as in the area of dispute resolution.

³⁶⁶ EACJ Reference No. 1 of 2006

³⁶⁷ <https://www.africaportal.org/features/caught-between-africa-and-the-west-kenyas-proposed-us-free-trade-agreement/> (Last accessed on 2nd October,, 2021)

Chapter 5

Conclusion and Recommendations

5.0 Introduction

A critical feature of a CU is that partner nations establish a single external tariff in addition to reducing trade obstacles amongst themselves. While a CU offers the benefit of member coordination, it lacks the flexibility of an FTA. Unlike the EU, which has well defined areas over which only the Union can legislate, such as trade policy, the EAC lacks the CU's clearly defined competencies. In light of these circumstances, this study investigated whether EAC member states were permitted to enter into trade agreements with third parties and if the EPA between Kenya and the United Kingdom complied with the EAC's trade agreement with third party regulations. Additionally, the study examined the effect of the Kenya-UK EPA on EAC.

5.1 Summary of the findings

This study examined the rules, regulations, and framework governing the EAC member states' trade relations with third countries.

Chapter one was an introductory chapter that included an introduction, the study's background, a statement of the research problem, the research questions, the study's significance, a literature review, the research methodology, and a synopsis of the remaining chapters.

Chapter 2 provides an overview of the WTO and GATT and defines multilateralism and regionalism. Mino and Olmedo's definition of multilateralism is used for the purposes of this research. This chapter delves deeper into the MFN exceptions and the substantive and procedural requirements of GATT Article XXIV. The chapter finishes with a review of CUs and the requirements for a perfect CU. In conclusion, the chapter briefly discusses the exceptions in EAC to the CET requirement.

Chapter 3 lays forth the legal and administrative framework for EAC member states trade relations with third parties.

While there are laws, rules, and frameworks in place, there are gaps in the law that EAC partner states must resolve if the prerequisites for a flawless CU and a really common external tariff are to be realized.

While the law makes it apparent that members states must submit draft agreements for discussion to other members, the statute is silent on the 'weight' of partner state comments or even what occurs if a majority of EAC partner nations are opposed to the substance of the agreement.

Chapter 4 acknowledges that while much has been said about the existence of an EPA between Kenya and the United Kingdom, there has been little or no in-depth study of the EPA's substance. Recognizing this fact, this chapter provides an outline of the EPA's contents and analyses the agreement's implications on EAC. The chapter concludes that it is unclear who the parties to the EPA between Kenya and the UK are, that concerns with tariffs and competing principles under the EAC treaty and its protocols exist in comparison to the EPA's principles. This research analysed the laws, regulations and framework governing the trade relations of EAC member states with third countries.

5.2 Conclusions

The current legislative framework regulates trade between EAC member states and third-party countries. The EAC Treaty, its protocols, and several other pieces of law govern this relationship-or rather ought to. However, there is a gap in both the law and its application. Kenya used this legal loophole to negotiate two accords, one with the United States of America and another with the United Kingdom, without consulting other EAC member states. Now is the time to reexamine the legislative framework and close any loopholes that exist. With AfCFTA fully operating and the eight recognized RECs, including the EAC, serving as the foundation, it is critical to establish a clear framework with defined rules governing economic ties with countries beyond the regional and continental blocks. AfCFTA has just been born, but the continent has placed a great deal of hope in it as it attempts to strengthen Africa's position in the global market, where all eyes are currently focused. As a result, Kenya should not be seen as impeding not only the regional goal but the continent's goals as well. The AfCFTA Protocol on Goods requires signatories to give any trade preferential treatment to all state parties. Ideally, any trade benefits provided to the UK would under the Kenya- UK EPA would have to be extended to the other AfCFTA state parties.

5.3 Recommendations

The refusal to transfer sovereignty to the community demonstrates that EAC member states place a higher premium on nationalism than on regionalism. This creates difficulties in achieving the community's objectives. To achieve comprehensive regional integration, it is recommended that EAC member states submit their sovereignty to the community, similar to the stance in the EU. This is critical if the EAC is to realize its political federation integration pillar.

It is recommended that the Treaty provisions governing trade relations between EAC member states and third countries be clarified. While the laws allow member states to comment on a member state's prospective agreement with a foreign country, the legislation is ambiguous regarding the consequences of such comments. As a result, it is recommended that member nations establish a system to govern interactions between EAC member states and third countries.

It is further recommended that regional enforcement measures must be strengthened to ensure the Treaty's provisions are effectively implemented. The Committee on Trade that is responsible for disputes regarding the customs union should be proactive in not only resolving the disputes but rather by also checking compliance with the laws and regulations.

It is recommended that the EACJ's authority be expanded to include hearing disputes arising under the EAC CU Protocol and the EAC Common Market Protocol, as well as the ability to examine the Committee on Trade Remedies' decision. This extended jurisdiction can either be through a review of the committee's decision or an appeal from their decision should lie to the EACJ.

It is recommended that the East African Community operationalize the EAC Trade Negotiations Act in order to enable the East African Joint Trade Negotiations Commission to create the EAC trade regime.

It is recommended that the EAC follow EU practice and develop competencies that allow only the community to join into trade agreements.

Finally, it is proposed that a full assessment of the EAC CET be conducted, with a focus on the Treaty and protocol exemptions.

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